CLASS ACTIONS
(PLAINTIFFS' PERSPECTIVE)

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CLASS ACTIONS: PLAINTIFFS' PERSPECTIVE

I. INTRODUCTION

The most significant recent change in the law governing class actions is the passage of federal legislation, rather optimistically named the "Class Action Fairness Act of 2005" (CAFA). CAFA expands federal jurisdiction over class actions and restricts class action settlements. Courts throughout the country will face the task of interpreting CAFA, and some initial skirmishes over jurisdiction have already been fought. Over the longer term, CAFA will change the way that class actions are filed, litigated and settled in both state and federal courts.

At the state level, Texas courts have continued the restrictive trend that began with *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000), narrowing the types of claims that may be adjudicated as class actions. Several recent cases have focused on whether consumers may use class actions to seek declaratory and restitutionary relief.

II. CAFA'S EXPANSION OF FEDERAL JURISDICTION

A. Redefining Diversity

In one of the largest expansions in federal jurisdiction since the Judiciary Act of 1789, CAFA amends 28 U.S.C. § 1332 to provide for federal jurisdiction over any class action in which (1) the *aggregate* amount in controversy exceeds $5,000,000, exclusive of interest and costs, and (2) diversity of citizenship exists between *any* class member and *any* defendant. 28 U.S.C.A. § 1332(d).

CAFA changes the law with respect to both amount in controversy and diversity of citizenship. Prior to CAFA, class members' damages could not be aggregated for purposes of determining the amount in controversy. *See, e.g., H&D Tire & Automotive-Hardware Inc. v. Pitney Bowes Inc.*, 250 F.3d 302, 304 (5th Cir. 2001). Although circuit courts have disagreed as to whether each class member must meet the minimum amount in controversy, all courts have held that at least one class member must satisfy the requirement. *See In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995).

In addition, longstanding case law held that diversity of citizenship would not exist if any named class representative was from the same state as any properly joined defendant. *See Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284 (11th Cir. 1998). In sum, the relevant case law declined to extend federal jurisdiction to state-law class actions in which (1) the parties were not diverse or (2) the individual claims at issue did not exceed the minimum amount in controversy established by the statute.

The Senate Judiciary Committee Report (available online at http://thomas.loc.gov) describes this longstanding precedent as "a technical glitch in the diversity jurisdiction statute." The Report argued that a dramatic expansion of diversity jurisdiction was necessary to provide "the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court." Despite the concern expressed for "out-of-state defendants," CAFA also expanded federal jurisdiction over in-state defendants. The new removal provision created by CAFA allows removal of class actions "without regard to whether any defendant is a citizen of the State in which the action is brought." 28 U.S.C. § 1453(b). The new provision also exempts class actions from the "1-year limitation under section 1446(b)" and the longstanding "rule of unanimity," which requires that all defendants consent to removal. *Id*.

CAFA also reversed the traditional restriction on appellate review of remand orders, providing that an order granting or denying remand of a class action may be appealed within seven days. 28 U.S.C. § 1453(c). The appeal must be decided within 60 days. *Id*. The court of appeals may extend the 60-day period if all the parties agree, or the court may order an extension of no more than 10 days "for good cause shown and in the interests of justice." *Id*. If the court of appeals does not issue judgment within the statutory time period, the appeal is denied. *Id*.

B. Exceptions

CAFA does provide some exceptions to the broad grant of federal jurisdiction. These include the "home state" exceptions, the "local controversy" exception, and specific exceptions based on the subject matter or size of the class action.

1. The "Home State" Exceptions

One set of exceptions, described in the Committee Report as the "home state" exceptions, can either be mandatory or discretionary, depending on the composition of the proposed class. A court must decline jurisdiction over a class action in which two-thirds or more of the members of all proposed plaintiff classes in the aggregate and the primary defendants are all citizens of the state in which the action was originally filed. 28 U.S.C. § 1332(d)(4)(B).

A court may decline jurisdiction over a class action "in the interests of justice and looking at the totality of the circumstances" if "greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(3). In determining whether to decline jurisdiction, the court is to consider the following six factors:

- whether the claims asserted involve matters of national or interstate interest;
- whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
- whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
- whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
- 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; and
- whether, during the three-year period preceding the filing of that class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

28 U.S.C. § 1332(d)(3).

Applying these exceptions will necessarily require a court to make factual determinations regarding the residence of the proposed class members. At least one commentator has already observed that this may require defendants "to provide confidential information, such as customer lists, early in the litigation to enable the court to make a determination on the percentage of the potential plaintiff class residing in the forum state." Mark Trachtenberg, *The Class Action Fairness Act of 2005: The Federalization of Class Actions*, THE APPELLATE ADVOCATE 17(4):20, 22 (Spring 2005).

