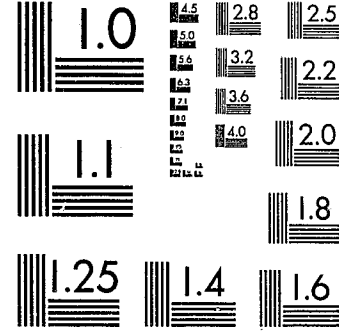


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JUDICIAL ACCESS BY SMALL BUSINESS

MAY 16, 1980.—Ordered to be printed

Mr. SMITH of Iowa, from the Committee on Small Business,
submitted the following

REPORT

[To accompany H.R. 5103 which on August 2, 1979, was referred to the
Committee on the Judiciary and the Committee on Small Business]

[Including cost estimate of the Congressional Budget Office]

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The Committee on Small Business, to whom was referred the bill (H.R. 5103) to provide for better access to the Federal courts for small businesses and others with small- to moderate-size claims, to expand the duties of the Office of Advocacy of the Small Business Administration, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

On the first page, line 4, strike out "1979" and insert in lieu thereof "1980".

Page 5, line 8, strike out "on" and insert in lieu thereof "or".

Page 10, strike out line 15 and all that follows through page 11, line 4, and insert in lieu thereof the following:

"(A) as soon as practicable after such assumption, a relator who measurably advanced the initiation of the action shall be paid reasonable expenses, including attorney's fees, by the Department of Justice, a State or an agency. Payment shall include expenses incurred by the relator at any time prior to the date of assumption.

"(B) the Department of Justice, a State or any agency may retain a relator or other private counsel to litigate, under its direction and control, the action on behalf of the United States—

"(i) on an hourly basis: or".

Page 11, line 9, strike out "Department" and all that follows through line 10 and insert in lieu thereof the following:

clerk of the court who shall deposit it in a public recovery fund established under section 3004(e).

(3) All such payments, or the authority to enter contracts to make such payments, shall be in effect for each fiscal year only to the extent or in the amounts as are provided in advance in appropriations Acts.

Page 11, line 24, strike out "Any" and insert "The United States and any".

Page 12, strike line 8 and insert "3001(a)(1);".

Page 13, line 14, insert the word "and" at the end thereof.

Page 13, line 16, strike out "; and" and all that follows through line 18 and insert in lieu thereof a period.

Page 14, strike out line 16 and all that follows through page 15, line 17, and insert in lieu thereof the following:

(c) If the public recovery is greater than the payments referred to in subsection (a) and a State has not prosecuted the action, the clerk of the court shall transfer the excess amount to the general fund of the Treasury. If a State has prosecuted the action, such excess shall be paid to that State as general revenues.

Page 15, after line 23, insert the following:

(e) There are hereby authorized to be appropriated such sums as may be necessary to pay the expenses of a relator or other private counsel as provided in section 3003(b): *Provided however*, that the amount of the appropriation shall not exceed the amount of funds transferred to the general fund of the Treasury pursuant to subsection (c).

Page 17, line 2, strike out "judgment" and insert in lieu thereof "judgment; escheat".

Page 17, after line 23, insert the following:

(d) If the recovery is greater than the sum of payments of claims and the expenses incurred in their distribution, and the court determines that the calculation of damages under subsection (a) was reasonably accurate, the clerk of the court shall transfer the excess amount to the general fund of the Treasury.

Page 25, strike out lines 1 through 3 and insert in lieu thereof the following:

(1) a defendant for or against whom the class compensatory action judgment was entered; and.

Page 29, strike out line 10 and all that follows before line 13.

Page 29, line 13, strike out "(c)" and insert in lieu thereof "(b)".

Page 30, beginning in line 21, strike out "date of enactment" and insert "effective date".

Page 34, line 19, strike out "date of enactment" and insert "effective date".

Page 34, line 20, strike out "date of enactment" and insert "effective date".

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Page 35, after line 15, insert the following section heading: "REPORTS ON FEE AND COST AWARDS".

Page 36, after line 4, insert the following section heading: "REPORTS ON CIVIL PENALTY APPEALS".

Page 36, strike out line 16 and insert in lieu thereof the following: agency.

SEC. 302. This Act shall take effect October 1, 1980.

THE PURPOSE OF THE BILL

The bill, H.R. 5103, is divided into 3 titles, all of which were extensively studied by your committee.

Title I is designed to deter violations of our antitrust laws which injure small businesses and to provide them with easier access to the Federal courts to obtain compensation for injuries they have sustained due to a violation of such laws. This easier access would be provided by establishing a new procedure under which small businesses could join together and bring a class action type lawsuit.

Title II is designed to permit a new, less cumbersome and less expensive appeal of a decision by a Federal agency imposing a civil penalty upon a small business for violation of a Federal law or regulation.

Title III is designed to permit an evaluation by the Congress and the President of the effectiveness of the preceding titles in assisting small business in obtaining easier access to justice.

INTRODUCTION AND BACKGROUND

The bill, H.R. 5103, was introduced by Representative Neal Smith of Iowa and cosponsored by Representative Joseph McDade, chairman and ranking minority member, respectively, of your committee. It was jointly referred to the Committee on Small Business and the Committee on the Judiciary. Subsequent to its introduction, 19 additional members of the Small Business Committee have been added as cosponsors.

The bill was developed in consultation with the Department of Justice as a means to provide the small business community with easier access to the courts and to provide a faster review of a Federal agency decision imposing a civil penalty on a small business for violation of Federal law.

At hearings before your committee's Subcommittee on SBA and SBIC Authority and General Small Business Problems, it received the support of a wide spectrum of representatives of over 1 million small businesses. Previously, the 1,700 delegates to the White House Conference on Small Business, who assembled in Washington in January after a series of 57 State and local conferences, placed reform of expensive procedures governing Federal judicial access 12th in their list of recommendations of items to aid the Nation's 14 million small businesses.

The bill was unanimously approved, as amended, by the subcommittee and was subsequently unanimously approved by the full committee by a vote of 29 to 0 without any additional amendments.

THE NEED FOR THE LEGISLATION

(A) IN GENERAL

The recent White House Conference on Small Business demonstrated the degree of concern with the need to reduce the staggering costs of access to the Federal courts for small businesses and others who do not enjoy the luxury of large resources to conduct litigation. Among all constituencies that would be affected by the bill, small business has an especially strong interest in H.R. 5103 and since 1977 it has worked closely with the Department of Justice and your committee to remove the staggering cost impediments to (1) effective small business deterrence of anticompetitive activity and other violations of Federal law, and (2) small business compensation for its injury, where this proves necessary, as well as reform of costly procedures governing small civil penalty assessments. H.R. 5103 has the support of the Small Business Legislative Council, the National Federation of Independent Business and other small business groups.

Mr. Milton Stewart, Chief Counsel for Advocacy of the Small Business Administration has testified that "... title I (of H.R. 5103) provides this Committee with a significant opportunity to revitalize and give new direction to the enforcement of antitrust laws ... Title I offers a mechanism by which we can shift the enforcement focus to the encouragement of private innovation and initiative. No longer should small businesses have to rely solely on sluggish bureaucracy to achieve effective antitrust enforcement. Adequate tools ought to be provided to those with the greatest incentive to pursue antitrust violations for the public good—the small businesses facing economic ruin. In terms of incentive, these businesses are in an entirely different position than the government attorney who does not stand to lose the source of his livelihood if an action is not brought."

Mr. Gregg R. Potvin has testified on behalf of the Texas Oil Marketers Association and the Illinois Petroleum Marketers Association that "too often we have seen outstanding members [of the House Small Business Committee] spend vast amounts of time they could ill afford to probe small business problems—only to have their recommendations ignored or, at best, not fully acted upon. Ironically, the Antitrust Division of the Department of Justice has consistently been one of the chief offenders in this regard. * * * H.R. 5103 * * * is badly needed. Title I would provide funding for the unequal struggle between small businessmen and economic giants."

(1) *The failure of antitrust and other Federal statutes to deter large scale illegality*

Reform is imperative if widespread illegal activity by the largest corporations is ever to be credibly deterred. The Law Enforcement Assistance Administration has recently completed a meticulous study of illegal behavior by the 582 largest publicly owned corporations, which include 477 manufacturing firms, "Illegal Corporate Behavior" (1979). It concluded that more than 40 percent of manufacturing corporations engaged in repeated violations of Federal statutes covering the whole gambit of antitrust, securities, and financial regula-

tion. Your committee has every reason to believe that these violations injure small businesses most grievously. Whether small businesses are manufacturers themselves, supplied by these huge enterprises, or merely intermediaries between producers and consumers, they often bear the full and direct brunt of this repetitive misconduct. Clearly the deterrent threat of possible private or public litigation stemming from this misconduct has not prevented repeated violations by the most powerful private institutions in this country.

Data on the injury inflicted on small businesses due to antitrust violations are necessarily sketchy. However, from a variety of sources, including studies provided this committee in its meat marketing investigation, it becomes apparent that private and public enforcement has not been able to deter widespread anticompetitive activity. The most conservative estimate of injury to small business, \$3.5 billion annually, comes from the U.S. Chamber of Commerce. The conservative nature of this estimate is evidenced by studies previously provided this committee. For example, in the food processing industry alone injury from anticompetitive practices may damage small businesses and consumers in the amount of \$12 to \$15 billion a year. Further, the Senate Judiciary Committee has estimated that the costs to small businesses and consumers of price fixing and other violations of the antitrust laws may be as high as \$150 billion a year.

