

# **Interim Report of the ABA Task Force on Class Action Legislation**

[The views expressed in this report have not been approved by the House of Delegates or the Board of Governors of the ABA and accordingly should not be construed as representing ABA policy.]

In the fall of 2001, ABA President Robert Hirshon appointed a Task Force on Class Action Legislation to “study the issues related to the move toward directing large class action lawsuits into the federal courts instead of the state courts.” The Task Force’s primary focus has been on the proposed legislation referred to as the “Class Action Fairness Act of 2001” and the “Class Action Fairness Act of 2002” [H.R. 2341, 107<sup>th</sup> Cong., 1st & 2d Sess. and S. 1712, 107<sup>th</sup> Cong., 1st & 2d Sess.].

## **Task Force Membership**

The Task Force’s members are all experienced in large class actions and represent a wide range of class action practice. The chair of the Task Force is Edward F. Sherman, professor of law and former dean of Tulane Law School, and William Conroy is a member-at large. The other members have been appointed from ABA sections, including Leo Jordan and Thomas Minton from the Tort and Insurance Practice Section; Rich Wallis and Jeff LeVee from the Section of Antitrust Law; David Cathcart and Richard Seymour from the Section of Labor and Employment Law; Tom Allman and Elizabeth Stong (who is also liaison from the Commission on Women in the Profession) from the Section of Business Law; Robert Clayton and John Beisner from the Health Law Section; Dinita James and Jeffrey Greenbaum from the Section of Litigation. Lawrence Baca from the Commission on Racial and Ethnic Diversity in the Profession; and William C. Robinson from the Section of Individual Rights and Responsibilities, serve as liaisons to their respective units. Federal District Court Judges Lee Rosenthal and Jed Rakoff participate in the Task Force by providing information but are not voting members. ABA staff liaison is Susan Lynch Nolte, and Lillian Gaskin has provided expertise on legislative affairs.

The Task Force’s membership, while diverse, is not necessarily evenly divided in terms of plaintiff-defendant perspectives and approaches to class action practice. At its first meeting, the Task Force agreed not to operate on the basis of majority vote but to seek a consensus on the positions taken in its final report. This has required of each Task Force member a willingness to consider other positions.

## **Task Force Operations**

Over the past seven months of its operations, the Task Force has communicated through a large number of conference calls, dissemination of views in writing to other Task Force members, exchange of drafts of proposals including the work of a drafting subcommittee (composed of Jeffrey Greenbaum, Dinita James, Richard Seymour, and

Edward Sherman), and three day-long meetings, with a fourth scheduled at the time of the ABA Annual Meeting in August, 2002.

The April meeting of the Task Force included a half-day open session at which representatives of organizations with an interest in class action issues were invited in order to solicit their views, expertise, and advice. Representatives from eleven organizations, representing diverse constituencies, made presentations and discussed the issues with the Task Force members,<sup>1</sup> and several legislative staff members also attended. The Task Force also invited written comments and received and considered submissions from a number of organizations.

At the Task Force's May meeting, staff members from congressional committees, representing both proponents and opponents of the legislation, discussed the legislation with the Task Force. Presenters included Jeffrey Miller, Counsel to the Senate Judiciary Subcommittee on Antitrust, Competition and Business, and Consumer Rights; Liz Treanor, Minority Counsel to the Senate Judiciary Committee; John F. Mautz, IV, Counsel to the House Judiciary Committee; Shelley Hanger, Legislative Director, Office of Representative Bob Goodlatte (R. Va.); and Michone Johnson and Scott Deutchman, Minority Counsel to the House Judiciary Committee.

The Task Force has particularly considered the proposed legislation referred to as the "Class Action Fairness Act of 2001" and "Class Action Fairness Act of 2002" [H.R. 2341 (107<sup>th</sup> Cong. 1st & 2d Sess.) and S. 1712 (107<sup>th</sup> Cong., 1st & 2d Sess.)].<sup>2</sup> The most significant, and controversial, aspect of this legislation involves the jurisdictional and removal provisions, and the Task Force has particularly focused on the "minimal diversity" standard for removal of certain class actions in the proposed legislation. It also includes a variety of other provisions affecting class action practice, some closely related to the jurisdictional and removal provisions and some essentially unrelated to those provisions.<sup>3</sup> The Task Force expects to address these provisions in its final report.