The Committee Report attempts to downplay this issue. While acknowledging that "a federal court may have to engage in some fact-finding," the Report suggests that courts could refer to "readily available information" and use "factual stipulations" to determine the facts. The Report asserts that "it would in most cases be improper for the named plaintiffs to request that the defendant produce a list of all class members (or detailed information that would allow the construction of such a list), in many instances a massive, burdensome undertaking that will not be necessary unless a proposed class is certified."

It is not at all clear that the approach outlined by the Committee Report is realistic. In many, if not most, cases it will not be possible to determine the residence of potential class members merely by using "readily available information" or "factual stipulations." On the contrary, the relevant facts may be highly disputed, and the information may be in the control of the defendants. As a matter of fundamental fairness and due process, it is difficult to imagine how a federal court could make factual determinations without giving the parties an opportunity to develop the facts. Despite the hopes of its drafters, CAFA may well be interpreted to require the disclosure of significant information at an early stage.

2. The "Local Controversy" Exception

The Committee Report also describes a "local controversy" exception to CAFA. The court must decline jurisdiction of a class action in which the following conditions are met:

- greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;
- there is at least one in-state defendant from whom significant relief is sought by members of the plaintiff class and whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class;
- the principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and
- during the three-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.

28 U.S.C. § 1332(d)(4)(A).

To illustrate the type of case that would be covered by the "local controversy exception," the Committee Report gives the following example:

> A class action is brought in Florida state court against a Florida funeral home regarding alleged wrongdoing in burial practices. Nearly all the plaintiffs live in Florida (about 90 percent). The suit is brought against the cemetery, a Florida corporation, and an out-of-state parent company that was involved in supervising the cemetery. No other class action suits have been filed against the cemetery. This is precisely the type of case for which the Local Controversy Exception was developed. Although there is one out-of-state defendant (the parent company), the controversy is at its core a local one, and the Florida state court where it was brought has a strong interest in resolving the dispute. Thus, this case would remain in state court.

The Report contrasts this with an example of a class action that would be covered by CAFA even though it was limited to residents of the forum state:

> A class action is brought in Florida against an out-of-state automobile manufacturer and a few in-state dealers, alleging that a certain vehicle model is unsafe because of an allegedly defective transmission. The vehicle model was sold in all fifty states but the class action is only brought on behalf of Floridians. This case would not fall within the Local Controversy Exception for two reasons. First, the automobile dealers are not defendants whose alleged conduct forms a significant basis of the claims or from whom significant relief is sought by the class. . . . Second, the case falls outside the Local Controversy Exception because the `principal injuries resulting from the alleged conduct,'--i.e., selling a vehicle with a defective transmission--were incurred in all fifty states.

3. <u>Other Exceptions</u>

CAFA also exempts the following specific categories of class actions:

- cases in which the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief. 28 U.S.C. 1332(d)(5)(A).
- cases in which the number of members of all proposed plaintiff classes in the aggregate is less than 100. 28 U.S.C. 1332(d)(5)(B).
- claims involving corporate governance and certain securities claims defined in other federal statutes. 28 U.S.C.A. § 1332(d)(9).

C. "Mass Actions"

In addition to covering a broad category of class actions, CAFA encompasses a category called "mass actions," which is defined to include "any case in which monetary relief claims of 100 or more persons are proposed to be tried jointly . . . ." 28 U.S.C. 1332(d)(11)(B). Blurring some rather important procedural distinctions, the Committee Report describes "mass actions" as "class actions in disguise." The Report contends that a "mass action" somehow allows attorneys to "confuse a jury into awarding millions of dollars to individuals who have suffered no real injury."

The Report offers no empirical support for this remarkable assertion. It has been noted that the Report presumes that state trial and appellate courts "are incompetent or cannot be trusted to correct such errors." Rick Knight, *The Class Action Fairness Act of 2005: A Perspective*, 52 FED. LAWYER 46, 49 (June 2005). Needless to say, state courts may have a different perspective. *See, e.g.*, *In re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex.1998) ("Our state trial courts have gained considerable experience in managing the thousands of claims asserted in asbestos litigation. By and large, our courts appear to be coordinating pretrial discovery and scheduling trials in a satisfactory manner . . . .").

CAFA treats "mass actions" as if they were class actions, except that jurisdiction exists only with respect to plaintiffs whose claims satisfy the jurisdictional amount requirements of 28 U.S.C. § 1332(a). A mass action is not covered by CAFA if any of the following conditions are met:

- all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;
- the claims are joined upon motion of a defendant;
- all of the claims in the action are asserted on behalf of the general public pursuant to a state statute (such as California's Unfair Competition Law); or
- the claims have been consolidated or coordinated solely for pretrial proceedings.

