REPORT OF THE

ABA TASK FORCE ON CLASS ACTION LEGISLATION

In the fall of 2001, then-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 was extended by ABA President A.P. Carlton, Jr. for the period of his presidency.

The creation of the Task Force is an indication of the importance the ABA places on ensuring that this issue is carefully considered in a non-politicized atmosphere by the bench and bar, as well as the general public. The Task Force's mission has been to study the issues from both the plaintiff and defense sides in the hope of finding common ground. The Task Force has focused primarily on the proposed legislation referred to as the "Class Action Fairness Act of 2001," H.R. 2341 and S. 1712 (107th Cong. lst Sess.).[1] This legislation has been the subject of extensive hearings that reflected very differing views on its merits.[2] The House version was passed by the House of Representatives on March 13, 2002, but the Senate version was not reported out of the Senate Judiciary Committee. Alternative approaches to the issues involved have been the subject of considerable study over the past decade by a variety of committees, governmental bodies, and organizations.[3]

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. William Conroy is a member-at-large, and the other members have been appointed from ABA sections, including Leo Jordan and Thomas Minton from the Tort Trial and Insurance Practice Section; Rich Wallis and Jeff LeVee from the Section

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[1] This was derived from the "Class Action Fairness Act of 2000," H.R. 1875 and S. 353 (106th Cong., 2d Sess.), which, in turn, was derived in part from the " Interstate Class Action Jurisdiction Act of 1999," H.R. 1875 (106th Cong., 2d Sess.) .

[2] See, e.g., Hearings before the Senate Committee on the Judiciary on "Class Action Litigation," July 31, 2002; Senate Report 106-420 from the Committee on the Judiciary on "The Class Action Fairness Act of 2000," Sept. 26, 2000; House Report 106-320, from the Committee on the Judiciary on "Interstate Class Action Jurisdiction Act of 1999," Sept. 14, 1999; Hearing before the Committee on the Judiciary on H.R. 1875, "Interstate Class Action Jurisdiction Act of 1999," July 21, 1999; Hearing before the Subcommittee on Courts and Intellectual Property, House Committee on the Judiciary, June 18, 1998; Hearing before the Subcommittee on Administrative Oversight and the Courts, Senate Committee on the Judiciary, on "S. 353, The Class Action Fairness Act of 1999," May 4, 1999.

[3] *See, e.g.*, American Bar Association Report to the House of Delegates, Commission on Mass Torts (Feb. 1990)(report withdrawn by the proponents and not considered by the House of Delegates); 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 United States and to the Judicial Conference of the United States (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 United States, 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).

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 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.

Over the past year, the Task Force has sought the expertise and advice of a wide range of organizations and individuals. It has held a large number of meetings and telephone conferences, including two public meetings with testimony from interested persons, organizations, and governmental entities.[4]

The proposed legislation can be divided into two principal parts: first, the heart of the proposal, provides for expanded federal court jurisdiction over class actions based on a "minimal diversity" rationale and for removal of such actions from state to federal court, and second, a number of provisions relating to the administration of class actions in federal courts, which have been collectively referred to as "Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions."

I. <u>Jurisdiction and removal provisions</u>

The portion of the legislation concerning jurisdiction and removal is by far the most controversial. The Task Force attempted to identify the principal concerns with class action practice that have prompted proposals to expand federal court jurisdiction and removal of class actions. The issues involved are complex and controversial, and strongly held views, supported by legitimate considerations, exist on both sides.[5]

The Task Force was able to reach agreement on the following principles in considering federal legislation that would expand federal-court jurisdiction and removal of class actions

[4] In the April 2002 meeting of the Task Force, 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). At the Task Force's May 2002 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; Elizabeth 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 also invited written comments and received and considered submissions from a number of organizations.

[5] The differing positions and arguments are set out in the Task Force's Interim Report submitted to the ABA Board of Governors at its Annual Meeting in Washington, D.C., on August 4-6, 2002. This Report can be found on the ABA Website, www.abanet.org (click on the icon on the first page for the Task Force on Class Action Legislation).

