

**Testimony of Brian Wolfman
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Before the ABA Class Action Task Force
Washington, D.C.
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Chairman Sherman and members of the Task Force: Thank you for the opportunity to appear today. I have represented class action plaintiffs in a variety of settings, mostly against government defendants in civil rights and public benefits cases. My work in recent years at Public Citizen's Litigation Group (PCLG) has been in consumer class actions of the kind targeted by H.R. 2341 and its predecessor legislation. In most of those cases, we have represented absent plaintiffs challenging unfair, unlawful, or collusive class action settlements, including in the *Amchem* case, the *Bowling* heart valve litigation, the *General Motors* truck litigation, the airline antitrust litigation, and more than two dozen others. Thus, our concern is the rights of the absentees.

We find ourselves in these cases fighting not only the defendant, which has enticed the named plaintiffs into a low-ball settlement, but plaintiffs' counsel who, on occasion, want to walk off with far too much of the pie. With respect, we are concerned that the Task Force does not include the perspective of any member who regularly represents objectors, rather than defendants (seeking only to protect their bottom lines) and plaintiffs' counsel (who, on occasion, lose sight of the interests that they are duty-bound to protect). We hope to bring that perspective today.

What Are the Potential Points of Agreement?

The memo that we received from Chairman Sherman on Friday, April 5, noted

that the Task Force was seeking common ground. From our perspective, here is where we find common ground with those who believe that there is a problem requiring a rule-based or legislative fix.

1. There are abusive class action settlements. Most consumer class actions are neither frivolous nor attempts by counsel to profit at their clients' expense. But abuses occur because of the potential conflict between counsel and their clients in class actions, where there is usually no control exercised by the clients over their lawyers.

2. There is sometimes a problem with overlapping class actions that are filed in different courts (whether state or federal), requiring the same matter to be litigated in many fora, creating a "reverse auction" dynamic detrimental to plaintiffs.

3. On occasion, problems arise from extraterritorial application of state law. That problem arises, of course, whether the case is pending in state or federal court.

4. Judges need to scrutinize class actions and, particularly, class action settlements more closely than they have in the past.

What Are Our Significant Points of Disagreement with the Pending Legislation?

We do not agree with some of the assumptions of the proponents of the class action legislation.

1. Do all cases with national implications — those affecting the practices of a defendant on a multi-state basis — belong in federal court? No. Both state and federal courts are equally competent to handle them. Moreover, there are a range of federalism and fairness concerns that demonstrate that putting all those cases in federal court would be a serious mistake.

2. Do federal judges do a better job scrutinizing class certification and class

action settlements than their state court counterparts? No. Some of the class certifications and settlements raising the most serious problems — the *Hanlon* minivan latch case, the Western Union money order coupon case, the *General Motors* truck settlement, and some other highly questionable coupon cases — have occurred in federal court. Moreover, state courts are equally competent to root out abuses as are the federal courts.

As noted above, overlapping class actions present potential problems. So, then, what is the problem with the federal legislation (H.R. 2341)? Well, it is not quite like killing a pesky insect with an atomic bomb, but it is overkill. The legislation would:

1. Bring almost all class cases against at least one out-of-state defendant into federal court by removal, even where that defendant does substantial business in that state (indeed, even where that defendant has a substantial business **presence** in that state), and even where its corporate affiliates are located in that state and have perpetrated the illegalities at issue in the suit;

2. Bring to the federal courts all cases where the absentee class has a significant out-of-state component, even where the plaintiff class maintains that local law or substantially similar law from other jurisdictions properly could be applied to the defendant on a nationwide basis.

Most significantly, this vast increase in the federal caseload occurs **regardless of whether there are multiple class actions on file**. In other words, the legislation sweeps virtually all class cases into federal court even if there is no serious concern about

overlapping class actions.

Are There Potential Solutions Short of H.R. 2341's Overkill Approach?

As indicated above, our chief concern is that it be possible to consolidate several or more identical or similar class actions in state or federal court in appropriate circumstances. Two types of solutions seem worthy of exploration:

1. The MDL Panel could, on a discretionary basis, consolidate identical or similar class actions pending in federal **or** state court, just as it does now on a discretionary basis for pending federal cases. In our view, to respect the role and expertise of the state courts, a discretionary removal and consolidation system must provide the MDL Panel with the power to send cases to state as well as federal judges. A possible model for such a mechanism is found in the American Law Institute's *Complex Litigation Project*, § 5.01 (p. 271). The ALI proposal is primarily concerned with personal-injury mass torts, but with minor modifications, its language could be applied to overlapping class actions. Section 5.01 sets forth seven factors to be considered when determining whether to exercise discretion to remove cases. Section 4.01 of the ALI proposal contains a mechanism by which a state court could be designated as a transferee court.

2. Legislation could establish a complex litigation program in which state courts agree to accept federal funding to enhance their capacity to handle multi-state consolidated class actions, in exchange for adopting certain complex litigation techniques, including, most significantly, a consolidation program similar to the MDL program. Appendix B to the ALI proposal contains a model system for state-court consolidation through an Interstate Complex Litigation Panel.

