CITIZENS' ACCESS TO THE COURTS ACT OF 1978

HEARING

BEFORE THE

SUBCOMMITTEE ON CITIZENS AND SHAREHOLDERS RIGHTS AND REMEDIES

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S. 2390

PART 1

APRIL 20, 1978

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CITIZENS' ACCESS TO THE COURTS ACT OF 1978: S. 2390

THURSDAY, APRIL 20, 1978

U.S. SENATE,
SUBCOMMITTEE ON CITIZENS AND
SHAREHOLDERS RIGHTS AND REMEDIES
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:34 a.m., in room 6226, Dirksen Senate Office Building, Senator Howard M. Metzenbaum, chairman of the subcommittee, presiding.

Staff present: Nathan R. Zahm, acting chief counsel; Keith O'Donnell, counsel; Alfred Taffae, staff assistant; and Rhea B. Bruno, chief clerk.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, SENATOR FROM OHIO, CHAIRMAN OF THE SUBCOMMITTEE

Senator METZENBAUM. The hearing will come to order.

The Subcommittee on Citizens and Shareholders Rights and Remedies of the Senate Judiciary Committee will hear today from witnesses on S. 2390, a bill which I, as chairman of the subcommittee, introduced in the Senate on January 19, 1978. [The text of S. 2390 will be found on p. 53 of the appendix.]

As its title suggests, the bill is designed to increase and facilitate citizens' access to the courts by eliminating some recent court-imposed barriers which appear to be unnecessary and inappropriate to the vindication of citizens' rights.

The bill amends the jurisdictional amount provisions of the judicial code in relation to multiparty litigation. It also provides for more flexible notice provisions in class actions which present meritorious claims within the jurisdiction of the Federal courts.

There is widespread belief that legislation is necessary to make class actions in the Federal courts once more a practical and feasible means of providing relief to large numbers of persons with a common complaint. This is substantiated by the fact that a draft proposal for legislation on the subject was issued last December by the Assistant Attorney General who heads the Department of Justice Office for Improvements in the Administration of Justice.

He announced that, although the final version of the proposed legislation had not yet been agreed upon within the Department of Justice, the draft was submitted as a basis for further discussion and comment.

I am advised that the process is still underway, and it may be some time before a final draft of a bill proposed by the Department of Justice is introduced for congressional action.

In the meantime, it seems that an early solution is necessary, and possible, for the problems resulting from the Supreme Court's recent decisions affecting class actions.

S. 2390 does not seek to overhaul the existing procedures for bringing class actions which were established by the Supreme Court through its rule 23 of the Federal Rules of Civil Procedure. Rather the bill simply amends title 28 of the United States Code to alter certain procedures relating to the jurisdictional amount requirements and certain notice provisions.

As I said on the Senate floor in introducing S. 2390 in January, "I do not consider this bill the last word on the matter but only one of the first. Many, many practitioners, scholars, and other experts have given these questions a lot of thought." Among them are those of you who have come today to present your views on S. 2390. We are pleased to have you here today and we are anxious to hear your comments.

The witness list for this hearing includes:

Prof. Arthur R. Miller, Harvard Law School, coauthor of one of the most highly respected volumes of legal reference, Wright and Miller's "Federal Practice and Procedure."

Mr. Andrew Feinstein, Public Citizen Congress Watch, Washington, D.C.

Prof. Adolph Homburger, School of Law, Pace University, New York.

Paul M. Bernstein, member of Kreindler & Kreindler, a New York law firm, and chairman of the Class Action Committee of the American Bar Association's General Practice Section.

Ms. Sharon Nelson, Legislative Counsel of Consumers Union, Washington Office.

Prof. Roger L. Goldman, St. Louis University School of Law.

Mr. Beverly Moore, Director of Citizens for Class Actions, Washington, D.C.[1]

Richard Alpert, staff attorney of National Consumer Law Center, Boston, a program funded by the Legal Services Corporation.

I would like to say to all of the witnesses who are here as of this moment, and to those who may arrive later, that we have examined your written statements. We would appreciate your summarizing them and talking to the subject, rather than reading the statements.

Each of the statements submitted will be accepted into the record in full, but I think that there would be some merit in some discussion. [The prepared statement of each witness will be found following his or her testimony.]

To the extent possible, the Chairman would appreciate that kind of a discussion atmosphere, rather than the formalistic reading of the statement.

Our first witness is Professor Miller.

We are glad to have you with us.

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[1] Mr. Moore did not testify. However, his prepared statement will be found on p. 59 of the appendix.

TESTIMONY OF ARTHUR R. MILLER, PROFESSOR, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. MILLER. Thank you, Mr. Chairman.

It is a pleasure to be here, and I appreciate the accommodation to permit me to testify early so that I can perform my duties for the Copyright Commission here in the Capitol.

In the spirit of your suggestion that I summarize, I will do exactly that.

I have been fascinated by and had a morbid curiosity about the class action for close to 10 years since starting work on the treatise, Wright and Miller, "Federal Practice and Procedure." And I have actually participated in a number of class actions as a consultant on both sides of the "v."

I don't doubt, on the basis of my experience in class actions and my experience writing about class actions and my experience in teaching Federal judges about class actions under the auspices of the Federal Judicial Center, that this form of litigation is the most controversial aspect of modern civil litigation in our country.

In many, many senses, what we do with the civil action in the form of the class action will have a dramatic impact on the popular conception of justice in our courts, in terms of our ability to deter unlawful conduct and deter those injured by it.

Senator METZENBAUM. Why do you feel it is so controversial?

Mr. MILLER. We have something in the nature of a triangulated relationship.

The district judge feels burdened. There is no doubt that the Federal judiciary, as a group, is heavily overworked. And they have been born and educated and practiced under one conception of what a judge does to earn his daily bread, which is more or less to be a passive observer of the litigation scene who is occasionally called upon to make some rulings, arbitrate conflicts between the lawyers, and provide instructions to the jury.

The magnitude of some class actions is such that no judge with a serious interest in the administration of justice can dispose of these cases by being passive. That judge must be an active intervenor in the process. He must manage; he must organize; he must slap wrists; he must issue orders. And that is not a congenial role for many of our current district judges. I think the next generation of jurists may react differently to that.

In addition, these cases are increasingly viewed by judges as millstones around their necks. They may be instituted in 1978, but that judge knows that he or she may still be facing that case in 1986, which is a grim thought since the mortality table may say that he will probably retire or die in 1985. They are a real burden psychologically. They are a real burden practically and logistically.

The defense bar, of course, sees the class action as a form of strike suit. The current procedural situation is such that anybody with a contingent fee arrangement with the plaintiff's lawyer can hop the access barrier, enter the court, dive directly into the morass of modern discovery, hassle the defendant for several years, and then extract the settlement. Of course this is a bit of a caricature.

The plaintiff's bar, of course, views the matter differently. It has got to be somewhat schizoid on the subject. A portion of the plaintiff's bar sees the class action as social therapeutics in the finest sense of that term—a method for vindicating citizens' rights, consumer actions, environmental protection, race relations, and so forth. For other portions of the plaintiff's bar, realistically speaking, these cases are good fee-producing vehicles. Unfortunately, there have been some abuses in the last 10 years in the form of strike suits or marginal suits or suits brought by lawyers more interested in the fee than in the social therapeutics of the action.

When you get that mix of different perspectives on the class action and you find that the media have a field day, particularly when a large fee is awarded to an attorney, you get controversy and you get a lot of heat generated. Unfortunately, thus far, there is very little light on the question of the utility of the procedure.

I really do believe—and I am currently writing a short article in which I take this position—that much of the attitude toward class actions is a form of scapegoatism. We have a lot of problems in our society. We have great difficulties with our civil litigation machinery. Various segments of the bench, of the legal profession, and of the public are taking it out on the class action because it is a very convenient target. What they are really upset about is the fact that Congress has decided, in its infinite wisdom, to promulgate new substantive rules about truth in lending, warranty protection, antitrust protection, or environmental protection. This has generated complex litigation. In addition, the United States Supreme Court, in its infinite wisdom, has grown more sensitive to race relations, political rights, due process, and equal protection. Again the result is more litigation. The class action is simply a vehicle for vindicating rights that are created by the Congress or by the courts. Yet it is the class action that is the visual symbol of all the apprehension and anxiety of the defense bar about strike suits and the courts' concern over increased burdens. I don't know that that is a short or good answer to your question, but it is my perception of the matter.

Senator METZENBAUM. Obviously, your thoughts and perceptive views along that line were blessed by the Lord above; because at the very moment you described the value of class actions, the sun started to shine. [Laughter.]

Mr. MILLER. When I got on the plane in Boston this morning and we taxied out, the pilot announced we had engine difficulty and might not take off. I must confess to having a paranoid feeling that somehow the corporate structure had done me in. [Laughter.]

Senator METZENBAUM. The Lord knew you did, and that's the reason He wanted to answer you now and that He does look with favor on your views. [Laughter.] Go right ahead, Professor.

Mr. MILLER. The bill, as you well know, does two things. It, in effect, overrides the Supreme Court decisions in the *Snyder* and *Zahn* cases. It also permits aggregation as long as the claims are more than $25. I applaud that.

I have always believed that *Snyder* and *Zahn*, although they could be justified from a lawyer-like approach on the basis of precedence and conceptualization, I have always felt that they were wrong as a matter of social policy.

There is no doubt that the vast majority of citizen grievances, in fields like consumerism, antitrust, securities, and environment, are going to be far less than $10,000. Without aggregation in the diversity context, the Supreme Court decisions have the effect of closing the courthouse door.

Fortunately, there really is no amount-in-controversy requirement of any consequence on the Federal question side of the subject matter jurisdiction of the Federal courts; thus the antitrust and securities class actions can proceed without regard to amount in controversy. But in terms of the wide range of products liability, consumer protection, and environmental protection cases, the amount-in-controversy requirement, as interpreted by *Snyder* and *Zahn*, is an effective bar to citizen action and to what I have referred to as social therapeutics. So I applaud that aspect of S. 2390.

I note parenthetically that the success of this bill, should it be enacted, is inextricably tied to the outcome in your sister, or brother, Committee on Judicial Machinery of the proposals to limit or abolish diversity jurisdiction. If the Congress should abolish diversity jurisdiction, frankly, very little would be achieved by this amendment to 1331 and 1332 because there would be no diversity case. As I have indicated, the Federal question cases can fly jurisdictionally without satisfying the amount-in-controversy requirement. But if Congress limits diversity jurisdiction by raising the amount to $25,000 the need for S. 2390 will be greater.

However, in my statement I also indicate that I am a little apprehensive of the proposal, because it is not limited to class actions. The current draft of S. 2390 would permit aggregation in any multiparty situation. That creates the possibility of two or three or four or five claimants with individual grievances in the several-thousand-dollar range who probably could litigate on their own being able to aggregate under the proposal without, really furthering the policies that are sought to be achieved by 2390.

I also fear that this kind of aggregation in the simple joinder context might represent an unfortunate expansion of diversity jurisdiction by aggregation, assuming diversity survives.

I would think that the subcommittee might consider, or reconsider, the possibility of limiting S. 2390 to cases brought as class actions. Or, at a minimum, limiting the aggregation power to those situations in which the claimants are bringing transactionally related claims. This would mean that there is at least some efficiency, economy, administration of justice justification for permitting the joinder.

As to the second portion of the proposal, I, again, am extremely sympathetic. This is the portion of the bill that, in effect, would override the Supreme Court's decision in the *Eisen* case, which read rule 23(c)(2) literally and insisted that in a class action brought under rule 23(b)(3), the so-called damage class action, individual notice be given to each reasonably identifiable member of the class. In many cases, that is economically prohibitive, pure and simple, and the ability to remedy what may be unlawful conduct is destroyed.

It is very difficult, in 1978, to believe that that this form of notice is a constitutional necessity. I think all of the precedents suggest that far less is acceptable as a constitutional matter for notice giving

in a class action. I read *Eisen* simply as an interpretation of the current text of rule 23(c)(2) and not as a constitutional requirement. Therefore, ameliorative legislation that would effectuate the small claim damage class action by not making it prohibitively expensive to bring would be desirable, particularly if it could be done without impairing the value of notice. There really is no argument that any due process or practical objective is achieved by insuring individual notice to everyone in a huge class of small claimants whose rights are fungible and who can be adequately represented by a subset of that group.

I must say, however, and I betray my biases and attitudes in saying this, that I am a fan of the Federal Rules of Civil Procedure. I helped draft some of them in my youth; I teach them every year; in many senses, I earn my daily bread by those rules. I am committed to them as the most innovative system of court procedure we have ever had in this country. I am also committed to the rulemaking process, which delegates to the Supreme Court and its associated organizations the initiating task of drafting rules and presenting them to Congress for veto, acceptance, or modification.

It is sad, to me, that that rulemaking process has run into something approximating a brick wall in the last 6 years, as evidenced by Congress' intervention on the evidence rules, which I will say—with a double parenthetical—I am glad happened because I think the evidence rules were ill advised, and, again, on the criminal rules.

Changing the class action notice by statute has two deficiencies from my perspective. First it creates confusion by having a statute and a rule speaking to the same subject. Obviously, a good lawyer understands the statute overrides rule 23(c)(2). But to the less initiated, it might cause some confusion; the statute might even be overlooked. I would prefer to see it in the rule, which could be done by legislative amendment. Second, I fear that doing this by statute represents a further debilitation of the rulemaking process. I wish that did not have to come to pass. I am literally torn between a deep belief that what S. 2390 would do is right and the fear that in the long run it will weaken the rulemaking process, which I think, on balance, over the 40 years we have had the Federal Rules of Civil Procedure, has worked reasonably well.

In my statement, I make one textual suggestion. I do not think I need to speak to that directly at this point since it is covered in my statement. At this point I would be delighted to answer any questions.

Senator METZENBAUM. Thank you, Professor Miller.

I think your comments at the conclusion of your remarks relative to the Federal rulemaking power and the disadvantages, or the negatives, of Congress having to enunciate its view, hopefully in the public's interest, is more evidence of our tripartite form of government: maybe there always does have to be some balancing. And in spite of the quality of the fine legislation that Congress passes, the Supreme Court at times has to tell us that we are wrong and that some piece of legislation is unconstitutional.

Conversely, perhaps at times we have to say to the Supreme Court: "You're wrong."

Maybe that is one of the strengths, or perhaps, one of the weaknesses of the system, but I guess that I would come down harder on the side of it being one of the strengths.

There is a strong feeling that the rules to which we are addressing ourselves, to a substantial extent, came about by reason of sociological jurisprudence, by reason of the gut reaction of the men who were making the rule at that time and their abhorrence of these large suits brought in class actions.

This was a practical way of knocking them out of the courtroom. And I think that they should not have done so.

I'm not certain that the remedy we have proposed, or I have proposed here, is the most proper one or the only one; but I do believe that whenever you find the pendulum swinging too far one way, the pendulum swings the other way at a certain point in time. I think the pendulum has swung too far with respect to the class action rule and with respect to the unwillingness of the courts to permit an aggregation of claims in order to meet the monetary requirements.

I hope that we can do something to ameliorate the situation.

Maybe the very fact that we are considering this matter as proposed legislation could conceivably cause the court to take another look at the subject. Since it had the right to make the rule in the first instance, it obviously has the right to modify that rule at this point.

I might say as the author of the legislation that I would welcome such court action, thereby making it unnecessary to push forward with this legislation.

Absent that, I am hopeful and optimistic that we may be able to proceed through the entire congressional procedure and make the necessary changes in order to undo that which I consider to have been a wrong in the first instance.

I know by your testimony that you are aware of the fact that I have introduced a bill to eliminate diversity of citizenship as a basis for Federal court jurisdiction.

It is possible that that bill could be amended to retain diversity of citizenship for those cases involving a common disaster affecting many persons from various States.

Would S. 2390 be consistent in permitting aggregation in such cases of multiparty litigation, as well as with respect to class actions, in your view?

Mr. MILLER. I think the answer is yes. In the mass disaster situation, you rarely have an amount in controversy problem. That is the sad aspect of the mass disaster, the injuries tend to be extensive.

Senator METZENBAUM. You don't with respect to personal injury. But you do with respect to property damage.

Mr. MILLER. If the proposal would embrace a variety of product failures or consumer frauds or a whole range of antisocial conduct, these are the cases that run into amount in controversy difficulties. And to me, this is precisely the category of cases that should remain in the Federal courts. In most situations, you are dealing with national manufacturers or at least interstate distribution of products with claimants from all over the country, and these disputes could most efficiently be handled by the national courts, rather than being broken down on a State-by-State basis at the State court level.

Senator METZENBAUM. You might have a miniflood come about by reason of a dam.

Mr. MILLER. Exactly, Senator.

Senator METZENBAUM. And much property damage. And there might be a case of an action against the contractor, or something of that kind.

Mr. MILLER. Yes. Might I just note parenthetically what my own view on diversity jurisdiction is at the moment. I would not like to see its abolition. I would like to see, as one of the bills proposes, the elimination of the assertion of diversity by an in-State plaintiff. That has been indefensible for years. I would like to see an increase in the jurisdictional amount, perhaps to $25,000, coupled with your aggregation proposal. I think you would achieve reduction; you would perpetuate the historic role of diversity jurisdiction and permit cross-fertilization of ideas—States and Federal—and be able to use the Federal courts in interstate cases.

Senator METZENBAUM. Have you been asked to testify in connection with diversity legislation that is now pending, or would you have an interest in doing that?

Mr. MILLER. I would certainly have an interest.

I unilaterally decided to write Senator DeConcini a letter about a week ago. It, too, was a subject of great interest.

Senator METZENBAUM. We would like to be favored with a copy of that letter please.

Mr. MILLER. It would be my pleasure.

[The letter referred to follows:]

HARVARD LAW SCHOOL
Cambridge, Mass., April 11, 1978.

HON. DENNIS DECONCINI,
Chairman, Subcommittee on
Judicial Improvements,
Committee on the Judiciary
U.S. Senate
Washington, D.C.

Re: S. 2094 and S. 2389

DEAR SENATOR DECONCINI: I have been a professor of law for seventeen years during which time I have taught federal civil procedure at Columbia Law School, the University of Minnesota Law School, Michigan Law School, and, since 1971, Harvard Law School. I am also the co-author of the multi-volume treatise "Federal Practice and Procedure" and for the past two years I have been on the teaching faculty of the Federal Judicial Center.

I have just read the statement of my collaborator Professor Charles Alan Wright to your Subcommittee in which he supports the abolition of diversity jurisdiction proposed in S. 2389, and the letter to you from my colleague Professor David L. Shapiro, dated March 28, 1978, in which he concludes that the abolition of diversity jurisdiction is undesirable but that it should be limited as proposed in S. 2094. I am writing to express my view that the approach taken in S. 2094 is sounder than the complete elimination of diversity jurisdiction. This causes me to dissent from Professor Wright, which, I assure you, is an extremely difficult thing for me to do, not only because we have written fifteen volumes of Federal Practice and Procedure together, but because of my boundless regard for his expertise and judgment.

Nonetheless, I believe that outright abolition of diversity jurisdiction at this time would be precipitous and feel that its continued existence in a reduced form is socially desirable despite the burden these cases impose on the federal courts and the greater national importance of federal question jurisdiction. I agree with Professor Shapiro that the absence of possible interstate prejudice has not been demonstrated and that whatever savings might be achieved by

eliminating disputes over questions of the existence or non-existence of diversity jurisdiction might well be offset by combat over questions of ancilliary and pendent jurisdiction. I also believe that our national courts are uniquely qualified to hear a variety of complex multiple party and multiple claim diversity cases that typically transcend state boundaries—for example, mass disaster cases. Finally, although admittedly impossible to quantify, the continued existence of diversity jurisdiction is a valuable way of cross-pollinating federal and state substantive jurisprudence, exchanging ideas about civil procedure, and avoiding artificial categories of specialization within the Bar. I must add, however, that I do not subscribe to Professor Shapiro's notion that the availability of diversity jurisdiction could be regulated by local rule.

In my judgment the proper step to take at this time is to limit diversity jurisdiction to out-of-state plaintiffs as proposed by S. 2094. The illogic of the present practice seems clear. In addition, there seems to be good reason to raise the jurisdictional amount to $25,000.

Sincerely yours,

ARTHUR R. MILLER
Professor of Law.

Senator METZENBAUM. Do you think there is any constitutional problem involved in a notice provision, such as that in S. 2390 which allows the court to apportion expenses of giving notice among the parties?

Mr. MILLER. No; I do not. We are talking about advancing costs initially. We are not talking about ultimate or final costs. To be sure, the defense bar makes the point that the ability to recapture those costs at the end of the action often is slim and in many circumstances this may be true. But, in some instances, a judge, using discretion, might have the cost bonded to cover that contingency. But even though there is a contingency, it seems to me this does not raise itself to constitutional dimensions.

There are a variety of cost exposures that both parties are obliged to bear in the course of litigation. The mere fact that a judge, in his discretion based on a showing of justification, decides to alter the historic rule of each party bearing his or her own costs does not strike me as rendering the practice unconstitutional. We do precisely that in the discovery field all the time in terms of cost shifting or cost apportioning because of a variety of logistical or "fairness" factors. I, frankly, do not see why it could not be done in the context of notice costs.

Senator METZENBAUM. Does a constitutional problem arise if no preliminary hearing is conducted to determine such apportionment based on which party is likely to prevail on the merits?

Mr. MILLER. Again, I draw an analogy from the discovery field in which the practice has been to accede to a district judge's discretion under rule 26 or 30 to make an adjustment in the cost structure, based on factors other than probability of recovery. Sometimes it is based on the logistics of the situation, or it is based on relative conveniences, or, frankly, on terms of the relative ability to bear those initial costs.

That power has never been seriously doubted, and I think, if challenged, it would be held to be within the proper ambit of judicial administration. I think the question of notice costs is of the same stripe.

Frankly, though, and I talk about this briefly in my formal statement, I am not convinced that the probability of the class recovery

should be the exclusive standard for cost apportionment. I say that for two reasons: One, it overlooks other factors that may be germane in a particular case, such as the logistics of the situation and the relative burden on the parties. Second, the Supreme Court in *Eisen* did indicate some practical reasons why a preliminary hearing on the merits on the notice question was not advisable. Therefore, I would hate to see a merit inquiry mandated by the statute. First of all, it is extremely hypothetical. The notice issue comes on long before merit discovery takes place. So it is hypothetical. And—forgive the allusion—it is like shooting crap in the dark in part. Second, it is, or could be, an extremely expensive and time-consuming process. I can just see the lawyers lining up their big cannons on that motion. What you end up with is a minitrial. You end up with proliferation of the proceedings and all sorts of lawyering tactics being employed to block cost shifting on the notice. I can just see Federal judges looking skyward and feeling that they are playing the part of Job once again. So I have some reservations as to the draft's preoccupation with this factor.

Senator METZENBAUM. One last question.

Realistically speaking, do you see any possible change in the present rules pertaining to this subject by the incumbent Supreme Court?

Mr. MILLER. As you know better than I, the civil rules advisory committee has been working on this for a few years. They have sent out a detailed questionnaire. Nothing has emerged. I understand that the chairmanship of that committee is about to change, which I suspect has within it the seeds of further delay on the revision of the class action rule. Frankly, I feel that the composition of the advisory committee is not truly representative of all the forces that live and breathe in the civil litigation world. I think it is somewhat skewed. I have my doubts, I have doubt both as to the likelihood of revision in the near term and how sympathetic the committee would be.

Let me also answer your question another way. I indicated in my response to your initial question that Federal judges have felt terribly burdened by the modern class action. But let me qualify that. I interact with Federal judges a great deal at workshops conducted under the auspices of the Federal Judicial Center. And I also, by virtue of that treatise which is my own millstone, read every class action opinion that is made available. I am firmly of the belief, using your image of the swinging pendulum, that many judges, having watched the swing of the Supreme Court in *Snyder*, *Zahn*, and *Eisen*, are engineering their own minipendulum swing backward in a direction that I think both of us would applaud.

I think Federal judges increasingly are becoming more tolerant of class actions. And I think Federal judges increasingly are becoming more experienced and talented in managing them. They are beginning to use scalpels rather than meat-axes in dealing with certification and recognizing the value of group adjudication.