28 U.S.C. § 1332(d)(11)(B)(ii).

III. CAFA'S RESTRICTIONS ON SETTLEMENTS

In contrast to its expansive jurisdictional provisions, CAFA's substantive restrictions on class action settlements are fairly narrow. These restrictions primarily affect settlements that involve coupons. In such cases, a contingent fee attributable to the award of coupons must be based on the value to class members of the coupons that are actually redeemed. 28 U.S.C.A. § 1712(a). If the fee is not contingent, or the coupon settlement also involves equitable relief, the attorneys' fee is to be determined based on the amount of time reasonably expended. 28 U.S.C. § 1712(b)-(c). The statute permits but does not require the use of the "lodestar with multiplier" method.

A court may approve a coupon settlement only after holding a hearing and making a written finding that the settlement is "fair, reasonable, and adequate for class members." 28 U.S.C. § 1712(e). The court, in its discretion, may also require that a portion of the value of unclaimed coupons be distributed to charitable or governmental organizations, as agreed to by the parties. *Id*.

CAFA includes other restrictions on particular types of settlements. The court may not approve a settlement in which any class member suffers a net loss unless the court "makes a written finding that non-monetary benefits to the class member substantially outweigh the monetary loss." 28 U.S.C. § 1713. The court may not approve any settlement that "provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court." 28 U.S.C. § 1714.

Finally, CAFA requires that defendants inform "appropriate state and federal officials" of proposed class action settlements. 28 U.S.C. § 1715. The settlement may not be approved until 90 days after the notification. While this section requires notice, it does not impose any "obligations, duties, or responsibilities" upon the officials. Since the statute does not require or even suggest that the state or federal officials take any action, this requirement "holds little promise of having any meaningful impact . . . apart from interposing an automatic 90-day delay in the process . . . ." Knight, *supra*, at 51

IV. CAFA'S EFFECT ON PENDING CASES

Section 9 of CAFA provides that "[t]he amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act." While this provision seems straightforward, it has already led to several disputes, as defendants seek to invoke CAFA in cases filed before CAFA's enactment.

In *Pritchett v. Office Depot, Inc.*, 360 F. Supp. 2d 1176 (D. Colo. 2005), the defendant removed a class action two weeks before trial. Although the case had been pending since 2003, the defendants argued that by removing the case, they had "commenced" a new case in federal court, which was subject to CAFA. Finding this interpretation of the Act unpersuasive, Judge Marcia Krieger of the District Court for Colorado remanded the case approximately a week after it was removed. In addition to the logical difficulties posed by the defendant's reading of the statute, Judge Krieger observed that the result of such a statutory construction would be "a sudden tidal wave of filings on an already burdened federal judiciary, rather than the gradual, incremental flow of newly-filed class actions that would result from a purely prospective application of the Act." Even settled cases awaiting approval could be subjected to the new law, "frustrat[ing] the expectations of parties who might have litigated these suits to near-conclusion, only to find that a negotiated settlement that awaited judicial approval was stymied by the Act."

The defendant appealed the remand to the Tenth Circuit. Although the Tenth Circuit found that it had "jurisdiction to determine its jurisdiction" under CAFA's appeal provision, the court ultimately found CAFA inapplicable to the case. *Pritchett v. Office Depo, Inc.*, 404 F.3d 1232 (10th Cir. 2005).

Applying the traditional view that an action is "commenced" at the time it is initially filed, the court rejected the idea that the case "commenced" at the time of removal. The court explained that although CAFA was meant to be broadly construed, it was not intended to apply to pending cases. Noting that such an application would be "extraordinarily disruptive," the court concluded that "[t]he consequences of Defendant's argument are sufficiently dramatic that we are not eager to ascribe those motivations to Congress without a clearer expression than we find here." In fact, the court added, permitting removal of pending cases "would effectively apply new rules to a game in the final minutes of the last quarter, and we find it ironic that Defendant seeks countenance for its position from a statute that was designed, in the first place, to curtail jurisdictional gaming and forum-shopping."

In *Lander and Berkowitz, P.C. v. Transfirst Health Services, Inc.*, ___ F. Supp. 2d ___(E.D. Mo. 2005), the defendants relied on another unusual argument regarding CAFA's applicability. The defendants removed a case filed on Feb. 17, 2005, the day before President Bush signed CAFA into law. The

defendants argued that CAFA was "enacted" by Congress before it was signed by the president, making it applicable to cases filed on Feb. 17.

Judge Sippel of the Eastern District of Missouri remanded the case, holding that CAFA was enacted on the date it was signed into law. In a tongue-in-cheek footnote, Judge Sippel referred the parties to "a popular episode of the television series Schoolhouse Rock," in which a character called "Bill" explained the process of enacting a law:

> I'm just a bill, yes I'm only a bill
> And if they vote for me on Capitol Hill
> Well, then I'm off to the White House
> Where I'll wait in a line, with a lot of other bills
> For the president to sign
> And if he signs me then I'll be a law . . .
> *But today I am still just a bill*

The Seventh Circuit addressed another aspect of the issue in *Knudsen v. Liberty Mutual Insurance Co.*, decided on June 7, 2005 (available online at http://www.ca7.uscourts.gov/tmp/KP0XTMGT.pdf). In *Knudsen*, the defendant removed a class action that been pending since March 2000. Writing for the court, Judge Easterbrook noted drily that "the district judge promptly sent it back, observing that March 2000 precedes February 2005." The defendant argued that a change in the class definition constituted "commencement" for purposes of CAFA.