The reason for such massive antitrust illegality is the failure of private and public enforcement to deter and ensure that the conduct will not be profitable. As the LEAA study concluded, the Government simply does not have the resources to police a \$2 trillion economy. If deterrence is to be effective, the enforcement initiative must come from the private sector. The present system has failed small business by crafting enormous expense barriers to collective redress.

(2) *The enormous costs of private antitrust enforcement*

Stated simply, the class damage action is used by the courts when a large number of people have been illegally injured by a single course of conduct by a defendant. Rather than trying each claim separately, which would be time consuming, repetitious and costly, all claims are brought before the court in one action—a class damage action authorized by rule 23(b) (3) of the Federal Rules of Civil Procedure. The rule is intended to spread the costs and to avoid repetitious litigation.

Before a court can begin to consider the merits of such an action, it must determine whether the injured parties have met the guidelines established by the rule to determine when a collective damage is permissible.

Federal rule 23(a) provides that a class action may be maintained only if—

- (1) The class is so numerous that joinder of all members is impracticable;
- (2) There are questions of law or fact common to the class;
- (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) The representative parties will fairly and adequately protect the interests of the class.

Rule 23(b) (3) (governing class damage actions) states:

An action may be maintained as a class action if the prerequisites of subdivisions (a) are satisfied, and in addition:

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

These prerequisites, which bear no direct relation to the cost-sharing rationale for collective damage actions, have generated tremendous litigation and inhibited the courts' ability to identify swiftly or with certainty, those actions suitable for class treatment. For example, tactics to unearth as many uncommon issues as possible, in order to show a lack of "predominance" of common issues has encouraged a spate of cross-claims, counterclaims, and affirmative defenses lodged by defendants with nearly inexhaustible litigation resources. To generate many separate factual issues, the defense will often propound extensive interrogatories to the small business class members who must take the time and bear the considerable cost of obtaining counsel and replying (i.e., supplying the answers or information) or risk a court order excluding them from damage recovery. Small business plaintiffs may yield to these pressures rather than bear the enormous costs, the long delays, and the frustration of litigation.

These costs and delays are demonstrated by the *In re Cessna Aircraft Distributorship Antitrust Litigation*, M.D.L. No. 231 (WD Mo., filed April 1972), where litigation over whether small business distributors could sue as a class has consumed \$120,000 of small business out-of-pocket costs (exclusive of attorney's fees) over a 6-year period. And the parties had yet to reach inquiry into the merits of the case.

The bill generally streamlines these prerequisites and ties them more closely and directly to the cost-sharing rationale for permitting collective relief. For example, the bill adopts a standard requiring only a substantial question of law or fact common to the class, rather than predominance of several common issues.

Studies have shown that, when small businesses participate in antitrust class damage actions, they do so as plaintiffs between 94 and 99% of the time.

For some months, your committee has been conducting an investigation of marketing practices in the sale of meat. That investigation has shown that persons injured by anticompetitive practices have no effective remedy, given the enormous expense of litigating even the most meritorious individual or collective action. Counsel representing some of the Colorado beef packers, Mr. Richard Freese, has noted that even to interest the Government in pursuing an action would require his clients to expend \$100,000. He also estimated that it would cost \$500,000 or more for his clients to go forward with a collective damage action. But to these costs, he has been unable to mount such an action or interest the Government in his case. Since his endeavors in this regard one of his clients has gone out of business.

Of course, those tempted to engage in anticompetitive acts which cause massive injury are aware of these hard realities. They realize full well that potential litigation by small businesses and others who may be harmed offers no credible threat to the profitability of their

activities. A comparison of data generated by Arthur Young & Co. documenting the recoveries of small businesses in antitrust class damage actions over the last decade and the chamber's conservative estimate of their injury shows that the antitrust laws can be violated with relative impunity. Less than one-half of 1 percent of small business injury has ever been compensated. These figures are admittedly rough estimates, but they demonstrate how the existing procedure has failed to remove the profitability of anticompetitive activity. It has not deterred this activity, nor has it compensated small businesses after the fact.

A related problem is that interlocutory appeals of class certification decision are not now permitted. In *Coopers and Lybrand v. Livesay*, 437 U.S. 463 (1978), the Supreme Court held that current law does not permit such appeals. A negative certification decision, therefore, effectively terminates a class action. But, class actions can often serve the public interest. Such actions also have a much broader effect than do traditional one-on-one controversies between individual parties. Recognizing this argument, the Court acknowledged that appellate review of certification decisions might be a topic for congressional consideration. The certification decision is crucial to the action and it is important that Congress shape an appeal procedure to meet this problem.

Another significant roadblock in the class action procedure is the prejudgment notice provisions of rule 23(c)(2), intended to inform those with stakes in the outcome, of the commencement of the action. Rule 23(c)(2) requires the court to "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."

An early requirement of individual, letter notice, delays the action considerably. Identification of and notice to all of the thousand of injured parties can be extremely expensive and time consuming, particularly in commercial litigation involving national markets. Furthermore, when small, but widely spread claims are at stake, notice does very little to protect the interests of absent class members. On the one hand, if notice is given, courts and counsel are lured into believing that representation of those interests has been assured. On the other hand, the expense of notice creates a major obstacle to the advancement of the interests of the injured and encourages these interests to be disregarded in favor of an early settlement. Title I adopts more flexible and less expensive notice standards that require individual notice when the claims at issue are substantial enough to justify the work and expense.

Obviously, additional incentives designed to deter this pervasive illegality and, where necessary, compensate small businesses are needed. This can be done without creating or expanding administrative bureaucracies but rather by emphasizing small business initiative. As the Department of Justice has observed "the demonstrated failure of private and public enforcement, individually, to deter unlawful commercial activity, requires a new approach—one that harnesses the resources and energies of both Government and individuals in support of effective class litigation." This goal can be met by the following:

First, creating a partnership between private citizens and the Government to insure financially responsible representation of the interests of injured persons and the public. This would help prevent "deep-pocketed" defendants from exploiting their litigation resources to wear out the victims by employing attrition strategies in litigation.

Second, by providing monetary incentives to enhance and better target private detection enforcement. This would encourage the bringing of actions on the basis of social importance rather than the lawyer's interest in a large fee. It also would help to insure deterrence by decreasing the probability that illegality will be successfully prosecuted.

Third, by enhancing deterrence (and compensation) by streamlining procedures for obtaining redress. As the Justice Department has pointed out, "optimal deterrence requires not only effective detection, but certain and swift remedy." Much unnecessary expense could be eliminated by provisions that limit initial discovery; require the holding of a preliminary hearing on the merits before great procedural expense is required; simplify the criteria for suing as a class; permit the separate trial of issues; and facilitate proof of damages.

(B) THE FAILURE OF THE FEDERAL ANTITRUST LAWS TO PROTECT SMALL BUSINESS—RECENT STUDIES

Enforcement by Federal agencies alone does not remove the incentive for the 582 largest small business suppliers to violate antitrust and other laws. As noted above, in October of 1979 consultants for the Law Enforcement Assistance Administration of the United States Department of Justice finished a detailed study of the illegal behavior of the 582 largest publicly-owned corporations (Illegal Corporate Behavior, supra).

The study surveyed 477 manufacturing corporations, 18 wholesale corporations, 16 retail corporations, and 21 service corporations. The report concluded that more than 40 percent of manufacturing corporations engaged in repeated violations in all areas of commercial regulation. It also observed that about two-thirds of the manufacturing industries of the nation are concentrated, with only a few firms controlling most of the major manufacturing sectors. In addition, this aggregation has substantially risen over the last 50 years. "Corporations have tremendous power and influence on government; this is not true of ordinary offenders."

The LEAA consultants concluded that "[t]he greatest handicap to the successful enforcement of agency regulations in the corporate area is not the availability of legal tools, problems of investigation, or direct industry influence; it lies in limited agency budgets and inadequate enforcement staffs." [Italic supplied.]

Further, monetary penalties to deter and disgorge illegal proceeds are not widely used in federal enforcement outside the environmental area. "It has generally been conceded among knowledgeable persons that penalties for corporate offenses are far too lenient, as shown in this study. Administrative actions such as warnings and consent agreements are used too often. Civil and criminal actions are infrequently utilized, and monetary penalties, frequently because of statutory limitations, are often ludicrous in terms of the corporations' assets, sales and profits." [Italic supplied.]

With Government unable to do the job, the burden must fall on private enforcement. However, individual and collective relief is out of reach for 99 percent of this Nation's businesses. First, even the largest individual small businesses cannot afford to bring an antitrust action on their own. A recent report prepared for the section of antitrust law of the American Bar Association by the National Economic Research Associates, Inc. (A Statistical Analysis of Private Antitrust Litigation: Final Report (1980)) documents the expense of individual antitrust actions. NERA compared the average size of plaintiffs and defendants on a case-by-case basis for those cases filed between 1973 and 1978 in the southern district of New York. Data on average annual sales of both plaintiffs and defendants were available in 29 cases. The cases covered nearly all industrial classifications. "In 24 of the 29 cases, the plaintiffs were on average a fraction of the size of the defendants."

Nonetheless, the study also detailed the average annual sales of the individual business plaintiffs. In this context it must be remembered that over 99 percent of the businesses in this country have average sales (or gross receipts) of less than \$5 million. In only two industries (printing-and-publishing and recreational services) out of the 19 surveyed did the plaintiff have average sales of less than \$5 million.