<u>First,</u> the Task Force recognizes that "[a]ny proposal to add to federal subject-matter jurisdiction must be considered with great care."[6]

<u>Discussion</u>: This is consistent with the 1995 Report to the ABA House of Delegates from the Standing Committee on Federal Judicial Improvements, which stated that Congress should be encouraged "to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism"[7] 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."[8]

<u>Second</u>, the Task Force believes that some concerns over class action practice could be addressed with federal legislation providing for expanded federal court jurisdiction. Any expansion should preserve a balance between legitimate state-court interests and federal-court jurisdictional benefits. Policymakers, in the drafting of any federal legislation providing for expanded federal jurisdiction of class actions, should consider such factors as aggregate amount in controversy, number of plaintiffs in the alleged class, percentage of the class who are citizens or residents in the forum state, whether the defendants are all residents of the forum state, standards for removal, and existence of overlapping classes or cases; and how the entire mix of all factors balance legitimate state-court interests and federal-court jurisdictional benefits. Not every bill that addresses these factors would be appropriate, because the factors are interrelated and the key is to strike a reasonable balance as a whole.

<u>Discussion</u>: 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.[9] Such overlapping class actions consume unnecessary litigation resources, encourage "gaming" of court filings, and risk inconsistent treatment of like cases.[10] 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

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[6] See Memorandum to the Civil Rules Advisory Committee from Judge David F. Levi, supra note 3 at 15.

[7] Recommendation #1, Report to the ABA House of Delegates from the Standing Committee on Federal Judicial Improvements (August 1995).

[8] Id., Recommendation #6.

[9] 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 3, 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. See notes 12-17 for further developments concerning this memorandum.

[10] 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 favourable to the class in return for reaping the rewards that flow to successful class counsel."

that is not available when overlapping cases are pending in state courts. The proposed legislation does not address the problem of overlapping class actions, although the scope of its grant of federal jurisdiction presumably would allow removal of the vast majority of such cases to federal courts.

The Task Force also recognized the concern that class actions involving class members from multiple states can be filed in state courts (which may be considered to be more favorable to plaintiffs or may lack sufficient resources for handling certain class-actions), resulting in those courts adjudicating cases that have a nationwide impact despite possibly small interest of the forum state in the suit. It also recognized the concern of plaintiffs that some federal courts have applied stricter class certification standards than have some state courts and are often considered more favorable to defendants.

Questions have been raised as to whether Article III of the Constitution authorizes "minimal diversity" jurisdiction based simply on any non-party class member being a citizen of a state different than that of any defendant.[11] Without resolving this constitutional issue, the Task Force notes that, given a legislative finding of impact on interstate commerce, the commerce clause of Article I may provide constitutional authority for expanded federal-court jurisdiction regarding overlapping and multistate class actions, so long as there are appropriate limitations to leave within the jurisdiction of state courts those class actions in which a state's interests are stronger than federal interests.

Support for basing expanded federal-court jurisdiction on a "minimal diversity" rationale has come from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. It approved a recommendation approved by the Advisory Committee on Civil Rules 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."[12] The supporting memorandum concluded that "[t]here is a secure basis in the Article III authorization of diversity jurisdiction to consider various approaches to

[11] The Supreme Court's approval of "minimal diversity" in *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967) was for statutory interpleader in which there was minimal diversity between parties, while the proposed minimal diversity in the class action context would rely on the citizenship of any class member rather than that of formal parties. 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.

[12] Memorandum to the Civil Rules Advisory Committee from Judge David F. Levi, supra note 3, at 17.

consolidating overlapping class actions by bringing them into federal court"[13] and 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."[14]

The Committee on Federal-State Jurisdiction of the Judicial Conference, however, declined to endorse this recommendation of the Committee on Rules. It expressed concern with minimal diversity jurisdiction "as the sole means to respond to the problem of overlapping and competing class actions."[15] It noted the objections of the Conference of Chief Justices to the legislation on federalism grounds[16] and reiterated its objections to the legislation while recognizing "the importance of continuing to explore less intrusive and burdensome means, both statutory and non-statutory, to redress the problems presented by overlapping and competing class actions."[17]

If exercised to the maximum degree, the "minimal diversity" approach could permit removal of virtually all class actions in the state courts. In recognition of this fact, the 2002 version of the legislation limited the extent of "minimal diversity"-based federal jurisdiction over class actions. The legislation contained a minimum amount in controversy ($2,000,000 of aggregated class member claims[18]) and number of class members (100) aimed at excluding smaller class actions[19] and a carve out for cases deemed to present primarily state, as opposed to multi-state, controversies (actions in which "the substantial majority' of the class members and "the primary defendants" are citizens of the forum state *and* the claims are "governed primarily by the laws" of that state).[20]