The Seventh Circuit affirmed the remand, writing that "we agree with *Pritchett* . . . that § 9 of the new Act must be taken seriously. Deconstructionist tactics do not permit its evasion." The court further agreed with *Pritchett* that "a civil action is 'commenced' for purposes of § 9 when it is *filed* in state court and not when some later step occurs in its prosecution. Equating filing with commencement is the norm in civil practice." Rejecting the argument that a change in the class definition effectively "commenced" a new case, the court explained:

> [A]s a matter of normal language (and normal legal practice) a new development in a pending suit no more commences a new suit than does its removal. Plaintiffs routinely amend their complaints, and proposed class definitions, without any suggestion that they have restarted the suit – for a restart (like a genuinely new claim) would enable the defendant to assert the statute of limitations.

In response to the defendant's evocation of "crafty lawyers tending a garden of pre-2005 class actions, in which they plant new claims by amendment so that the 2005 Act never comes into play," the court suggested in dicta that some steps might "commence" a new action. The addition of a new cause of action, a new defendant "or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes." The court drew an analogy to the "relation back" doctrine codified in Fed. R. Civ. P. 15(c).

No court has yet addressed whether such changes would actually "commence" a new action subject to CAFA. Cases involving the "relation back" doctrine are not necessarily instructive on this point. In *Sledz v. Flintkote Co.*, 209 F. Supp. 2d 559, (D. Md. 2002), the court declined to apply the "relation back" doctrine in determining when a case "commenced" for purposes of 28 U.S.C. § 1446(b), which prohibits removal one year after commencement. In language equally applicable to CAFA, the court noted that Congress "could have worded § 1446(b) to be claim or party specific, but chose not to . . . ."

Other courts construing section 1446(b) have observed that "the term 'commencement of action' should be understood to refer to commencement of the action initially, and not as to any later addition of a particular party or claim." *Sasser v. Ford Motor Co.*, 126 F. Supp. 2d 1333, 1336 (M.D. Ala. 2001) (quoting *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir.1994)). *See also Service Asset Management Co. v. Hibernia Corp.*, 80 F. Supp. 2d 626, 629 (E.D. Tex. 2000) (the word "action" in section 1446(b) "refers to the initial lawsuit filed in state court and not to separate claims added later in the suit.").

The language of CAFA leaves little doubt that Congress did not intend for the legislation to affect pending cases. Nevertheless, class action defendants have not always been willing to defer to this unambiguous legislative intent, offering highly creative justifications for removing pending class actions to federal court. No court has been willing to accept these arguments yet, but it is safe to assume that the applicability of CAFA will continue to be litigated in pending cases.

V. RECENT DEVELOPMENTS IN TEXAS

A. Certification Under Rule 42(b)(2)

In *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657 (Tex. 2004), the Supreme Court of Texas addressed the requirements for class certification under TEX. R. CIV. P. 42(b)(2) and what is now TEX. R.

CIV. P. 42(b)(3) (formerly TEX. R. CIV. P. 42(b)(4)). The plaintiffs alleged that thirty-seven models of Compaq's Presario computer had defective components. The plaintiffs initially filed the case in federal court under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, but the federal court held that the named plaintiffs did not satisfy the minimum $5,000 damages requirement under the statute. The court dismissed the claims with prejudice. *See id.* at 662 n.3.

In state court, the plaintiffs limited their claim to a request for declaratory relief and disavowed any claim to consequential damages from the loss or corruption of data. Specifically, the plaintiffs sought a declaration that Compaq breached its express warranty and that purchasers had a right to seek repair, replacement or refund under the warranty. *Id*. at 661-62.

The trial court certified a class of 1.8 million computer purchasers under Rule 42(b)(2) and Rule 42(b)(3). The Beaumont Court of Appeals affirmed the certification under Rule 42(b)(2). *See Compaq Computer Corp. v. Lapray*, 79 S.W.3d 779 (Tex. App.–Beaumont 2002, pet. granted). The court of appeals then concluded that since the certification was proper under Rule 42(b)(2), it was unnecessary to address the predominance and superiority requirements of Rule 42(b)(3). *Id*. at 791. Compaq appealed to the supreme court, where the case drew significant attention. More than ten amicus briefs were filed by various computer companies, trade associations and "other interested parties." *See Compaq*, 135 S.W.3d at 660.