Therefore, at the operational level, I am optimistic. At the rules advisory committee level I am guardedly pessimistic.

Senator METZENBAUM. The scalpel treatment by the lower courts is encouraging. But the fact is that as long as *Snyder* and *Zahn* and *Eisen* are Supreme Court decisions, the plaintiffs' bar has to be re-

luctant to enter into class action cases, knowing in advance that there is a reasonable probability that they will be stopped midway without having been able to achieve any results.

I was a practicing lawyer before the people sent me here, and I had an interest in consumer actions and class actions. I remember talking about such subjects and saying that there just is no reason to bring an action under the present circumstances. You can't go very far with it. It is easy to file it, but not very easy to win it.

So I would say that my hat is off to the lower court judges. But I, for one, will make an extra heavy push with respect to this legislation, hopefully to see if we cannot still move it during this session. And, if not, then the first of next year.

Mr. MILLER. The best of all possible worlds would be S. 2390 and increased sensitivity by the district judges regarding class actions and hands off by the courts of appeal.

Senator METZENBAUM. Thank you very much. We appreciate your being with us.

Mr. MILLER. Thank you.

[The prepared statement of Professor Miller follows:]

PREPARED STATEMENT OF PROFESSOR ARTHUR R. MILLER, HARVARD LAW SCHOOL

It is a pleasure to respond to the subcommittee's request to discuss the Citizens Access to the Courts Act of 1978, Senate Bill 2390. It deals with matters in which I have had a keen interest for many years and my background, as it relates to the Bill, may be of interest to the subcommittee. I have been a teacher of Federal civil procedure for 17 years at Columbia Law School, Minnesota Law School, Michigan Law School, and, since 1971, at Harvard Law School. I am also the co-author of the multi-volume treatise "Federal Practice and Procedure," along with Professor Charles Alan Wright of the University of Texas Law School and Professor Edward H. Cooper of the University of Michigan Law School. In addition, I was in the active practice of law in New York City, specializing in litigation, before becoming an academic and during 1976–1977 I took leave of absence from Harvard and worked on a number of class actions in order to "resensitize" myself to the problem of modern civil litigation. Finally, during the past 2 years, I have been conducting workshops for Federal judges under the auspices of the Federal Judicial Center. In particular, I have conducted workshops on class actions for the district judges in each of the 11 judicial circuits.

There cannot be any question about the proposition that the modern class action is the most controversial aspect of contemporary civil litigation. The debate over the virtues and vices of the procedure has reached heroic proportions; unfortunately, much of the discussion has been emotional and there is little empiric evidence on most aspects of the controversy. No purpose would be served by my documenting the charges and counter-charges but I do think it would be appropriate for me to indicate to the subcommittee that my attitude toward the class action is a positive one. I believe that this procedural device holds considerable promise for providing redress for large numbers of injured citizens who otherwise would not have the economic and logistical capacity to litigate individually and that a properly managed class action can achieve this efficiently from the perspective of the judicial system. I also believe that many of the alleged deficiencies of the class action have been grossly overstated and those that are real can be partially, perhaps even entirely, remedied by sensitive Federal judges who are willing to shape and move these cases. Indeed, I fear that Federal Rule of Civil Procedure 23 has been used as a convenient scapegoat for grievances against our civil litigation system and trends in our society that are unrelated to the class action.

I fully support the philosophy and objectives of Senate Bill 2390, particularly the proposals to permit aggregation of small claims for purposes of computing the jurisdictional amount. I believe that the Federal courts are in a unique position, given their national character and their uniform procedure, to deal effec-

tively with large-scale, multiple party, or multiple claim litigation. As I have already indicated, I think that the proper utilization of the class action procedure offers considerable promise of giving citizens having relatively modest claims an opportunity to secure redress and possibly deter anti-social conduct. Thus, whatever the logic of the Supreme Court's decisions in *Snyder* v. *Harris*, U.S. 332 (1969) and *Zahn* v. *International Paper Company*, 414 U.S. 291 (1974), may have been in terms of precedents in the field of amount in controversy, I feel that the results in those cases were unfortunate in terms of social policy. Thus, I applaud S. 2390 for attempting to revitalize the utility of group litigation in the federal courts.

As presently drafted, however, S. 2390 would permit aggregation in cases other than class actions. In theory, for example, a few plaintiffs, perhaps two or three, could secure Federal jurisdiction simply by joining their claims, which might be for a few thousand dollars each, and by aggregating under S. 2390 more than $10,000. This construction of the proposal could represent a significant expansion of subject matter jurisdiction, which would not be justifiable in terms of the objectives of the proposal. This result would be compounded by the fact S. 2390 does not limit aggregation to situations in which the plaintiffs' claims are related. It therefore would be desirable for the subcommittee to consider limiting the amendment to actions brought as class actions or, at a minimum, to claims that are related enough to satisfy a "transaction or occurrence" test or a "common nucleus of operative fact" test. See *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966).

I should note parenthetically that the primary value of S. 2390 would be in diversity litigation, inasmuch as the amount in controvery requirement has been virtually eliminated in Federal question cases. Accordingly, the ultimate effectiveness of the bill before this subcommittee is inextricably interwoven with the fate of the bills before the Subcommittee on Improvements in Judicial Machinery to abolish or limit the diversity jurisdiction of the federal courts.

I also find myself in agreement with the principle embodied in the proposal in S. 2390 to add a new Section 1657 to Title 28 to revise the holding in the Supreme Court's decision in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) by (1) giving the district courts flexibility in prescribing the nature of the notice to be given in class actions under Federal Rule 23(b)(3), and (2) allowing the district courts to apportion the expense of giving notice among the parties by imposing it entirely on the defendant. In my judgment the result in the *Eisen* case was not constitutionally necessary but, rather, appears to have been mandated by the particular wording of Federal Rule 23(c)(2), which probably was drafted with an excess of caution in terms of the Supreme Court's decisions on the notice requirement in civil actions. Given the similar position of all class members it seems to me that actual notice to a subset of members would be sufficient, especially when the cost of a more punctilious form of notice would be prohibitive and destroy the very availability of the class action.

The proposal in S. 2390 seems to me to represent a proper balance between the importance of giving notice to class members and considerations of economy. Trial court discretion with regard to notice based on the circumstances of each particular case seems to me to be an eminently desirable approach. The New York State courts are operating under a similar provision and I do not know of any difficulties that have arisen in that system.

I am uncertain as to the desirability of limiting the court's discretion to apportion the cost of giving notice by the words "in proportion to the likelihood that each will prevail upon the merits." This might prove to be an unnecessary limitation on the district judge's flexibility. More significantly, it virtually obliges the court to conduct a preliminary hearing on the merits, which often will be extremely time-consuming and quite hypothetical at that point in the action. There seems to be little reason to add such a burden to the already heavy procedural requirements borne by the litigants and the court in most class actions.

In conclusion I must note that I would much prefer to see the question of notice dealt with by a revision of the Federal Rule itself. I have long believed in the integrity and genius of the Federal Rules of Civil Procedure and regret that the rulemaking process has experienced difficult times since 1972. Dealing with the substance of proposed Section 1657 in a statute disturbs my sense of aesthetics and, more importantly, represents a further debilitation of the rule-

making process. Moreover, the co-existence of a statute and a rule on the same subject might prove confusing.

Senator METZENBAUM. Mr. Andrew Feinstein of Public Citizen Congress Watch.

TESTIMONY OF ANDREW A. FEINSTEIN, PUBLIC CITIZEN CONGRESS WATCH, WASHINGTON, D.C.

Mr. FEINSTEIN. My statement is very brief, and I will summarize it to make it even briefer.

My name is Andrew Feinstein. I am testifying on behalf of Public Citizen Congress Watch, an organization that is dedicated to making consumer justice a reality.

I certainly appreciate this opportunity to present our view on consumer class actions in general and on your bill, S. 2390, in particular.

From the point of view of consumers, consumer class actions are an essential judicial remedy. They serve five basic functions and needs which can, in part, be served by other types of procedures; but no other type of procedure which meets all five of these goals has been offered, and none seem feasible at this time. Given that situation, we certainly think that revitalizing the consumer class action mechanism is preferable to moves that have been suggested in other directions.

Briefly, the five needs to be served are:

First, the traditional need of private litigation is to make an injured party whole. Consumer class actions meet that need and should, therefore, not be looked at any differently from any other type of private litigation.

For political reasons, the defense bar often argues that consumer class actions are some type of unique overreaching on the part of consumers. And they are different, in a way, from conventional litigation seeking recovery on a breach of contract or on a tortious wrong.

We don't see that difference. We see consumer class actions as a simple question of recovery from an injury.

The second, and very important, interest of consumer class actions is disgorging lawbreakers from ill-begotten gains. In other words, taking away that which was taken illegally.

The defense bar, again, makes the suggestion that recoveries for consumers in class actions are punitive and unfair. Consider the analogy of the common thief. When the common thief is caught, the money is first taken away. And, second, prosecution and punishment take place.

While we would certainly support criminal actions against those who violate the law, we certainly don't see the consumer class action and the recovery therefrom as being any sort of punishment.

Particularly in the area of economic crime, this type of disgorgement of illegal profits is particularly essential; prosecutions of economic crimes are not given the type of priority for law enforcement that are prosecutions for kidnaping and murders.

I think four main reasons account for that low priority.

First, economic law is complex, difficult, and expensive to enforce.

Second, enforcement is generally assigned to understaffed agencies such as the trade commission on the Federal level and attorneys general on the State level.

Third, defendants in these types of cases are often politically well connected and leaders of their community. So when enforcement does take place, punishment usually amounts to a mere slap on the wrist.

Finally, prosecution of corporate crime tends not to take place on a local level because there are continual threats of shutdown and transfers of operation, and such as a means to stop prosecution.

As a result of this virual nonenforcement, consumers are routinely overcharged. Former Assistant Attorney General Thomas Kauper estimated that consumers lose tens of billions of dollars annually due just to violations of the antitrust laws. Joan Claybrook, Administrator of the National Highway Traffic Safety Administration, has testified that auto repair fraud totals $2 billion annually.

Thus, consumer class actions can provide an enforcement mechanism for consumer laws which are passed by Congress and are otherwise not given the type of enforcement which we think would be appropriate.

Fourth, class actions are a very efficient way of doing judicial business.

From the point of view of taxpayers, the debate over class actions becomes a choice between the costs of one, somewhat more complex law suit, versus the cost of many, perhaps somewhat simpler, suits.

The cost of that single integrated, consolidated suit is usually much smaller and, therefore, if recovery is seen as important—and we certainly see it as important—the consolidation and the efficiency that comes with it is very important.

The fifth need for consumer class actions is that it is often the only way that consumers can hope to get their money back.

In our formal statement, we cite the example of the Arizona bakery case where close to a quarter of a million consumers received about $10 each back—money that they would not have recovered otherwise. Private litigation for such a small recovery is just not feasible.

Consumer class actions provide a workable answer to the cynical statement of C. Wright Mills that it is better to take 1 dime from each of 10 million people at the point of a corporation than $100,000 from each of 10 banks at the point of a gun. It is also safer.

From the point of view of consumers, rule 23 has been a failure. The Supreme Court and district court judges have erected a series of obstacles to the bringing of class actions. While the Federal rules of civil procedure were meant to provide flexibility for district court judges, many have used those rules to make class actions a virtual impossibility.

Though many of the obstacles that have been raised by Federal court judges, including questions of predominance, maintenance, typicality of the plaintiff and circumstances surrounding the retention of counsel, do not relate to the *Eisen/Zahn/Snyder* trilogy of cases, they are the types of procedural burdens which must be corrected if class actions are truly to serve the function that we think is so important. Nevertheless, the impact of *Snyder/Eisen/Zahn* has been

very effective in limiting many consumer fraud class actions and, therefore, we support the efforts in S. 2390 to reverse these cases.

We should note that our endorsement of S. 2390 is as a limited and immediate mechanism to do two things:

One, to reverse those three cases; and, two, to send a clear and loud message to Federal district judges that the Congress wants consumer class actions to go forward.

We still think that a fundamental rewriting of the whole class mechanism is needed. The effort ongoing in the Justice Department should not be affected by any action on this bill. We disagree with Professor Miller on the question of the corrections coming through the rules process rather than through the statutory process. We believe the Justice Department effort to rehaul class actions by statute is the appropriate method for amelioration.

We see consumer class actions not just as a procedure to make the judicial system work but much more as a substantive right of consumers. And, therefore, it is perhaps most appropriately done by an act of Congress to provide a comprehensive mechanism, including procedures for the bringing of class actions and a wider range of causes of action for which class actions can be brought.

In the testimony, we suggest alternate means of notice which might be appropriate, separate from the preliminary hearing in shifting the costs of notice, suggested in S. 2390. However, we do not see a constitutional problem with that procedure envisioned in the bill.

In sum, we believe S. 2390 is a worthy contribution to the advancement of consumer class actions. Fundamentally, consumers need an efficient method to recover the money they lose to pervasive corporate illegality. The consumer class action is the best method, so far devised, to accomplish this goal.

Thank you.

Senator METZENBAUM. Thank you.

There will be a 1-minute recess while the Chairman takes a telephone call. I will be right back.

[Recess taken.]

We will be back in order.

Mr. Feinstein, you indicate that the fundamental reworking of rule 23 is needed and the Department of Justice staff is working on an overall study of the class action procedures.

Do you feel that there would be value in early passage of S. 2390, which has a limited scope, or should we await the Justice Department action?

Mr. FEINSTEIN. I certainly think S. 2390 should be passed as soon as possible. It would provide an immediate shot in the arm for consumer class actions. It would provide for the bringing of types that are not now available to be brought. It would turn on a green light for various different types of notice procedures for Federal district court judges, and it would also provide the sense of Congress that class actions are something that the Congress wants to exist in our American judicial system.

The Justice Department proposal is much more comprehensive. It is going to be a much longer process of gestation before it is given birth by Congress. I think that there are some elements of that pro-

posal which are going to be exceedingly controversial. S. 2390 covers ground that has been well debated over the last few years.

Therefore, although S. 2390 is not free from controversy, certainly the arguments for and against the bill have been developed and the process can be completed much quicker.

So I do see S. 2390 as something that can be enacted within the next year or so. I see the Justice Department proposal as much further down the road.

Senator METZENBAUM. I don't know if we can do this on a percentage basis; but under the present status of the law—*Snyder*, *Zahn*, and *Eisen*—what is your thought as to what percentage of cases have effectively been precluded from being brought by reason of the court decisions in those cases?

You can answer it in some way other than percentage, because I'm not particularly interested in a percentage number. I am interested in the effectiveness of precluding access to the courts for a large group of people who, I believe, would in some way lose faith in the democratic processes if they can't have their day in court.

Mr. FEINSTEIN. I think I am going to answer by passing the buck.

Beverely Moore who I understand is testifying before you later today has been a student of class actions. Like Professor Miller, he has studied virtually every decision that has been rendered since the change in rule 23 in 1966 and perhaps could give a better judgment of the proportions of each.

I think that it is important to note that even when a Federal district court precludes a class action on the basis of inappropriateness of counsel or on the basis of the class issues not predominating or on the basis that the class can't be certified, that what it is doing is responding to the Supreme Court's quite apparent hostility to consumer class actions.

So while these decisions are not resting on the exact language of the *Eisen/Zahn/Snyder* cases, what the district judges are doing is reading what the Supreme Court is saying between the lines, which is, "We don't like class actions and we don't want them in Federal courts except in very limited circumstances."

Since it is supposed to be the Congress and not the courts that make that final social judgement, I think it is appropriate for the Congress to tell the court that the Congress does want class actions.

Senator METZENBAUM. Are there advantages to the plaintiffs in having private attorneys have the right to bring the actions rather than government agency attorneys? Or is there merit to proposals applying the concepts of parens patriae as a substitute for private class actions?

Mr. FEINSTEIN. We would obviously prefer a privately initiated right. Reliance on government has a good number of disadvantages. There is never a certainty that the government is going to pursue the suit. It is unclear if the prosecution is going to be as vigorous.

The other side, of course, is that the Government has the resources to be able to prosecute the suit with the type of effort necessary.

I think a combination of the two may be the best mechanism; but at least where the Government decides not to go forward, there must be a right for private initiation.

Senator METZENBAUM. Thank you very much.
Mr. FEINSTEIN. Thank you, sir.
[The prepared statement of Mr. Feinstein follows:]

PREPARED STATEMENT OF ANDREW A. FEINSTEIN, PUBLIC CITIZEN CONGRESS WATCH

Mr. Chairman, Members of the Committee: My name is Andrew A. Feinstein and I am testifying on behalf of Public Citizen Congress Watch, a public interest lobby dedicated to making consumer justice a reality. We appreciate this opportunity to present our views on consumer class action lawsuits and S. 2390 in particular.

From the point of view of consumers of goods and services, class actions serve five vital functions, which are either unserved or poorly served without this class remedy. Means other than consumer class actions could meet each of these needs, but the likelihood of enactment of any alternative approach is small. Moreover, while consumer class actions meet each of these five needs, alternative approaches usually only serve one or two.

The first need served by consumer class actions is the traditional goal of private litigation, to make an injured party whole. Consumer class actions provide a means for individual consumers to recover the money they have lost through a violation of law. Unfortunately, there are few laws which, when violated, give rise to a class action remedy. One of the goals of class action legislation, therefore, should be expansion of the causes of action for which the class remedy can be used. S. 2390 may, indirectly, accomplish this goal by allowing aggregation to meet the jurisdictional minimum.

The consumer compensation goal of consumer class actions is no different from the compensation goals in other types of actions. A person injured in an automobile accident is entitled to recover the amount of their injuries if they are not to blame. A party to a contract who incurs costs through the other party's failure to perform is entitled to recover damages. This right to recover should certainly be no less for consumers when dealing with providers of goods and services.

Second, consumer class actions serve the societal interest of making law violators disgorge their illegal gains. It offends a fundamental sense of justice for a law breaker to be able to keep that which he wrongfully won. Stripping the wrongdoer of enjoyment of his illicit profits is not a form of punishment. When a thief is caught, the money stolen is immediately confiscated. Well after this occurs, the state indicts and prosecutes the criminal for the crime. The retrieval of the cash is not regarded as any form of punishment, and certainly an offer to return the stolen money should not and does not spare the thief punishment. Successful consumer class actions at least serve this important social purpose of not permitting people to profit from illegality—even if such lawsuits have no punitive element.

The societal policy toward disgorgement of illegal profits leads to the third need for consumer class actions—which is that they provide a privately initiated means of enforcing public law. Society has decided to focus its law enforcement activities according to a certain set of priorities. Police will expend considerable resources to solve each and every kidnapping and murder. On the other end of the scale, in very few localities do the police do anything to enforce the jaywalking laws. Corporate abuse of consumers has been a low priority law enforcement item for a number of reasons. First, the law is often complex, deals with economic transactions, and violations may be difficult and costly to prove. Second, enforcement is given to understffed agencies like the Federal Trade Commission or state Attorneys General. Third, defendants in these cases are often leaders of their communities, friends to politicians, and respected citizens, thus making enforcement less likely and punishment, usually a mere slap in the wrist. Fourth, corporate executives have used threats of shut-down or transfer of operations as a means to stop prosecution.

As a result of this virtual nonenforcement, consumers are routinely overcharged. Former Assistant Attorney General Thomas Kauper estimated that consumers lost tens of billions a year in violations of the antitrust laws. Joan Claybrook, administrator of the National Highway Traffic Safety Administration, has testified that auto repair fraud totals $2 billion annually. Consumer

class actions, thus, can provide the enforcement mechanism for the consumer protection laws passed by the Congress, without the need for government involvement and the expenditure of taxpayer's money. Given the apparent popular suspicion and cynicism about government and its ability to function, concommitant with a public outcry for better protection against marketplace abuse and fraud, the consumer class action would seem to be an ideal solution. The unpopularity of class actions on Capitol Hill now is due to the fact that many members of Congress translate suspicion of government into a call for a return to laissez faire economy. The fact that the American people are concerned about the ability of the federal government to achieve social goals does not mean the American people believe that massive corporations should be able to ignore laws designed to protect the consumer's interest in health, safety, and pocketbook. In this respect, consumer class actions are a very decentralized, non-bureaucratic peoples' solution to the violation of public law.

Fourth, they are very efficient. Consumer class actions are a cost-effective means for the legal system to deal with widespread harms. Rather than processing numerous individual suits resting on the same circumstances, class actions allow the question of legality to be answered in a single proceeding. From the point of view of taxpayers, the cost to society of numerous individual suits is many times the cost of a single suit. Hence, the question of class actions is really a question of higher costs for a corporation having acted illegally or higher costs for all citizens, who in no way were responsible for the violation of law. Fairness and the public interest require that the cost lie with the wrongdoer and not be distributed across society.

Fifth, consumer class actions often provide the only means that consumers can hope to get their money back. Examine the Arizona bread price-fixing case in which each of 245,000 Arizona consumers received an average check for $9.60 to cover the damages suffered as result of an antitrust law violation. Clearly, no consumer had an economic incentive large enough to warrant an individual suit. Only because each consumer similarly injured paid a small portion of their settlement into a fund could a lawyer be hired and the case pursued. It is interesting to note that the attorneys fee in this case cost each recipient only $1.40 out of the recovery. Without this sort of funding mechanism, these types of mass harms which cause only small monetary losses to each of numerous consumers could never be vindicated. The choice to be made here is whether consumers should be allowed to win small individual recoveries or, in the alternative, whether law violators should be able to keep huge sums wrongfully won. Consumer class actions provide a workable answer to C. Wright Mills' cynicism that "It is better to take one dime from each of 10 million people at the point of a corporation than $100,000 from each of 10 banks at the point of a gun. It is also safer."

From the point of view of consumers, Rule 23 of the Federal Rules of Civil Procedure has been a failure. It was adopted in 1966 when the prevalent view of liberal jurisprudence was to give judges broad discretion in the management of their cases. While this wide flexibility has permitted certain exceptionally bright and creative judges to innovate and try difficult cases, it has also allowed other judges to hide from hard cases. In the class action area, the results are particularly acute. Judges have imposed unduly stringent requirements of typicality, and predominance, and have permitted far-flung inquiries into the circumstances surrounding the function of the class and the retention of counsel, all to prevent consumer class actions from ever coming to trial on the merits. Judges hostile to class actions have read the words of Rule 23 as containing prohibitions, rather than spelling out factors to be considered in managing a class action. Some judges have set up an impossible situation where the typical named plaintiff must be rich enough to pay his lawyer in advance, regardless of the outcome, and must still be typical of the members of the class of consumers injured. Courts have precluded lawyers from being named plaintiffs and even partners and family of the lawyer are denied the right to lead a class. The Federal case reports are rich with examples of trial judges ducking class action suits.

Well-paid counsel for class action defendants are equally eager to pull at the loose strings. A variety of motions and inquiries are used to try to assert that the plaintiff class is poorly represented by the named plaintiff or that the lawyer bringing the suit is really the person behind the suit. At the insistence of defense counsel, who have everything to gain from prolonged proceedings in that they

are paid by the hour, class certification proceedings and discovery go on interminably. Too often the plaintiff class lacks the resources to play this judicial hardball and the suit is not prosecuted. Under Rule 23, there is little way for the plaintiff counsel or for the trial judge to force the case to go to trial.

Moreover, Rule 23 has failed because the Supreme Court has been hostile to class actions. Besides smiling at the avoidance tactics of trial judges, the Supreme Court has struck a one-two punch at class actions. It is this flurry that S. 2390 seeks to reverse.