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[13] Id. at 13.
[14] Id. at 16.
[15] Report of the Judicial Conference Committee on Federal-State Jurisdiction to the Chief Justice of the United States and Members of the Judicial Conference of the United States, Agenda F-9, Federal-State Jurisdiction, Sept. 2002, at 4. See also Letter to House Judiciary Chairman Hyde from Leonidas Ralph Mecham, Director of the United States Administrative Office, opposing the proposed legislation.
[16] See Letter to House Judiciary Chairman Hyde from Chief Justice David Brock, President of the Conference of Chief Justices, July 19, 1999, expressing the Conference's opposition to the proposed legislation as "an unwarranted incursion on the principles of judicial federalism underlying our system of government"; Letter to Senate Committee on the Judiciary Chairman Leahy from Annice M. Wagner, President, Conference of Chief Justices, March 28, 2002, reiterating the opposition and stating that "the state courts and state legislatures should be responsible for correcting any problems," which, in fact, they are doing, including a CCJ training program for judges on managing class actions pursuant to a grant from the State Justice Institute.
[17] Id.
[18] The legislation would permit aggregation of the claims of all putative class members to determine the amount in controversy for diversity jurisdiction, reversing existing precedents that class members may not aggregate their claims to satisfy the amount in controversy, Snyder v. Harris, 394 U.S. 332 (1969), and that the claim of each class member must meet the amount in controversy, Zahn v. International Paper Co., 414 U.S. 291 (1973).
[19] 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, text at supra note 1, at § 4(a)(4) and 4(a)(3)(C).
[20] "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 1, 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

The Task Force has considered a number of different factors that have been – or might be - included in proposed legislation to limit the scope of class actions that would be subject to federal jurisdiction under a "minimal diversity" rationale in the interests of striking a balance between legitimate state-court interests and federal-court jurisdictional benefits. First, it has considered the provisions of the legislation that impose threshold requirements of a minimum amount in controversy and minimum number of class members and that provide a carve out for suits brought under state law with certain further requirements.[21] It has considered whether these provisions are suitable for excluding from federal –court jurisdiction those cases that properly belong in the state courts. It has further considered whether the numbers contained in those provisions are set at a correct level.

Second, the Task Force has considered a wide range of other provisions that might serve the objective of leaving in state courts those cases that properly belong there. It has identified certain factors that, in combination, seem highly relevant to striking a balance between legitimate state-court interests and the benefits of expanding federal-court jurisdiction. Those factors are the aggregate amount in controversy, number of plaintiffs in the alleged class, percentage of the class who are citizens or residents in the forum state, whether the defendants are all residents of the forum state, standards for removal, including whether any discretion should be allowed the court; and existence of overlapping classes or cases. The Task Force recognizes that this is not an exclusive list and that appropriate legislation need not contain all of these factors. It also recognizes that not every bill that addresses these factors would be appropriate, because any factors selected are interrelated and the key is to strike a reasonable balance as a whole. The critical question is how the entire mix of the factors utilized by the policymakers will balance legitimate state-court interests and federal-court jurisdictional benefits.

> **Third, the Task Force reaffirms the position of the American Bar Association that, when legislation is considered that may affect the federal courts, Congress should take into account the judicial impact of the proposed legislation, including the increased caseload and resulting costs for the federal court; and in the event of any expanded federal jurisdiction over class actions, Congress should provide adequate resources to meet any added burden.**

II. Provisions relating to the administration of class actions

> **The Task Force reaffirms the support of the American Bar Association for the Congressionally-enacted, judicial rulemaking process in the Rules Enabling Act; opposes enactment of legislation that conflicts with or touches upon the subjects**

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by that State." "The Class Action Fairness Act of 2000," Senate Report 106-420, supra note 2, 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. Carve outs are also provided for class actions that solely involve a claim (1) concerning a covered security under the federal securities laws, (2) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under the laws of the state of incorporation or organization, and (3) that relates to rights, duties, and obligations pursuant to any security under the Securities Act of 1933.

[21] See text and footnote at notes 19-20, supra.

covered in existing Rule 23 or the proposed amendments to Rule 23 which were approved by the Judicial Conference of the United States on September 24, 2002 and are pending before the United States Supreme Court; and recommends that any legislation respecting class action practice be confined to the subject of the expansion of the jurisdiction of the Federal Courts and the appropriate limitations thereto.