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<sup>1</sup> The following organizations made presentations: Alliance of American Insurers, American Tort Reform Association, Association of Trial Lawyers of America, Consumer Federation of America, Defense Research Institute, Lawyers Committee for Civil Rights under Law, Lawyers for Civil Justice, National Association of Securities and Commercial Law Attorneys, National Center for State Courts, Public Citizen, and United States Chamber of Commerce (Institute for Legal Reform).

<sup>2</sup> This legislation was based on "The Class Action Fairness Act of 2000," S. 353 and H.R. 1875, 106<sup>th</sup> Cong., 2d Sess. There are only small differences in the jurisdictional and removal provisions of the House and Senate versions of the 2001 and 2002 legislation, although there are some marked differences in other provisions. H.R. 2341 was passed by the House of Representatives on March 13, 2002, by a vote of 233 to 190.

<sup>3</sup> See, e.g., §1712 of S.1712 and §1711 of H.R.2341, providing that a court may approve non-cash and coupon settlements only after a hearing and written findings that "the settlement is fair, reasonable, and adequate for class members;" §1713 of S. 1712 and §1712 of H.R. 2341, providing that if a settlement provides for payments to class counsel that would result in a net loss to class members, the court must make written findings that "nonmonetary benefits to the class member substantially outweigh the monetary loss;" §1716 of S. 1712 and §1715 of H.R. 2341, imposing requirements in terms of language, format, and content for written, television, or radio notices of proposed settlements; §1716 of H.R. 2341, providing that plaintiffs' attorneys shall disclose to each plaintiff at the time of payment the "full amount of the attorney's fees charged;" §1717 of H.R. 2341, providing that no court record, including discovery, whether or not formally filed with the court, may be sealed unless the court makes a finding that the sealing is "narrowly

Although the Task Force has particularly focused on the proposed legislation, it recognizes that other aspects of class action practice, such as overlapping and conflicting class actions and “best practice” class action procedures, are also relevant to the structural and jurisdictional issues. Thus it has also considered the variety of reports and proposals of the various bodies and organizations that have looked into class action practice issues.<sup>4</sup>

The Task Force has spent much of its time to this point on jurisdictional and removal issues underlying expanded federal court jurisdiction over class actions. It has addressed both the broad policy issues and the particulars in the proposed legislation, including the details of the conditions for and exceptions to the basic provisions for “minimal diversity” jurisdiction. It has also given considerable attention to possible variations from and alternatives to the provisions in the legislation.

### **Concerns with Class Action Practice Sought to Be Remedied by Expanded Federal Court Jurisdiction**

The Task Force has attempted to identify the principal concerns with class action practice that have prompted proposals to expand federal court jurisdiction over and removal of class actions. The issues involved are complex and controversial, and strongly held views, supported by legitimate considerations, exist on both sides.

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tailored, consistent with the protection of public health and safety, and is in the public interest” and that “disclosing the information is clearly outweighed by a specific and substantial interest in maintaining the confidentiality of such information;” §1714 of S. 1712 and §1713 of H.R. 2341, providing that a court may not approve a settlement providing for payment of greater sums to some class members solely on the basis that they are “located in closer geographic proximity to the court;” §1715 of S. 1712 and §1714 of H.R. 2341, providing that a court may not approve payment of a greater share of the award to a class representative “on the basis of the formula for distribution to all other class members, than that awarded to the other class members;” §1717 of S. 1712, providing that not later than ten days after a proposed settlement is filed, each defendant shall serve the appropriate state official (or, in certain situations, federal official) who has primary regulatory or supervisory responsibility, or licensing authority, or, if none, the state attorney general, with notice of various details of the settlement; §6 of S. 1712 and §7 of H.R. 2341, providing for the Judicial Conference of the United States to make recommendations within 12 months on “the best practices that courts can use to ensure that proposed class action settlements are fair” and that the fees and expenses awarded to counsel “appropriately reflect the extent to which counsel succeeded in obtaining full redress” and the time, expense, and risk involved; §6 of H.R. 2341, providing that orders granting and denying class certification may be interlocutorily appealed and all discovery and other proceedings shall be stayed pending the appeal.