First, in *Snyder* v. *Harris*, 394 U.S. 332 (1969) the high court ruled that for purposes of meeting the $10,000 jurisdictional minimum for Federal court litigation, the members of the plaintiff class could not aggregate their claims. In other words, class action plaintiffs, except in those areas of Federal law where no jurisdictional minimum exists, would have to assert damages of at least $10,000 each. If there remained any question about what the Supreme Court meant, in *Zahn* v. *International Paper*, 414 U.S. 291 (1973) the Court said the doctrine of ancillary jurisdiction would not allow named plaintiffs with claims of over $10,000 to create jurisdiction for other members of the class who had claims of less than $10,000. These decisions ran counter to the prevailing law that plaintiffs could aggregate their claims to meet jurisdictional requirements, if their interest was joint or common but not if their interests were several and distinct. Since all members of the plaintiff class under Rule 23 would be bound by the judgement of the court, and full res judicata would apply, the class appears to have all the characteristics of a common interest. As conservative an authority as Charles Allen Wright said in his 1970 Federal Courts treatise that "it would be highly desirable if Congress were to amend 28 U.S.C.A. 1332 [Diversity Jurisdiction] to provide that in any case permitted to be maintained as action under the Federal Rules of Civil Procedures, the aggregate claims for or against all members of the class shall be regarded as the matter in controversy."

Second, in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 136 (1974) the Supreme Court, on the basis of its interpretation of its own Rule 23 required that direct personal notice of the pendency of a class action be sent to all potential members of the class where the names of those members were ascertainable with reasonable effort. The *Eisen* case dealt with overcharges on odd lot purchases of publically traded stock. The class was estimated to number over two and a quarter million individuals. The cost of preparing and sending a mailing to this many people was well beyond the financial capacity of the plaintiffs, and so the case was dropped. A couple of points should be noted about this case. Although the defendant argued that lack of notice of pendency was unconstitutional as a violation of due process, the Supreme Court merely decided on the basis of the words of Rule 23, and since no constitutional objection was found and the court decided *Eisen* on the basis of Rule 23, the Congress is free to legislate in this area.

S. 2390 addresses these Supreme Court cases without taking on the broader questions of rewriting Rule 23. Attorneys in the Department of Justice are now at work on drafts of a class action bill to submit to the Congress. The Justice Department's efforts are aimed at a fundamental restructuring of damage class actions from the bottom up. It is an involved process, and nothing the Congress does on S. 2390 should affect in any way the Administration's efforts to rewrite Rule 23. Whether or not S. 2390 passes, a fundamental reworking of Rule 23 is needed to serve the need for consumer class actions. Hence, S. 2390 is limited in scope. Nevertheless it is a useful bill which, if passed, would add some vitality to Rule 23. Furthermore, it would be a clear signal to the Federal courts that Congress is committed to a workable class action mechanism. Sending this message may, indirectly, do a great deal to reform class actions. For this reason, we support passage of S. 2390.

Section 3 (a) and (b) of S. 2390 allow plaintiff classes to aggregate their damages to meet jurisdictional requirements, thereby revising *Snyder* and *Zahn*. If the Senate follows the action of the House in passing H.R. 9622, eliminating diversity of jurisdiction as a grounds for federal jurisdiction except in cases of alienage and removing the jurisdictional minimum from federal question cases, these sections may lose most of their impact. Surely, if diversity is inappropriate for individual lawsuits in Federal cases—a proposition which we, by and large, agree with—then it is probably inappropriate for class action lawsuits. While some strong arguments could be made for diversity class actions, based on the dispersed members of the plaintiff class, the absolute diversity required to meet

the diversity jurisdiction requirements would make it impossible for consumers from the state in which the defendant has its principal place of business to be part of the class. If H.R. 9622, introduced in the Senate as S. 2389 by Chairman Metzenbaum, does become law, S. 2390 would impose higher jurisdictional requirements of federal question class actions than exist on individual actions. We do not think that this is appropriate. Generally, we support legislation to allow consumer class actions in Federal courts based on questions of federal law or agency regulations, such as Federal Trade Commission regulations. State law violations are best handled in the state courts. The committee should consider certain mass harm situations where judicial resources will be inefficiently used if the tort action must be held in state courts and common questions of fact exist. Most notable are airline cases, in which numerous passengers from various states are injured due to one act of negligence by the defendant. It is judicially inefficient for each state court to have to decide the same issue of negligence independently and, in these cases, federal class actions based on minimum diversity would be appropriate.

Section 3(c), modifying the *Eisen* case, provides a useful preliminary hearing mechanism to allow the trial court to assign part or all of the costs of notice of pendency of the action to defendants where there is a showing that it is likely the plaintiff will prevail on the merits. Obviously, this section is enormously controversial and will be subject to considerable debate. We do not believe that such preliminary hearing, merely for the purpose of determining which side pays for notice, is necessarily prejudicial to the rights of the defendant. We are, however, somewhat skeptical about trial judges using this discretion in a manner likely to benefit consumers. The best that can be hoped for is that trial judges consider the intent of Congress in passing this law.

In your consideration of this legislation, the committee should examine alternative approaches to the question of notice in class actions. Notice of pendency to members of the plaintiff class is to allow individuals to opt out if they do not want to be bound by the judgement or to be represented by their own attorney. Obviously, the likelihood of either of these options being exercised is minimal in the case of those class actions in which the amount to be won by a class member is small. As the amount of claimed damages grows, notice of pendency becomes more important to its recipients. Congress could, therefore, declare by statute that personal notice of pendency is not required for class members whose total claim is less than a set figure, say $500, providing for alternative forms of notice instead. Alternatively, this committee could consider mechanisms for a public revolving fund to pay for the notice of class actions likely to succeed. Operating like a bank, this fund would be repaid by any class winning a recovery. The committee could also consider methods whereby the defendant could give notice through its regular mailings to customers or its packaging.

In sum, we believe S. 2390 to be a worthy contribution to the advancement of consumer class actions. Fundamentally, consumers need an efficient method to recover the money they lose through pervasive corporate illegality. The class action is the best method so far devised to accomplish this goal. Thank you.

Senator METZENBAUM. Professor Adolph Homburger, School of Law, Pace University.

It is good to have you with us this morning, Professor.

TESTIMONY OF ADOLPH HOMBURGER, PROFESSOR, SCHOOL OF LAW, PACE UNIVERSITY, WHITE PLAINS, NEW YORK

Mr. HOMBURGER. Thank you.

My personal interest in class actions goes back as far as 1952 when I drafted my first class action bill for the State of New York.

I persisted in my efforts during the past decade as chairman of the New York Judicial Conference Advisory Committee on Civil Procedure.

I must confess that I am the draftsman of New York's present class action statute which, with some deviations from my draft, was enacted into law in 1975.

It is understandable, in light of my writings and my position as a law teacher, that I have always had great interest in class actions. Therefore, I welcome the opportunity to say a few words here with respect to the class action bill that you have drafted, and which is now under consideration by your committee.

In order to avoid duplication, I refer you to the detailed analysis of the bill contained in my written statement. However, I want to point out a few things that crossed my mind as I listened to the testimony here today.

With respect to aggregation, I call to your attention that the draftsmanship of the bill will require minor revision. As it reads now, it leaves one point of great importance in a state of ambiguity.

The bill provides that the district court shall aggregate the claims of all parties bringing the action. That provision could well be read, particularly in light of the U.S. Supreme Court decisions, as a command to aggregate only the claims of the named class representatives of the class and not of all members of the class.

Undoubtedly, it is the intention of the committee and of the draft to permit aggregation of the claims of all the members of the class and not merely of those who are named as parties.

Senator METZENBAUM. The staff has taken note of your suggestion in that respect, and we will give that particular language more study, because there is certainly merit to what you are suggesting.

We will be in touch with you on that.

Mr. HOMBURGER. Fine.

In connection with aggregation, I would like to refer to one important reason why I find myself in agreement with your basic suggestion to permit aggregation freely.

It must be noted that whenever you permit joinder of parties, the requirements of rules 19 and 20 of the Federal rules must be met.

So you never have parties before the court who are not in a close relationship, at least by reason of their factual or legal coherence. The present state of the law is particularly unfortunate because one of the prime reasons for adopting present rule 23 was to get rid of the antiquated privity notion—the notion that class actions should only be permissible when there is a preexisting substantive relationship between the class members.

Now the aggregation rules, adhered to firmly by the U.S. Supreme Court, both in *Zahn* and in *Snyder*, have reincarnated the privity notion, at least for the purpose of aggregation.

Very obviously, in most small-claimants class suits, you cannot obtain Federal subject matter jurisdiction if you have no Federal question unless you are permitted to aggregate. That is an important consideration in favor of your bill.

I have doubts about the policy of excluding $25 claims, as I have explained in my statement which I submitted to you. I welcome the strategy of muting the criticism of those who say that Federal courts are overburdened. On the other hand, if you retain the $25 exclusion, it will be necessary to find some other way of dealing with wrongdoers who inflict damages of $25 or less upon individual class members and still reap millions of dollars in illegal profits.

A final point with respect to strategy: I find myself in agreement with Professor Miller's suggestion to limit the assault on the present

aggregation rules to class actions—if, for no other reason, to avoid opposition by those who are in great fear of overburdening Federal courts.

Antagonism to the bill will grow if you allow across-the-board aggregation outside the area of class actions.

As far as notice is concerned, you asked the question before whether the U.S. Supreme Court is likely to permit the notice provision of your bill to survive. That is a difficult question. The answer will depend largely on the Court's approach.

If the U.S. Supreme Court should persist in viewing class actions merely as an overgrown device that serves procedural convenience and economy, then I think the chances of your bill, from the constitutional due process point of view, are slim.

On the other hand, if the High Court will view the bill, as it should, as a clear expression of congressional intent to use class actions as a device to control massive wrongdoing inflicted in small doses, and to relieve the little man's frustration over his inability to gain access to justice, then the chances are, I think, very good.

One point which I have stressed in my writings time and again and which ought to be considered very carefully, is that in class actions notice is not a jurisdictional due process requirement comparable to situations where you give notice to an adversary in litigation; it is rather a byproduct of the procedural due process requirement of adequate representation of fellow members of the class whose interests are parallel to those of the representative. Therefore, a relaxed standard of notification would appear to be sound.

Another question that you raised before, was directed to the mini-hearing. You asked whether it is appropriate to go into the substance of the claim at the certification stage. In addition to the analogy drawn by Professor Miller to pretrial procedures, it should be noted that we are doing the very same thing every day in connection with provisional remedies where the court is called upon to pass judgment on the merits of the case on a tentative and temporary basis.

Let me make one final observation. I find myself in full agreement with the decision of the draftsman to confine the present bill to two essential questions, namely of aggregation and notice, and to defer the solution of other class action problems to a later date.

I think it is a mistake if the Justice Department draft attempts to solve all class action problems in one fell swoop. Such an undertaking is probably too large and raises so many problems that I predict it will not get very far.

Senator METZENBAUM. Professor Homburger, I'm sure you are aware of the fact that I have also introduced a bill to eliminate diversity.

Mr. HOMBURGER. I am.

Senator METZENBAUM. That bill might be amended to retain diversity of citizenship for those cases involving a common disaster.

I think you were here when I asked the same question of Professor Miller.

Would S. 2390 be consistent in permitting aggregation in such cases of multiparty litigation?

Mr. HOMBURGER. Of course, if you have a complete abolition of diversity jurisdiction, the bill would have to be amended very significantly in order to give it meaning and purpose.

I personally find myself respectfully in disagreement with your suggestion to completely abolish diversity jurisdiction.

It ought to be possible perhaps to convert class actions generally into a Federal question type of litigation on the basis of carefully selected factors.

If that were the case, some of my objection to the abolition of diversity jurisdictions would possibly be answered. But, frankly, I do not believe that your bill has a great chance of succeeding on its way up to the President.

Senator METZENBAUM. That is perfectly all right, Professor Homburger. Sometimes we try to climb some hills that are a little difficult.

If a plaintiff has purchased more than one product, or several units of the product, manufactured by a single defendant, do you believe such a plaintiff would be able to use the total amount spent or overcharged to reach the $25 minimum required to aggregate claims under S. 2390?

Mr. HOMBURGER. Do you mean one single plaintiff who tries to bring an action when there are damages of only $25 and there are many others who have similar claims?

Senator METZENBAUM. That is correct.

Mr. HOMBURGER. Under the wording of the bill, if you have only claims below the jurisdictional threshold a class action would probably be excluded. I do find an interesting problem embedded in your bill. Suppose you do have some plaintiffs whose claims are in excess of $25 and who are able to meet the jurisdictional limit. But there are many others who are not.

Now your bill only prohibits aggregation of the claims below $25. It does not speak to the question of whether all the claimants with claims above and below $25 do not constitute one single class.

So you might have a situation where you aggregate claims over $25. You meet the $10,000 jurisdictional threshold; and you have numerous other claims of $25 or less. They belong to members of the same class, although they are disregarded for the purpose of aggregation.

The question is whether they will be included in the class. That, of course, will be a problem of ancillary, or possibly pendent party jurisdiction. It is a field of great uncertainty.

Litigation is now pending before the U.S. Supreme Court. One of the cases brought up a situation of that sort. And nobody can tell how the question of ancillary and pendent party jurisdiction will finally be answered.

The bill leaves this point open.

Senator METZENBAUM. I appreciate your testimony. You have been very helpful.

The question of whether or not $25 is the right number or $10 or $15 is a judgmental question that we will be taking a look at. I think there ought to be some minimum, but we appreciate very much your thoughtful presentation.

I am certain that the subcommittee staff will be in touch with you. Thank you for being with us.

Mr. HOMBURGER. You are welcome.

PREPARED STATEMENT OF PROFESSOR ADOLPH HOMBURGER, SCHOOL OF LAW, PACE UNIVERSITY

The "Citizens' Access to the Courts Act of 1978," now under consideration by the Subcommittee on Citizens and Shareholders Rights and Remedies, has been drafted to achieve two major objectives. One is to scuttle the dysfunctional rules relating to aggregation of claims for the purpose of satisfying the statutory amount in controversy requirement in multi-plaintiff litigation. The other is to override the United States Supreme Court's restrictive construction of the notice provision in Rule 23(c)(2) of the Federal Rules of Civil Procedure, as applied to common question class actions under Rule 23(b)(3). If enacted into law, the bill would remove two major obstacles to the utilization of class actions in federal Districts Courts in consumer and other small claimants' class actions.

AGGREGATION

The law applicable to aggregation of claims for the purpose of reaching the required jurisdictional amount in diversity and, occasionally, federal question cases is chaotic and devoid of logic and rationality. Under the present state of the law, "vertical aggregation," that is the aggregation of claims by one single plaintiff against one single defendant, is free and unlimited. Federal jurisdiction is available even though the aggregated claims are wholly unrelated and independent and, in reality, constitute not one matter in controversy, but several matters in controversy the values of which, if added together, exceed the $10,000 statutory minimum. In contrast to the overly liberal rules of vertical aggregation, "horizontal aggregation," that is the aggregation of claims asserted by co-plaintiffs, ordinarily is not permitted at all for jurisdictional purposes. Even if the claims arise from a common core of facts, they qualify for aggregation only if they meet a mysterious "common undivided interest and single title or right" test that yields no predictable results. That anti-aggregation test, reminiscent of the nebulous "community of interest test" governing the propriety of class actions under the Codes, should be abandoned once and for all. Most modern proceduralists would agree that transactional affinity and identity of the factual and legal issues underlying the controversy, rather than an ill-defined substantive relationship of the claimants, should determine the monetary dimension of a controversy for jurisdictional purposes.

The bill now under consideration by the subcommittee provides that the District Courts "shall aggregate the claims of all parties bringing the action." There would be no limitation on horizontal aggregation of claims over $25, exclusive of interest and cost, other than those flowing from the application of the pragmatic and functional rules of joinder of parties. In other words, whenever joinder of parties is permitted or required under Rules 19 or 20 of the Federal Rules of Civil Procedure, the monetary value of the claims of the parties would be aggregated for jurisdictional purposes. It should be noted, however, that the phrase "all parties bringing the action" is ambiguous and may not be sufficient to overcome the restrictive effect of *Snyder* v. *Harris*, 394 U.S. 332 (1969), and *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1974), which held that the claim of each member of the class must exceed $10,000 in order to satisfy the amount in controversy requirement. The bill should make it clear that in class actions the claims of all members of the class, whether or not they are named as plaintiffs, shall be aggregated.

Two other questions merit consideration by the Subcommittee. First, it is not clear to me that the provision of the bill which would bar aggregation of claims under $25 is desirable. To be sure, the exclusion of very small claims in class actions would, to some extent, mute foreseeable criticism by those who would complain about misuse of federal courts as "small claim parts." However, with respect to class actions, the effect of the exclusion will be to perpetuate what amounts to a license to wrong doers to commit massive wrongs where the damage to each individual member of the class does not exceed $25. If the limitation stands it will be imperative to develop procedures aimed specifically at this type of wrong doing. Outside the area of class actions the $25 limitation appears to

have little practical significance; for, with or without that limitation, it is unlikely that more than 400 claimants with claims of $25 or less would join in one action and be able to meet the diversity requirement. If some of the claims exceed $25, and are sufficient to meet the jurisdictional amount requirement, while others are below the $25 limit, subject matter jurisdiction might be claimed for the non-aggregable claims, notwithstanding the exclusion, under the much maligned "pendent party doctrine."

Second, while I personally favor a general revision of the present law of aggregation within and without the area of class actions, the subcommittee should consider whether, as a matter of legislative strategy, an across the board attack on the rules of horizontal aggregation is advisable. If liberalization of the aggregation rules extends beyond class actions, the opposition of those who, at any price, would keep the caseload in the federal courts at the lowest possible level will stiffen. Greater liberality of the rules of aggregation in class actions may be justified on the ground that the prerequisites for the maintenance of class actions are far stricter than those for actual joinder of parties. Perhaps it would be better to shorten the battle line by limiting, for the time being, the assault on the rules of aggregation to the area of class actions where the restrictive effect of the present law is most keenly felt.

NOTICE IN CLASS ACTIONS

The most difficult question raised by the bill is whether its notice scheme comports with constitutional due process requirements.

Under the bill "reasonable notice" of the commencement of a common-question class action brought under Rule 23(b)(3) is required. However, the bill makes it clear that "actual" notice to each individual member of the class is not the only "reasonable" method of notification. The District Courts are instructed to balance the interest of the represented members in receiving actual notice of the pendency of the suit against their interest in having the action proceed without actual notice. The bill outlines various factors which the court should consider in that balancing process. Random sampling of the class members is expressly approved in order to determine the significance of the stake that each member has in the litigation, and the likelihood that he may wish to opt-out. While normally the plaintiff would bear the expense of notification, the court under the bill has the power to shift the financial burden in whole or in part to the opponent of the class and, in connection therewith, to hold "mini-hearings."

The notice provision briefly outlined above resembles the notice scheme of New York's new class action statute adopted in 1975, but conflicts sharply with the notice requirements under federal Rule 23(c)(2), as construed by the United States Supreme Court in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). Under the Court's narrow reading, the Rule has been interpreted to require individual notice of the commencement of the action to each member of the class who can be identified with reasonable effort. That confining construction of the Rule spells disaster for most consumer and other small claimants' class actions; for the expense of individual notification often is economically prohibitive when the class is large. A consequence of the *Eisen* approach is that consumers and other small claimants are protected in their right to receive actual notice to the point where they lose all protection.

A careful reading of Federal Rule 23 makes it quite clear that the notice provision of subdivision (c)(2) need not necessarily be interpreted as the Supreme Court did. The Rule provides that "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." That language could be read as authorizing the courts to choose among the modes of notification the best notice practicable under the circumstances, including individual notice to identifiable members, but not excluding other modes of notification if individual notice is economically impracticable. In other words, the notice scheme of the bill, while it overrides the *Eisen* construction of subdivision (c)(2), is not necessarily inconsistent with the broad language of Rule 23(c)(2) and, therefore, would not require its amendment.

The important question, however, remains whether the bill's liberal notice provision, so essential to the viability of class actions, satisfies constitutional due process requirements. I can do no more here than restate in summary fashion my argument in favor of constitutionality set forth elsewhere in greater

detail. It has been my belief for a long time, that notice to the members of the class of the commencement of a class action is a procedural due process requirement that need not measure up to the strict standards of jurisdictional due process where parties with conflicting interests face each other in an adversarial contest. Rigid notice requirements are essential when the purpose of notification is the acquisition of adjudicatory power over an adversary. The duty of notification imposed on the class representative vis-a-vis the represented members is of a different nature. It is an element of adequate representation of the class and resembles the obligation of an agent to inform the principal of steps taken in his behalf. I believe, therefore, that flexible and relaxed standards of notification, as adopted by the bill, are constitutionally acceptable when the economic stake of the individual members is small, the cost of individual notification prohibitive, and when the court finds that the interest of each member in having the action go forward and the claims of the class presented to the court is greater than his interest in receiving actual notice of the suit.

Of course, no one knows whether the United States Supreme Court will be inclined to view the problem in that fashion. The Court still owes us a clear exposition of its views on the constitutional aspects of notice to the class. All we can do is to emphasize that the *Eisen* decision turns on a narrow construction of the language of Rule 23(c)(2), and not on due process. To be more specific, the Court construed the notice provision of the Rule in accordance with the expressed intent of the Advisory Committee which wished to avoid a possible constitutional confrontation. However, that does not mean that the Court, when directly confronted with the constitutional question, would not adopt a pragmatic and flexible attitude towards the notice requirement. Due process, after all, is traditional process as the United States Supreme Court has said since early days. If class actions are to survive, a workable notice provision is essential.

Before I close, I wish to state that I find myself in complete accord with the policy decision of the draftsmen of the bill to tackle the two most pressing problems in class action procedure, aggregation and notice, while leaving other problems for resolution in the future. Once the aggregation and notice problems have been solved, it will be easier to deal with other problem areas, such as manageability of the action, in the light of the experience gained on the battlegrounds of litigation in State and Federal courts.

Senator METZENBAUM. Mr. Paul Bernstein of Kreindler & Kreindler.

TESTIMONY OF PAUL M. BERNSTEIN, KREINDLER & KREINDLER, NEW YORK, NEW YORK

Mr. BERNSTEIN. Thank you, Senator.

First, I would like to express my appreciation for the privilege of appearing before this subcommittee and giving my views.

Senator METZENBAUM. We appreciate your being with us.

Mr. BERNSTEIN. I seem to be a rare animal among the speakers here today. I think I am the only private practicing attorney who litigates daily in the class action crucible in the courtroom.

We have heard from two professors and a member of a lobbying group, and I will not go over the well-plowed ground that they covered.

I do favor class action. I have a bias and a prejudice. I represent plaintiffs for the most part in these actions and have for many years.

I am a firm, staunch believer that class actions are a boon to society and the salvation of the little man and not the Frankenstein monster that some judges have so characterized them.

Taking a hint from you, Senator, when you questioned Professor Miller, if he brought the sun. If God is still up there, he will probably throw a rainbow around because there is a pot of gold at the

end of it for the class action attorney, as Professor Miller indicated.

It is true that class action attorneys in the private sector who are successful—and I emphasize the word "successful"—are generously compensated for their efforts. And I believe they should be, because their labors are at risk.

It is very rare to find a major class action brought by an attorney who, as distinguished from the counsel for the defendant, will be paid by the hour or the minute. They are only paid if they are successful, and they could spend thousands and thousands of hours trying to gain a recovery for the public or consumers or stockholders and come to naught and be paid nothing for their labors, including the many, many hours and the overhead involved.

So it is very risky business, and that is why the courts—and I think the courts are right—compensate these lawyers generously. And I don't think it is an abuse.

Turning to the legislation, I applaud it.

I think the overruling of *Zahn* and *Eisen* is something that is necessary to open the courthouse doors. I believe that the statements made by Professor Homburger and Mr. Feinstein, in terms of the slight ambiguity in the legislation about parties vis-a-vis class members, is well taken. It is in my statement too.

I have suggested particular language to remedy that apparent ambiguity.

I have another problem with the legislation in terms of ambiguity, and I would just like to speak to that for a moment.

Diversity—if it is not abolished by your other bill—is a problem lurking in *Zahn*. Although not addressed specifically in *Zahn*, it may well be that in order for a case to have complete diversity between plaintiffs and defendants, there must be diversity between each class member and defendants.

When you have a national class, it seems likely that there will be some member of the class who has the same citizenship as one of the defendants, which would destroy diversity. So, for the very reason that S. 2390 aggregates the claim of a class member and puts him in for jurisdictional amount purposes, it may, some courts will say, drag his citizenship along as well as his dollars. If that is the case, you have a diversity problem.