The supreme court found that the decision of the court of appeals conflicted with *Bernal*. The court concluded that, since the trial court did certify a Rule 42(b)(3) class in addition to a Rule 42(b)(2) class, the court of appeals should have analyzed the predominance and superiority requirements under *Bernal*. *Id*. at 663. Based on this finding of conflict, the court found that it had jurisdiction over the interlocutory appeal. *Id*.

With respect to the Rule 42(b)(2) class, Compaq argued that the request for declaratory relief was an attempt to "shoehorn" a damages claim into a Rule 42(b)(2) class action. *Id*. at 663. Unlike Rule 42(b)(3) classes, Rule 42(b)(2) classes are not expressly required to offer individual notice or "opt-out" rights. In addition, Rule 42(b)(2) does not specifically require a finding of predominance and superiority, the most commonly disputed issues in class certification proceedings. The court noted that these procedural distinctions, combined with the "perception that (b)(2) class representatives need not satisfy *Bernal*'s 'rigorous analysis' requirements," had led to "much legal wrangling" about whether a class is appropriately certified under (b)(2) or (b)(3). *Id*. at 664-65 & n.7.

Relying heavily on cases interpreting the federal counterpart to Rule 42, the court held that "trial courts considering certification under (b)(2) must consider, and due process may require, individual notice and opt-out rights to class members who seek monetary damages under any theory." While acknowledging the role that (b)(2) class actions had played in "the civil rights arena," the court cautioned that "a mandatory (b)(2) consumer class may deprive its members of due process rights." Based on these concerns, the court concluded that "we are reluctant to affirm a (b)(2) class that includes claims for damages without the concomitant protections afforded by notice and opt-out, and we cannot do so without knowing whether class members will be afforded these protections. . . . While we cannot say that no (b)(2) class can be certified absent notice and opt-out rights to class members, we can state that, if damage claims are implicated, constitutional considerations will likely mandate such protections."

Observing that the "ordinary remedy for a breach of warranty claim is damages," the court concluded that "it appears the plaintiffs have tried to 'shoehorn' their damages action into the (b)(2) framework . . . . We note, however, that these concerns will become largely irrelevant if, on remand, the trial court orders notice and opt-out for the (b)(2) class members."

The court also held that, although Rule 42(b)(2) does not explicitly require a showing of predominance and superiority, trial courts must still undertake a "rigorous analysis" of the "cohesiveness" of a (b)(2) class. The court found that a (b)(2) class is "by its very nature assumed to be a homogenous and cohesive group with few conflicting interests among its members." In many cases, the analysis of cohesiveness will parallel the analysis of predominance and superiority under Rule 42(b)(3), particularly when the court provides individual notice and opt-out provisions.

B. Choice of Law

In *Compaq*, the court found that the trial court should have conducted "an extensive choice of law analysis." *Id*. at 672. Traditionally, Texas courts presume that Texas law is identical to the law of other states unless and until a party seeks judicial notice of another state's law. *See, e.g., Torrington Co. v. Stutzman*, 46 S.W.3d 829, 848-50 (Tex. 2000); *see also* Russell J. Weintraub, *Choice of Law as an Impediment to Certifying a National Class Action*, 46 S. TEX. L. REV. 893, 896-97 (2005). Under TEX. R. EVID. 202, a party requesting the application of another state's law

must "furnish sufficient information to the trial court for it to determine the foreign law's applicability to the case . . . ." *Daugherty v. Southern Pac. Transp.*, 772 S.W.2d 81, 83 (Tex. 1989).

Departing from this approach, the court held in Compaq that the class representatives must "present an extensive analysis of state law evaluating any differences." *Compaq*, 135 S.W.3d at 672. Even if the claims are based on a largely uniform body of law such as the Uniform Commercial Code, the trial court must "conduct a state-by-state analysis of the questions of law presented." *Id.* at 673. The trial court had held that because Compaq was headquartered and incorporated in Texas, all of the claimants could proceed under Texas law.

The supreme court rejected this analysis under the "most significant relationship" test. Somewhat oddly, the court begins this part of its discussion with a citation to *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *Shutts* held that the Due Process Clause would not permit a state to apply its own law to transactions that had no significant relationship to the transaction. *See Shutts*, 472 U.S. at 821-22. But the Due Process Clause does not require a state to select the law with the most significant relationship to the transaction. Indeed, it is difficult to imagine that it would be unconstitutional to subject a Texas-based corporation such as Compaq to Texas law. The real question is not whether the Constitution permits such an application but rather whether Texas choice-of-law rules support the trial court's analysis. Confronting that issue directly, the supreme court rejected the trial court's reasoning.

Citing its earlier decision in *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675 (Tex. 2002), the court held that "Texas law . . . does not apply the law of the state where a defendant is headquartered to every claim for economic damages that can be alleged. . . ." *Compaq*, 135 S.W.3d at 681 (quoting *Schein*, 102 S.W.3d at 698).