In the securities/commodities industry the plaintiff had average sales of \$8 million. In all other industrial areas (16 of 19 surveyed) plaintiffs bringing actions had assets at least two times the size of those of 99 percent of the businesses in the United States.

Second, present procedure allowing small businesses to share costs and bring collective damage actions under rule 23(b)(3) of the Federal Rules of Civil Procedure has compensated these businesses for only a fraction of 1 percent of the antitrust injury inflicted upon them over the past several years.

The United States Chamber of Commerce conservatively estimates that \$3.5 billion in injury may be inflicted upon businesses by illegal competition and deceptive practices. (A Handbook on White Collar Crime 6 (1974)). It can be safely estimated that 99 percent of these are small businesses, if \$5 million or less gross receipts annually defines a small business. However, over the past decade small businesses have recovered approximately \$.14 billion. (Arthur Young & Co., Small Business Representation in Federal Antitrust Class Actions (1979) (funded by the Office for Improvements in the Administration of Justice)). Given the Chamber data, this is less than one-half of 1 percent of a conservative estimate of their damage. (See discussion, supra). Even if small businesses' injury is overstated under an admittedly conservative estimate by a factor of two, they have recovered less than 1 percent of their antitrust damage.

The Arthur Young study also demonstrates that small business' interest in antitrust class damage actions is that of plaintiffs. Over the last decade they have recovered \$140.7 million in antitrust class damage actions. Their exposure as defendants has been only \$2.3 million. Ninety-four to 99 percent of the time, when small businesses are involved in antitrust class damage actions, they are on the plaintiff side.

(C) REVISION OF CLASS DAMAGE PROCEDURE: A PROCEDURE TO ENHANCE
DETERRENCE

Class actions are frequently brought under antitrust and other commercial statutes where the economic injury is widespread and large in the aggregate, yet so small in individual impact that no single small business has the financial resources or incentive to pursue litigation. Rule 23(b)(3) of the Federal Rules of Civil Procedure was intended to be useful in these circumstances by permitting cost spreading and efficient management, while at the same time insulating small businesses and others from intimidation by powerful adversaries. These laudable intentions, however, have yet to be realized in the 13 years of rule's existence.

Another major premise underlying the revisions is that some of the major problems encountered in class actions for damages have stemmed from ineffective judicial management. Title I provisions are designed to provide the courts with the necessary tools to manage these actions more effectively.

Among all the constituencies that would be affected by the bill, small business has an especially strong interest, a view borne out by the extensive small business testimony before your committee. The recent White House Conference on Small Business demonstrated the degree of concern on the part of small business over the staggering cost of access to the Federal courts.

The Department of Justice, which developed title I in consultation with your committee, has testified, "the demonstrated failure of private and public enforcement, individually, to deter unlawful commercial activity, requires a new approach—one that harnesses the resources and energies of both government and individuals in support of effective class litigation."

Title I achieves this goal in three ways. First, it creates a partnership between private citizens and the Government to ensure financially responsible representation of the interests of small businesses and the public generally. This will correct the resource imbalance in these collective actions which has greatly favored defendants—particularly those with deep-pockets, who have the means to wear down the victims by employing attrition strategies in litigation.

Second, the public action encourages private detection of illegality. Injured persons who materially advance the prosecution of the action can receive monetary compensation. This is a central feature of the public action approach. It enhances the likelihood of deterrence by increasing the probability that illegal conduct will be uncovered and successfully prosecuted.

Third, the public action streamlines the procedures for obtaining redress. As the Department of Justice has testified "optimal deterrence requires not only effective detection but certain and swift remedy. Present procedures, which were not designed with deterrence primarily in mind, are replete with obstructions to the expeditious disposition of collective damage claims in the form of cumbersome notice requirements and issue-proliferating standards. When these procedures are coupled with the abuses of discovery and motion practice discussed below the chances are scant of obtaining effective redress."

(1) *Financially adequate representation*

Public actions may be initiated by the United States or by injured persons suing on its behalf. If an injured person commences the lawsuit, the United States has four options available. First, it may assume control of the case and apply its full resources to promote the action.

Second, it may permit the action to be prosecuted by the injured person, but participate in any settlement proceedings to ensure that the remedy is adequate to effectuate deterrent interests.

Third, the United States may refer the case to a state attorney general in a state where a substantial portion of the injured persons reside; that attorney general can exercise any of the other options available to the United States. This results in a decentralization of joint private and public enforcement when unlawful conduct does not have a nationwide effect.

Finally, the United States may inform the court that it does not believe that continuation of the public action by a private attorney would be in the public interest. For example, the case may present no serious questions on the merits or private counsel may not adequately represent the interests of injured persons or the public, the court then would consider the Government's position, together with any rebuttal by the suit's initiator, to determine whether dismissal is justified.

Under the first three alternatives, the key actor is the private attorney. However, the costs of private counsel can be enormous and in many instances virtually deny to injured small businesses the right to have their day in court.

As the Department of Justice has put it, "in the past, government agencies have relied heavily on private class actions to effect the disgorgement of unjust profits, but have done little to promote the process. By correcting this deficiency, title I can be expected to promote the goal of deterrence by combining private and public resources to ensure financially adequate representation of the injured public."

(2) *Incentives for detection and enforcement of the antitrust laws by small business*

To encourage the initiation of meritorious public actions by small businesses and the injured persons, incentive fees of up to \$10,000 should be paid to those citizens whose efforts measurably advance an action that results in a monetary judgment. This is appropriate because they should be compensated for the considerable time they must devote to these actions. They advance not only their own interests, but those of the public as a whole. The incentive fee will also encourage cooperation between individuals and the government in the conduct of the litigation, especially when the size of the individual small business claim would not necessarily justify the great amount of time he must devote to the action.

(3) *Swift and sure redress*

Financially adequate representation and sufficient monetary incentives will not be enough to enhance deterrence if the remedy itself is delayed for years by slow and cumbersome procedures. Credible deterrence requires not only sure detection of illegality, but rapid and

certain redress as well. The violator—who may stand to make millions of dollars—must realize that, if he is found out, he will quickly be brought to the bar of justice and made to pay.

To achieve this end, the public action first offers more precise standards for determining when collective redress should be afforded. Next, the action should not be cluttered by tangential matters, such as cross-claims, counterclaims or pendant state law claims, that may generate exorbitant expense and create great inefficiencies. These claims may be resolved once central merit issues are decided. Also the present wasteful requirement of prejudgment notice needs to be eliminated. It has caused much expense and done little to protect the interests of absent, small claimants. It has also delayed redress greatly. Finally, and perhaps of greatest importance, is the need to promote more rational and less expensive management of the public action, as well as the larger-claim class compensatory actions described above. These provisions are needed to furnish the judge with tools to proceed in an orderly and efficient manner toward either a determination of the merits or an adequate settlement.

Current law forces a court to deal with certification and notice before confronting the substantive issues. It often takes years and hundreds of thousands of dollars and considerable judicial oversight before the court is faced with the merits of a class action. The court may be prompted to use its broad discretion to simply deny certification rather than ratify results which it may be unable to evaluate adequately. Judge Rubin, sitting for the Fifth Circuit Court of Appeals put it this way:

Of course, the easiest way for any court to handle complex class litigation is simply to deny certification; this may have the real effect of permitting a defendant to violate a Federal statute either with impunity or minor expense. In the present case few of the individual claimants would have the resources necessary to litigate against a well-financed defendant. . . . (Other courts have observed that) to permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the suit was to prevent.

There are no available means for courts and litigants to determine whether the merits are worth enduring the costs and complexities of the pre-merits procedures. A preliminary hearing on the merits would allow the court to put aside extensive procedural inquiry now required by law, to assess if the action has any basis.

The concept has many advantages. Small businesses and others could use this tentative evaluation to assess the wisdom of pursuing the action and investing more time and dollars. Defendants would be better insulated from harassing suits and forced settlements because the hearing would provide a means of assessing their degree of risk.

The preliminary hearing could also provide an opportunity for strong judicial control of discovery. Current procedure does not provide sufficient judicial attention to early definition of the issues. This encourages excessive, unfocused discovery, much of which is often never used. Often, defendants when confronted with meritorious small business class actions, will use their superior litigation resources to

wage an attrition campaign of motion practice and factfinding to reduce the size of the class. If the injured persons do not respond or participate in these maneuvers, they will be barred in some courts from recovery. The scope of discovery could be shaped and limited at a preliminary hearing of core violation issues.

Another useful device for handling class actions more efficiently is separate trial of issues. The issues of liability and damages are now tried simultaneously. Trying the issues of violation of liability before trying issues relating to damages could greatly simplify complex collective litigation. If the court makes a negative violation determination, all parties would be spared the time and expense of proving damages.

Another innovation in title I of critical importance for expeditious remedy is its provision for greater use of statistical sampling. By their very nature class damage actions bring together small businesses and others whose injuries arise out of the defendant conduct but whose claims may vary in type and amount. Courts in the past have required that thousands of individual small businesses and others come forward and make individual proofs of their damages—a class action into myriad and expensive individual actions.

The imaginative use of sampling may be the only practical way for a class representative to present an adequate case with respect to issues of causation and damage, and should be encouraged in the interests of fairness to injured persons and effectuation of the public interest.