Therefore, I have suggested in my statement appropriate revision of the language of the statute to make it clear that, for purposes of citizenship under section 1332, the citizenship of only the named plaintiffs be considered rather than the citizenship of all class members.

You asked a question as to whether or not it would be more appropriate for the private bar with a class champion in the form of an attorney and a willing plaintiff to go forward rather than the governmental agency to protect the rights of consumers and shareholders.

Again, I may be prejudiced and biased; but I have found over the 25 years that I have practiced that government agencies are motivated, highly dedicated, able, experienced people who are totally understaffed and underbudgeted to fight the fight along all of the front that we have to fight it on.

I think without the aid and assistance of the private class champion the right of the little man will not be enforced. Even though the Government agencies—the FTC, the SEC, and so forth—do a marvelous job, they simply cannot, because of the large numbers of wrongs that are committed, do the job. You must have the aid and assistance of the private litigating bar.

I would like to also indicate—and I'm sure that the drafting of the statute is not inadvertent in what I am about to say—but I would like to put on the record and call to the attention of the committee and the subcommittee and to the people here that the language in the second part of the statute which, in effect, repeals the restrictive *Eisen* rulings, to me, is probably modeled after the New York class action statute that was enacted in 1975. The words are almost identical.

Coming from New York, I can tell you that we have had no problems that I know of in administering the notice provisions of our class action statute which gives the court wide discretion in shifting costs, which gives the court discretion in sending notice to some but not all of the class, and provides specifically for random sampling.

Finally, as I state at the end of my prepared remarks, I think the legislation is a partial effort to swing the pendulum back to where the little people are and away from where the defendants would like it to be. But there is more to be done. And just glancing over Beverly Moore's statement, he makes the same point. And that is that the critical need in the consumer class field—not so much in the securities and stockholder field where I do most of my work—is the fluid class recovery concept where if there is a wrong and if future wrongdoing is to be deterred, damages should be awarded on a class basis. If people do not make claims, even though they have a right to make claims, that money should not revert to the wrongdoer but should be used for some purpose which would benefit the class or the State or the community at large rather than let the wrongdoer keep what is so commonly called his illgotten gains.

If we don't do that in the consumer area, the victory will be pyrrhic in successful class actions and will result in continual wrongdoing. There will be no deterrent effect.

Again, I will not repeat what is in my statement. It is in the record, as the Senator has said, and I feel that I have said what I came to say. If you have any questions, I would be happy to answer them.

Senator METZENBAUM. Thank you very much for your testimony.

As the chairman of the American Bar Association Committee on Class Actions, does the Bar have a position on this subject generally?

Mr. BERNSTEIN. I made that clear in my statement, and I should have said it orally as well.

I do not speak here on behalf of the committee of which I am the chairman. I speak on my own behalf.

There are various sections of the American Bar Association, as the Senator knows, and they do speak on the subject but they speak with different voices.

My committee, by and large, being the General Practice Section, is generally favorable. The majority of the people on the committee favor liberal interpretation of class action statutes.

There is a class action committee of the Litigation Section, of which I am a member but not chairman, and my views there are a minority.

The Corporate Business and Banking Law Section, as you might expect, is opposed to liberal class action rules. The only other sections that I know that have spoken on the subject are the Antitrust Section and the Public Utility Law Section. They were also quite conservative in their views on class actions, and generally came down with reports against class actions.

So, on balance, of the five committees that have spoken, three are opposed to what I would call liberal interpretation. One is in favor, and the Litigation Section is generally somewhat neutral but leaning toward conservatism.

One specific incident—and I'm sorry to take so long in answering your question, but this might be very appropriate—The Uniform Class Action Act, which was adopted by the National Conference of Commissioners of State Laws in 1976 in Atlanta, was put to a test by the General Assembly of the House of Delegates of the American Bar Association as to whether or not the American Bar Association as a body would approve the Uniform Class Action Act.

The five committees that I mentioned were asked to give their comments on it, and they came out in favor or opposed, as I indicated.

The House of Delegates did not approve the Uniform Class Action Act. The Act itself has been adopted in only one State that I know of, and that is North Dakota.

The Uniform Act is plus and minus in many respects, but on balance I would have to say that it comes out plus because it has, among other things, the *Eisen*-type notice rule that you propose in your legislation and it also has fluid class recovery or a form of it in the nature of escheat.

I would like to say one other thing which I should have said. That is, why are we all here if, especially in the consumer area, there are State courts that are open to the public. No one has addressed that point, and I would like to just say a few words about it. The reason why your bill is necessary and the reason why we must have access to the Federal courts is that the State laws concerning class actions and mass consumer remedies are a hodgepodge.

By the accident of residence, you may or may not be able to sue. There are some States that have liberal class action rules, like New York and California. There are some that have antiquated class action rules, and there are some States that have none.

The uniformity afforded by rule 23 and this legislation would permit consumers to sue no matter where they lived.

That's why the Uniform Class Action Act was passed by the National Conference, but it doesn't seem to be having too much success in the State houses. And, therefore, this legislation is necessary.

Senator METZENBAUM. Why do you find a need for greater access to Federal courts, instead of just relying on State court statutes?

Mr. BERNSTEIN. As I said, I think the statutes in the States, if they were all rule 23 and if they were all administered the way Federal judges administer rule 23 and they had a basic uniformity, I wouldn't have any problem. I would go into the State court with my cases.

But you don't have that. Our cases are national in scope. We don't sue only in New York. We have to sue where the defendants are.

We have cases all over the country, and we find that in some States we just can't do it. And that's why the uniformity afforded by the Federal rule is a salvation to the consumer, especially when you have national class actions.

I also have a problem, which I have written on in connection with the Uniform Class Action Act, and that is one of basic jurisdiction.

I wonder, despite the fact that New York has a liberal class action act, how the New York State court can exercise jurisdiction over a class member who purchased the product in Illinois and has never left Illinois. He gets a notice in Illinois saying: If you want to be a member of the class, you don't have to do anything; but if you don't want to, you have to send a letter to the court. I wonder about that jurisdiction. No one has ever tested it, to my knowledge But I question the jurisdiction of a State court in a national class action where class members reside outside of New York and have never had any contact in New York.

Senator METZENBAUM. It would be helpful to the subcommittee if you could advise us of who are some of the members of the practicing bar who would be opposed to this legislation.

Mr. BERNSTEIN. I could just send you a list of all my cases and you could just take the names of the defendants' counsel. I would be happy to tell you who are the principal spokesmen. I can do that now.

Senator METZENBAUM. I think that is what we would want.

In the main, our witnesses today are generally supportive of this legislation. We expect to have another hearing in order to hear from those opposed.

Mr. BERNSTEIN. At the risk of doing class movements some damage, Senator, I think I will tell you that as I am the one with the white hat, I think the black hat who is the principal spokesman for the anticlass movement is a lawyer. I'm sure he won't mind me telling you that his name is Joseph McLaughlin. He practices law in New York City with the law firm of Shearman and Sterling. He goes on circuit as I do, to spread his gospel. We have some interesting debates.

But I think Joe McLaughlin is a staunch believer in no class actions, and I'm sure that he could give you the names of others if he is unavailable for your committee.

Also, there is an association of lawyers which has written the definitive treatise. If your staff has not seen it, or if you have not seen it, it is somewhat antiquated now but it is still the most anticlass action piece of literature I have ever read.

It is written by certain members of the American College of Trial Lawyers. It must be about 4 years old by now and maybe five.

It gives all of the reasons why class actions are not good. There is also a substantial body of literature as to why class actions are good. In the final analysis, however, I think that the best testament for class actions are the many, many thousands of people who, were it not for class actions, would not have the money that they have received in cases that were brought by private attorneys.

Senator METZENBAUM. This committee chairman has indicated by being the author of the bill that I obviously support the thrust and

direction of the bill and the necessary changes to be made in the law apropos this subject. Notwithstanding that fact, we do want the record to reflect the opposite point of view.

Mr. BERNSTEIN. I think it should.

Senator METZENBAUM. We will conduct a separate hearing to hear from the opposition at a later point.

Thank you very much. We appreciate your testimony, and it has been extremely helpful.

Mr. BERNSTEIN. Thank you for allowing me to be here.

[The prepared statement of Mr. Bernstein follows:]

PREPARED STATEMENT OF PAUL M. BERNSTEIN

It is a distinct honor and privilege to be asked for my comments on the Bill. First, lest there be any doubt from my remarks, I have a strong prejudice in favor of redressing consumer and shareholder wrongs, especially through class actions. I am a member of the New York City law firm of Kreindler & Kreindler and I have spent most of my time during the past 10 years prosecuting major securities class actions on behalf of victimized shareholders.

I am chairman of the Class Action Committee of the American Bar Association's General Practice Section and I have lectured and written extensively on the subject of class actions. If more detail concerning my experience in this field is desired, I would be happy to provide it.

The subject bill has a limited, but important, purpose, i.e. legislatively overruling the Supreme Court opinions in *Zahn* and *Eisen*.[1] There are a number of other issues where class action legislation would be appropriate, but my remarks herein are confined for the most part to the limited scope of the Bill.

THE PROBLEM CREATED BY ZAHN

The Supreme Court's *Zahn* ruling effectively closed the federal court doors to representative litigation where the $10,000 jurisdictional amount requisite is present.[2] Simply stated, *Zahn* holds that each class member's claim in a Federal court suit brought pursuant to Rule 23 of the Federal Rules of Civil Procedure must satisfy the $10,000 jurisdictional requirement and that aggregation of all class members' damages for such purpose is impermissible. The rule of *Zahn* applies to so-called diversity cases (28 USC §1332) as well as federal question cases (28 USC §1331).

Equally simply stated, the bill overrules the *Zahn* holding and permits the aggregation of the damages of "all parties" for purposes of meeting the jurisdictional amount requirement in both diversity and federal cases.

WHY ACCESS TO THE FEDERAL COURTS?

There can no longer be any serious doubt that in our complex modern society a single act by a major corporation may have a damaging effect on the economic interest and social well-being of thousands, even millions, of persons. It is essential that both the means and the incentive to obtain redress be made available to such persons. The reason is obvious—the individual's damages are usually too small to warrant litigation for himself alone. Certainly, in the overwhelming majority of consumer and shareholder cases the individualized damages are less than $10,000.

On the other hand, to permit a wrongdoer to keep the fruits of his illegal conduct, or escape responsibility to persons he has damaged, simply because he has injured a great many people, each in a small amount, seems completely contrary to our sense of justice. Affording some means of redress would also plainly serve a deterrent, as well as a compensatory, purpose. Thus, the class action devise was born.[3]

But, argue the advocates of ridding the Federal courts of "burdensome" litigation, why not relegate the consumer to the State courts, especially with re-

[1] *Eisen* v. *Carlisle & Jacquelin*, 40 L. Ed.2d 732 (1974) *Zahn* v. *International Paper Company*, 38 L. Ed.2d 511 (1973)

[2] Cases involving substantive areas where no jurisdictional amount is required, e.g. securities, antitrust and civil rights cases, of course, remain unaffected by *Zahn*.

[3] And made truly viable in 1966 with the amendment of F.R.C.P. Rule 23.

spect to non-federal (i.e. diversity) claims. The answer is that our State class action laws are a hodgepodge. The accident of residence determines whether a wrong can be remedied. Some states have liberal class procedures, others restrictive, still others, none. The Uniform Class Actions Act, adopted by the National Conference of Commissioners on Uniform State Laws, is a noble effort, but has made little progress.[4] Also, despite well meaning efforts, public agencies are too understaffed and underfinanced to wage the battles for the little man on the many fronts involved.

Thus, private litigation brought by class champions in the Federal courts, is the only presently practical way of assuring the non-discriminatory application of an effective means of redressing consumer wrongs. This route also assures the uniformity so lacking under the differing state procedures.

AGGREGATION UNDER THE BILL

Assuming each individual's damages exceed $25, it is plainly the intention of the Bill to aggregate the claims of all class members in determining whether the $10,000 jurisdictional amount has been met. In any meaningful consumer or securities case, there is little doubt that both of these amounts will be reached. Thus, the legislation, insofar as *Zahn* is concerned, appears to accomplish the desired result of affording citizens access to the Federal courts.

There are, however, two problems that may be lurking in the language of the bill which should be remedied. If they are not, by judicial interpretations the courthouse doors, once opened, may be quickly slammed shut.

1. "Parties"

The bill, for both §1331 (Federal questions) and §1332 (diversity) provides that "the district courts shall aggregate the claims of all *parties* bringing the action." (emphasis added). The term "parties" is not defined in the bill.

The Supreme Court has not determined whether a class member in a suit brought under Rule 23 is a "party" to the litigation. Some lower courts have raised questions, especially for purposes of discovery. Clearly, if a class action is unsuccessfully prosecuted, an absent member of the class could not be liable for costs. Yet, a "party" is so liable. In short, the definition in the bill should be sharpened to accomplish the legislative intent. Otherwise, it is entirely possible that cases will be dismissed for lack of jurisdiction where the damages of class members, in the aggregate, exceed many millions of dollars.[5]

Accordingly, I respectfully suggest that Section 3(a) and (b) of the bill be amended to read as follows (new matter in italic):

Sec. 3.(a) Section 1331 of title 28, United States Code, is amended by adding at the end thereof the following new subsection (new matter underscored):

"(c) In determining under subsection (a) whether the matter in controversy in an action exceeds the sum or value of $10,000, exclusive of interest and costs, the district courts shall aggregate the claims of all parties bringing the action *or, if the action is brought pursuant to FRCP Rule on behalf of a plaintiff class or classes, the district courts shall aggregate the claims of all class members.* The claim of a party *or class member* may not be aggregated under this subsection unless the sum or value of such claim exceeds $25, exclusive of interest and costs."

(b)(1) Section 1332(a) of such title 28 is amended by adding at the end thereof: "In determining under subsection (a) whether the matter in controversy in an action exceeds the sum or value of $10,000, exclusive of interest and costs, the district courts shall aggregate the claims of all parties bringing the action *or, if the action is brought pursuant to FRCP RULE 23 on behalf of a plaintiff class or classes, the district courts shall aggregate the claims of all class members.* The claim of a party *or class member* may not be aggregated under this subsection unless the sum or value of such claims exceeds $25, exclusive of interest and costs."

(b)(2) Section 1332 (a) of such title 28 is amended by deleting such subsection (b) and replacing it with the following:

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[4] Although under active consideration in several states, only North Dakota has adopted the Uniform Act.

[5] There would be very few class actions where a sufficient number of plaintiffs would join in a suit where aggregate plaintiffs' damages exceed $10,000, i.e., the very purpose of the class action rule is to afford persons who have small claims, which would otherwise go unremedied, to obtain redress.

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiffs who file the case originally in the Federal courts are finally adjudged to be entitled to recover less than the sum or value of $10,000 in the aggregate *for themselves or on behalf of a class or classes they represent*, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiffs and, in addition, may impose costs on the plaintiffs."

2. "Diversity"

It may be implicit in the *Zahn* ruling that in a diversity class action brought under Rule 23(b)(3) not only must all class members satisfy the jurisdictional amount requirement, but they must also satisfy the citizenship requirement. If so, if *any class member* is a citizen of the same state as any defendant, then there is no diversity and the federal court has no jurisdiction.

Since most classes of consumers and shareholders will be large and national in scope, there will be no federal court class actions in diversity cases if *Zahn* is so interpreted. Therefore, the bill should be amended by adding a new sentence to the end of Section 1332(a) which provides:

"Only the citizenship of the named plaintiffs and defendants shall be considered in determining the issue of diversity of citizenship for jurisdictional purposes."

With the suggested changes, it is respectfully submitted that the bill effectively neutralizes the restrictive *Zahn* ruling.

THE PROBLEM CREATED BY EISEN

In *Eisen*, the Supreme Court, among other things, held that plaintiff must bear the expenses of notice to all identifiable class members and that first class mail must be utilized for such purpose. The Court also held impermissible notice by random sample and the holding of a "mini-hearing" on the merits to determine the probability of plaintiff's success in order to allocate notice costs.

Eisen, in effect, sounded the death knell of many otherwise meritorious class actions. Most class actions are brought on a contingent basis. The individual plaintiff's damages are usually meager in comparison to the costs of notice. Of course, counsel is permitted to advance expenses, but few lawyers, and fewer plaintiffs, would risk the hundreds of thousands of dollars that could be required by *Eisen* to send notice in the case of a massive wrong.[6]

Thus, the greater the wrong, and the larger the class, the more likely it is that the wrongdoer will escape liability. He might even be encouraged to do it again, with the knowledge that there is no effective means of redressing the wrong. Again, justice and equity cry out for judicial intervention through utilization of the class device.

CLASS NOTICE UNDER THE BILL

The bill effectively overrules the foregoing *Eisen* holdings and affords the court discretion to determine the form of notice, the recipients thereof, and who should bear the cost. Also, the Court may hold a mini-hearing in making its determinations.

The bill not only eliminates the absolute requirement of mailed notice, but it also permits notice to a random sample of the class in order to determine the likelihood of a significant number of opt-outs.[7]

With respect to the mini-hearing, the bill does not make clear whether the hearing is to be on the merits (expressly prohibited by *Eisen*), or on the respective resources of the parties, or on the degree to which class members are identifiable, or on all three, or any other subject related to class notice. In view of the discretionary shifting of notice costs between the parties, it would

[6] In this connection, consider the impact of a reversal in the argued, but as yet undecided, case of *Sanders* v. *Levy*, 558 F.2d 636 (2d Cir. 1977), *cert. granted* ____ U.S. ____(1977). In *Sanders*, the opponents of calss actions seek to have the plaintiff bear the cost of not only notifying class members, but also the cost of identifying class members from computerized records. These latter costs could be very substantial.

[7] Although implicit in the new section 1657, it might be advisable to expressly provide for notice by means other than mail—even if the class members are readily identifiable.

seem that all issues concerning notice are relevant on the mini-hearing, including the substantive merits, and, therefore, the legislation should so provide. This could be easily accomplished by having the last sentence of §1657(c) provide (new matter in italic) :

Unless the plaintiff is required to bear the cost of notification, the court shall hold a preliminary hearing *on issues relating to notice, including the merits of the litigation*, to determine the appropriate apportionment.

CONCLUSION

Except for limited exceptions, where statutes create their own jurisdiction for Federal courts irrespective of the dollar amount involved in the claim, *Zahn* and *Eisen* have precluded citizens' access to the federal judiciary in the case of massive wrongs affecting large numbers of people, each in a relatively small amount.

State laws and public agency enforcement have not, and under present circumstances, cannot afford meaningful redress for these wrongs.

By legislatively overruling *Zahn* and *Eisen*, citizens can again be compensated for injuries, wrongdoers can be effectively held to account, and because of the deterrent effect of the class action, our citizens may get better treatment in the future.

Although perhaps not totally relevant to the subject bill, application of one other innovative technique would make the remedy even more effective, i.e. permitting fluid recovery in class actions. Admittedly, this statement is already too long and I will not go into detail with respect to this concept, other than to describe it.[6]

In the case of a massive consumer wrong, there seems to be a consensus of all concerned that, even after the wrongdoers have agreed or been ordered to pay damages to the class, very few class members come forward and make claim. In these circumstances some form of damage distribution must be devised to overcome consumer apathy.

Prospective injunctive relief or a cease and desist order—the proverbial slap on the wrist—advocated by some as the answer to the problem are no answers at all. The deterrent effect is virtually nil and the economic impact on the wrongdoer is minimal. The only effective relief in such a situation is damages. Hit the wrongdoer in his pocketbook for a meaningful sum, and it is more likely that he will give consumers a fairer shake in the future. Out of this philosophy came fluid recovery.

Simply stated, the fluid recovery theory holds that if damages cannot be distributed directly to the victims of the wrong, rather than permit the wrongdoing defendant to retain its illegal gain because of the practical impossibility of locating and identifying all such victims, the damages will be awarded to some broad group which more than likely will include most, if not all of the victims.

Again, I think the Committee for giving me the opportunity to express my views.

Senator METZENBAUM. Miss Sharon Nelson of the Consumers Union.

TESTIMONY OF SHARON NELSON, LEGISLATIVE COUNSEL, CONSUMERS UNION, WASHINGTON, D.C.

Ms. NELSON. Thank you.

I find that there is probably no need to reiterate the excellent comments of those who have already preceded me, but I will summarize portions of my written statement.

On behalf of Consumers Union, I want to thank the subcommittee for inviting us to testify on S. 2390 today.

As an organization, Consumers Union has long favored Federal legislation to facilitate consumer class actions. Also, Consumers

[6] If the members of the subcommittee desire more information on the fluid recovery subject, I would be happy to provide it.

Union participated in the *Eisen* and the *Zahn* litigation as an amicus curiae in the Supreme Court.

We also published in the August 1974 issue of Consumer Reports an article on consumer class actions. We find that S. 2390 responds in large part to the recommendations for legislation in that article.

Consumers Union believes that the goal of the prevention of unjust enrichment and the deterrence function of the class action mechanism are just as important as the compensatory functions of class actions.

As Professor Miller discussed, class actions have long been a controversial item. I would like to add a citation to the record of one of the responses to the arguments that are usually brought up in opposing class actions.

That is the Senate Commerce Committee study from the 93d Congress, I believe, which presented empirical data on consumer class actions and arguments about court congestion and attorneys' fees and the like.[1]

We commend the subcommittee for considering this bill today and support the concepts contained in it. We think it is a modest and attainable legislative measure and applaud the subcommittee and the chairman for introducing it and for carrying it through to this point in the legislative process.

However, we would urge the subcommittee to analyze and evaluate the following suggestion:

First, that the notice requirements of S. 2390 be reexamined in that they seem to imply that only one method of notice may be given to the entire class. We think as much flexibility in providing notice should be written into the statute as is possible. So, depending on the interests of the various class members or subclasses within the class, notice could be given individually or by publication, either in print or electronic media, or by posting and so on. We also think that the random sampling provisions written into S. 2390 are an excellent and progressive step forward, and this might be used also in determining what kind of notice would be given to various of the class members or subclasses.

Along with Professor Homburger, we would urge the subcommittee to consider removing the $25 floor, or threshold, for the individual claims of individual class members which then may be aggregated.

As Mr. Justice Douglas pointed out in the dissent in *Eisen*, consumer and environmental class suits often involve class members who have been harmed, and suffered total damage of much less than $25. In *Eisen*, the average class member's claim was only $3.90.

Finally, along with Mr. Bernstein, we suggest that the subcommittee examine the possibility of adding a provision which would permit the aggregation of damages—some kind of fluid recovery or cy pres concept. As Mr. Bernstein argued, the deterrence and unjust enrichment functions of the class action in consumer cases cannot be served unless there is a means for forcing the lawbreaker to disgorge his ill-gotten gains.

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[1] *See* Class Action Study, committee print, Commerce Committee, 92d Congress, 2d Session (1974).

Mr. Chairman, in sum, we endorse the concepts of this legislation and again, thank you for inviting us to testify today. I would be happy to answer any questions that you might have.

Senator METZENBAUM. Thank you.

Let me ask you a question that has nothing to do with this hearing.

There is a consumers union in Cleveland. I guess it is the Consumers League. It is not related to the Consumers Union in Washington at all is it?

Ms. NELSON No. We publish Consumer Reports, and we are members of Consumer Federation of America, which might also include the Consumers League of Cleveland.

Senator METZENBAUM. We appreciate your testimony.

Since you support our legislation and you are in agreement with it, I don't think I am going to ask you any questions but I hope that you will be available for us with respect to further consultation.

I might ask you whether you feel very strongly that the $25 figure is too high, whether you think there ought to be no figure at all, or whether you think that any figure lower than $25 would be appropriate?

Ms. NELSON. As Professor Homburger stated, once you start setting a threshold, then one has to worry about piggybacking those people with smaller claims onto the rest of the class and computation of the damages becomes problematical. I think we would, in the best of all possible worlds, not want a floor or threshold at all.

If political strategy requires that there be some sort of minimum amount, I think that would be a judgment that the Congress will have to make.

Of course, if a floor were set we probably wouldn't withdraw our support of the bill.

Senator METZENBAUM. Thank you very much.

Ms. NELSON. Thank you.