The court held that out-of-state purchases were not necessarily governed by Texas law. In the absence of a showing that Texas law would govern all claims, Rule 42(b)(3)'s predominance requirement was not satisfied. In *State Farm Mut. Auto. Ins. Co. v. Lopez*, 156 S.W.3d 550 (Tex. 2004), the court reiterated that trial courts "must resolve any choice-of-law issues the parties have raised before certifying a class in order to determine how the case will be tried." *Id.* at 556.

Professor Weintraub has written that if "anyone entertained the notion that the door was still open to applying Texas law to claims of a national class suing a Texas wrongdoer, that door was slammed shut in *Compaq Computer Corp. v. Lapray*." Weintraub, *supra*, at 901. Professor Weintraub notes that Texas litigants face similar obstacles in federal court under the Fifth Circuit's decisions. *See id.* at 902-03 (discussing *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996)).

The door "slammed shut" in *Compaq* may still have some cracks. Many consumer contracts contain explicit "choice of law" provisions. If a given contract makes a valid selection of a particular state's law, the choice-of-law issues discussed in *Compaq* would not arise. *See Schein*, 102 S.W.3d at 696 (if class members' contracts contained a valid provision selecting Texas law, those claims would be governed by Texas law). There may also be areas of the law that are sufficiently uniform for the class representatives to demonstrate that common issues predominate.

C. Restitutionary Relief

Even under the restrictive approach set out in *Schein* and *Compaq*, certain claims for restitution could satisfy the requirements of predominance and superiority under Rule 42(b)(3) or "cohesiveness" under Rule 42(b)(2). Texas law permits restitutionary remedies for certain types of claims, such as "over-charges" under a contract. *See, e.g., Southwestern Elec. Power Co. v. Burlington Northern R.R. Co.*, 966 S.W.2d 467, 469 (Tex. 1998) (acknowledging that "in some circumstances, overpayments under a valid contract may give rise to a claim for restitution or unjust enrichment").

Schein acknowledged that restitution, as distinguished from consequential damages, "could be proved by Schein's records or by checks, charge slips, receipts, or other evidence of payment. It appears from the record that the determination of such amounts would be common to the class and would not require individual examination of class members except in unusual instances." 102 S.W.3d at 694.

The difficulty with restitution in *Schein* was that potentially significant consequential damages would have to be assessed individually, and the class representatives could not necessarily disclaim such "significant, viable claims . . . ." *Id.* at 694-95. The court observed that the individual claims could be worth as much as $10,000, in addition to exemplary damages and attorneys' fees. *See id.* at 699-700.

Such concerns would be much less compelling with respect to "negative-value" suits, in which "the stakes to each member are too slight to repay the cost of suit." *Grant Thornton L.L.P. v. Suntrust Bank*, 133 S.W.3d 342, 362 (Tex. App.–Dallas 2004, pet. denied). In *Grant Thornton*, the court affirmed a class certification, based in part on a finding that many of the claims would fall

"into the negative-value range" after settlements were deducted. *Id*. The court distinguished *Schein*, in which the amount at stake "was sufficient incentive for each class member to bring an individual suit." *Id*.

In appropriate cases, the remedy of restitution could be very well suited to class action treatment, particularly if the consequential damages are too small to repay the cost of individual suits. Under such circumstances, a class action would be the only real mechanism for preventing unjust enrichment or providing other restitutionary relief. Texas courts have not yet squarely addressed the viability of such class actions. *See, e.g.*, *J.C. Penney Co., Inc. v. Pitts*, 139 S.W.3d 455, 459 (Tex. App.–Corpus Christi 2004, no pet.) (reversing class certification order but declining to reach issue of whether class action could proceed solely on equitable theory of "money had and received").

It should be noted that even when the calculation of damages is "mechanical," the class certification issues will turn on the particular facts of the case. In *Snyder Communications, L.P. v. Magana*, 142 S.W.3d 295 (Tex. 2004), the supreme court held that a group of sales representatives could not maintain a class action suit against their former employer for fraud and breach of contract. The court acknowledged that "the alleged misrepresentation – that all sales associates would receive commissions and bonuses pursuant to the commission plan – would have been the same for all potential class members" and that calculating the damages would be "a largely mechanical task." *Id*. at 300. Nonetheless, the court found that the primary issue in dispute was "highly individualized" because the contracts set out numerous criteria governing the payment of commissions and bonuses. *Id*.

D. Classwide Arbitration

Given the legislative and judicial restrictions on class action lawsuits, classwide arbitration may attract more attention. In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the United States Supreme Court held that the issue of whether an agreement authorized classwide arbitration should be determined by the arbitrator rather than a court. Shortly after the decision in *Bazzle*, the American Arbitration Association issued supplemental rules governing class arbitrations (available online at http://www.adr.org).