In sum, as the Department of Justice, which has worked for 3 years on this issue, has testified by creating a financially responsible plaintiff, by increasing the incentive to ferret out and complain of wrongdoing, and by streamlining procedures for obtaining redress, title I strives to implement a coherent strategy of deterrence. Prevention of illegal conduct is vitally important to small businesses; they do not have the capacity to absorb punishing losses in the course of getting the system of justice to work in their favor.

Title I is also significant for small business because it represents for them a refreshing new approach to enforcement—one that relies not on larger bureaucracies, but upon the initiative of persons with the greatest incentive to enforce the law, those who suffer actual injury.

Taken together, the provisions of title I are designed to make litigation by small business and others a credible threat to large corporations tempted to violate the law and inflict widespread injury. And the likelihood of successful litigation is greatly enhanced by the possibility that substantial government resources will be arrayed in the contest against the wrongdoers. For all these reasons, the Administration believes that title I offers significant benefits to small business.

TITLE II

REDUCING THE COST OF JUDICIAL REVIEW OF SMALL BUSINESS CIVIL PENALTIES

Small Business also needs a remedy when it contests a small civil penalty levied by an administrative agency. Present procedures require a small business which is confronted with a Federal fine it

considers unjust or inequitable to exhaust all administrative remedies before it may seek redress in court. This creates a prohibitive expense for the business that can well exceed the amount in controversy and deplete the resources of a small company. Thus, under existing law, a small business has no effective recourse.

As the Small Business Legislative Council has put it:

Civil penalties affecting small business have increased in number and widened in scope in recent years. Contesting such orders can deplete resources of a small company. Rapid administrative review is needed where the sum in controversy is small, and the decision requires review of factfinding rather than invalidation of a statute, rule or regulation. Recently the White House Conference on Small Business listed title II as one of its 15 legislative priorities.

What is needed is a procedure that accords the small business rapid and impartial review when it contests a minor civil penalty matter with an agency. It should not be required to exhaust administrative remedy, especially when such exhaustion requires review by officers who may have been long-term employees of the agencies and who will tend to defer greatly to its initial findings.

This is not only necessary to relieve small business frustration with the administrative process, it is also important in the Government's endeavor to legitimize the exercise of its civil penalty powers. If agencies are to be accorded broad powers, there is always the possibility of arbitrary exercise of that power. Certainly their endeavors to weed-out law violators will be much more favorably received by small firms if an accused small business has an effective way to protect itself from the arbitrary exercise of that power.

TITLE III

EVALUATION OF NEW PROCEDURES

In order for your committee to adequately measure the effectiveness of this Act in securing easier access to justice by small business, it is necessary that certain relevant data be submitted to the Congress for its evaluation. Therefore, title III of this bill directs the Office of Advocacy within the Small Business Administration to issue periodic reports which detail the measure to which this act is meeting its goal of providing swift, inexpensive and effective access to justice by small business.

WHAT THE BILL WOULD DO

TITLE I

The basic provisions of title I would deter violations of our antitrust laws which injure small businesses and would facilitate legal action by small businesses to recover damages for such violations. This would be accomplished by establishing two separate procedures governing the bringing of class action lawsuits in the Federal courts: first, a "public action" designed for the situation where illegal conduct is alleged to have caused widespread harm to individuals in small amounts (not exceeding \$300 each) and where it is not economically

feasible for the injured persons to initiate individual actions; and second, a "class compensatory action" designed to provide more effective, less cumbersome procedures if individual injury exceeds \$300.

It also would provide Federal courts the necessary "tools" to manage these actions more effectively.

SUBCHAPTER A—THE PUBLIC ACTION PREREQUISITE

Subchapter A would recognize the interest of the United States in preventing unjust enrichment and deterring illegal conduct. This would be done by establishing a public action which addresses both the public and private interest and which would have the result of encouraging private detection as well as the initiation of litigation to arrest such unjust or illegal conditions.

The public action provisions would establish a single claim in the U.S. Government against the wrongdoer for unlawful conduct causing widespread harm in small amounts to small businesses, or other injured persons.

In order to be brought as a public action, the following elements would be required: (1) a "reasonable likelihood" that at least 200 persons had been injured in an amount not exceeding \$300 each; (2) a combined total of all injuries of more than \$60,000; (3) injuries arising out of the same transaction or occurrence; and (4) at least one substantial question of law or fact common to all injured persons.

The "same transaction or occurrence" and the "common question" tests would be similar to those found elsewhere in the Federal rules. The only modification in the "common question" language would be a requirement that the question be "substantial" rather than the rule's present requirement that common issues "predominate."

A number of other procedural class prerequisites in rule 23(b)(3) of the Federal Rules of Civil Procedure which have proven vague or unproductive would be eliminated or modified:

(1) The impractical joinder tests contained in rule 23(a) would be replaced by the objective requirement that a specific minimum number of persons be injured (200).

(2) Since the theory of the public action is that there is a single claim vested in the United States, there would be no need for notice to all persons who have been injured to ensure that they are adequately represented. Accordingly, the prejudgment notice requirement would be omitted.

(3) The requirement that the claim of the class representative be typical of those of the class would be deleted for the same reason.

The public action thus would reduce much expense caused by the present notice and certification procedures which are more suitable for compensatory actions.

PARTIES WHO MAY INITIATE AND PROSECUTE

The public action would be brought by the United States or by a relator (a person injured) suing on behalf of the United States. If the action is initiated by a relator, he or she would be required to serve notice on the Attorney General and provide him with evidence supporting the public claim.

The United States could then take any one of several actions: (1) enter an appearance and assume control of the action if it appears that a substantial number of persons are injured in at least 10 States; (2) allow the action to proceed as a public action pursued by the relator (on behalf of the United States); (3) recommend to the court that the action not be allowed as a public action because it is not in the public interest; or (4) refer it to the appropriate state attorney general if a substantial number of the injured parties reside in that state.

These options would recognize the United States' interest in public actions, while providing flexibility so that the government may allocate its resources to these actions as it is able.

The role of the state attorney general would provide a decentralized means of prosecution. A relatively small percentage of "national" public actions would be assumed by the Federal Government. Regional violations could best be handled by state attorneys general in the affected areas.

INCENTIVES TO PRIVATE DETECTION AND ENFORCEMENT

The role of the Government in the public action would be calculated to insure adequate representation. However, the action itself would be aimed at deterring illegality in the first place and the key participants in this effort would be the private attorneys and the injured parties. The public action, therefore, would include authorization for the payment of expenses and attorney fees whenever the Government assumes control of the action. The Government also would have the option of retaining private counsel to represent it after the date of assumption. Appropriated funds for these purposes, however, would be limited to an amount equal to unclaimed portions of recoveries in prior public actions. Should the Government prevail in or settle an action, the defendant would be ordered to reimburse the government for such expenditures.

It is expected that in situations where a large number of persons are injured in small amounts, the judgment funds would not be exhausted by the payment of claims as claimants do not always take the trouble to come forward despite efforts to notify them. For example, in a recent antitrust action class members claimed only \$18,980 of a \$5.2 million settlement.

Providing appropriated funds to pay for private enforcement of antitrust laws, limited to the amount of excess recoveries, would not cost the Government anything; on the other hand it would be a large step forward for aggrieved small businesses. It would alleviate well-known financial pressures on their counsel, who in many cases, now must advance large sums for out-of-pocket expenses. Such pressures now encourage an attrition strategy by the opposition and may result in inadequate settlements.

Also, in many situations private counsel may file a public action with the collective action covering larger compensatory claims, "class compensatory action", because a particular violation may result in individual injuries of both over and under \$300. Payment of attorney fees in the public action if it is assumed, would replenish private counsel's funds and thereby provide money for litigation of the compensa-

tory action. In addition, counsel would have the resource benefits of the United States or state litigating at his side in the public action.

To further encourage initiation of meritorious public actions, the bill would allow payment of an incentive fee of up to \$10,000 to a realtor whose efforts measurably advanced an action that results in a monetary judgment. This incentive fee would be paid by the losing defendant as part of the judgment and would be in addition to the amount of damages assessed by the court.

JUDGMENT—THE PUBLIC RECOVERY FUND

In a public action in which the defendant is found liable, the judgment would include a public recovery in an amount equal to the monetary benefit or profit realized by the defendant as a consequence of the illegal conduct or the amount of the aggregate damage to all persons injured. The court could also provide equitable or declaratory relief.

In determining the measure of the public recovery, the court would include in its consideration (1) which of the two recoveries is easiest to prove, (2) the intent of Congress embodied in the statute giving rise to the action, and (3) the clarity of the deterrent standard prior to the filing of the complaint.

Separate proof of the damages to persons injured would not be required except as shown by any sampling that the court may direct. (Sampling is discussed under subchapter C.)

The recovery would be owed to the United States—not to the injured persons. These persons, however, would be entitled to compensation from the United States in those actions in which the United States prevails and they would be paid from a fund comprised of damages collected from the defendant-violators of the antitrust and other laws.

CLAIMS ADMINISTRATION

In order to overcome the administrative burden on an individual court, the bill would allow the court to direct the Administrative Office of the U.S. Courts to handle the payment of claims. Under the direction of the court, this office would administer the public recovery fund and supervise notice to injured persons following judgment. Notice of the recovery would be made in any manner "reasonably likely to inform" persons eligible for compensation. Notice and other administrative expenses incurred in distributing the recoveries would be financed by the fund.