[The prepared statement of Ms. Nelson follows:]

PREPARED STATEMENT OF SHARON NELSON, LEGISLATIVE COUNSEL WASHINGTON OFFICE, CONSUMERS UNION

Mr. Chairman: Consumers Union[1] thanks the Subcommittee on Citizen's and Shareholders' Rights and Remedies for its invitation to testify at this hearing on S.2390, the "Citizens' Access to the Courts Act of 1978". S.2390 would overrule two Supreme Court decisions which create effective barriers to consumer class actions in the federal courts. First, the bill would modify the holding of *Snyder* v. *Harris*, 394 U.S. 332 (1969) and permit the aggregation of claims exceeding $25 to meet the $10,000 jurisdictional amount requirements of 28 U.S.C. §§ 1331 and 1332. The bill also would modify the holding of *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), to permit Federal district courts more flexibility in determining the most appropriate form of notice to members of the class and apportioning the costs of giving notice. Consumers Union favors Federal legislation to facilitate consumer class actions. We believe the Chairman and the subcommittee should be commended for the introduction of this pro-consumer measure, and the concepts contained in S.2390.

[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of *Consumer Reports*, its other publications and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports*, with more than 1.8 million circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

The right of consumers to be free from unfair or deceptive acts and practices was written into Federal law in 1938 as part of the Federal Trade Commission Act and the right to be free from anti-competitive practices even earlier. However, it remains a cruel fact that a consumer who is cheated out of $10 or even $500 in the marketplace has only an illusory legal remedy. No matter how unlawful and incontestable the harm suffered, the right to recovery of damages is only a paper right. Given the high cost of legal representation, legal expenses probably exceed the value of the claim. Thus, it is economically irrational to enforce the claim and make a legal recovery a meaningful deterrent to unscrupulous operators. Although we have proclaimed unfair and deceptive acts and practices to be unlawful, we have failed to make such practices unprofitable. As C. Wright Mills once observed, "It is better to take one dime from each of ten million people at the point of a corporation than $100,000 from each of ten banks at the point of a gun." He added, "It is also safer." [2]

The class action device provides a potential remedy for a wronged consumer. An effective consumer class action statute promises to make consumer fraud and other unlawful business practices unprofitable by permitting the consumer to join with other persons who may have been injured in a similar manner. As important, the class action mechanism does not require vast new outlays of the Federal budget for investigators and administrators, prosecutions and court appeals. It does not require the creation of a new bureaucracy. It does not require the consumer to wait until a Federal agency brings an enforcement action.

Many Federal, State and local consumer protection agencies are effectively prosecuting actions on behalf of injured consumers; however, the enforcement resources of various of our agencies are so limited that they can only bring proceedings against the most visible and egregious violators. Serious anti-consumer practices are often regional or local in nature and involve companies whose names are rarely household words. Consumers injured in these cases ought to have an effective private right of action. In these cases a violator often will have injured substantial numbers of consumers in similar or identical ways which make a class action wholly appropriate. A meaningful class action remedy would simply open the doors of the courthouse to consumers so that they may have meaningful access to the traditional American opportunity of seeking one's remedy in court.

One of the most significant and controversial developments in the law of Federal procedure has been that associated with class actions. The crucial events have been the 1966 amendment of Rule 23 of the Federal Rules of Civil Procedure and the subsequent restrictive interpretations of the Rule by the Supreme Court.[3] Since a vast outpouring of legal literature has discussed the intricacies of Rule 23 and the Court's decisions,[4] no attempt will be made here to analyze the Rule or the judicial precedents in detail.

Appropriate purposes of the class action remedy are: (1) compensation of named and unnamed plaintiffs, (2) prevention of unjust enrichment, and (3) deterrence. Ideally, even under present Rule 23 procedures, these goals can be accomplished—at least where individual claims are large. Where a plaintiff class obtains judgment, the entire class is given notice so that all members receive compensation, the defendant is deprived of unjust gains, and the defendant and other unscrupulous operators are deterred from further illegality.

However, present Rule 23, as judicially interpreted, is aimed primarily at effecting the compensatory objectives, rather than at the prevention of unjust enrichment and the deterrence goals of the class remedy. For example, the burdensome notice requirement of Rule 23(c)(2), as interpreted by the Supreme Court in *Eisen*, is designed to protect the interests of individual class members in obtaining compensation. Unfortunately, this requirement means that a typical consumer class action, involving a large class and consequently great notice costs, is likely to be dismissed or not filed at all. Moreover, if the chief purpose is viewed as individual compensation, most large classes with small

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[2] *White Collar Criminal* (G. Gels ed. 1968).

[3] *Snyder* v. *Harris*, 394 U.S. 332 (1969). *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973). *Eisen* v. *Jacquelin & Carlisle*, 417 U.S. 156 (1974).

[4] See e.g. *Eisen* v. *Carlisle & Jacquelin—Fluid Recovery, Mini-hearings and Notice in Class Actions*, 54 B.U.L. Rev. 111 (1974); Note *Rule23(b)(3) Class Actions: An Empirical Study*, 62 Geo. L.J. 1123 (1974); National Institute for Consumer Justice, *Staff Report on the Consumer Class Action*, (1972); Senate Commerce Committee, *Class Action Study*, 93d Cong., 2d Sess. (1974).

individual claims are particularly likely to be held unmanageable and not allowed to proceed under Rule 23(b)(3). Finally, a consumer class action typically involves individual claims of much less than $10,000. Except for the purchase of housing, ordinary consumers are rarely involved in transactions exceeding $10,000. *Snyder* and *Zahn* virtually closed the courthouse door to consumers by forbidding the aggregation of individual claims to meet the $10,000 amount in controversy requirements of 28 U.S.C. §§ 1331 and 1332. The judicial analysis of Rule 23 has thus reduced the effectiveness of the class action mechanism as a consumer protection device.

The labyrinthian history of the *Eisen* litigation itself illustrates the potential complexity of consumer class action litigation. With a potential class of odd-lot traders numbering 6 million—2,225,000 of whom could be identified, each with an average claim of only $3.90—the *Eisen* case was aptly denominated by Judge Lumbard of the 2nd Circuit Court of Appeals as a "Frankenstein monster posing as a class action." 391 F.2d 555, at 572 (2d Circuit, 1968, *Eisen* II). Although extreme, *Eisen* is perhaps not atypical of a consumer class action. Thus, it raises the spectre of cases which are not welcomed by the judiciary or the bar. Statements by the Chief Justice as well as the Attorney General would lead one to believe that the courts are either no longer capable of or should not be handling either the very large cases or the very small cases.[6] Additionally, the views of our chief magistrate and chief law enforcement officer are not atypical of the general views of the bench and the bar toward class actions.[6] Since consumer class actions combine elements of both the large and the small case, one probably should not be surprised at judicial statements of disapproval. However, such statements should not be dispositive of legislative policy concerning consumer class actions.

Judicial decisions since *Eisen* have left unanswered several questions concerning *Eisen*-type class actions. The most important of these fundamental questions probably remains whether consumer class actions like *Eisen* can ever be held "manageable" within the meaning of Rule 23. Because the *Eisen* Court required individual notice to the 2,250,000 class members who were easily ascertainable, and because *Eisen* flatly refused to furnish such notice, it was necessary to decide whether the mammoth class of small investors in that case met the manageability requirements of Rule 23. The Court expressly declined to reach that question.[7] The Court also expressly declined to reach the question of the "fluid class recovery." Since the Court of Appeals decision in *Eisen* III was vacated, these issues have not been resolved. Thus, it would appear that the question of manageability will continue to be resolved on a case-by-case basis and that the devise of a fluid class recovery will remain available in appropriate cases for facilitating damages distribution problems.

A consumer class action statute necessarily would have to address such questions if Congress determined that the goals for a class action mechanism include the prevention of unjust enrichment and deterrence as well as compensation of individual class members. Such a statute would recognize individual compensation as a primary purpose of the class action remedy, but also would accept the fact that individual relief may not be feasible in all class suits. It is desirable that Congress mandate that the goals of prevention of unjust enrichment and deterrence be effected through class suits even when individual redress is not possible.

If Congress were to make such a determination, it would necessarily raise further policy questions which have not yet been answered. These include the question of the point in the proceedings at which notice to absent class members must be given.[8] The requirement of providing notice possibly could be delayed until after the determination of liability. Alternatively, various flexible alternatives for providing varying types of notice—by personal notice, by publication—to various sub-classes within the class might be tried.

Also, legal scholars have advanced various proposals which could serve as means to the prevention of unjust enrichment and deterrence ends of a con-

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[5] Address by Mr. Chief Justice Burger to the ABA National Conference on Minor Disputes Resolution, May 25-27, 1977. Remarks by Attorney General Bell to the Public Citizen Forum, April 14, 1977.

[6] See *Responses to the Rule 23 Questionnaire of the Advisory Committee on Civil Rules*, 5 Class Action Reports 3, (Jan.-Feb. 1978).

[7] 417 U.S. 156, at 172, n. 10.

[8] See Schuck and Cohen, *The Consumer Class Action: An Endangered Species*, 12 San Diego Law Review 39, at 64 (1974).

sumer class action remedy. These proposals, which have not been evaluated either by legislators or the judiciary, include the aggregate class damage concept, various trust fund concepts, such those dealing with the distribution of damages which remain uncollected by the affected consumers, and the utilization of various *cy pres* concepts such as those invoked in *Daar* v. *Yellow Cab*, 433 P.2d 732 (1967). In that case, the court ordered Yellow Cab to set its fares below those which otherwise would be charged, as a means of satisfying the judgment.

Certain innovative concepts have been considered by the 95th Congress in other legislation. We recommend, specifically, the Committee's analysis and evaluation of the class action provisions of H.R. 3816 and S.1288. Although the legislative history of the Federal Trade Commission Improvements Act indicates substantial Congressional doubt about the adoption by statute of such proposals as those noted above, the ultimate goals for consumer class actions as an effective enforcement mechanism must not be lost from view.

S.2390 represents a modest step toward repealing those barriers erected by the Supreme Court which effectively prevent large numbers of consumers with similar claims to assert their rights in a single action. It is such judicial obstacles which this legislation seeks to overrule. Specifically, Section 3 of S.2390 would overrule *Snyder* v. *Harris*,[9] by permitting the aggregation of all claims which exceed $25 to meet the $10,00 jurisdictional amount. Section 3 would amend 28 U.S.C. § 1331 (Federal question jurisdiction) and 28 U.S.C. § 1332 (diversity jurisdiction) by permitting such aggregation.[10] Section 3(c) of S. 2390 would modify the rule set forth in *Eisen*,[11] which requires individual notice to all class members whose names and addresses may be ascertained through reasonable effort. The proposed modification would permit a United States District Court to consider various alternative methods of providing notice to unnamed members of the class. The proposal would include permitting random sampling of the class in order to determine the likelihood that significant numbers of the class would desire to opt out. The provision also would permit apportioning the costs of notification between the plaintiffs and the defendants "if justice so requires". The new provision also would require a "mini-hearing" on the apportionment of costs. The modifications contained in S.2390 are important first steps toward providing consumers with access to the courts. Thus, the bill represents a significant effort toward fulfilling the redress purposes of the class action device.

With regard to the specific provisions of S.2390, we recommend the removal of the $25 floor on the amount of the individual claims which may be aggregated. As pointed out above, many consumer class actions involve lesser amounts of money to the individual consumer. Also, we would recommend redrafting the notice provisions of S.2390, perhaps modeled after the provisions of S. 1288, as reported by the Senate Committte on Commerce, Science, and Transportation. That bill permitted the courts considerably more flexibility in ordering alternative types of notice. S.2390, on the other hand, seems to imply that only one method of notice for all members of the class may be ordered by the court. We support concepts permitting the court to evaluate the efficacy of various types of notice by statistical or other random sampling methods, such as is permitted by the provision contained in S. 2390. In addition, recognition of the practical problem of paying the actual costs of providing notice is absolutely critical in providing for an effective class action remedy. However, the solution set forth in S.2390, that of apportioning notice costs between plaintiff and defendant, is but one of many possible solutions which have been offered. An alternative method, the establishment of a notice fund in the U.S. Treasury, is novel and of interest;[12] such a proposal would avoid potential constitutional problems.

In conclusion, we commend the subcommittee for its consideration of S. 2390 and endorse the purposes for which the bill was drafted—to ensure compensation to consumers and others who have suffered mass injury. However, we would also recommend that the subcommittee analyze the other purposes

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[9] 394 U.S. 332 (1969).

[10] Obviously, the potential abolition of diversity jurisdiction would make this portion of the bill unnecessary. See S. 2389 and H.R. 9622.

[11] 417 U.S. 156 (1974).

[12] See e.g. S.1288, § 11(c) as reported by the Senate Committee on Commerce, Science and Transportation.

which class actions mechanisms were designed to serve, the prevention of unjust enrichment function and the deterrence function, and include in S. 2390 additional provisions designed to effect these goals.

Senator METZENBAUM. Prof. Roger Goldman of St. Louis University School of Law.

TESTIMONY OF ROGER L. GOLDMAN, PROFESSOR, SCHOOL OF LAW, ST. LOUIS UNIVERSITY, ST. LOUIS, MISSOURI

Mr. GOLDMAN. Thank you, Mr. Chairman.

I am a professor of law at St. Louis University, currently on sabbatical studying the operations of the Federal district courts in Manhattan and Brooklyn.

Earlier this week, I should point out, the House and the Senate conferees approved a bill for 152 additional judgeships. That may have some impact in terms of being able to absorb any overburdening that S. 2390 may or may not have on the courts. Of course, those additional judgeships may also affect the need for abolishing diversity.

On that point, since we have gotten into it a bit, I would be in favor of an amendment to permit mass disaster cases to stay in the Federal courts. There is currently the Tenerief air crash case going on in the Southern District of New York involving an air crash outside the country of some 600 victims, and it is a diversity case. I don't think that kind of case could be conveniently brought in State court. So I think there is some need to retain that in your diversity legislation.

Further, on the diversity point, going along with Mr. Bernstein, I would think that State courts would be less able, familiar, and sympathetic to handle the kinds of class actions we are talking about today. As a matter of fact, the current situation is just the opposite from what I would expect. Federal courts now hear simple negligence cases and contract disputes between merchants, but they can't hear the kind of environmental and consumer cases that we are concerned about.

If anything, I would think that situation ought to be reversed, where the Federal court gives up those negligence cases which State courts are perfectly able to handle and start hearing the kinds of class actions that your bill would permit.

With respect to overturning aggregation, no one has mentioned today that there may actually be a timesaving effect of your bill. No longer will the courts have to go through the rather esoteric question of deciding whether a matter is common and undivided, in which case aggregation is now permitted, or whether it is separate and distinct, in which case it isn't. There are a lot of appellate decisions on that question. With your bill, we wouldn't have to go through that exercise. Further, it will prevent the back-door approach that is now used to get claims into Federal court under the doctrine of pendent jurisdiction. Under your bill, you could go directly into Federal court without having that pendent claim.

On the $25 issue that you mentioned, I should point out that the Justice Department's draft statute does not have any minimum requirement at all. That's the way they have handled it.

Let me turn to the notice provisions of the bill. Those who favor the result in *Eisen*, I suppose, do so because they perceive one or more abuses in 23(b)(3) class actions. Those concerns, I would say, in the main, include the fact that defendants stand to lose astronomical amounts for merely technical violations of the law.

The second abuse might be that such cases take years to try in courts, and they are accompanied by all kinds of delaying tactics.

Finally, it is often alleged that the only people who benefit are plaintiff's counsel.

Even conceding those highly disputed allegations for the moment, there are ways to handle each one of those abuses without having *Eisen*—without, in effect, banning small consumer and other class actions. For example, if you wanted to limit attorneys benefiting, one way to do that is by having, as we now do, the courts approve any settlement. Or, by statute, if the Congress finds that there is tremendous abuses, limiting the amout of recovery in some cases.

I might add that the draft class action statute by Justice does just that. They do limit attorney fees in the class action.

Senator METZENBAUM. In what way is that done?

Mr. GOLDMAN. It is in section 3031 of their bill.

What they do is that they will say it can only be a certain—I don't have the exact language—but they would only allow a certain hourly fee to be given. If there is a contingent fee arrangement, that can't be piggybacked onto some other award. There are all kinds of possibilities for limiting the fees.

Senator METZENBAUM. Doesn't the court now normally set the fee? Isn't the court providing that kind of supervision?

Mr. GOLDMAN. The court does do that, without the kind of specific direction, however, in rule 23 that a statute or other rule might give. But they do do that. It varies from appellate jurisdiction to appellate jurisdiction, but there are limitations.

Senator METZENBAUM. I am not quite clear how you could have a Federal statute which would provide a limitation on the amount of fee, because I'm not certain what standards you would use.

Lawyers in certain parts of the country charge a much higher hourly rate. Lawyers in these kinds of cases work on a contingent fee basis. They lose some, and they win some. So I would be quite curious.

Now you talked about the Justice Department bill on this subject.

Mr. GOLDMAN. That's that draft class action statute we already talked about. It's the December draft class action statute that you referred to earlier.

Senator METZENBAUM. Yes. I guess the Justice Department only uses the prevailing community going rate.

Mr. GOLDMAN. Yes. I think that's how they have it written.

Senator METZENBAUM. I have some difficulty trying to spell that out. There is the element of contingency.

Where the defendant's lawyer is charging $150 an hour and getting it win, lose, or draw, the plaintiff's lawyer only gets paid if he or she wins.

That gives me some concern when you try to do that by legislation, because if it's the prevailing community rate, that means there

is no element of contingency in it unless, I suppose, you also add something to include a fair allowance with reference to the fact that the case is handled on a contingency basis.

Mr. GOLDMAN. I haven't tried to draft that, and it may not be able to be done. But I prefer that approach to throwing out the baby entirely—of no class action, which is essentially what we have now.

Senator METZENBAUM. I'm not suggesting no class actions. I'm just suggesting whether or not it is a satisfactory procedure to leave it up to the courts or to try to do something with that subject congressionally, since it does not appear to have been a problem area.

I do think that you could possibly provide a provision that the plaintiff's lawyer shall not be compensated on the basis of it being a percentage of the award, which maybe is the real nub of the issue.

I'm not certain. I have some difficulty in saying that the plaintiff's lawyer ought to get *a* percentage of $11 million, or whatever the case may be. And that has been the fact in some cases, and some astronomical fees have been paid as a consequence.

Mr. GOLDMAN. On the second point of dealing with the abuses, in terms of astronomical recoveries from your technical violations:

Again, Congress, if they find that to be a problem—and I am not at all sure that it is—they stepped in in the truth-in-lending area and limited the amount of recovery. Again, I'm not sure if I favor that; but that's an approach that can be taken to deal with abuses if it is found that there are, in fact, abuses to class actions.

Finally, if there is a problem of dilatory motions or other improper trial tactics in class actions, and again, I have not particularly observed that to be any more true than other kinds of cases, there are ways to penalize litigants and attorneys for filing frivolous motions.

The Justice Department in its draft statute tries to do it by adding up the percentage of motions won or lost. If you lose more than a certain number of motions, even if you ultimately prevail, you have a reduction in your fee.

Again, I'm not sure I approve of that; but it is just to illustrate that there are ways to get at abuses if they are real, rather than having the *Eisen* situation where we essentially have given up because of the Supreme Court's decision on these small class actions.

Finally, on the notice provision, there have been concerns mentioned earlier with the court holding a preliminary hearing on the merits.

One of the grounds is that a judge who has a preliminary hearing to determine cost allocations will somehow be prejudiced when he gets to the trial on the merits. He will have already made a preliminary determination.

Earlier, as Professor Homburger said, that is done all the time by judges in preliminary injunction matters and in supervising settlement negotiations. If a particular judge finds that it would be improper to handle a preliminary hearing on the merits, I would imagine under the bill the hearing could be handled by a magistrate. That is now done when a judge has a judge-tried case and doesn't want to get involved in settlement negotiations. The judge will re-

fer the matter to the Federal magistrate to handle. I'm not sure if there would be any problem currently under the bill to do just that.

Those were all my written comments.

Senator METZENBAUM. Thank you, Professor Goldman.

You expressed the view that S. 2390 would not, in fact, overburden the Federal courts and their caseload, despite the charge that it will permit more class actions to be filed. What is the basis for that point of view?

Mr. GOLDMAN. It is something that I alluded to earlier. That is that the Federal courts are now going through time-consuming matters in trying to determine whether claims can be aggregated under current law.

I mentioned earlier that if two claims are considered common and undivided, as opposed to separate and distinct, they can be added together. Now those are terms of art which Professor Kaplan has said make little or no sense at all. It is very difficult—and the courts have tremendous difficulty—trying to decide currently whether matters can be aggregated. Under your bill, that will no longer be necessary.

So what I am saying is that it is a trade off. We are going to get rid of some of the time-consuming matters that we currently have.

Senator METZENBAUM. You note that the Justice Department draft proposal makes no provision for notice in small injury cases under $500. Do you believe this raises a constitutional problem which is avoided by our bill, S. 2390?

Mr. GOLDMAN. Yes.

Under their approach, the parens patriae approach that you mentioned, they take the position that the individuals are really not parties at all, that it is the United States who is bringing the suit. They are the real party in interest.

And, therefore, the individual doesn't need notice.

Well, even if technically correct, I think that that is a policy that is unwise and of grave constitutionality for someone not to get any notice at all and, therefore, lose an opportunity to participate in a suit to recover up to $500.

Senator METZENBAUM. Thank you very much, Professor Goldman. We appreciate your being with us.

[The prepared statement of Professor Goldman follows:]

PREPARED STATEMENT OF ROGER L. GOLDMAN, PROFESSOR OF LAW, ST. LOUIS UNIVERSITY

My name is Roger L. Goldman, Professor of Law, St. Louis University. I have been teaching law since 1971, including courses in Constitutional Law and Civil Procedure. This academic year I am observing the operations of the courts in the Eastern and Southern Districts of New York. As a former legal services attorney and past President of the ACLU of Eastern Missouri, I have concluded that the Federal judiciary is virtually alone in a local community in guarding the rights of individuals. I am therefore strongly in favor of S. 2390 which gives access to Federal courts to persons who otherwise would be unable to have their grievances redressed.

I thought my comments would be most helpful to the subcommittee if I anticipated the arguments in opposition to the Bill. I will also compare the approach taken by the Justice Department in its December 1977 draft class action statute with respect to aggregation and notice.

With respect to the aggregation sections of the Bill, the argument is sure to be made that this will overburden the courts. Aside from the policy question of whether it is wise to shut the doors to the courthouse to persons with genuine grievances, it should not be conceded that the increase will be great. Since actions based on federal laws can be brought under jurisdictional statutes which do not require any amount in controversy, the Supreme Court discounted the impact of its aggregation decisions in Federal question cases. *Zahn* v. *International Paper Co.*, 414 U.S. 291, 302 n. 11. Thus, with respect to the amendment of § 1331, S. 2390 should not cause a substantial increase in filings.

Even those cases which must be brought under § 1331 can nonetheless be heard if they can be joined with claims not requiring $10,000 under the doctrine of pendent jurisdiction. Typical of this kind of action is a challenge under Rule 23 to state welfare regulations in conflict with the Social Security Act. Usually, the individual claim is for less than $10,000 and thus the federal courts have no jurisdiction. However, by adding a claim that the state regulation violates the constitutional rights of the recipients, jurisdiction can be obtained under 28 U.S.C. § 1343, which does not require any amount in controversy. The constitutional claim must be "substantial," meaning only that it is not "obviously frivolous," *Hagans* v. *Lavine*, 415 U.S. 528, 537 (1974), in order for the court to take jurisdiction. Under settled practice, the court will decide the statutory claim first and never reach the constitutional claim which is typically without merit and raised solely to bring the statutory claim before the court. By allowing aggregation of claims, S. 2390 will permit the courts to proceed directly to the federal statutory claim.

Instead of increasing the burden on the courts, S. 2390 will significantly lessen the time now expended by judges in determining whether claims are "common and undivided" or "separate and distinct." Under the aggregation decisions, the former claims may be joined to reach the jurisdictional amount while the latter may not. Since the meaning of those phrases is far from clear, the litigant who loses in the trial court has a good chance of prevailing on appeal, and thus a great deal of time is spent arguing a matter which has nothing to do with the merits. S. 2390 will put an end to this wasteful process.