In *In re Wood*, 140 S.W.3d 367 (Tex. 2004), the Supreme Court of Texas adopted the reasoning of *Bazzle*, concluding that the authority to rule on "class certification issues . . . resides in the arbitrator . . . ." *Id*. at 368. In cases where the arbitration agreement does not preclude classwide arbitration, or where such a restriction is found invalid, an arbitrator has the authority to determine whether to conduct the arbitration on a classwide basis.

Many defendants may consider classwide arbitration even less desirable than a traditional class action lawsuit. *See, e.g.*, Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 118 (2000) ("Companies and their attorneys may prefer to resolve their disputes through the known quantity of class action litigation, rather than risk a bad experience with the relatively unknown [classwide arbitration]"); Robert S. Safi, Note, *Beyond Unconscionability: Preserving the Class Mechanism Under State Law in the Era of Consumer Arbitration*, 83 TEX. L. REV. 1715, 1721 n.36 (2005) (arguing that from a defendant's perspective, "class arbitration is a greater threat than class action litigation" because of the limited judicial review of arbitration decisions).

In the wake of the *Bazzle* decision, many companies revised their arbitration agreements to prohibit classwide arbitration. The Supreme Court of California recently held that, in certain adhesion contracts, such restrictions were void:

> We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

Discover Bank v. Superior Court, 30 Cal. Rptr.3d 76, 87 (Cal. 2005) (citations omitted). It is not clear whether Texas courts would reach the same conclusion. In fact, the dissent in *Discover Bank* cites a Texas case, *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190 (Tex. App.–Houston [14th Dist.] 2003, orig. proceeding), for the proposition that "arbitration clauses are not invalid . . . because they specifically exclude class treatment

. . . ." *Discover Bank*, *supra*, at 98 n.1 (Baxter, J., concurring and dissenting).

The actual holding in the *AutoNation* case was somewhat more limited: the court explained that "[w]hile there may be circumstances in which a prohibition on class treatment may rise to the level of fundamental unfairness, Leroy's generalizations do not satisfy her burden to demonstrate that the arbitration provision is invalid here." 105 S.W.3d at 200. If individual arbitration were impossible or impractical, a plaintiff could well argue that the strong policy favoring arbitration should be interpreted to authorize classwide arbitration of certain disputes.

A company facing classwide arbitration may "prefer a federal district judge over an arbitrator . . . ." Safi, *supra*, at n.36. In that event, a court would have to determine whether a classwide arbitration proceeding could be removed under CAFA. Such a strategy would be difficult under the language of CAFA. To be sure, CAFA establishes a broad definition of "class action," encompassing "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons as a class action." 28 U.S.C.A. § 1332(d)(1)(B).

Nevertheless, it is a stretch to define an arbitration proceeding as a "civil action." *See, e.g.*, *Max Software, Inc. v. Computer Associates Int'l, Inc.*, 364 F. Supp. 2d 1233, 1237 (D. Colo. 2005) (discussing the "the inherent characteristics which distinguish arbitration from a civil action . . . ."); *Miele v. Prudential-Bache Securities, Inc.*, 656 So.2d 470, 472 (Fla. 1995) (holding that the term "civil action" used in punitive damages statute "clearly refers to an action filed in a court of this state and does not include an arbitration proceeding"); *see also Moore v. Omnicare, Inc.*, __ P.2d __ (Idaho 2005) (Eismann, J., concurring) (explaining that an arbitration proceeding was not a "civil action" for purposes of a statute authorizing recovery of attorneys' fees). To the extent that arbitrators are willing to permit class actions, those decisions may be effectively insulated from review by state or federal courts.

APPENDIX A

PUBLIC LAW 109–2—FEB. 18, 2005

CLASS ACTION FAIRNESS ACT OF 2005

Public Law 109–2
109th Congress

An Act

Feb. 18, 2005
[S. 5]

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

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

Class Action Fairness Act of 2005.

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

28 USC 1 note.

(a) SHORT TITLE.—This Act may be cited as the "Class Action Fairness Act of 2005".

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

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

Sec. 1. Short title; reference; table of contents.
Sec. 2. Findings and purposes.
Sec. 3. Consumer class action bill of rights and improved procedures for interstate class actions.
Sec. 4. Federal district court jurisdiction for interstate class actions.
Sec. 5. Removal of interstate class actions to Federal district court.
Sec. 6. Report on class action settlements.
Sec. 7. Enactment of Judicial Conference recommendations.
Sec. 8. Rulemaking authority of Supreme Court and Judicial Conference.
Sec. 9. Effective date.

28 USC 1711 note.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds the following:

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

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

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

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"CHAPTER 114—CLASS ACTIONS

"Sec.
"1711. Definitions.
"1712. Coupon settlements.
"1713. Protection against loss by class members.
"1714. Protection against discrimination based on geographic location.
"1715. Notifications to appropriate Federal and State officials.