Injured parties could then file claims with the fund or receive a distribution based on business or other similar records if these records permit reasonably accurate claim calculation.

If the public recovery is greater than the payment of claims and administrative expenses, and a state has not prosecuted the action, the excess would be transferred to the general fund of the U.S. Treasury. Although available for general use by the Government, the amount transferred would also be used as a benchmark to limit the maximum amount which might be appropriated to pay private counsels.

If, however, a state had prosecuted the action, any excess funds would be paid to the state.

SUBCHAPTER B—CLASS COMPENSATORY ACTION

If individual injury is more substantial, private compensation becomes the chief concern. The class compensatory action authorized by this bill is designed to be the collective "larger claim" remedy for violation of antitrust and other Federal statutes. This type of action would be available if Federal statutes create a private civil right of action for damages; its application is, therefore, considerably broader than that of the public action.

PREREQUISITE

In order to bring a class compensatory action, at least 40 persons, named or unnamed, must have suffered injury exceeding \$300 each or be alleged to be liable for damages exceeding \$300 each. Each injury must—

- (1) arise out of the same transaction or occurrence; and
- (2) present a substantial question of law or fact common to the class.

There must also be a representative party who, with counsel, adequately represents the class interest.

At or after the preliminary hearing (discussed in subchapter C), the court would determine whether some or all injured persons should be excluded or included in the class if they so state by a specified date. (Rule 23(b)(3) currently requires class members to exclude themselves or "opt-out".)

Before imposing an "opt-in" requirement, the court would determine the likelihood that the amount of their injury or liability makes it feasible for them to pursue their interests separately, and whether they are likely to have the business sophistication and resources to conduct their own litigation.

ADEQUACY OF REPRESENTATION

Once the procedural prerequisites are met, the court would direct notice to be given to all class members. Under existing law the best notice practicable under the circumstances, including individual notice, must be given to all members who can be identified through reasonable effort. The bill, however, would change this and require notice "reasonably necessary to assure adequacy of representation" and "fairness" to all persons included in the class. So, although the court would be given the flexibility to direct the use of less expensive forms of notice in some cases, in other compensatory actions the individual amounts in controversy might be substantial and thereby justify more costly individual notice.

AMOUNT OF CLASS RECOVERY

If a defendant is found to have engaged in illegal conduct, after a separate determination of liability, he would be required to use his resources to identify those likely to be injured and determine the amount of their injury. Proof of damages is often the most complex phase of a class proceeding and often works to the advantage of the

party with superior resources. Imposing costs on the law violator would remove one incentive for an attrition strategy.

SUBCHAPTER C—JUDICIAL MANAGEMENT OF PUBLIC AND CLASS COMPENSATORY ACTIONS

PRELIMINARY HEARING

The bill would require a preliminary hearing within 120 days after a complaint is filed and it also would sharply limit discovery in the prehearing period. No more than 10 days of depositions or 10 depositions per side could be taken and only 30 interrogatories would be permitted.

On the basis of the preliminary hearing and any pleading, affidavits, discovery or other material presented, the court would determine among other things, whether—

- (1) there are "sufficiently serious questions going to the merits to make them fair grounds for litigation"; and
- (2) there is a "reasonable likelihood" that the class prerequisites have been met.

If the court makes a negative determination under these tests, the suit would be dismissed as a collective action. If a collective action is improperly denominated in the complaint as "public" or "class compensatory" action, the bill would allow amendment of the complaint to allege the correct collective action.

If the preliminary hearing does not result in dismissal, the court would enter a conditional order describing the "scope of the action, including a description of the transaction giving rise to the action and a statement of the substantial questions of law or fact common to all injured persons."

The requirements of an early preliminary hearing on the merits accompanied by early limitations on discovery, and the conditional order describing the scope of the action, would have large potential benefits for small business. First, they could use the tentative evaluation of the merits to assess the wisdom of pursuing the action further, and investing more time and money. It also would provide the defendant with a tentative insight into the possible extent of its liability, and protection from the costs of extensive and unnecessary discovery in cases without merit.

Second, current procedure permits "free-wheeling" discovery and motion practice which some parties use to obtain delays of years before critical prerequisite determinations are ever made. Some defendants when presented with a meritorious small business class action will mount an attrition strategy of motion practice and fact finding to reduce the size of the class. The defendant may propound many questions to small business class members or demand lengthy depositions. Class members can have their case dismissed in some situations when they do not respond to these motions, yet often very little of the material developed is ever used to decide the case.

To overcome this, the bill would prohibit, both before and after the preliminary hearing, discovery of injured parties without a showing that there is a "substantial need of the materials" and an inability

"without undue hardship to obtain the substantial equivalent of the materials by other means".

INTERLOCUTORY APPEALS

The bill also would amend Section 1292 of Title 28 of the United States Code to permit interlocutory appeals within 20 days of a decision granting or denying collective status. The court of appeals would have the discretion to entertain the appeal if the interest of justice so demands.

SEPARATE TRIAL OF ISSUES

The bill would require separate trials for liability and for proof of damages, unless such trials would be unconstitutional or it would be demonstrated that they would fail to expedite final resolution of the case. If liability is found in the cases compensatory action, the defendant would be required to use every means at his command to identify, at his expense, the injured persons and their damage.

Trying the issues of violation or liability before trying issues relating to damages could greatly simplify complex collective litigation. Plaintiffs could conserve their resources and proceed in a step-by-step fashion. It is likely that adequate settlements would occur if violation or liability issues are resolved in their favor, thus eliminating the need for complicated damage proof. If there is no violation or liability, the defendant would be spared the expense of defending damage issues.

Defendants often complain that they are forced to settle nonmeritorious actions because of the time-consuming, expensive procedures and the size of the defendants possible damage exposure. The preliminary hearing on the merits, together with separate trial of issues, would give these defendants an early day in court on core merit issues.

Only in exceptional circumstances does the Constitution prohibit separate trials. However, the Supreme Court in *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494 (1931) held that the seventh amendment prohibits the retrying of one issue by a separate jury following an appellate reversal if that issue is so inextricably intertwined that independent submission may cause inconsistent outcomes.

In the past this difficulty has been raised in antitrust suits where liability requires a showing of violation plus fact of injury or causation, which is also involved in the damage determination. However, under this bill, the district court judge would have complete control over which issues are to be separated and could structure the separation accordingly. For example, if issues of causation and damage are too intertwined, violation issues alone could be tried separately.

SAMPLING

In the case of a "compensatory action", the bill would permit, and in the case of a "public action" would require, the use of sampling to determine liability or the amount or extent of damages in order to trace the amount of damages actually inflicted on any one individual.

By their nature, collective actions bring together small businesses and others whose injuries arise out of the same illegal activity by the

defendant, but whose claims may vary in character or amount. Sampling would provide a means to determine the average individual damage claims as accurately as possible without the complexities of individual proof.

In the class compensatory action, where individual claims are larger and thus more susceptible to individual proof, sampling would be conditional, but could still be very useful to simplify damage proof. Once conditional findings of liability and damages are entered, the court would make conditional awards of recovery. The defendant would be able to raise any counterclaim or defense against an injured person when that person attempts to levy on the fund. This would preserve any due process rights of the defendant while postponing skirmishes over individual issues until after determination on the merits.

Your committee notes that although sampling is sanctioned by the Manual on Complex Litigation, the Federal Rules of Evidence, and parens patriae antitrust procedure under the Hart-Scott-Rodino Act, some courts have been reluctant to permit its use on the theory that it would violate the Rules Enabling Act by changing the substantive requirement of individual proof. Congress, however, does not labor under such a restraint and the bill would thus clearly provide for the use of sampling.

MANAGEMENT OF CONCURRENT ACTIONS

As noted above, public and class compensatory actions will often be brought simultaneously because a particular violation may inflict injuries of over and under \$300 per class member.

If overlapping or multiple claims are brought separately in different districts and by separate relators or representative parties, the bill would provide mandatory transfer to and consolidation in any district court of all public and class compensatory actions arising out of the same transaction or occurrence "to the extent feasible and consistent with the interest of justice".

The district court would be required to notify the Judicial Panel on Multidistrict Litigation of the filing of any public or class compensatory action. In addition, counsel would be required to give notice to the panel of any other civil proceedings of which he has knowledge that might be consolidated with the action.

Under current law, the Judicial Panel of Multidistrict Litigation may consolidate cases temporarily and for pre-trial discovery purposes only. The bill would amend 28 U.S.C. 1407 by authorizing permanent transfer and consolidation of the entire action. The full effect of the current limitation has not been felt because most class actions are settled before trial due to the difficulties of the present class action procedures. If the new judicial management provisions in the bill make trials more feasible, as expected, the present limits on consolidation might lead to inconsistent or unfair results.

EFFECT OF JUDGMENT

The bill also would specify the estoppel effects of the public and class compensatory actions. The defendant would be estoppel or prohibited from relitigating in another civil action any issue decided for

or against him. Injured persons, and the United States or individual States, suing on their behalf, would be bound by the judgment to the extent their interests have been adequately represented.

SETTLEMENT; EXAMINATION OF FEE REQUESTS

The bill would broaden the settlement requirements of rule 23(e) of the Federal Rules of Civil Procedure by explicitly requiring, in addition to approval by the court, a hearing and entry of a judgment stating: the terms of the settlement, the scope of the action, a description of the transaction giving rise to the action, and the substantial question of law or fact common to all injured persons represented by the action. Proponents of the settlement would be required to demonstrate its fairness to the court. Your committee's intent is to ensure that settlement proceedings do not prejudice the interests of absentee class members.