The increase in cases by enactment of the Bill will be non-pendent, separate and distinct diversity claims, typically consumer, environmental or shareholder class actions based on state law. Because of the aggregation cases, the Federal courts cannot hear those cases if they involve persons damaged in an amount less than $10,000. They are hearing cases involving automobile accidents and contract actions between merchants, so long as $10,000 is at stake. So long as diversity jurisdiction is retained, I can see no reason why the Federal courts should hear the latter cases but not the former; if anything, the result should be just the opposite.

The Justice Department's Draft Class Action Statute of December, 1977, also changes current law on aggregation of claims. Unlike S. 2390 which applies to both diversity and Federal question cases, the Draft Statute is limited to Federal question cases. It permits aggregation only in class actions where more than 40 claimants have been injured while S. 2390 applies not only to class actions but also to other multiparty devices such as joinder. Under S. 2390, the current jurisdictional amount of $10,000 is retained, while under the Draft Statute, the minimum amount is $20,000. There is no minimum amount per claimant under the Draft Statute while S. 2390 requires $25.00.

I now will address the notice provisions of the Bill. Because of the Supreme Court's decision in *Eisen*, class actions involving large numbers of persons with small monetary injuries cannot feasibly be brought; in *Eisen*, the cost of notice to the plaintiff would have been over $200,000. S. 2390 does away with the requirement of individual notice in such cases but permits other forms of notice, including individual notice, to absent class members.

The Justice Department's Draft Statute goes further; in cases involving small monetary injury, no notice at all is given to absentees. Even if they should hear about the suit, they are not permitted to intervene. S. 2390 assumes, to the contrary, notice and the opportunity to participate or request exclusion are worth preserving. The degree of notice under the Bill depends on such factors as the likelihood that absentees will request exclusion.

Although the Supreme Court based its decision in *Eisen* on the meaning of Rule 23, it referred to the constitutional underpinnings of that Rule in holding that individual notice was required. The Justice Department may be correct in

concluding that its approach does not violate due process, Draft Statute at 38, but the provisions of S. 2390 avoid the substantial constitutional question. Moreover, there are sound public policy reasons for letting injured parties know that their rights are being irrevocably decided, even if their injuries are worth only $500.

Since the Draft Statute does not permit notice to absentees, it does not have to deal with the second part of *Eisen*, the cost of notice and who must pay it. The Supreme Court held that under Rule 23, the entire cost must be borne by plaintiff. Thus, even if individual notice were not required in *Eisen*, the cost of notice would have been over $20,000. Since no individual plaintiff would put up such costs, the effect would be a cessation of the action. Following the solution arrived at by the district court in *Eisen*, S. 2390 requires a preliminary hearing on the merits to allocate the costs proportionately.

The Supreme Court in *Eisen* criticized the preliminary hearing procedure because there were not the safeguards of a regular trial and the defendant might be prejudiced in later proceedings. 417 U.S. at 178. Yet trial judges form tentative views on the merits in hearing motions for preliminary injunctions, apportionment of discovery costs, and participation in settlement discussions. It should be made clear that any determinations at the hearing are for the sole purpose of allocating costs of notice and have no effect on future proceedings. The Justice Department advocates such preliminary hearings on the merits prior to certification of the class. *See* Draft Statute at 46–47.

I have appended to this statement suggested revisions to S. 2390 which I believe clarify the intent of the drafters.

APPENDIX

Suggested Revisions to S. 2390, "Citizens' Access to the Courts Act of 1978"

I Suggested Revisions

A. Section 3, Aggregation of Claims

1. Whenever the word "parties" appears, add the phrase "and absent members of a class." If this is too cumbersome, a definition subsection of the word "parties" to include absent class members would accomplish the same thing.

2. A new section 3(b) should be added, to amend § 1331(b) in the same manner as S. 2390 amends § 1332(b).

B. § 1657, Notice in Class Actions

1. On page 4, line 7, substitute for "random" the word "representative."

2. On page 4, line 3, after the word "class" insert the phrase "the adequacy of representation". Instead of this statutory change, add in the Senate Report accompanying S. 2390 that subsumed in the phrase "the interest of the represented members in knowing of the pendency of the suit", page 3, lines 18 and 19, is the adequacy of representation.

3. Renumber proposed sec. 1657(b)(2) to sec. 1657(b)(3) and insert as a new sec. (2): The first sentence of Rule 23(c)(2) of the Federal Rules of Civil Procedure is repealed.

II Comments

A. Section 3, Aggregation of Claims

1. Assuming that the intent of the Bill is to permit aggregation in class actions as well as in cases of joinder, the word "parties" is needlessly ambiguous. A defendant seeking to apply a narrow interpretation to the Bill would point out that absent class members could not have their claims aggregated since they are not technically parties.

2. I have been unable to ascertain why § 1332(b) is to be amended but not the virtually identical provision, § 1331(b).

B. § 1657, Notice in Class Actions

1. The use of the word "random" might suggest that a method of giving notice which has been validated by a statistician is required under the section. Assuming that is not the intent of the Bill, the word "representative" avoids the technical connotation and also conveys the idea behind such cases as *Hansberry* v. *Lee*, 311 U.S. 32 (1940), that the entire spectrum of interests should have the opportunity to participate in a class action.

2. Consideration of "adequacy of representation" includes both the competency of counsel and the interests of the representative parties in pursuing the case with vigor. Even though these factors are meant to be analyzed by the court in

the certification stage, the decision to certify is an all or nothing proposition—either the class is certified or it is not. The quality of notice, however, can be more finely tuned to permit the judge to require more rigorous notice procedures when there is some lingering doubt about the ability of counsel or the true interests of the representative parties.

3. The effect of the notice provisions of the Bill is to repeal the first sentence of Rule 23(c)(2). Unless there is some legislative drafting problem with "repealing" a rule of civil procedure, it seems advisable to make the repeal explicit. *See, e.g.*, Section 4 of the Justice Department's Draft Class Action Statute.

Senator METZENBAUM. Mr. Beverly Moore is not in the audience; is that correct? We will include his statement in the record. [See p. 59 of the appendix.]

Our next witness is Mr. Richard Alpert.

TESTIMONY OF RICHARD ALPERT, STAFF ATTORNEY, NATIONAL CONSUMER LAW CENTER, BOSTON, MASSACHUSETTS

Mr. ALPERT. Thank you, Senator, for allowing me to present my views.

Without having to read the statement, I will just quickly go over the points to be made and perhaps touch on a few of the other statements that have been made this morning.

Regarding the notice provision of the bill, I strongly support that provision. I would like to comment that one of the witnesses earlier observed that this problem exists where there are large classes. There was an implication that this was not a problem where the classes were relatively small.

In talking with numerous legal services attorneys in various types of cases, they have experienced notice cost problems, even when the class sizes are as small as several thousand. Many legal services programs don't have a lot of funds to pay for notice provisions, and this type of a provision would aid even small classes to go forward in Federal court. Even when the classes are as small as several thousand, to legal services program $500 is maybe a significant sum.

Also, there have been several decisions allowing discovery from legal services programs and other plaintiffs as to the financial resources. And I think that this is an untoward consequence that this bill will help address.

One problem I have with the notice provision which may be a small one, is that the section applies only to 23(b)(3) actions, while *Eisen* addressed only 23(b)(3) actions under rule 23(c), and notice is not required for other than (b)(3) actions.

In many (b)(1) and (b)(2) actions, notice is ordered by the court for various reasons. I think it is important to have a provision in the bill that flexible notice provisions may be available for actions other than (b)(3) as well.

I don't see any harm in such a provision, and I think that I would be concerned that some court would read a sense of Congress that flexible notice is preferred only in (b)(3) actions and not for (b)(1) or (b)(2).

I understand the thrust of this part of S. 2390 is to address the *Eisen* decision and the (b)(3) problem, but I think it might be important to amend the bill to refer basically to class actions certified under rule 23 and allow that flexibility for all class actions.

Again, I agree with many previous witnesses that this is just one step in the notice provisions; that there are many other obstacles to class action treatment which are more egregious and should be addressed.

I also feel that piecemeal efforts might be the most sensitive way of addressing the question. But I think it is important for the subcommittee to realize that there are many other problems, and particularly the problems of damage calculation and damage distribution, previously referred to, which should be addressed in one form or another.

Regarding the aggregation aspect of the bill, the thrust of my testimony is that some step is necessary to address the problem created by the interpretation in several circuits of 28 U.S.C. 1343(3), wherein it is possible to have a right based upon a Federal law which is not constitutional and yet still need to achieve the $10,000 amount in controversy, which deprives many people of the right to be in Federal court to adjudicate the Federal claims.

In that regard, responding to a previous question by the Chair regarding State court proceedings, not only are many State courts less favorable to class actions than Federal courts, but when Federal rights are involved it is preferable to be in a Federal jurisdiction where the judges are more familiar with Federal law.

Similarly, judges in Federal courts would be generally more familiar with the class procedure, since there are very few State court class actions, except in the few States that are most favorable to class actions, such as California.

Again, regarding the aggregation, although there is a need to address the problem, as I pointed out in the testimony, it is my feeling that S. 2389 is a better way to address the issue.

I go through several reasons for that in my testimony. Briefly summarizing them to say that much of the problem in the area is wasted court time over both the amount in controversy—is there $10,000 in controversy?—and whether there is a substantial constitutional issue.

The approach of S. 2389 will eliminate most of these questions, if not all of them. The approach of S. 2390 will still retain a number of them.

For example, under S. 2390 it is possible that a defendant will be more likely to oppose the class action procedure, realizing that if the class is defeated, the aggregation will not be possible and, therefore, the $10,000 jurisdiction amount will not be reached and the case will have to be remanded to State court.

This, again, will create unnecessary litigation over the class acton maintainability question, whereas S. 2389 would avoid that problem entirely.

Similarly, under the amount in controversy aspect of S. 2390 we still will have the question of the dollar value of the claims involved. Will there have to be litigation? Is there $27 or only $26 perhaps in this claim, because when you add them together, maybe they will only be $9,900 instead of $10,000.

That's a very real question in many instances, and I think the approach of S. 2389 will eliminate that entirely, and the approach of S. 2390 would not necessarily.

Similarly, regarding the issue of the $25 floor, which has been alluded to by several witnesses, I do not see any reason or necessity for that. In fact, I think it may create quite a few problems.

Not only is there a question about whether class members whose claims are less than $25 would be included in the class, let alone be aggregated to achieve the $10,000 amount, but there would also be litigation over whether their claims are, in fact, $25 or more. Again, this will not help solve the problems of wasting judicial resources on collateral procedural issues.

Also, there could be many instances where people will have Federal claims of only $5, $6, or $7; and yet there are sufficient numbers to warrant Federal court jurisdiction.

I don't see the justification for prohibiting those people from being able to assert their Federal rights in Federal court, whereas others will be able to assert such rights under S. 2390 merely because they have $20 or more at stake.

If the policy is that a large enough amount in controversy, or important enough rights, will justify Federal court jurisdiction, then I don't see any justification for having any floor or any cutoff amount.

If you have 10,000 people, each deprived of $1, I don't see any distinction between that and, say, 100 people deprived of $100.

I would just like to reaffirm what other people have said regarding the drafting problems.

As I see it, the use of the word "parties" is inappropriate. There have been a number of decisions in other areas of class action law where the concept of whether class members are parties has been important, such as whether discovery is available or whether counterclaims may be asserted against absent class members.

Generally speaking, the courts have taken the position that absent class members are not "parties" for proceedings under the Federal rules. And, therefore, I think it is important to avoid the use of the word "parties" in the aggregation concept.

Thank you for allowing me to present my views.

Senator METZENBAUM. Thank you.

Let me ask you just one question.

You are practicing law in a community service law firm; is that correct?

Mr. ALPERT. Yes, in some regards.

Senator METZENBAUM. Pardon?

Mr. ALPERT. A large part of our work involves assisting the neighborhood legal aid attorneys in their actual practice.

So my present experience is more in the nature of working with neighborhood attorneys and their problems.

In that regard, I would say over the last several years I have been involved in approximately 100 class actions with attorneys in various aspects—not just consumer law but all class actions.

We are involved in some litigation of our own, but it is of a minor nature compared with the assisting aspects.

Senator METZENBAUM. Say you have been involved in 100, how many of them did you have to turn away because of the recent Supreme Court decisions?

Mr. ALPERT. That is difficult to answer, because those 100 cases all involve suits, generally speaking, where the suit is filed already. And the attorney then has some problems with a class action procedure and would like some assistance in that regard.

However, there have been occasions—I can think of several at least—where the notice costs were a great deterrent. I have received calls for assistance from attorneys saying their program may not be able to afford even $300 to $500 to pay for notice. Is there any way around it?

And if there isn't, they won't bring it as a class action.

Specifically, I can think of several in the truth in lending area where that has been a problem.

So I am aware of at least several instances where the notice problems have deterred filing of class actions in Federal court.

Senator METZENBAUM. Thank you.

Mr. ALPERT. Thank you.

[The prepared statement of Mr. Alpert follows:]

PREPARED STATEMENT OF RICHARD ALPERT, STAFF ATTORNEY, NATIONAL CONSUMER LAW CENTER

Introduction

My name is Richard Alpert. I am a staff attorney with the National Consumer Law Center, a legal services program for low income persons funded by the Legal Services Corporation. I have considerable experience with class actions under Rule 23 of the Federal Rules of Civil Procedure and with similar state court class action rules. I am the author of the "Class Action Manual," a publication of the National Consumer Law Center for legal services attorneys. I also have lectured and written articles on the class action procedure.

I strongly support that section of S. 2390 dealing with notice in class actions. I support as well the section which would permit the aggregation of claims to meet the $10,000 jurisdictional amount of 28 USC § 1331 but suggest that a better way to resolve the problem of citizen access to Federal courts caused by amount in controversy requirements is the passage of S. 2389 introduced by the distinguished chair of this Subcommittee and currently before the Subcommittee on Improvements in Judicial Machinery.

Notice in Class Action

Section 3(c) of this bill would be of significance to low income plaintiffs and class members in Rule 23(b)(3) class actions because it gives the Federal courts flexibility which they presently lack as to whom notice must be sent and who must bear the cost. The Supreme Court in *Eisen* v. *Carlisle & Jacquelin*, 417, US 156 (1974) interpreted Rule 23(c)(2) to require personal notice to all identifiable class members in Rule 23(b)(3) damage class actions. The court said that the plaintiff must pay the cost of assembling and mailing this notice. The *Eisen* decision means that low income consumers wishing to bring a (b)(3) antitrust or employment discrimination class action have to face the prospect of mailing notices to perhaps thousands of fellow class members when they may be too poor to hire a lawyer. Unless such persons can find some other means of financing the litigation, important cases involving federal rights are thus simply not filed or are pursued on only an individual basis. There should be no such price tag on justice.

This bill would modify *Eisen* significantly. A Federal court would not necessarily have to order notice to all identifiable class members. In some circumstances a random sample might suffice. Such a flexible provision is sensible: There are many (b)(3) classes where extremely costly notice is required by Rule 23 even though class members have no need for receiving notice, such as where their claims are small, there is little likelihood of divergent interests in the class membership and individuals would have little interest in controlling

their own litigation. The bill also provides for the possibility in certain limited circumstances that the defendants might pay for the notice or both parties share the costs. In a case involving low interest consumers and a wealthy corporate defendant, and where there is a strong likelihood of the class prevailing on the merits, it may be essential that the defendant pay all or part of the costs of notice to enable the lawsuit to go forward and protect the absentees' interests. In short, S. 2390 vastly improves (b) (3) notice provisions as required by present law. Congress should move quickly to enact this change.

It is vital, however, that this subcommittee understand that such a change will not eliminate all significant barriers to class action suits involving large numbers and small claims. In fact, it does not address the greatest obstacle: calculation and distribution of damages. Many courts are unwilling to use their broad powers to facilitate such class actions absent specific statutory authority even though it means many individuals will be without relief and the defendant can retain illegally allocated funds. *See e.g., Eisen* v. *Carlisle and Jacquelin*, 479 F. 2d 1005 (2d, Cir. 1973), *vacated*, 417 U.S. 156 (1974) ; *In re Hotel Telephone Charges*, 500 F. 2d 86 (9th Cir. 1974) ; *Hackett* v. *General Host Corp.*, 172 Trade Cases ¶73, 879 (E.D. Pa. 1970) ; *United Egg Producers* v. *Bauer Int'l Corp.*, 312 F. Supp. 319 (SDNY 1970) ; *Fertey* v. *Blue Cross of Iowa*, 68 FRD 53 (ND Iowa 1974) ; *Goshes* v. *General Motors Corp.* 59 FRD 589 (N.D. Ill. 1973) ; *City of Philadelphia* v. *American Oil Co.*, 53 FRD 45 (D. N.J. 1971). The courts deny potentially meritorious class action because it may be too difficult either to determine each individual's small claim or to distribute to each individual the monetary award. I urge this subcommittee to amend S. 2390 or consider any additional proposal addressing this problem, preferably by authorizing class wide calculation of damages and equitable distribution of damages.

Aggregation To Meet Jurisdictional Amount Requirements

The section of the bill permitting plaintiffs to aggregate their claims to meet the $10,000 amount in controversy requirements of 28 U.S.C. § 1331 (the "Federal question" jurisdictional statute) is an attempt to assure that Federal rights can be litigated in their logical and rightful forum—Federal court. The current law of Federal jurisdiction is a morass for a low income plaintiff with a claim arising under a Federal statute (but not the Constitution) which is less than $10,000 value or, more importantly, incapable of monetary evaluation. Many legal services clients whose Federal statutory rights to health care benefits or emergency public assistance payments have clearly been violated have difficulty in some circuits establishing their right to be in Federal court, even though, as these circuits acknowledge, 42 U.S.C. § 1983 gives them a cause of action for deprivation under color of state law of "any rights, privileges, and immunities secured by the Constitution *and laws*" of the United States (emphasis added).

This anomalous situation occurs because the jurisdictional counterpart to § 1983, 28 U.S.C. § 1343(3), is less clear as to whether it covers claims based solely on alleged violations of statutory rights. Some circuits have therefore concluded that plaintiffs must allege a constitutional claim which is not frivolous to obtain jurisdiction under § 1343(3) and that a Federal court can consider the statutory claims only as pendent to the constitutional claim. See *Gonzalez* v. *Young*, 560 F. 2d 160 (3rd Cir. 1977), cert. granted, 46 LW 3526 (February 21, 1978) and *Andrews* v. *Maher*, 525 F. 2d 113 (2nd Cir. 1975). But cf. *Blue* v. *Craig*, 505 F. 2d 830 (4th Cir. 1974) and *Chapman* v. *Houston Welfare Rights Organization*, 555 F. 2d 1219 (5th Cir. 1977), cert. granted 46 LW 3526 (February 21, 1978). Poor plaintiffs denied jurisdiction under § 1343(3) usually have difficulty establishing jurisdiction under other statutory grants, especially those such as 28 U.S.C. § 1331 where there is an amount in controversy required. Most legal services cases involve relatively small amounts of money (although not from the perspective of the low income litigant) falling far short of the $10,000 required by § 1331. See *Gonzalez*, *supra* and *Andrews*, *supra*. Under the holdings of *Snyder* v. *Harris*, 394 US 332 (1969) and *Zahn* v. *International Paper Co.*, 414 US 291 (1973) these plaintiffs cannot aggregate their claims to reach the $10,000 jurisdictional amount.

Some plaintiffs with legitimate Federal claims thus altogether are denied a forum. Many others waste significant amounts of time, even years, as well as the precious time of our courts litigating these jurisdictional issues. As previously indicated, in most circuits, if the plaintiffs assert jurisdiction under 28

U.S.C. § 1343(3), they must at the very least plead a constitutional claim which is not frivolous under the standard of *Hagans* v. *Lavine*, 415 U.S. 528 (1974). There has been, not surprisingly, extensive litigation over the substantiality of the constitutional argument. In *Hagans* itself, poor plainitffs began a challenge to certain New York welfare regulations in 1972. The Supreme Court found jurisdiction in 1974. The Federal courts and the parties did not begin to address the merits meaningfully until 1975. See the history of the case in one of the numerous Second Circuit opinions, 527 F. 2d 1151 (2nd Cir. 1975).

There is also protracted litigation involving another issue previously referred to: Whether § 1343(3) or 1343(4) authorize suits against State or local officials where the plaintiffs allege that the defendants have violated only a Federal statute and not a provision of the Constitution. Litigants also spend years on the question of whether plaintiffs claiming jurisdiction under 28 U.S.C. § 1331 have met the $10,000 amount in controversy requirement. The body of law on measuring the amount is complicated. Professor Wright devotes 156 pages to it in his treatise, 14 Wright, Miller & Cooper, "Federal Practice and Procedure": Jurisdiction, 355–511 (1976).

The Federal courts, pressed to resolve crucial issues affecting our national life—from criminal cases to antitrust suits to challenges to HUD housing programs—are wasting precious resources on jurisdictional issues. As the Second Circuit has observed in *Andrews* v. *Maher*, when it found no jurisdiction:

We note with irony . . . of having to spend so much time and effort on questions of jurisdiction when the underlying issues on the merits seem comparatively simple. Moreover, we recognize, as we have before, that such claims are highly appropriate for a federal forum, and we are aware that it may seem hypertechnical to permit subtle analysis of jurisdictional statutes to accomplish a result which, on policy grounds, we find uncongenial. But we prefer to wait guidance on these jurisdictional issues, on which there is now a clear conflict among the circuits, either from higher authority or from Congress. 525 F. 2d at 120.

This all would provide guidance to the courts by permitting "all parties bringing the action"[1] to aggregate their claims in order to reach the $10,000 amount in controversy. While such a change in the law would be helpful, I support the more comprehensive, valuable and rational approach of S. 2389, introduced by the chair of this Subcommittee. Section 2389 (and its counterpart H.R. 9622, which passed the House February 28, 1978) would simply abolish the amount in controversy requirement in § 1331, eliminating any financial barrier to the right to litigate Federal claims in Federal court. The approach of S. 2389 has several significant advantages over this aspect of S. 2390. First, it does not create a dual system of adjudication dependent upon whether the suit is filed as a class action or individual action. Under S. 2389, a party would not have to use the class action device to secure Federal court jurisdiction,, thereby discouraging unnecessary class actions. Second, S. 2389 will prevent lengthy and strident litigation over the maintainability of a class action. Under S. 2390, a defendant will redouble its efforts to defeat the class status in an attempt to reduce the total claims below $10,000 and defeat Federal court jurisdiction. Such unnecessary court time will be avoided if S. 2389 is enacted since Federal court jurisdiction will not rest on a certified class and aggregated claims. Third, S. 2389 will avoid the costly and wasteful litigation over the amount in controversy. There will be no need to determine the exact dollar amount of each person's claim or the exact number of persons involved, problems which will exist under S. 2390. The further problem of denying Federal court jurisdiction where claims are incapable of monetary evaluation also will be avoided. Thus, S. 2389 will reduce the burden on the Federal courts and parties where important questions of Federal law are at stake. I submit with this a statement of a working group of legal services attorneys, of which I am a part, in support of S. 2389 which more fully explains my position. [The statement referred to will be found on p. 65 of the appendix.] I urge the members of this subcommittee as members of the full Judiciary Committee to work for the prompt passage of S. 2389. Such a result will assure open access for citizens with Federal claims and would obviate the need for the aggregation provision of this bill.

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[1] The bill is not clear whether this phrase covers class members or only named plaintiffs. In legal services cases involving public assistance benefits of $100 per plaintiff, there would need to be 100 named plaintiffs unless the class claims could be aggregated.

Consistent with my support of S. 2389, I favor abolition of diversity of citizenship jurisdiction, but if it is retained, I can support application of the aggregation concept to 28 USC § 1332.

Conclusion

I thank the subcommittee for hearing my views. I urge passage of S. 2389 to eliminate all amount in controversy requirements for cases involving Federal rights, but I would support the aggregation portion of S. 2390 as a secondary measure should S. 2389 fail to pass this year. I strongly support the notice provisions of S. 2390 but suggest that more class actions improvements are necessary.