<sup>4</sup> See, e.g., American Bar Association Report to the House of Delegates, Commission on Mass Torts (Feb. 1990); Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (1991); American Law Institute Complex Litigation Project (1991); Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the U.S. and to the Judicial Conference of the U.S. (Feb. 15, 1999); RAND Institute for Civil Justice, Class Action Dilemmas: Pursuing Public Goals for Private Gain (2000); Memorandum to Members of the Advisory Committee on Civil Rules from L. Rosenthal, E. Cooper, & R. Marcus, “Proposed Amendments to Rule 23,” (April 10, 2001); E. Cooper, Reporter’s Call for Informal Comment: Overlapping Class Actions (Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Sept. 2001); Memorandum to the Civil Rules Advisory Committee from Judge David F. Levi, “Perspectives on Rule 23 Including the Problem of Overlapping Classes” (April 24, 2002).

Proponents of the legislation contend that the Framers established diversity jurisdiction to ensure that significant disputes between citizens of different states could be adjudicated in federal courts (before judges appointed by the President and confirmed by senators from all states) as opposed to locally elected state courts, which might be biased in favor of local defendants or counsel (or give the appearance of such bias). The proponents urge that if cases warranting federal court attention were prioritized, interstate class actions would top the list, since they most clearly satisfy the core purposes of diversity jurisdiction. The proponents also urge that compared to state courts, federal courts tend to have fewer cases per judge and more resources. Presently, however, most interstate class actions are heard by state courts, since the current federal diversity jurisdiction statute tends to exclude interstate class actions.<sup>5</sup> According to the proponents, expanded federal jurisdiction over interstate class actions is needed urgently because under the present regime class counsel can avoid federal courts in favor of certain “magnet” state courts that have reputations for unfairly applying class certification standards, for imposing their own laws (or their own views of the law) on other states’ citizens, and for approving class settlements that primarily benefit class counsel, not class members. Further, they are concerned that the current system is causing substantial increases in overlapping, conflicting, and duplicative class actions pending simultaneously in state and federal courts. The proponents urge adoption of a “minimal diversity” jurisdictional standard, allowing federal courts to hear class actions in which any member of the plaintiff class is a citizen of a state different from that of any defendant. However, the pending legislation would provide exceptions aimed at carving out smaller class actions<sup>6</sup> and cases presenting local controversies.<sup>7</sup>

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<sup>5</sup> See *Strawbridge v. Curtiss*, 3 Cranch 267 (1806)(the “diversity of citizenship” statute requires “complete diversity,” i.e., that no defendant be a citizen of the same state as any plaintiff). Although only the citizenship of the named plaintiff(s) can be considered for purposes of determining if the parties to a class action are diverse, *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921); *Snyder v. Harris*, 394 U.S. 332 (1969), it is alleged that “plaintiff’s counsel frequently and purposely evade Federal jurisdiction in multi-State class actions by adding named plaintiffs or defendants simply based on their State of citizenship in order to defeat complete diversity.” “The Class Action Fairness Act of 2000,” Report 106-420, Senate Committee on Judiciary, Sept. 26, 2000 (106<sup>th</sup> Cong., 2d Sess.), at 13. It is pointed out in response that 28 U.S.C.A. § 1359 denies jurisdiction where a party has been collusively joined. Defendants have also alleged that since the “amount-in-controversy” requirement must be satisfied as to each plaintiff class member, *Zahn v. International Paper Co.*, 414 U.S. 291 (1974), class actions for large sums avoid removal if each class member’s claim does not exceed \$75,000.