"§ 1711. Definitions

"In this chapter:

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

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

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

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

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

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

"§ 1712. Coupon settlements

"(a) CONTINGENT FEES IN 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 award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

"(b) OTHER ATTORNEY'S FEE AWARDS IN COUPON SETTLEMENTS.—

"(1) IN GENERAL.—If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

"(2) COURT APPROVAL.—Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

"(c) ATTORNEY'S FEE AWARDS CALCULATED ON A MIXED BASIS IN COUPON SETTLEMENTS.—If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief—

"(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

"(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

"(d) SETTLEMENT VALUATION EXPERTISE.—In a class action involving the awarding of coupons, the court may, in its discretion upon the motion of a party, receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.

"(e) JUDICIAL SCRUTINY OF COUPON SETTLEMENTS.—In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

"§ 1713. Protection against loss by class members

"The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss.

"§ 1714. Protection against discrimination based on geographic location

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

"§ 1715. Notifications to appropriate Federal and State officials

"(a) DEFINITIONS.—

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

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

"(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

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

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

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

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

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

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

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

"(B) a proposed settlement of a class action;

"(4) any proposed or final class action settlement;

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

"(6) any final judgment or notice of dismissal;

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

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

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

"(c) DEPOSITORY INSTITUTIONS NOTIFICATION.—

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

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

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

"(e) NONCOMPLIANCE IF NOTICE NOT PROVIDED.—

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

"(2) LIMITATION.—A class member may not refuse to comply with or to be bound by a settlement agreement or consent

decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant.

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

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

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

"114. Class Actions ..... 1711".

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

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

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

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

"(d)(1) In this subsection—

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

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

"(C) the term 'class certification order' means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

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

"(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

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

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

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

"(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

"(A) whether the claims asserted involve matters of national or interstate interest;

"(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

"(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

"(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

"(E) 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; and

"(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

"(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

"(A)(i) over a class action in which—

"(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

"(II) at least 1 defendant is a defendant—

"(aa) from whom significant relief is sought by members of the plaintiff class;

"(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

"(cc) who is a citizen of the State in which the action was originally filed; and

"(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

"(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

"(B) 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.

"(5) Paragraphs (2) through (4) shall not apply to any class action in which—

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

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

"(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

"(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

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

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

"(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

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

"(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

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

"(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

"(B)(i) As used in subparagraph (A), the term 'mass action' means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

"(ii) As used in subparagraph (A), the term 'mass action' shall not include any civil action in which—

"(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

"(II) the claims are joined upon motion of a defendant;

"(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

"(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

"(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court

pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

"(ii) This subparagraph will not apply—

"(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

"(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

"(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.".

(b) CONFORMING AMENDMENTS.—

(1) Section 1335(a)(1) is amended by inserting "subsection (a) or (d) of" before "section 1332".

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

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

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

"§ 1453. Removal of class actions

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

"(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

"(c) REVIEW OF REMAND ORDERS.—

Applicability.

"(1) IN GENERAL.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

"(2) TIME PERIOD FOR JUDGMENT.—If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

"(3) EXTENSION OF TIME PERIOD.—The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

"(A) all parties to the proceeding agree to such extension, for any period of time; or

"(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

"(4) DENIAL OF APPEAL.—If a final judgment on the appeal under paragraph (1) is not issued before the end of the period

described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

"(d) EXCEPTION.—This section shall not apply to any class action that solely involves—

"(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

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

"(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).".

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

"1453. Removal of class actions.".

SEC. 6. REPORT ON CLASS ACTION SETTLEMENTS.

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

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

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

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

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

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

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

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

SEC. 7. ENACTMENT OF JUDICIAL CONFERENCE RECOMMENDATIONS.

28 USC 2074 note.

Notwithstanding any other provision of law, the amendments to rule 23 of the Federal Rules of Civil Procedure, which are

set forth in the order entered by the Supreme Court of the United States on March 27, 2003, shall take effect on the date of enactment of this Act or on December 1, 2003 (as specified in that order), whichever occurs first.

28 USC 2071 note.

SEC. 8. RULEMAKING AUTHORITY OF SUPREME COURT AND JUDICIAL CONFERENCE.

Nothing in this Act shall restrict in any way the authority of the Judicial Conference and the Supreme Court to propose and prescribe general rules of practice and procedure under chapter 131 of title 28, United States Code.

28 USC 1332 note.

SEC. 9. EFFECTIVE DATE.

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

Approved February 18, 2005.

LEGISLATIVE HISTORY—S. 5:

CONGRESSIONAL RECORD, Vol. 151 (2005):
Feb. 7–10, considered and passed Senate.
Feb. 17, considered and passed House.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 41 (2005):
Feb. 18, Presidential remarks.

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