It is also your committee's intent that the court encourage aggrieved parties to participate in the hearing. In the class compensatory action, it would not be appropriate that the court merely present the settlement to the class and give them an opt-in, opt-out choice. In the public action the United States could present its views on the adequacy of the settlement, regardless of whether it assumed the action.

Finally, the bill would require a separate hearing on the amount of the plaintiff's attorney fees in both actions and encourage the court to seek additional views of persons other than the attorneys involved. This might be the United States in a public action or, in the class compensatory action, a special master or magistrate.

TITLE II—APPEAL OF SMALL CIVIL PENALTIES AGAINST SMALL BUSINESS CONCERNS

Title II would authorize an alternative to, or by-pass of, the present administrative appeal system which the small business concern could utilize if it so chooses.

It would do so by authorizing immediate, impartial magistrate review of a Federal agency civil penalty of \$2,500 or less which was imposed against a small business.

The magistrate would be authorized to review the facts and affirm, rescind or modify the penalty, but he would not be permitted to invalidate a law or regulation. The decision of the magistrate would be final and not reviewable by any court or agency. Also, while the magistrate proceedings are pending, the penalty could not be enforced unless the magistrate finds that failure to enforce the penalty poses an imminent danger to the public's health or safety.

TITLE III—OFFICE OF ADVOCACY

Title III of the bill would assign to the Chief Counsel for Advocacy of the Small Business Administration, the role of assisting state and Federal facilitation of small business collective relief under Federal statutes. Also, the Chief Counsel would be directed to monitor small business utilization of collective redress, the extent to which redress is delayed, and the amount of government resources devoted

to these actions. Finally, the Chief Counsel would report to the Congress and the President on the effectiveness of the remedies afforded by the act, including both the class actions and magistrate review provisions.

This act would become effective on October 1, 1980.

CONCLUSION

As noted, the U.S. Chamber of Commerce conservatively estimates that \$3.5 billion in inquiries are inflicted annually upon businesses by illegal and deceptive trade practices alone. Ninety-nine percent of these businesses are small, yet in the past decade small businesses have recovered less than one-half of 1 percent of their estimated injuries. The failure of existing law to deter violations of antitrust and other Federal statutes or to provide compensation for such violations can be traced to three hard, cold facts of life. First, even "large" small business cannot afford to bring their own individual actions in nearly all circumstances. Second, even when small businesses join together in a collective damage action, the present class action procedures do not give effective, affordable redress. Third, the antitrust law enforcement agencies of the Federal government cannot or will not do the job.

By creating a financially responsible plaintiff, increasing the incentive for detection of violations and enforcement of their penalties, and by streamlining procedures for effective redress, title I provides a strategy of deterrence. The provisions of title I are designed to make litigation by small business and others a credible and more easily enforceable threat to those contemplating violation of a law which would inflict widespread injury.

Of more or equal importance in this era of reduced Federal spending is the aspect of the bill which funds the cost of providing the incentives for private enforcement of the antitrust laws out of the pockets of the law violators. Amounts recovered from them will go to the general fund of the U.S. Treasury and will provide a limit on the amount which may be paid in incentives. Thus, although the Government would acquire a new private partner to help enforce antitrust laws, the cost of the partnership would not be paid by the taxpayers.

Title II addresses a different but equally troublesome area of small business concern—the need for an expeditious and economical means of contesting small civil penalties imposed by Federal agencies. Under existing law, a small business which is dissatisfied by an agency decision imposing a civil penalty of \$2,500 or less is required to appeal the decision through all higher levels within the agency before having access to the courts. By authorizing an immediate appeal of the appropriateness of the penalty to a magistrate, this title would allow an aggrieved small business to by-pass a time consuming, possibly inherently biased, and expensive procedure, oftentimes costing thousands of dollars more than the amount of the penalty. Permitting such an expedited and low cost review of the agency's decision would in no way thwart the agency's mission, but it would go a long way towards restoring the confidence of the small business community in the Government by insuring him an independent determination of the appropriateness of the penalty to the violation with which he was charged.

Your committee unanimously endorses this bill and urges its prompt

consideration and approval by the House in order to provide the nation's small businesses with easier access to justice.

MATTERS REQUIRED TO BE DISCUSSED UNDER HOUSE RULES

In compliance with clause 2(1)(2) of rule XI of the House of Representatives, the following statement is made relative to the recorded vote on the motion to report H.R. 5103, as amended.

A majority of the committee voted in person and was actually present and the motion was approved by a recorded vote of 29 ayes and 0 nays, with 5 votes being cast by proxy.

In compliance with clause 2(1)(3) of the rule XI of the Rules of the House of Representatives, the following statements are made:

With regard to subdivision (A), relating to oversight findings, the committee finds, in keeping with clause 2(b)(1) of rule X, that this legislation is in full compliance with the provision of this rule of the House, which states:

"In addition, each such committee shall review and study any conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation within the jurisdiction of that committee. * * *"

With regard to subdivision (B), relating to the statement required by section 308(a) of the Congressional Budget Act of 1974, the following statement is made relative to the legislation:

"Section 3(a)(2) of the Congressional Budget Act defines the term 'tax expenditures' as those revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability."

None of the provisions of H.R. 5103 deals with taxation and thus, in your committee's opinion, this bill does not provide new or increased tax expenditures.

Section 3(a)(2) of the Congressional Budget Act defines the term "budget authority" as authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds.

Under this definition, it is the final action of Congress that authorizes an agency to enter into obligations which constitutes new budget authority. In those cases which entail (1) an authorization for an agency to undertake a program; (2) an authorization for appropriation of funds to permit that agency to enter into obligations; and (3) an actual appropriation of such funds, it would be only the final action of Congress in appropriating funds which constitutes the budget authority.

None of the provisions of H.R. 5103 appropriates funds and thus, in your committee's opinion, the bill does not provide new budget authority. Accordingly, no comparison of budget authority, outlays or tax expenditures or 5-year projections have been made.

With regard to subdivisions (C) and (D), a cost estimate of the

Director of the Congressional Budget Office relative to H.R. 5103 follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., May 15, 1980.

HON. NEAL SMITH,
Chairman, Committee on Small Business, U.S. House of Representatives,
Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for H.R. 5103, the Small Business Judicial Access Act.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

C. G. NUCKOLS
(For Alice M. Rivlin, Director).

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 5103.
2. Bill title: The Small Business Judicial Access Act.
3. Bill status: As ordered reported by the House Committee on Small Business on May 13, 1980.
4. Bill purpose: H.R. 5103 would provide a comprehensive revision of current class action procedures. It would also allow small businesses to select immediate magistrate review of certain agency imposed civil penalties and fines. The Small Business Administration (SBA) would monitor and report to the Congress on the status of these public and class action suits.
5. Cost estimate: The estimated costs of implementing the provisions of this bill are summarized in the following table:

Estimated authorization level:		Millions
Fiscal year:		
1981	-----	\$3.2
1982	-----	6.3
1983	-----	8.2
1984	-----	10.6
1985	-----	11.5
Estimated outlays:		
Fiscal year:		
1981	-----	3.1
1982	-----	6.1
1983	-----	8.0
1984	-----	10.4
1985	-----	11.4

The above table does not reflect any excess funds which may revert to the general fund of the Treasury as a result of the provisions in H.R. 5103. Depending upon the assumptions made, it is estimated that between \$10 million and \$75 million will annually accrue to the Treasury after distributions for damages, as a result of class action suits. The funds, subject to appropriation, would then become available for future enforcement efforts.

The costs of this bill fall primarily within budget function 750.
6. Basis of estimate:

TITLE I—REVISION OF CLASS DAMAGE PROCEDURES

This title would amend Title 28 of the United States Code to allow class action suits for damages when economic injury is small (less than \$300) and the primary purpose is to deter illegal conduct or prevent unjust enrichment. It would also allow a class action suit to be filed in U.S. District courts when the primary purpose is to provide compensation when individual economic injury is more substantial.

Title I specifies the methodology to be used by the courts to determine the computation and distribution of any recovery of damages assessed by the courts for public actions. Any such recovery is to be deposited in a public recovery fund, which may be administered by the Administrative Office of the United States Courts. Damages are to be paid from this fund, but only to the extent that the payments are provided in advance by appropriation action. Any excess funds are to be transferred to the general fund of the Treasury. The bill authorizes to be appropriated the expenses of private counsel but limits the amount which may be appropriated to the amount of excess fund deposited in the Treasury.

Currently, class action suits are litigated primarily by private attorneys. This bill would broaden the authority of the Attorney General or other federal enforcement agencies to bring certain types of class action suits or support certain types of privately initiated class action suits. In a public action the Attorney General could assign the legal staff of the Department of Justice (DOJ), or another federal agency to handle the lawsuit. Based on a study prepared for DOJ, it is estimated that when fully implemented, approximately 25 law suits would be appropriate for assumption annually by DOJ, at a cost to litigate of approximately \$2.8 million in 1977 dollars. Assuming that the provision would take four years to implement, and assuming adjustments for overhead and inflation, it is estimated that the additional cost to the federal government would be \$1.4 million in fiscal year 1981, increasing to \$7.8 million by fiscal year 1985 although no funds are authorized in the bill for this purpose. Outlays are estimated to be 90 percent the first year and 10 percent the second year. No additional costs have been assumed for the district court system, since it is likely that the total number of cases would not change significantly over the current level.