<sup>6</sup> The bill would exclude from “minimal diversity” jurisdiction those class actions with an amount in controversy of less than \$2 million (in the aggregate) and encompassing fewer than 100 persons. H.R. 2341, supra note 2, at § 4(a)(4) and 4(a)(3)(C).

<sup>7</sup> “Minimal diversity” jurisdiction would not apply to any civil action in which “the substantial majority” of the class members and “the primary defendants” are citizens of the state in which the action was filed and the claims are “governed primarily by the laws” of that state. H.R. 2341, supra note 2, at § 4(a)(3)(A)(I) & (ii). The Senate Committee Report stated that the exception when a “substantial majority” of the class members are citizens of the forum state should apply “only if virtually all members of the proposed class [using an example of “more than 99%”] are residents of a single State of which all ‘primary defendants’ are also citizens and the claims are governed by that State.” “The Class Action Fairness Act of 2000,” Senate Report 106-420, supra note 5, at 29. “Primary defendants” are defined as “those defendants who are the real ‘targets’ of the lawsuit – i.e., the defendants that would be expected to incur most of the loss if liability is found.” Id. at 29.

Opponents maintain that state courts continue to be capable of properly conducting complex class actions, and that abuses are no more common in state than in federal courts. They point out that most affected class actions are based on state law, which state courts are best equipped to interpret and apply and which federal courts can often only predict, as “stand-ins” for state courts. Where there is no “certified question” to a state court (and not all states allow certified questions), there is no mechanism to correct a wrong federal interpretation or prediction of state law. Some question whether Article III of the Constitution authorizes “minimal diversity” jurisdiction based on any non-party class member being a citizen of a state different than that of any defendant. Opponents see the bill as denying victims a convenient state forum and permitting defendants to “forum shop” through removal to federal courts. They express concern about overloading already burdened federal courts with all but the smallest state class actions, with actions brought by organizations for their members, and with virtually all mass-tort individual cases where for reasons of efficiency more than 100 claims are consolidated for trial of common issues. Opponents see the bill, even with its limited exceptions, as sweeping into federal courts many cases in which there is no particular federal interest superior to the interests of the forum state. They argue that the bill emphasizes defendants’ concerns, unfairly ignoring victims’ concerns as to some corporations’ attempted preclusion of class actions by imposing single-claimant arbitration “agreements” on customers and employees, the bill’s built-in delays of litigation, the declining ability of federal courts to handle complex litigation in light of presumptive limits on attorney-controlled discovery, and the enormous transfer of jurisdiction over complex cases from a large number of state judges to a small number of federal judges. Opponents see the bill as ignoring victims’ legitimate interest in keeping their cases in state court, where removal to federal courts cannot adequately address the complaint,<sup>8</sup> or where federal courts in their area have adopted standards for damages class actions so restrictive as virtually to preclude their use, resulting in the denial of meritorious class claims even where they could have been tried fairly in state courts.

Based on the literature and on the oral testimony and written submissions provided the Task Force, it has attempted to identify the principal concerns that are often expressed about contemporary class action practice. Task Force members vary considerably in their perceptions of the seriousness of various concerns, as well as their amenability to legislative remedies. The concerns might be placed on a continuum based on the degree of agreement of Task Force members. On one end would be concerns as to which there is considerable agreement as to their seriousness or amenability to legislative solutions. On the other end would be concerns as to which there is considerable disagreement as to their seriousness or amenability to legislative solutions. The most prominent concerns identified by the Task Force, placed in the descending order of Task Force agreement, are: 1) overlapping and conflicting class actions; 2) class actions in which the forum-state court’s decision as to choice of law has an extraterritorial effect on defendant’s conduct beyond its borders; 3) magnet or target venue state courts; and 4)

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<sup>8</sup> E.g., federal courts cannot entertain state-law actions against state agencies, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984), and normally abstain from suits that involve matters particularly within the province of the state judicial system, such as domestic relations, child support, construction of wills, eminent domain, title to real estate, and unsettled questions of state law, *Ankenbrandt v. Richards*, 504 U.S. 689, 696-701 (1992).

class actions against non-resident corporate defendants claimed to subject them to local bias. The Task Force has devoted much discussion to the legitimacy of such concerns and whether they are amenable to remedy either through the proposed legislation or otherwise.