Discussion: The members of the Task Force agree that there are legitimate concerns over the current administration of class actions, particularly relating to settlements and notice to class members. They favor in general the objectives of many of the provisions of the legislation relating to the administration of class actions, but do not support their passage as legislation at this time because they are addressed by the proposed amendments to Rule 23 and could be the source of confusion in the administration of class actions.

The Task Force believes many of the objectives sought by the administrative provisions are served by the existing Rule 23 and the proposed amendments to Federal Rule 23 (which were finalized after this legislation was originally drafted).
The proposed amendments to Rule 23 relate to four primary areas: timing of the certification decision and notice; judicial oversight of settlement; attorney appointment; and attorney compensation. These amendments have been approved by the standing Committee on Rules of Practice and Procedure and have been sent to the Supreme Court by the Judicial Conference of the United States. The Supreme Court has until May 1 to forward them to Congress, and they will become effective in December unless Congress passes adverse legislation. The Task Force believes that these issues are particularly within the purview and expertise of the rule-making process and that differences in language between legislation and rules could give rise to confusion and unnecessary litigation in class-action practice.

The American Bar Association adopted a policy in 1995, "reaffirm[ing] its support for the Congressionally-enacted, judicial rulemaking process set forth in the Rules Enabling Act and opposing those portions of the Common Sense Legal Reform Act or other legislation that would circumvent that process." The Task Force also notes that the RAND study of class actions recommended greater judicial involvement in the administration of class actions.[22] The proposed amendments to Rule 23 impose responsibility on federal judges to oversee the administration of class actions and provide the discretionary tools to assure better supervision. The Task Force believes that the grant of judicial discretion is preferable to precise legislative standards in this matter.

Although the Task Force agrees with some of the apparent objectives of some of the provisions of the legislation that concerns class-action administrative practices, the Task Force believes that it would be preferable to leave those issues to the judicial rulemaking process, as set forth below:

I. The Task Force agrees in general with the apparent objectives of the following provisions of the legislation, but believes that they are addressed or touched on by the existing Rule 23 or

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[22] See RAND Institute for Civil Justice, Class Action Dilemmas: Pursuing Public Goals for Private Gain, at 486-90, 497-989 (2000).

the proposed amendments to Rule 23 or would be within the authority of the federal rulemaking apparatus:

Judicial scrutiny of coupon and other noncash settlements, which is not directly addressed by the proposed amendments to Rule 23(e) but which would fall within the judicial responsibility to review the terms of settlement required under those proposed amendments;

Clearer and simpler settlement information, which is addressed by amended Rule 23c)(2)(A)(1), requiring the court to direct notice to the class that "concisely and clearly describe[s] in plain, easily understood language" and which is being implemented by a project of the Federal Judicial Center to draft and promulgate model notices for various kinds of class actions**;**

Protection against net loss to class members, which is not directly addressed by the proposed amendments to Rule 23(e) but which would fall within the judicial responsibility to review the terms of settlement required under those proposed amendments;

Disclosure of the amount and method of calculating and funding attorney's fees, which is not directly addressed by the proposed amendments to Rule 23(e), but which would be the subject of rulemaking;

Report on class action settlements by the Judicial Conference within 12 months on the best practices for class action settlements, which could be initiated by the Judicial Conference itself.

II. The Task Force has not reached a consensus in support of or opposition to the following provisions of the legislation, but believes that they are addressed or touched upon by the existing Rule 23 or the proposed amendments to Rule 23 or would be within the authority of the federal judicial rulemaking apparatus:

Notifications to appropriate federal and state officials before final court approval of settlement, which is not required under the present rules;

Mandatory interlocutory appeal of class action certification with discovery and other proceedings stayed pending appeal, which would expand that discretionary appeal authority established several years ago by Rule 23(f) and its provision that an appeal does not stay proceedings unless the district judge or court of appeals so orders;

Prohibition on payment of greater sums to some class members based on closer geographic proximity to the court, which would fall within the judicial review of the terms of settlement under proposed Rule 23(e)**.**

Prohibition on the payment of "bounties" to class representatives, which would fall within the judicial discretion in amended Rule 23(e) to insure that settlement terms and award payments are fair.

III. One provision of the legislation does not relate specifically to class action practice and has not been considered by the Task Force:

Sunshine in court records, 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 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."

Respectfully submitted,

Edward F. Sherman, Chair and Reporter
ABA Task Force on Class Action Legislation

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