The amount of excess funds available in the public recovery fund, after distribution for damages, is estimated by DOJ to be between \$10 million and \$75 million annually. These funds would then be available, subject to appropriation, for financing subsequent enforcement efforts.

H.R. 5103 also requires the U.S. district court to hold preliminary hearings to assess the appropriateness of class compensatory actions for injuries exceeding \$300. The bill specifies procedural prerequisites and rules for such class action suits. Damages and expenses, if awarded, are to be paid first, and then any excess is to be deposited in the general fund of the U.S. Treasury.

TITLE II—APPEAL OF SMALL CIVIL PENALTIES AGAINST SMALL BUSINESS CONCERNS

Title II would allow a small business to appeal a civil penalty of not more than \$2,500 directly to the agency or courts. Prior to the judgment, the agency could not enforce the penalty. Based on data from the Administrative Conference of the United States, it is estimated that probably no more than 10,000 actions would likely be subject to appeal annually under this provision. It is estimated that approximately 75 percent of these actions would be appealed, requiring approximately 19 magistrates to handle this workload. The Administrative Office of the United States Courts estimates that it currently costs approximately \$133,000 annually for each magistrate, the support staff, and overhead and benefits, plus \$41,000 in nonrecurring costs. Assuming implementation would require two years, it is estimated that the cost of Title II, adjusted for inflation, would be \$1.8 million in fiscal year 1981, \$3.3 million in fiscal year 1982, \$3.2 million in fiscal year 1983, \$3.4 million in fiscal year 1984, and \$3.7 million in fiscal year 1985. Outlays are estimated to be 90 percent the first year and 10 percent the second year. No funds are authorized for this purpose in the bill.

TITLE III—OFFICE OF ADVOCACY

The Chief Counsel of Advocacy of the Small Business Administration (SBA) would be required to cooperate with the Attorney General in carrying out the provisions of Title I, and to analyze and to report to the Congress on the status of the public and class action suits brought by or on behalf of small businesses. Since most of these data are currently available, it is expected that the cost incurred by SBA as a result of this provision would be minimal.

7. Estimate comparison: None.
8. Previous CBO estimate: None.
9. Estimate prepared by: Mary Maginniss (225-7760).
10. Estimate approved by:

C. G. NUCKOLS
(For James L. Blum,

Assistant Director for Budget Analysis).

No oversight findings or recommendations have been made by the Committee on Government Operations with respect to the subject matter contained in H.R. 5103.

In compliance with clause 2(1)(4) the committee concludes that the provisions of this legislation in and of themselves will have no inflationary impact on prices and costs in the operation of the national economy.

In compliance with clause 7, rule XIII of the House of Representatives, the committee makes the following statement:

The costs attributable to this bill for the current fiscal year and for fiscal years 1981-85 are as follows: this bill does not require any authorization for the appropriation of additional funds. The provisions of title I establishing new types of class actions and involving personnel of the Justice Depart-

ment will impose some additional administrative duties on this Department; however, the bill merely reiterates the obligation of the Justice Department to enforce our antitrust laws. Moreover, by bringing private counsel into use as additional enforcers of our antitrust laws, the bill may ultimately permit the Department to reduce its staff. Finally, in regard to title I, the committee would stress that the cost of any such private counsel will be paid based upon the amounts recovered from those who are proven to have violated the antitrust laws and that these recoveries may exceed the cost of private counsel and thus actually provide the Government with additional income. In regard to title II, there will be some cost for the salaries of the magistrates; however, this cost should be offset by a reduction in the cost now associated with internal appeals within the agencies involved and in the courts. Finally, in regard to title III, the administrative expenses of the Office of Advocacy of the Small Business Administration in monitoring the use of the other titles and reporting to Congress and the President thereon will be minimal.

Your committee has not received a cost estimate on this bill from a Government agency.

In your committee's opinion, the above statements fully comply with the Rules of the House of Representatives.

SECTION-BY-SECTION ANALYSIS

Section 1 provides that this act may be cited as the "Small Business Judicial Access Act of 1980".

Section 2 contains a statement of purposes. The stated purposes are (1) to improve class damage procedures without creating or enlarging any private right of action, (2) to provide rapid, inexpensive court review of administrative fines and penalties affecting small business, and (3) to compensate small businesses and other injured persons for delayed remedy.

Section 101(a) adds new chapter 176 to title 28 of the United States Code. The sections of this new chapter provide for the following:

SUBCHAPTER A—PUBLIC ACTION

The proposed section 3001(a) specifies the procedural prerequisites for a "public action". A public action may be brought against any person whose conduct in the manufacture, rental, distribution, sale, purchase or offer of realty, goods or services, including securities, gives rise to a civil right of action under a statute of the United States. The class must include 200 or more named or unnamed persons, each injured in an amount not exceeding \$300, with a combined injury exceeding \$60,000. The injuries must arise out of the same transaction or occurrence, and the action must present a substantial question of law or fact common to the injured persons.

The proposed section 3001(b) accords the district courts of the United States exclusive jurisdiction over the public action, provided that such jurisdiction shall not extend to cross-claims, counterclaims, pendent claims based on state law, or actions removed from state courts which do not meet the prerequisites of subsection (a).

The proposed section 3001(c) provides that public actions shall be brought in the name of the United States and may be brought by (1) the Attorney General of the United States, (2) an executive or independent agency of the United States if it has exclusive authority to seek civil enforcement of the statute giving rise to the public action or is authorized by the Attorney General to bring such action, or (3) by a person or relation who has suffered injuries not in excess of \$300.

The proposed section 3001(d) provides that if a public action is brought against the United States, the court may order that the action not be assumed by the United States and shall issue any other order appropriate to assure that counsel defending the action against the United States will act independently of counsel prosecuting the action.

The proposed section 3002(a) provides that when a relator (that is, an injured party) brings a public action against a defendant other than the United States, he shall serve upon the Attorney General of the United States a copy of the summons and complaint together with a written disclosure of all relevant information or material known to him.

The proposed section 3002(b) provides that the Attorney General may assume control of the action, refer it to a Federal agency, which may assume control of it, permit it to be prosecuted by the relator, refer it to a State attorney general, or file a statement of reasons why the public interest would not be served by allowing the action to continue as a public action. A state attorney general to whom an action is referred may assume control of it, permit it to be prosecuted by the relator, or file a statement of reasons why the public interest would not be served by allowing the action to continue as a public action. Upon such a filing, by the attorney general of either the United States or a State, the action shall be dismissed as a public action unless the relator demonstrates to the court's satisfaction that the public interest would be served by allowing the action to continue as a public action.

The proposed section 3002(c) provides that in actions which are assumed by the U.S. Attorney General, the court may permit the relator or any other person injured not in excess of \$300 to intervene, and the Attorney General or agency may allow private counsel to participate in the conduct of the action by the United States or State under the direction and control of the Attorney General or agency.

The proposed section 3002(d) provides that the Attorney General of the United States shall issue necessary regulations to implement section 3002 authority.

The proposed section 3003(a) provides that if the United States prevails or settles in a public action brought by a relator, the defendant shall be ordered to pay to the relator, in addition to the public recovery, (1) the taxable costs and reasonable litigation, expenses, including attorney's fees if such fees are otherwise allowed by law, and (2) an incentive fee equal to 20 percent of the first \$25,000 of public recovery and 10 percent of the next \$50,000 of public recovery, unless the relator substantially relied upon specified Federal or State proceeding.

The proposed section 3003(b) provides that if an attorney general, a State, or an agency assumes control of a public action, it must pay the reasonable expenses, including attorney's fees, to a relator who the court finds measurably advanced the initiation of the action. Payment

shall include expenses incurred by the relator prior to the commencement of the action to the date of assumption. Such payments by the Federal Government are limited to the extent and in the amounts as are provided in advance in appropriations acts.

The proposed section 3004(a) and 3004(b) provide that there shall be a public recovery equal to either the monetary benefit or profit realized by the defendant from the course of conduct, or the aggregate damage to persons injured not in excess of \$300 each.

The proposed section 3004(c) provides the standards for electing the appropriate public recovery. Factors to be considered include the intent of Congress embodied in the statute giving rise to the public action; the relative expeditiousness of proof; and the degree of uncertainty in the law upon which liability is based prior to the filing of the complaint.

The proposed section 3004(d) makes clear that if the underlying substantive statute giving rise to the public action requires an award to be multiplied by some factor, this factor shall be applied to the mode of public recovery selected. In addition, limitations on aggregate liability, and punitive damage requirements in the underlying substantive statute are made applicable to public action recoveries.

The proposed section 3004(e) requires the losing defendant to pay to the clerk of the court the amount of the judgment, which shall be used to establish the public recovery fund.

The proposed section 3005(a) provides that the public recovery fund shall be used to make payments to persons injured in an amount not exceeding \$300 and to pay administrative expenses.

The proposed section 3005(b) permits the court to make use of the Administrative Office of the U.S. Courts to assist in the distribution of the recovery. Notice may be by publication and other such means as the court or the Administrative Office determines are reasonably likely to inform persons eligible to file claims.

The proposed section 3005(c) provides that funds not needed to pay claimants or administrative expenses shall be transferred to the general fund of the U.S. Treasury unless a State prosecuted the action, in which case the excess funds shall be paid to that State as general revenues.