Senator METZENBAUM. That concludes the hearing for this morning.

There will be a subsequent hearing to give those who are opponents of the proposed legislation an opportunity to be heard.

[Whereupon, at 11:30 a.m., the hearing recessed, subject to the call of the Chair.]

APPENDIX

95TH CONGRESS
2D SESSION

S. 2390

IN THE SENATE OF THE UNITED STATES

JANUARY 19, 1978

Mr. METZENBAUM introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 28, United States Code, to reduce financial barriers to citizens' access to the courts for violations of their rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Citizens' Access to the Courts Act of 1978."

SEC. 2. The Congress finds that there is a Federal interest in lowering certain financial barriers to citizens seeking to join in multiparty litigation in the federal courts and in increasing the availability of remedies to citizens suffering violations of their judicial rights. It is the purpose of this Act to remove the inequities created by such barriers to the pro-

tection of citizens' rights by altering certain procedures relating to the jurisdictional amount requirements and certain notice provisions.

SEC. 3. (a) Section 1331 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(c) In determining under subsection (a) whether the matter in controversy in an action exceeds the sum or value of $10,000, exclusive of interest and costs, the district courts shall aggregate the claims of all parties bringing the action. The claim of a party may not be aggregated under this subsection unless the sum or value of such claim exceeds $25, exclusive of interest and costs."

(b) (1) Section 1332 (a) of such title 28 is amended by adding at the end thereof: "In determining under subsection (a) whether the matter in controversy in an action exceeds the sum or value of $10,000, exclusive of interest and costs, the district courts shall aggregate the claims of all parties bringing the action. The claim of a party may not be aggregated under this subsection unless the sum or value of such claim exceeds $25, exclusive of interest and costs."

(b) (2) Section 1332 (b) of such title 28 is amended by deleting such subsection (b) and replacing it with the following:

"(b) Except when express provision therefor is other-

wise made in a statute of the United States, where the plaintiffs who file the case originally in the Federal courts are finally adjudged to be entitled to recover less than the sum or value of $10,000 in the aggregate, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiffs and, in addition, may impose costs on the plaintiffs."

(c) (1) Chapter 111 of such title 28 is amended by adding at the end thereof the following new section:

"**§ 1657. Notice in class actions.**

"(a) In an action which the court certifies to be a class action brought under Rule 23 (b) (3) of the Federal Rules of Civil Procedure, reasonable notice of the commencement of such action shall be given to the members of the class in accordance with the provisions of this section.

"(b) In determining the method of notice in a class action, the court shall consider both the interest of the represented members in knowing of the pendency of the suit and the interest of such members in having the action go forward and the claims of such members presented to the court without receiving actual notice of the suit. The court shall take into account—

"(1) the cost of giving notice by each method considered;

"(2) the resources of the parties; and

"(3) the stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to be excluded from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class.

"(c) Unless the court orders otherwise the plaintiff or plaintiffs shall bear the expense of notification. The court may, if justice so requires, order the defendant to bear the expense of notification, or may require each party to bear a part of the expense in proportion to the likelihood that each will prevail upon the merits. Unless the plaintiff is required to bear the cost of notification, the court shall hold a preliminary hearing to determine the appropriate apportionment.".

(2) The table of sections for chapter 111 of such title 28 is amended by adding at the end thereof the following new item:

"1657. Notice in class actions.".

JUSTICE DEPARTMENT VIEWS ON S. 2390

U.S. DEPARTMENT OF JUSTICE,
OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE
Washington, D.C., May 3, 1978.

HON. HOWARD M. METZENBAUM,
Chairman, Senate Judiciary Subcommittee on Citizens and Shareholders Rights and Remedies, U.S. Senate
Washington, D.C.

DEAR MR. CHAIRMAN: In response to your recent request for comment on S. 2390, let me forward the following views of the Department of Justice. As you know, the Office for Improvements in the Administration of Justice is considering legislation which would substantially revise federal class damage procedures, supplanting Rule 23(b)(3) F. R. Civ. P., to improve access and management. Thus, the Department appreciates the opportunity to comment on S. 2390. We agree that arbitrary financial barriers to court access having no relation to the underlying policies governing use of this precious national resource should not be erected.

I. AGGREGATION OF MULTIPARTY CLAIMS

Section 3(a) of the bill would allow aggregation of "multiparty" claims in actions brought under federal question jurisdiction, 28 U.S.C. §1331(a). As you know, in 1976 subsection 1331(a) was amended to except from its jurisdictional amount requirement those actions brought against the United States and its officers. In addition, many of the federal statutes according federal private rights of action for damages are exempted from the $10,000 jurisdictional amount requirement. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 549 (1972). It is the Department's view that the volume of cases affected would be so small[1] that the Department does not oppose aggregation. A more direct approach, however, might be to repeal the $10,000 requirement so it would not arbitrarily exclude a handful of cases which would not be brought within federal jurisdiction even with aggregation.[2] The Department of Justice supports such an amendment to section 1331.

Section 3(b) would permit parties suing under 28 U.S.C. §1332(a) to aggregate their diversity claims. On this issue the Department would like to defer taking a position, given the pending legislation which could abolish diversity jurisdiction in the federal courts entirely. *See* H.R. 9622. If there is only to be partial abolition of diversity, the Department would like to assess more fully the impact of aggregation on the federal courts if all multiparty and all class actions under all manner of state law were accorded access under 28 U.S.C. §1332(a), as amended. Substantial progress needs to be made in managing multiparty and class actions if access to the courts is to equate to access to justice.

Before turning to the notice provisions of the bill, I might note, as a technical matter, that section 3(a), as drafted, may allow only aggregation of *named-plaintiff* amounts in controversy in class actions, since unnamed class members may be considered "parties."[3] The subcommittee may wish to clarify statutory intent in this regard.

II. NOTICE IN CLASS ACTIONS

The Department expresses its support in principle of section 3(c)(1) of S. 2390. That section purports to adjust the notice requirements of Rule 23(b)(3) actions.[4]

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[1] *Cf.* H. Rep. No. 94-1656, 94th Cong., 2d Sess., 15-16, 29, *reprinted in* 1976 *U.S. Code Cong. & Ad. News*, 6136-37, 6149 (1976) (impact of total repeal of $10,000 federal question jurisdiction requirement and letter of Assistant Attorney General Scalia, Office of Legal Counsel).

[2] *Id.*

[3] *Compare Zahn v. International Paper Co.*, 414 U.S. 291, 300, n.1, 301 (1973); *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1004 (7th Cir. 1971), *cert. denied sub nom., Herriman v. Midwestern United Life Ins. Co.*, 405 U.S. 921 (1972) *with Wainright v. Krafteo Corp.*, 54 F.R.D. 532, 534 (N.D. Ga. 1972); *Fischer v. Wolfinbarger*, 55 F.R.D. 120, 132 (W.D. Ky. 1971). *Cf. Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 485, 488-89 (S.D. N.Y. 1973) (absent class members are not "parties" for purposes of counterclaims).

[4] However, I note that Rule 23(c)(2), as construed in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974), is not explicitly repealed. Presumably this is the intent.

At present, Rule 23(c)(2) requires that in (b)(3) actions best notice practicable under the circumstance be directed to the members of the class, including individual notice to all members who can be identified through reasonable effort. For this, bill paragraph (c)(1) would substitute a "reasonable notice" standard. The bill also elaborates elements the court shall consider in determining reasonable notice in a particular case.

The language of subsection (c)(1) would promulgate a new section 1657 in Title 28.

Proposed section 1657(b) reads as follows:

"(b) In determining the method of notice in a class action, the court shall consider both the interest of the represented members in knowing of the pendency of the suit and the interest of such members in having the action go forward and the claims of such members presented to the court without receiving actual notice of the suit. The court shall take into account—

"(1) the cost of giving notice by each method considered;

"(2) the resources of the parties; and

"(3) the stake of each represented member of the class, and the likelihood that significant numbers or represented members would desire to be excluded from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class.

This language raises several drafting questions which the subcommittee may wish to consider.

(1) Does the language "actual notice" mean "individual notice" specified under Rule 23(c)(2), or mean individual notice with proof of receipt and understanding?

(2) Will the notice standards of subsection (b) apply to Rule 23(d),(2),(e) notice as well? If so this should be made more explicit in language or in legislative history.

(3) Subsection (b), taken as a whole, seems to imply that in some circumstances no notice at all would be required. For example if (1) the cost of giving notice were high; (2) the litigating resources of both parties were low; and (3) the amounts in controversy for absent class members were high, would no notice of any sort be required? For purposes of determining the fairness of foreclosure of absentee claims perhaps these circumstances should be further specified in the statute, *e.g.*, dollar amounts of absentee claims at which notice of a certain sort would be mandated. Further, are the three factors listed for judicial attention exclusive?

(4) Section 1657(b)(3) permits the court to determine by sending "notice to a random sample of the class," the likelihood that members of the class would desire to opt out or appear individually. Is this notice to be individual notice or can the sampling be accomplished by publication notice?

Turning from section 1657(b) to 1657(c), the latter provides:

"(c) Unless the court orders otherwise the plaintiff or plaintiffs shall bear the expense of notification. The court may, if justice so requires, order the defendant to bear the expense of notification, or may require each party to bear a part of the expense in proportion to the likelihood that each will prevail upon the merits. Unless the plaintiff is required to bear the cost of notification, the court shall hold a preliminary hearing to determine the appropriate apportionment."

This language raises possible constitutional problems if (1) the defendant must bear the cost of notice and (2) there is no assurance that the defendant will be reimbursed if he prevails on the merits.[5] Such problems may be avoided under the "if justice so requires" language. Perhaps the statute should be made more explicit, however.

Does "party" in the context of section 1657(c) mean "named parties" alone or include absentee class members? This language could be construed to imply that absentee members are liable for notice costs.[6]

Hopefully, these comments will be of some assistance as you work in a very important area. Please let me know if the Department can be of any further assistance.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.

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[5] *See* Note, *Allocation of Identification Costs in Class Actions*, 91 Harv. L. Rev. 703, 711 n.61 (1978).

[6] *See Manual for Complex Litigation* § 1.45 p. 25 (4th ed. 1977).

STATEMENT OF BEVERLY C. MOORE, JR., DIRECTOR, CITIZENS FOR CLASS ACTION LAWSUITS

Despite the good intentions of its sponsors and this bill's slightly progressive provisions, we must respectfully oppose its enactment by the Congress. Styled the "Citizens' Access to the Courts Act of 1978", S. 2390 would in fact result in almost no increase in "the availability of remedies to citizens suffering violations of their judicial rights."

The bill fails to address at all the three major obstacles to effective class action remedies. These are, first and foremost, the unavailability of the statistically projected "lump sum" aggregate class damage remedy, by which the total proven damages may be disgorged from the defendant regardless of the extent to which the recovery can be distributed to the individual members of the class. The usual requirement that all recoverable damages must be affirmatively claimed by individual class members almost invariably results in recoveries of only modest fractions of actual class damages and frequently results in the class action being dismissed entirely on manageability/common question predominance grounds. The second major obstacle is the frequent disqualification of proposed class representatives for inadequate representation, atypicality, lack of standing, and other "wrong plaintiff" grounds. In these instances courts "protect" the interests of the class by denying it any redress for its injuries. This is by far the single most frequent reason for denial of class certification in securities cases, for example.[1] The third major problem is the unavailability of federal private substantive rights to sue for many types of injuries, including deceptive advertising and other forms of "consumer fraud". Even the most effective class action remedies are of no avail when there is no right to sue in the first place.[2]

Enactment of S. 2390 would accomplish only two quite minor class action "reforms". First, it would permit aggregation of all "parties" damage claims in excess of $25 in satisfying the $10,000 jurisdictional amount requirement of 28 U.S.C. § § 1331 and 1332(a). The objective here is presumably to overturn the Supreme Court's decisions in *Snyder* v. *Harris*, 394 U.S. 332 (1969), and *Zahn* v. *International Paper Co.*, 410 U.S. 925 (1973). Second, S. 2390 would substitute a flexible scheme of giving notice of class action pendency for the Supreme Court's arbitrary requirement, set forth in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), that individual notice must be given to every reasonably identifiable class member even if its prohibitive cost requires that the suit be dismissed. For the reasons discussed below, we do not believe that the very limited energy which the Congress has to devote to the subject of class actions should be consumed in a battle over these marginal issues, especially since the Justice Department will soon be submitting to the Congress proposals for comprehensive reform of the class action process.[3]

Aggregation of Claims for Jurisdictional Amount. In *Zahn* the Supreme Court ruled that where a $10,000 jurisdictional amount is required for a particular lawsuit to be entertainable in the federal courts, *each member* of the class must *individually* claim $10,000 or more in damages. Thus, where individual class member claims are less than $10,000, the case cannot be brought in the Federal courts, notwithstanding that the *aggregate* damages claimed by all class members is far in excess of $10,000 and the class litigation would be far more "substantial" than most nonclass suits which do satisfy the $10,000 jurisdictional requirement. Almost all class actions involve class member claims of under $10,000. Indeed, several courts have refused to allow cases to proceed as class actions precisely because class member claims *did exceed* $10,000. In those cases the reasoning was that since class members might want to exercise "individual control" over their sizeable claims, a class action would not be the "superior" means of adjudication as required by Rule 23(b)(3)(A).

From the foregoing it might appear that *Zahn* poses a very serious obstacle to class action legal remedies. The appearance, however, is deceptive. There are two categories of lawsuits to which a $10,000 jurisdiction amount requirement may apply: (1) Federal question cases, which are suits alleging violation of

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[1] *See* 4 *Class Action Rep.* 550–551 (1975).

[2] Legislation which would deal with these problems has been proposed at 4 *Class Action Rep.* 342–364 (1975).

[3] The initial draft of the Justice Department proposals, which are now being revised, is published at 841 BNA Antitrust & Trade Reg. Rep. F–1 (1977) and analyzed at 5 *Class Action Rep.* 1 (1978).

constitutional right or of a Federal statute, regulation, or policy; and (2) diversity cases, which are suits alleging violations of state laws where plaintiffs and defendants reside in different states. For almost all types of Federal question cases which might be brought as class actions the $10,000 jurisdictional amount requirement has already been *waived*, either in the statute creating the Federal right to sue or through 28 U.S.C. §§ 1333 (admiralty), 1337 (commerce), 1338 (patents, copyrights, trade trademarks, unfair competition), 1343 (civil rights and elective franchise), 1346(a)(1) (taxes), and 1361 (mandamus). Consequently, *Zahn* simply does not apply to class actions charging violations of the antitrust, securities, employment discrimination, or labor laws, the Truth in Lending Act, the National Bank Act, the Interstate Land Sales Full Disclosure Act, the Magnuson Moss Consumer Project Warranties Act, etc.

The areas in which the $10,000 Federal question jurisdictional amount requirement remains intact are limited to (1) suits arising under Federal common law, (2) suits challenging the constitutionality of state law that do not come within 28 U.S.C. § 1343(3), and (3) civil rights suits against municipalities.[4] The number of such cases, according to Professor Wright, "must be a very small one." In any event, where damages are sought cases of these types have often been denied class action status under Rule 23(b)(3). While the $10,000 jurisdictional requirement should certainly be eliminated for these cases, the impact of Congress doing this on the effectiveness of class action remedies would be almost imperceptible.

It would seem, therefore, that the S. 2390 aggregation provision would have its greatest impact in opening the Federal courts to diversity jurisdiction class actions alleging violations of State laws. The appearance, again, is misleading. In the first place, diversity jurisdiction may soon be substantially abolished. A bill to that effect has already passed the House, and the Senate is presently considering similar legislation. Even if diversity jurisdiction is retained, it is unlikely that S. 2390 would open the Federal courts in any genuine sense to many class actions alleging violations of state law. Federal judges are likely to rule that differences among the applicable laws of the various states involved cause common questions not to "predominate" over individual questions as required by Rule 23(b)(3). For confidence in this prediction we need only look at analogous cases in which class action complaints alleging violations of antitrust, securities, or other Federal statutes have included "pendent" state law counts alleging common law fraud, breach of fiduciary duty, etc. In a substantial majority of those cases class certification of the pendent state law counts has been denied on the ground of variations in the multiple state laws.

We believe that these decisions are wrong. They generally contain no analysis of how the various State laws differ or of why any variations could not be dealt with through sub-classes. Nevertheless, there is no reason to believe that multistate diversity jurisdiction class actions would fare any better.[5] To obtain certification these classes would often have to be limited to people from one or a few States. Either the defendant would escape liability to the remainder of the victimized class, thus crippling the deterrance of mass harms; or, assuming an abundance of unsolicited plaintiffs, separate class actions would have to be inefficiently litigated on behalf of each state or state-group subclass. In short, while opening the Federal courts to diversity class actions might do some good, the preferable approach would be to enact new Federal private substantive causes of action which require no jurisdictional amount.

We also object to the bill's provision limiting jurisdictional aggregation to class member claims in excess of $25. Apparently it is the drafters' view that class actions involving class member claims of under $25 are usually "unmanageable" and therefore should be denied access to the Federal courts. If such cases are in fact unmanageable, courts will deny class certification under Rule 23(b)(3)(D) even if the $10,000 jurisdictional amount requirement is satisfied through aggregation. Thus there is no need to limit jurisdictional aggregation to avoid manageability problems.

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[4] *Hearings on Diversity of Citizenship Jurisdiction/Magistrates Reform before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977), at 261–263 (analysis of Prof. Charles Alan Wright).

[5] The exceptional cases would be those in which (a) the class harm perpetrated was localized in impact, with most of the victims happening to reside in only one state or in a few states, all happening to have similar relevant laws; or (b) the law of a single state happened to be controlling, because of applicable conflict of law doctrines, with respect to the damage claims of class members residing in all of the involved States.

More importantly, there is no basis for assuming that class actions involving class member claims of less than $25 are unmanageable. Experience has demonstrated that claims as small as $5–$10 can be efficiently recovered and distributed to hundreds of thousands of consumers or other victims of mass illegality. For example, in *In re Arizona Bakery Products Litigation*, 1976–2 Trade Cases ¶61,120 (D. Ariz.), a price fixing case, 245,387 damage checks, each averaging $9.60, were mailed to Arizona consumers. The total cost of the litigation, including attorney fees, was $1.40 per consumer—a mere 12 percent of each person's recovery. Nor is *Arizona Bakery* the only case in which the manageability of very small claims has been demonstrated. For example, in *In re Private Civil Treble Damage Actions Against Certain Snack Food Companies*, No. 71–2007 (D.C. Cal.), another price fixing class action, damage checks averaging less than $10 will soon be mailed to 313,000 California consumers.

Finally, we note that the bill's jurisdictional aggregation provision applies to the claims of "parties" rather than to the claims of class members. This is apparently a drafting oversight, as courts have generally regarded as "parties" only named plaintiffs, intervenors, and persons actually "appearing" in the action. Absent class members are not "parties".

Notice of Class Action Pendency. We generally agree with the bill's provisions that would overturn the *Eisen* mandatory individual notice requirement. We object, however, to § 1657(c), which would authorize the court "if justice so requires" to shift part or all of the cost of notice to the defendant upon a preliminary showing that the plaintiff will ultimately prevail in the litigation. Since § 1657(b) would permit the court to avoid prohibitive plaintiff expense by reducing the scope of the notice ordered, it is unlikely that it would ever be necessary to shift notice costs to a defendant. It has never happened in states such as California which have enacted legislation similar to § 1657(c).

The only conceivable type of case in which this issue might arise is one in which the number of class members is very large (i.e., in the hundreds of thousands) *and* each class member has a damage claim so large (i.e., in the thousands of dollars) as to entitle him to individual notice that a class action has been filed in his behalf as a matter of constitutitnal due process. We are not aware of any cases which meet this description *and* would otherwise be certifiable as class actions under prevailing judicial interpretations of Rule 23 requirements. Since § 1657(c) is unnecessary, it should be eliminated if only for the purpose of diffusing corporate opposition to this legislation.

We must point out also that the problems caused by the *Eisen* decision have been vastly exaggerated. Only a handful of class actions have in fact been thwarted because of the inability of the plaintiffs' attorneys to bear the cost of notice. Indeed, as many class actions have probably been dismissed because of the plaintiffs' financial inability or unwillingness to *reimburse* counsel for advancing notice costs, as required by DR 5 103(B) of the ABA Code of Professional Responsibility, as have been dismissed because neither the plaintiffs nor their attorneys had the funds to pay for notice.

The reason that plaintiffs (or their attorneys) have usually been able to bear notice costs has to do with the relatively modest sizes of most classes that have been certified under Rule 23. The cost of notifying a class of a few thousand persons is rarely prohibitive. If the class is large enough for its identifiable members to make the cost of individual notice prohibitive, class certification is likely to be denied on manageability/common question predominance grounds anyway—a result which Congress should reverse by authorizing the lump sum aggregate class damage remedy. If Congress did authorize aggregate class recoveries, the *Eisen* notice doctrine might *then* pose serious problems. Also, if the Supreme Court's forthcoming decision in *Oppenheimer Fund, Inc.* v. *Sanders*, No. 77–335 (cert. granted Oct. 31, 1977), reverses the Second Circuit[6] and holds that plaintiffs are responsible not only for the cost of *giving* notice but also for the cost of *identifying* the class members to whom notice is to be given, then the adverse financial impact of *Eisen* on plaintiffs would be magnified. At the present moment, however, it cannot be seriously contended that *Eisen* has crippled or even substantially impaired the effectiveness of class action remedies.

That does not mean that Congress should not overturn *Eisen*—only that doing so would not accomplish very much. *Eisen* should be repealed because the notice

[6] Sanders v. Levy, 23 F.R. Serv. 2d 676 (2d Cir. 1977). *See* 5 *Class Action Rep.* 62–71 (1978).

cost, even if bearable, exacerbates the imbalance of litigation resources between plaintiffs and defendants and may often force plaintiffs to settle earlier and for less than the class deserves to recover. Also, the requirement that individual notice be sent to every class member is wasteful from the point of view of the recipients of the notices. Nothing better illustrates this point than a court-commissionel survey of the 885,000 consumers who ultimately filed claims and recovered damages in the western states *Antibiotics* antitrust litigation.[7] Prior to receiving the recovery notices and claim forms which these people filled out and returned to the court, all of them had received *two* other notices—a notice of the pendency of the class action and a notice of the terms of the proposed settlement. These two notices ultimately cost each claimant about $1 (claims averaged slightly more than $30). Yet 45.6% of the claimants could not remember ever seeing or receiving *either* notice even when shown copies of each.

The purpose of pendency notice is simply to ensure adequate class representation by describing the nature of the lawsuit that has been filed and affording other class members who might better represent the class or some subclass an opportunity to join in the litigation as formal plaintiffs. Except for the very few class members who may intervene, the recipients of the notice need take no action at all, other than discarding the notice into the trash can.[8] Notice to a random sample of class members easily satisfies the objective of ensuring adequate representation. It is only the notice of a class *recovery* that needs to be given individually to all identifiable class members.

STATEMENT OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA,
Washington, D.C., May 1, 1978.

Re: S. 2390, "The Citizens' Access to Courts Act of 1978."

HON. HOWARD M. METZENBAUM,
Chairman, Subcommittee on Citizens' and Shareholders' Rights and Remedies, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN:

It is my pleasure to submit to you the enclosed statement by Howard A. Specter. This statement publishes the Association of Trial Lawyers of America's support for S. 2390. It was not possible for a spokesman for ATLA to testify at the hearings held on this subject by the Subcommittee on April 20, so I ask specifically that our statement be made a part of the official hearing record.

As Mr. Spector states in his paper, he and many other ATLA members are very much involved in the areas of law which give rise to class actions. We understand well the practical realities of the state of Rule 23.

Sincerely,

ROBERT G. BEGAM.

Enclosure.

STATEMENT OF HOWARD A. SPECTER

I appreciate the opportunity to support the proposed Citizens' Access to the Courts Act of 1978. It is my privilege to speak on behalf of the Association of Trial Lawyers of America, commonly known as ATLA. ATLA welcomes and appreciates the opportunity to express its views on this proposed legislation under the auspices of its Federal Courts Program, an arm of its National Affairs Department.