3. Congress may wish to consider choice-of-law legislation for class and mass-accident litigation. However, I am not certain that such legislation is needed. As Chief Judge Becker has noted in the school asbestos litigation, the tort law of the 50 states may at times break down into a handful of distinct groupings, making the problem less complex than one might expect. Moreover, it is possible in some cases that the law of the state of the defendant's headquarters or of the state where relevant corporate decisions were made could be applied across-the-board with respect to key issues in a case.

Why Is It Important to Allow Consumer Class Actions to Stay in the State Courts?

1. There is considerable delay in many federal courts and plaintiffs ought to be able to sue in state courts that can handle such cases expeditiously.

2. H.R. 2341 would essentially take the state courts out of the business of interpreting state consumer protection laws that are meant to be enforced primarily through the class action device. State courts should remain the chief interpreters of state law.

3. Rule 23 is not the be-all and end-all of proper class certification. For instance, state courts might interpret commonality, predominance, or superiority differently from how federal courts have interpreted those concepts in (b)(3)-type small-claims consumer class actions. H.R. 2341 effectively prevents state courts from putting their own distinctive gloss on their own class action rules.

Other Problems with the Federal Legislation.

The bill passed by the House is bad legislation because of its jurisdictional

provisions discussed above. However, some of its other provisions would do a great disservice to the class action device and its promise of mass justice. For present purposes, two aspects of the bill are particularly noteworthy.

1. Section 6 of H.R. 2341 provides an **interlocutory appeal as of right** to anyone adversely affected by a district court's decision to certify (or not to certify) a class under Rule 23. Federal Rule of Civil Procedure 23(f) already allows permissive interlocutory appeals of class certification decisions, and is reserved for cases in which an erroneous decision threatens to impose serious harm on a litigant. Thus, section 6's radical expansion of the federal appellate docket is unnecessary. Although district court filings have leveled off, federal appellate case filings continue to climb at a steady rate. This provision would add a new category of complex appeals to the already crowded appellate docket. More fundamentally, the proposal is directly contrary to Supreme Court precedent and longstanding federal policy against piecemeal litigation that, with a few narrow exceptions, requires a "final decision" before an appeal may be taken.

Let's be clear why this provision is in the bill: Corporate defendants want the right to appeal class certification immediately to delay the case and make sure that the merits (including any merits discovery) are not reached until years down the road. That delay, of course, undermines the plaintiffs' ability to press their cases to trial and to receive reasonable settlement offers. A federal civil appeal currently takes, on average, a year from filing to decision, with some circuits more delayed. Of course, class actions are not "average" cases, and so the appeals to which this provision would apply will take considerably longer than average, as is the case for almost all the federal appeals in which PCLG is involved. If they lost on appeal, defendants would seek certiorari to the

Supreme Court, which would rarely, if ever, succeed, but which would add 6 to 9 months to the delay.

Another aspect of this provision unmasks its improper purpose: Ordinarily, proceedings in the district court are stayed during the pendency of the appeal, making clear that the bill seeks to take all pressure off the defendant for a long period of time after a district court certifies a class. Rule 23(f) the permissive appeal provision discussed above takes the opposite approach; it says that, unless otherwise ordered, proceedings in the district court will **not** be stayed during the pendency of an appeal.

In sum, this provision will be extremely detrimental to plaintiffs with meritorious claims. It will increase the number of "sell out" settlements because no other kind of settlement will be offered until years of appellate proceedings have ended. It will overload the already overloaded appellate courts. It has no relationship to the bill's supposed concerns about state court and overlapping class actions, and indeed it is hostile to one of the bill's stated purposes to enable plaintiffs with meritorious claims to achieve justice. Even if H.R. 2341 were otherwise worth supporting which it is not the bill should be rejected based on section 6 alone.

2. Under section 5 of H.R. 2341 (new 28 U.S.C. 1453(e)), "an order remanding a class action to the State court from which it was removed shall be reviewable by appeal or otherwise." Under current law, however, remand orders generally are not reviewable. See 28 U.S.C. 1447(d). And for good reason: When a federal district judge finds that removal jurisdiction is lacking, the case can proceed promptly in state court. H.R. 2341 would reverse that longstanding practice. Defendants facing a remand order would invariably appeal. If the decision were affirmed (as would generally be the case), the

defendant could, of course, seek certiorari, with the net result a year or two of delay before the case even begins. As with the bill's interlocutory certification appeal, this provision would do great harm to plaintiffs with meritorious claims.

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We believe it is critically important that changes made to the infrastructure of our court system procedural rules and allocation of jurisdiction continue to be made on a consensus, non-partisan basis. We are alarmed that the House has broken precedent by approving procedural changes in a divided party-line vote. The ABA Task Force would perform a valuable service by recommending changes that represent the consensus of the entire bar. We believe that we have identified such changes