Although the Task Force is not at a point of achieving consensus on these issues, it is able to make this interim report indicating certain shared values and perceptions.

### **A. Care in Considering Expanding Federal Court Jurisdiction**

The Task Force recognizes that “[a]ny proposal to add to federal subject-matter jurisdiction must be considered with great care.”<sup>9</sup> Indeed, the 1995 Report to the ABA House of Delegates from the Standing Committee on Federal Judicial Improvements stated that Congress should be encouraged “to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism”<sup>10</sup> and “to exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and should do so only to further clearly defined and justified interests.”<sup>11</sup>

### **B. Overlapping or Competing Class Actions**

The Task Force early on identified the filing of multiple class actions on the same matters resulting in the pendency of overlapping or competing class actions in a number of courts as one of the most serious concerns with class action practice.<sup>12</sup> Such overlapping class actions consume unnecessary litigation resources, encourage “gaming” of court filings, and risk inconsistent treatment of like cases.<sup>13</sup>

Procedural devices that are only available in federal courts are particularly suited to dealing with the problem of overlapping or competing class actions. The Judicial Panel on Multi-District Litigation (MDL) permits consolidation of federal cases for pre-trial proceedings, and, although a few states have similar devices for cases within their state, no such device exists for consolidating suits in different states. Thus removal to a federal court would permit the invocation of MDL treatment that is not available when overlapping cases are pending in state courts. Additional devices to avoid duplication

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<sup>9</sup> See Memorandum to the Civil Rules Advisory Committee from Judge David F. Levi, *supra* note 4 at 15.

<sup>10</sup> Recommendation #1, Report to the ABA House of Delegates from the Standing Committee on Federal Judicial Improvements (August 1995).

<sup>11</sup> *Id.*, Recommendation #6.

<sup>12</sup> The problem of overlapping class actions has been described as “multiple filings of multi-state diversity class actions in both federal and state courts.” Memorandum to the Civil Rules Advisory Committee from Judge David F. Levi, *supra* note 4, at 9. This memorandum was approved unanimously by the Civil Rules Committee at its meeting on May 6-7, 2002, and by the Standing Committee on the Rules of Practice and Procedure at its meeting on June 10-11, 2002.

<sup>13</sup> See *id.* at 11: “Membership in these classes may overlap with classes sought – or actually certified – in other courts, state or federal. Pretrial preparations may overlap and duplicate, proliferating expense and forcing delay now in one proceeding, now in another, as coordination is worked through. Settlement negotiations in one action may be played off against negotiations in another, raising the fear of a “reverse auction” in which class representatives in one court accept terms less favorable to the class in return for reaping the rewards that flow to successful class counsel.”

and conflicting outcomes might also be available in federal courts, such as anti-suit injunctions and preclusion, although these devices may require changes in rules or statutes and raise additional issues of federalism and administration.<sup>14</sup>

The proposed legislation does not specifically address overlapping class actions although its broad grant of “minimal diversity” with limited exceptions might make many overlapping class actions amenable to removal. The Task Force has not as yet reached a consensus as to a proper legislative approach to the overlapping or conflicting class action concern, although there is general agreement on the seriousness of the problem.

### C. The Use of “Minimal Diversity”

Proposals to use “minimal diversity” as a basis for removing certain class actions from state to federal courts have been met with questions as to both pragmatic considerations and constitutionality. Proponents and opponents of the proposed legislation are sharply divided on these points.<sup>15</sup>

Some contend that Article III would authorize “minimal diversity” jurisdiction in focused situations where interstate and federal court interests are strong and the interests of state courts are not paramount or do not predominate. The Advisory Committee on the Federal Rules of Civil Procedure and the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States have unanimously approved a recommendation to “support the concept of minimal diversity for large, multistate class actions in which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states’ jurisdiction over in-state class actions is left undisturbed.”<sup>16</sup> The memorandum accompanying the recommendation states that “the problems that persist with respect to overlapping and competing class actions are precisely the problems in multistate

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<sup>14</sup> See Cooper, Reporter’s Call for Informal Comment: Overlapping Class Actions, *supra* note 4, at 8-35; Memorandum to the Civil Rules Advisory Committee from Judge David F. Levi, *supra* note 4, at 12, 14.