Some background information concerning both ATLA and me may be appropriate. As a 32,000 member bar association among whose principal objectives are education in all phases of advocacy and the improvement and preservation of our adversary system, ATLA is the Nation's largest national trial bar association. Its members engage in litigation in virtually every phase of the law.

[7] T. Bartsch, F. Boddy, B. King & P. Thompson, *A Class Action That Worked* (Lexington Press, to be published in 1978).

[8] Another purpose of pendency notice is to enable class members who disagree with the suit to opt out, but this can be accomplished by such persons simply declining to file damage claims. In fact, most persons who opt out of class actions do so not because they disagree with the lawsuit's objectives but because they do not understand the legalese notice and often think that they are *supposed* to opt out.

As an association, it is primarily a "plaintiff-oriented" bar, although the experience of its members is not limited to representation of only plaintiffs or only defendants in class action litigation. We recognize the need to deliver legal services to litigants at realistic costs along and the need to preserve our traditional adversary system through, among other means, maintaining free access to our state and federal courts. These goals and philosophies resulted in action by the Board of Governors of ATLA at its recent meeting in San Antonio, Tex., on March 3, 1978, where the Board articulated a Resolution which embodied the Association's commitment to supporting proposed legislation which improves citizens' access to the courts and to opposing proposed litigation which inappropriately denies or limits such access.

As I observed previously, some of my personal background also may be relevant in considering this statement. In addition to being a member of ATLA's Board of Governors and a member of the Federal Courts Program of its National Affairs Department, I am the current Chairman of the Association's Education Department, I am a former President of the Western Pennsylvania Chapter of the Association of Trial Lawyers of America, former Chairman of the Allegheny County Pennsylvania Bar Association Antitrust and Class Action Committee, former Chairman of the Commercial Litigation Section of the Association of Trial Lawyers of America, a member of the Business Torts Committee of the Litigation Section of the American Bar Association, the Subcommittee on Multidistrict Litigation of the Section of Antitrust Law of the American Bar Association, and a former member of the Board of Governors of the Pennsylvania Trial Lawyers Association and the Class Action, Continuing Legal Education and National College of Advocacy Committees of the Association of Trial Lawyers of America.

In addition to serving as a faculty member (1974–77) and 1977 Chairman of the National College of Advocacy, where I have lectured and conducted workshops on various aspects of class action litigation, I have lectured on those subjects at various legal seminars and have published papers related to class action litigation. I have been actively engaged in such litigation for nine years.

It is not my intention to debate, and I have not been asked to debate, philosophical needs for change or unsubstantiated attacks on consumer and class action litigation. Rather, I have been asked to express ATLA's views of the proposed legislation and to recount observations of situations where one or more of the *Snyder-Zahn-Eisen*[1] triology has impeded the ability to pursue apparently valid rights.

Obviously, *Zahn* does not stand alone in the environmental field. Since *Zahn*, I and others have seen numerous situations where aggrieved citizens, only some of whom had claims exceeding $10,000, were unable to pursue remedies effectivly under Rule 23 of the Federal Rules of Civil Procedure or otherwise because of the failure of other similarly situated persons to have similarly substantial claims. Reality compels us to recognize that environmental litigation, with its concomitant potential for substantial ongoing harm and damages to person and property alike and its potentially costly corrective measures, is hard fought and vigorously defended. The polluter, who may be less concerned with the threat of paying several injured citizens each several thousand dollars, or even $10,000, frequently is concerned primarily with continuing the opportunity to pollute. Cessation of that socially destructive activity may be more expensive than resolving a handful of claims. The obvious result is that the single *Zahn*-type plaintiff or small group of plaintiffs cannot vindicate their rights. These unfiled, unlitigated cases are the clearest examples of the law's punishing the man or woman who steals the goose from off the common but letting free the greater felon who steals the common from the goose.

The elderly citizens of our great Nation are particularly susceptible to injury of almost every kind. It is no secret that they are common victims of fraud and the treachery of time. Not infrequently pension funds, invested in and relied upon during productive years, shrink or disappear completely. Former employers go out of business, leave the area or otherwise terminate payments which were received or dreamed of for so long. Although diversity of citizenship may exist, only by banding together or resorting to the class action can these people obtain meaningful access to federal courts. Such persons may be scattered throughout a state, a region or, indeed, the entire country. Neither multiple state court suits

[1] *Snyder v. Harris*, 394 U.S. 332 (1969). *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

nor abandonment of these people in their later years is an appropriate answer. It is no solution to worry about federal court congestion only to create even more congestion in even more state courts throughout the country. The proposed bill presents a needed opportunity for such people to aggregate their claims and to band together in a single unit to vindicate, or at least test, their rights.

We have seen numerous, if not countless, examples of consumer fraud ranging all the way from costly $5,000 pyramid sales schemes all the way down to simple $25, $50 and $100 rip-offs effected through slick television and other media advertisements. In order to obtain jurisdiction over the modern day flim-flam man, litigants, sometime successfully and sometimes unsuccessfully, have argued that the pyramid schemes are within the proscription of the Federal securities laws. Without regard to the question of whether a particular scheme comes within the $10,000 jurisdictional requisite, litigants should not be forced to attempt to torture the facts or the law to gain access to our courts when thousands and ten of thousands of people are being victimized throughout the country. Efficiency dictates that these claims be litigated together if possible.

These examples are only a few of the many which reflect the extent to which class actions have been precluded or discouraged because of the restrictive interpretations in *Zahn* and *Snyder*. The list could go on endlessly. It is imperative to recognize, however, that in this era of jet travel and computer processing, a single act or actor impacts on masses of citizens. The impact may be relatively insubstantial when measured by an individual's loss. When measured by the aggregate loss or the total gain to the wrongdoer, however, "substantial" may be an understatement. The proposed legislation presents a potent means of securing redress.

In connection with the jurisdictional issues, I suggest that the act be clarified to reflect what ATLA believes to be the statute's intent in two areas. The first deals with the definition of "party" and "parties." Although class members are not "parties" in the usual sense of that term for such purposes as imposing costs,[2] exclusion of their claims in the aggregation process for the purposes of satisfying the jurisdictional prerequisites would impact adversely and dramatically on access to the courts. If the adequacy of representation prerequisite of Rule 23 of the Federal Rules of Civil Procedure is satisfied, no reason exists to aggregate only the claims of named plaintiffs. As pointed out in the discussion of management problems in § 1.43 of the "Manual for Complex Litigation," it is particularly in consumer class actions, where the potential or actual class members may number in the millions, ". . . where representative treatment may be most-needed, since . . . denial of the class action might well mean a total denial of relief as a practical matter for the persons injured." Aggregation of class members' claims will not impose a serious burden on the judicial system. In class actions brought under Rule 23(b)(3) manageability must still be considered and the court will retain its discretion to try only common liability issues when appropriate.

In the same vein, ATLA recommends that the legislation be clarified to mandate consideration only of the citizenship of the named plaintiffs and defendants in determining whether diversity of citizenship exists. Any other result would impede access to the court where even a single class member is a citizen of the same state as the defendant. Such an interpretation would either preclude class action treatment or require the arbitrary exclusion from the class of everyone with citizenship identical to that of the defendant.

I would like to comment on class action notices. *Eisen's* restrictive, inflexible approach to notice has presented a great barrier to free access to the courts. Not only did it eradicate the flexibility and discretion which Rule 23 reposed in district courts, it also slammed the door to the courthouse after *Snyder* and *Zahn* had begun to nudge it closed. The mini-hearing went out and the mini-theft stayed in. There was no constitutional impediment to the innovative approach adopted by the trial judge in *Eisen* when he conducted a preliminary hearing which resulted in a partial shifting of the cost of notice and in mailing individual notice to fewer than all class members.

In the Memorandum Report of the Association of Trial Lawyers of America to the Board of Editors of the "Manual for Complex Litigation," ATLA urged the Board to recommend procedures which, consistent with *Eisen*, would mini-

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[2] *Lamb v. United Security Life Company*, 59 F.R.D. 44 (S.D.Iowa 1973), and *Loves Wood Pit Barbecue v. Bell Brand Foods*, 1974-1 CCH Trade Cases ¶74,905, (S.D.Cal. 1973).

mize the cost of notice by adopting procedures which can be utilized in those common situations where, because of a business or other ongoing relationship, one or more defendants regularly communicates with class members. It was recognized that in today's mobile, computerized society, it is not uncommon for large and small entities such as banks, unions, trade associations, public utilities, department stores, insurance companies and a multitude of other business and non-business entities to communicate individually with customers or members on a regular basis by utilizing their own mechanized mailing facilities or the services of an outside firm which provides mailing services. The propriety of utilizing such facilities or services was thought to be consistent with *Eisen's* rigid requirements. Similarly, it was thought that the *Eisen* requirement of individual notice in Rule 23(b) (3) class actions would be satisfied by prominent publication of notice in magazines or newspapers which *it is known* that class members subscribe to and receive on a regular basis by virtue of membership in a trade association, labor union, or some other cohesive entity. Those approaches are consistent with the proposed legislation and, thankfully, the legislation goes a step further in not mandating individual notice in every case. ATLA believes that experienced and sensitive trial judges can, must and will deal properly with notice problems if given an appropriate opportunity to exercise their informed discretion.

Obviously, there will be those who suggest that the possibility of shifting the cost of notice will precipitate a flood of unwarranted, frivolous class actions. That notion does an injustice to reality and to the proposed Bill. It fails to recognize that costs will not be shifted in every case and that the possibility of facing substantial costs is itself a substantial barrier to frivolous suit. So, too, is Rule 11 of the Federal Rules of Civil Procedure.

It is not inappropriate to remember that the *Eisen* mini-hearing did shed light on the substantive merits of the plaintiff's claims. It was only the inflexible approach adopted by the Supreme Court which sounded the death knell of that action. ATLA commends the notice provision contained in the proposed Bill. It is our experience that much, if not all, of the evidentiary material required for class action determinations, as well as the type of hearing contemplated by the proposed Bill, can be obtained through efficient discovery, crystalized in an appropriate stipulation at the direction of the trial judge and presented with little or no live testimony or burden on the court.

In conclusion, although it is likely that there always will be debate over class actions, ATLA believes that S. 2390 will accomplish appropriate revision of Rule 23 without imposing an undue strain on the Federal judiciary. The Bill, if enacted, will permit sensitive trial judges, in the exercise of their informed discretion under Rule 23, to work with competent and qualified counsel to enable the citizens of this nation to do more than knock helplessly at the courthouse door. *Snyder, Zahn* and *Eisen* have caused the door to go unopened too long.

Once again, I appreciate the opportunity to express ATLA's views.

STATEMENT OF LEGAL SERVICES ATTORNEYS SUPPORTING S. 2389

Introduction

We submit this statement strongly supporting S. 2389 on behalf of a working group of legal services staff attorneys from throughout the country. The group has been communicating for the past several months about ways to eliminate the barriers which are increasingly preventing their low income clients from gaining access to the Federal courts to vindicate their Federal rights. The names and affiliations of the individual attorneys who have reviewed this statement and who support the views expressed in it are listed in Appendix A. These attorneys work in all regions of the country, in both urban and rural programs, and they have experience in all types of federal litigation involving the rights and entitlements of the poor.

S. 2389 (and its counterpart H.R. 9622, passed by the House February 28, 1978) is the most important bill before this Congress concerning access to Federal court. It deals with two major barriers: (1) by removing the $10,000 amount in controversy requirement for Federal question cases, it guarantees a Federal forum for the litigation of Federal rights and (2) by eliminating diversity of citizenship jurisdiction, it reduces Federal court docket congestion.

REMOVING THE AMOUNT IN CONTROVERSY REQUIREMENT FROM 28 U.S.C. § 1331

Congress should complete the job it began in 1976 and totally abolish the requirement in 28 U.S.C. § 1331 that Federal question cases involve a controversy of at least $10,000. P.L. 94-574, § 2, 90 Stat 2721 (Oct. 21, 1976) amended § 1331 to provide that no amount in controversy is necessary when the defendant is the United States or a federal agency or official. Total elimination of the amount in controversy requirement this year would serve the same purposes as P.L. 94-574 by making the law of Federal jurisdiction more consistent with principles of Federalism, fairer, simpler, and less time consuming for litigants and judges without adding many new cases to the burdened federal court dockets.

Under our American system of federalism, it ought to be axiomatic that litigants with legitimate claims under Federal law have the option of bringing their claims in the Federal courts. Unfortunately many legal services clients whose Federal statutory rights to health care benefits or emergency public assistance payments have clearly been violated by state or local officials, have difficulty in some circuits establishing their right to be in Federal court, even though, as these circuits acknowledge, 42 U.S.C. § 1983 gives them a cause of action for deprivation under color of state law of "any rights, privileges, and immunities secured by the Constitution *and laws*" of the United States (emphasis added). This anomalous situation occurs because the jurisdictional counterparts to § 1983,28 U.S.C. § 1343(3), is less clear as to whether is covers claims based solely on alleged violations of statutory rights. Some circuits have therefore concluded that plaintiffs must allege a constitutional claim which is not frivolous to obtain jurisdiction under § 1343(3) and that a Federal court can consider the statutory claims only as pendent to the constitutional claim. See *Gonzalez* v. *Young*, 560 F2.d 160 (3rd Cir. 1977), cert. granted, 46 LW 3526 (February 21, 1978) and *Andrews* v. *Maher*, 525 F2.d 113 (2nd Cir. 1975). But cf. *Blue* v. *Craig*, 505 F2.d 830 (4th Cir. 1974) and *Chapman* v. *Houston Welfare Rights Organization*, 555 F.2d 1219 (5th Cir. 1977), cert granted 46 LW 3526 (February 21, 1978). Poor plaintiffs denied jurisdiction under § 1343(3) usually have difficulty establishing jurisdiction under other statutory grants, especially those such as 28 U.S.C. § 1331 where there is an amount in controversy required. Most legal services cases involve relatively small amounts of money (although not necessarily so from the perspective of the low income litigant) falling far short of the $10,000 required by § 1331. See Gonzalez, supra and Andrews, supra. Furthermore, a number of plaintiffs cannot aggregate their claims. *Snyder* v. *Harris*, 394 US 332 (1969) *Zahn* v. *International Paper Co.*, 411 US 291 (1973).

If there were no amount in controversy required under § 1331, however, Federal questions would be resolved in Federal court where they in the normal course ought to be. Federal judges unsurprisingly are usually more sensitive to the policies behind Federal laws and more likely to enforce them fully than their state and local colleagues, who unfortunately are often unfamiliar with Federal statutes and view the rights and needs of the poor in parochial political and fiscal terms. Federal judges also, generally have better support resources than the state counterparts. Law clerks, well-stocked libraries, and support services like the educational programs of the Federal Judicial Center lead to a more reasoned and thorough examination of the often complex issues of federal law. Furthermore the procedural system in many states prohibits or limits swift and complete relief while the Federal district courts, operating under the Federal Rules of Civil Procedure and having the power to issue orders with statewide and sometimes nationwide effect, can resolve issues much more quickly and authoritatively. Thus, both theoretical and practical consideration of federalism call upon Congress to permit *all* Federal questions to come within the jurisdiction of the Federal courts.

Basic fairness also dictates elimination of the $10,000 requirement in § 1331. A disproportionate number of cases currently barred from the Federal courts by the amount in controversy provision involve low income plaintiffs. There is, however, no necessary correlation between the monetary amount at issue and the importance of a Federal constitutional or statutory issue to the litigants or to society in general. A $500 claim under the Federal medicaid statute brought by an elderly person in need of medical care or a claim for $700 worth of benefits under a federally financed, locally administered nutrition program, has more value to the effected persons than a $10,000 claim brought by General Motors. General Motors can sue in Federal court; the low income people may have

difficulty obtaining jurisdiction. The amount in controversy requirement is thus economically discriminatory, making the Federal courts more accessible to persons and entities who customarily handle large amounts of money and property and less accessible to those with fewer resources who often have greater need for judicial protection.

Action by Congress to eliminate this unfairness should not markedly increase the Federal court caseload. The 1976 amendment to § 1331 previously referred began as a total elimination of the amount in controversy approach but was amended in the Senate Judiciary Committee to cover only suits against Federal defendants because "[S]ome concern was voiced by members of the committee that this broad elimination of the jurisdictional amount may possibly result in an unforeseeable increase of the caseload of the Federal courts." S. Rep. No. 94-996 at 14 (1976). The committee went on to state that it had not concluded "that the broader elimination of the requirement is inappropriate or would result in any added workload but simply that it was unnecessary to achieve the purposes of the bill." *Idem.* Although there has been no solid statistical study on the caseload implications of abolishing the $10,000 amount since 1976 (and such a study may be impossible since it seeks to identify cases which have not been brought), authorities believe the 1976 amendment has left relatively few federal question cases where the amount in controversy is relevant. Both Charles Alan Wright and Joseph F. Spaniol, Jr., testifying on behalf of the Judicial Conference of the United States, told the House subcommittee considering HR 9022 to S. 2389) that the impact on District Court caseloads would not be appreciable. Professor Wright states there are only four classes of cases in which the amount in controversy still applies: (1) suits arising under Federal common law, (2) suits challenging State laws and practices which do not come within 28 U.S.C. § 1343(3) civil rights suits against municipalities, and (4) minor miscellaneous cases.

If so relatively few cases are totally denied a Federal forum, why such a fuss to eliminate the $10,000 requirement? as previously stated, the requirement impacts disproportionately on poor people who have a significant number of cases falling within Professor Wright's second and third categories. Furthermore, it is our experience that even in cases where we finally get a court ruling in favor of Federal jurisdiction, the judges and the litigants waste significant time, even years, resolving the plaintiffs' right to be in Federal court—perhaps even more time than it would take to handle the new cases which the elimination of the amount in controversy would bring to the courts. The law of Federal question jurisdiction is currently a confusing and perilous obstacle course. As previously indicated, in most circuits, if the plaintiffs assert jurisdiction under 28 U.S.C. §1343(3), they must at the very least plead a constitutional claim which is not frivolous under the standard of *Hagans* v. *Lavine*, 415 U.S. 528 (1974). There has been, not surprisingly, extensive litigation over the substantiality of the constitutional argument. In *Hagans* itself, poor plaintiffs began a challenge to certain New York welfare regulations in 1972. The Supreme Court found jurisdiction in 1974. The Federl courts and the parties did not begin to address the merits meaningfully until 1975. See the history of the case in one of the numerous Second Circuit opinions, 527 F.2d 1151 (2nd Cir. 1975).

There is also protracted litigation involving another issue previously referred to: whether §1343(3) or 1343(4) authorize suits against State or local officials where the plaintiffs allege that the defendants have only violated a Federal statute and not a provision of the Constitution. Litigants also spend years on the question of whether plaintiffs claiming jurisdiction under 28 U.S.C. §1331 have met the $10,000 amount in controversy requirement. The body of law on measuring the amount is complicted. Professor Wright devotes 156 pages to it in his treatise. 14 Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction, 355–511 (1976).

The Federal courts, pressed to resolve crucial issues affecting our national life—from criminal cases to antitrust suits to challenges to HUD housing programs—are wasting precious resources on jurisdictional issues. As the Second Circuit is observed in *Andrews* v. *Maher*, when it found no jurisdiction:

We note with a irony . . . of having to spend so much time and effort on questions of jurisdiction when the underlying issues on the merits seem comparatively simple. Moreover, we recognize, as we have before, that such claims are highly appropriate for a federal forum, and we are aware that it may

seem hypertechnical to permit subtle analyses of jurisdictional statutes to accomplish a result which, on policy grounds, we find uncongenial. But we prefer to wait guidance on these jurisdictional issues, on which there is now a clear conflict among the circuits, either from higher authority or from Congress. 525 F.2d at 120.

Passage of S. 2389 would provide the guidance the court is seeking and would end the waste and unfairness the Court refers to. We strongly support the section of the bill abolishing the amount in controversy requirement in §1331 Federal question cases.

ABOLITION OF DIVERSITY JURISDICTION UNDER 28 U.S.C. § 1332

Diversity of citizenship jurisdiction no longer serves any important purpose and cases based solely on diversity do not belong in Federal courts, given the current strain on their limited resources. The original justification for diversity jurisdiction was the fear that state courts would be prejudiced against citizens of other states who litigated before them. During the early decades of the Republic, the apprehension was undobutedly valid and it probably made sense for Federal judges to spend their time interpreting state law to guard against parochialism. There were then few issues of Federal law as well. Today, however, there is little evidence of State judicial prejudice against litigants from other States. Federal judges, nevertheless, must often guess as to the future direction of the law in their States and sometimes suffer the embarrassment of state supreme courts later deciding otherwise. Basic principles of federalism once supported the concept of diversity jurisdiction. Today, absent widespread interstate bias, that same federalism demands that state courts interpret their own law of contracts, torts, and real property, not courts of the Federal government.

Even assuming there is *some* lingering validity to the arguments for diversity jurisdiction, the case for the abolition approach in S. 2389 still remains strong given the currently crowded federal dockets. Congress should concentrate limited Federal court resources upon issues where these courts have a special expertise and role. Qustions of Federal statutory and constitutional law must take priority over those of State contract, tort, and real property law.

The abolition of diversity jurisdiction would have a great impact in unclogging our Federal courts. In fiscal year 1976, 24.3% of the civil filings in federal district courts were diversity cases. Director of the administrative office of the United States Courts, ANNUAL REPORT, Table C–2 (1976), hereinafter cited as ANNUAL REPORT. Only 42% of diversity jurisdiction cases were resolved without any court action (before pretrial, during or after pretrial or trial), compared to 50% of all federal question cases being resolved without any court action [ANNUAL REPORT, Table C–5A (1976)]. For those diversity jurisdiction cases that did require court action, the time interval between the filing and the disposition of the case was on the average one month longer than Federal question cases. Various studies, however, have indicated that diversity cases take an even larger share of the time of Federal judges—between 32% to 38% of all time spent on civil cases. Shapiro, Federal Diversity Jurisdiction: A Survey and A Proposal, 91 HARVARD L. REV. 317, 319–322, 323–339 (1977). In fiscal year 1976, diversity-based jurisdiction personal injury tort actions constituted 16% of all Federal court trial time and diversity-based jurisdiction contract actions constituted 19% of all federal court trial time. ANNUAL REPORT TABLES C8 and C9 (1976).

Poor litigants of course can and do make use of § 1332 diversity jurisdiction but they have less occasion to do so than other litigants. The Research Institute on Legal Assistance of the Legal Services Corporation did a computer search of reported cases involving legal services programs in fiscal year 1976 which revealed that only five were diversity cases. Fee generating cases involving poor clients are of course handled by the private bar, not legal services lawyers, but here there are few low income people with contract or land claims exceeding the $10,000 amount in controversy requirement. In addition, there are probably proportionately fewer diversity tort cases involving poor plaintiffs since the poor are statistically less likely to own an automobile or fly in an airplane than the rest of the population.

Measured against a relatively infrequent use of diversity of citizenship as a basis of jurisdiction must be the disproportionate impact Federal court conges-

tion visits on the poor. Their cases usually involve basic survival issues—the right to a job, housing, public assistance to feed and shelter their families, health care. The poor by definition lack the resources to sustain themselves without the essentials of life pending the resolution of bogged down litigation. Overcrowded dockets for them means not only delay but destitution. We therefore have no hesitation in supporting that portion of S. 2389 which abolishes diversity jurisdiction.

PROPOSED CHANGE IN SECTION 4

While we have no difficulty supporting S. 2389 as presently drafted, we believe it could be strengthened in one relatively minor way. Section 4 currently limits the reach of the bill to any civil action commenced on or after the date of enactment. This provision makes good sense when applied to diversity cases; otherwise litigation already commenced in federal court would have to begin again in state court. There is, however, no such justification for limiting the bill's application to federal question cases. Indeed, the Congress would save significant judicial resources if the abolition of the amount in controversy requirement applied to pending cases, because courts would then be free to escape the procedural morass and move to the merits. We urge the subcommittee to amend the bill appropriately.

CONCLUSION

We thank the subcommittee for its courtesy in hearing our views. There is no more important piece of legislation affecting access to Federal courts for legal services clients before this Congress than S. 2389. We urge its prompt passage.

APPENDIX A

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