<sup>15</sup> Opponents, including some Task Force members, question whether Article III provides constitutional authorization for “minimal diversity” jurisdiction based solely on diversity between a non-party class member and a defendant. Some argue that when a proposed class action is filed, a constitutional “controversy” exists only between the named plaintiffs and the defendant, and diversity jurisdiction cannot be constitutionally maintained prior to certification and some reasonable assurance that there is, in fact, diversity. Others, in response, argue that the complete diversity required by *Strawbridge v. Curtis*, 3 Cranch 267 (1806), was derived from the statute and not the Constitution and that the status of non-party class members has been recognized regarding a variety of functions in class action cases. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). They argue that statutes and cases have made practical determinations about who constitutes a party, and “minimal diversity” would be a determination by Congress that unnamed class members shall be considered parties prior to certification. The recent Supreme Court decision in *Devlin v. Scardelletti*, 122 S.Ct. 2005 (2002), which held that class members other than named representatives could appeal a court’s approval of a settlement, is seen as a further indication that the Court would allow “minimal diversity” based on the citizenship of any class member. Others maintain that the decision accords absent class members lesser rights than the named representatives and recognizes the administrative difficulties in having to consider the citizenship of all class members to determine jurisdiction.

<sup>16</sup> Memorandum to the Civil Rules Advisory Committee from Judge David F. Levi, *supra* note 4, at 17.

coordination that can claim high priority in allocating work to the federal courts.”<sup>17</sup> It concludes that “[t]here is a secure basis in the Article III authorization of diversity jurisdiction to consider various approaches to consolidating overlapping class actions by bringing them into federal court.”<sup>18</sup>

One Task Force member who doubts that Article III provides constitutional authority for broad “minimal diversity” jurisdiction in the proposed legislation sees the Commerce Clause as possibly supporting a limited grant of minimal diversity for overlapping class actions that pose a potential burden on interstate commerce. One avenue being explored by the Task Force is whether consensus on the constitutionality of some form of minimal jurisdiction could be achieved for focused situations in which federal interests are predominant, possibly based on a variety of constitutional rationales. The memorandum accompanying the recommendation of the Advisory Committee on the Federal Rules of Civil Procedure and the Committee on Rules of Practice and Procedure, supporting the concept of “minimal diversity” for certain large, multistate class actions, expressed the view that “minimal diversity” legislation “could be crafted to bring cases of nationwide scope or effect into federal court without unduly burdening the federal courts or invading state control of in-state class actions.”<sup>19</sup> As always, the devil is in the details, and any such grant of minimal jurisdiction that will command agreement will require attention to preserve a balance between legitimate state-court interests and federal-court jurisdictional benefits, as well as avoiding undue burdens on federal court caseloads.

#### **D. Other Important Class Action Concerns**

The Task Force continues to work on the other concerns regarding class actions, including the three identified earlier in this report -- class actions in which the forum-state court’s decision as to choice of law has an extraterritorial application to defendant’s conduct beyond its borders; magnet or target venue state courts; and class actions against non-resident corporate defendants claimed to subject them to local bias. The Task Force will seek to respond to the concerns on both sides in addressing legislative remedies on which agreement can be reached.

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<sup>17</sup> Id. at 15.

<sup>18</sup> Id. at 13.

<sup>19</sup> Id. at 16.

## **Final Report**

The Task Force expects to complete its work and issue a final report early next year.

Submitted on behalf of the Task Force,  
Edward F. Sherman, Chair and Reporter

August 1, 2002