The proposed section 3005(d) permits the Director of the Administrative Office to issue regulations necessary to assure efficient claim administration.

The proposed section 3005(e) authorizes appropriations as necessary to pay the expenses of a relator or private counsel as provided in subsection 3003(b), but limits the amount which may be appropriated to an amount equal to excess funds transferred to the U.S. Treasury pursuant to subsection 3005(c).

SUBCHAPTER B—CLASS COMPENSATORY ACTION

The proposed section 3011 specifies the procedural prerequisites for the class compensatory action. Such actions may be brought against persons whose conduct gives rise to a civil right of action under a statute of the United States. With one exception, a class must have 40 or more persons, each injured in an amount exceeding \$300 or 40 or more persons each liable in an amount exceeding \$300. The excep-

tion is that in actions brought under Federal statutes which do not give rise to public actions, a class compensatory action may be brought by 40 or more persons for injuries not exceeding \$300. The injuries or liabilities must arise out of the same transaction or occurrence or series of transactions or occurrences, and the action must present a substantial question of law or fact common to the injured or sued persons.

The proposed section 3011(b) accords the district courts of the United States exclusive jurisdiction.

The proposed section 3012(a) provides that the amount of injury shall be proved by any method permitted or required by sampling (sec. 3022(f)), or other law.

The proposed section 3012(b) provide that if the court orders a separate trial of liability issues, and the defendant is found liable he must, at his own expense, make a reasonable effort to identify the persons injured and give the best notice available of the finding of liability to such individuals.

The proposed section 3012(c) permits the court to order equitable or declaratory relief in addition to an award of damages.

The proposed section 3012(d) provides for the transfer of any excess funds, after the payment of claims and expenses, to the general fund of the U.S. Treasury.

SUBCHAPTER C—JUDICIAL MANAGEMENT OF PUBLIC AND CLASS COMPENSATORY ACTIONS

The proposed section 3021(a) limits early discovery by restricting the number of interrogatories and depositions that may be taken by each side prior to the preliminary hearing provided for in the proposed section 3022.

The proposed section 3021(b) prohibits discovery aimed against injured persons without leave of court.

The proposed section 3021(c) provides that notice of any discovery taken by a relator in a public action shall be served upon the Attorney General of the United States, who may examine the materials discovered.

The proposed section 3022(a) provides that the court shall hold a preliminary hearing to determine whether and in what manner actions brought as public actions or class compensatory actions will proceed.

The proposed section 3022(b) provides that immediately after the preliminary hearing, the court shall determine (1) whether there is a reasonable likelihood that the action meets the prerequisites of the public action or class compensatory action, (2) whether there are sufficiently serious questions going to the merits to make them fair grounds for litigation, (3) whether a public action should proceed, if an attorney general or agency has filed a statement of reasons why the public interest would not be served by allowing the action to continue as a public action, and (4) whether the relator and his counsel in an action not assumed by an attorneys general or agency, or the class representative and his counsel in a class compensatory action, will adequately protect the interest of the United States or the class.

The proposed section 3022(c) provides that if there is a negative determination on any of the criteria listed in the proposed section 3022(b) the court shall dismiss the action.

The proposed section 3022(d) requires the court, if an action is not dismissed pursuant to section 3022(c), to enter an order describing the scope of the action.

The proposed section 3022(e) provides that after the preliminary hearing in a class compensatory action, the court shall determine whether some or all injured persons shall be excluded or included in the class only if they so request by a specified date. After this determination, the court shall give notice reasonably necessary to assure adequacy of representation of all persons included in the class.

The proposed section 3022(f) requires the court to use sampling to determine a defendant's liability or the amount of damages in a public action. The use of sampling is discretionary in class compensatory actions.

The proposed section 3023(a) requires the judicial panel on multi-district litigation to the extent feasible and consistent with the interest of justice, to transfer to and consolidate district court public actions, class compensatory actions, and other civil actions that arise out of the same transaction or occurrence and that present a substantial question of law or fact common to the injured or sued persons. Excepted are civil actions for equitable relief brought by the United States pursuant to the antitrust statutes under 28 U.S.C. 1497 (g) or by the Securities and Exchange Commission under 15 U.S.C. 78u(g).

The proposed section 3024 sets forth the parties bound by judgments in public and class compensatory actions.

The proposed section 3025 provides that settlements of public and class compensatory actions must be approved by the court to be effective.

The proposed section 3026(a) provides that public and class compensatory actions shall be governed by the Federal Rules of Civil Procedure except as provided in this Act or other Federal law.

The proposed section 3026(b) permits the court, within certain specified constraints, to try issues of liability first and then to conduct a separate trial on damage issues.

The proposed section 3026(c) requires the court to hold separate hearings to determine the reasonableness of attorneys' fees awarded in public or class compensatory actions.

The proposed section 3026(d) permits the court to dismiss a public or class compensatory action if the court determines that full utilization of the provisions of this act and the Federal Rules of Civil Procedure will not enable the court to adequately manage the proceeding.

The proposed section 3027(a) defines "person" to mean an individual, corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, estate, society, union, club, church, or other association of persons, and includes a state or political subdivision of a state or a foreign state or political subdivision of a foreign state.

The proposed section 3027(b) through 3027(f) prescribes the effect of the bill on public and class compensatory actions brought under the Fair Labor Standards Act, the Hart-Scott-Rodino Antitrust Improve-

ments Act, the Magnuson-Moss-Warranty Federal Trade Commission Act, the Truth in Lending Act, the Fair Debt Collection Practices Act, the Equal Credit Opportunity Act, and the Deepwater Port Act of 1974.

Section 102 of this bill repeals rule 23(b)3 of the Federal Rules of Civil Procedure and concomitant notice provisions.

Section 103 of this bill deletes the requirement of the Fair Labor Standards Act requiring opt-in.

Section 104 of this bill adds to 28 U.S.C. 1292 a provision which gives the courts of appeals jurisdiction to review orders of the district courts dismissing or allowing public or class compensatory actions.

Section 105 of this bill strikes the last section of 18(i)(2) of the Deepwater Port Act of 1974 dealing with current rule 23(c)(2) of the Federal Rules of Civil Procedure and substitutes it with section 3022(e) of this act.

Section 106 of this bill provides that sections 101 through 105 shall apply to all civil actions commenced on or after the effective date of this act.

TITLE II—APPEAL OF SMALL CIVIL PENALTIES AGAINST SMALL BUSINESS CONCERNS

Section 201 amends section 636 of title 28, United States Code, by adding new subsection (f) at the end thereof. The proposed new subsection (f) allows a small business concern (as defined in 15 U.S.C. 632) against which an agency imposed a civil penalty of not more than \$2,500 to (1) within 30 days appeal the penalty to a Federal magistrate, or (2) appeal in the agency or the courts as otherwise provided by law. Appeals decided by a magistrate can be dismissed for want of jurisdiction, or affirmed, rescinded or modified. Until the magistrate decides the appeal or denies jurisdiction, the agency will be precluded from enforcing the penalty, barring a finding by the magistrate of imminent danger to health or safety resulting from a postponement. A determination on the merits will not be reviewable by any agency or court. A dismissal for want of jurisdiction will not preclude a small business concern from pursuing any other remedy available by law.

Section 202 amends 28 U.S.C. 639 by providing definitions of terms used in the proposed new subsection (f) of 28 U.S.C. 636. These definitions are:

(1) "small business concern" has the meaning prescribed in section 3 of the Small Business Act (15 U.S.C. 632).

(2) "agency" means an agency in the executive branch or an independent agency of the U.S. Government, or a corporation owned or controlled by the United States.

(3) "civil penalty" means a single civil fine or penalty, or part thereof, against a single small business concern that is equal to or less than the sum or value of \$2,500 exclusive of interest and costs, other than a civil fine or penalty that is within the jurisdiction of the U.S. Tax Court, the United States Customs Court, the U.S. Court of Military Appeals, or the U.S. Court of Claims. Section 203 amends 28 U.S.C. 636 by adding after new subsection

(f), provided in section 201 of this act, a new subsection (g). The proposed new subsection (g) makes section 201 of this act applicable to the Fair Labor Standards Act.

Section 204 provides that title II of this act shall apply to civil actions commenced or Federal fines imposed on or after the effective date of this act.

TITLE III—OFFICE OF ADVOCACY

Section 301 amends 15 U.S.C. 634(b) by authorizing the Small Business Administration's Office of Advocacy to advise, cooperate with, and consult with the Attorney General of the United States, a Federal agency, or a state in the performance of its duties in connection with public actions under the proposed title I of this act. It also requires the Chief Counsel for Advocacy to submit reports to the President and to the Congress on public and class compensation actions brought by or on behalf of small businesses and on the implementation of title II of this act.

Section 302 provides that this act shall take effect October 1, 1980.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

* * * * *

PART III—COURT OFFICERS AND EMPLOYEES

* * * * *

CHAPTER 43—UNITED STATES MAGISTRATES

- Sec. 631. Appointment and tenure.
- 632. Character of service.
- 633. Determination of number, locations, and salaries of magistrates.
- 634. Compensation.
- 635. Expenses.
- 636. Jurisdiction, powers, and temporary assignment.
- 637. Training.
- 638. Dockets and forms; United States Code; seals.
- 639. Definitions.

* * * * *

§ 636. Jurisdiction, powers, and temporary assignment

(a) * * *

* * * * *

(f) (1) Notwithstanding any other requirement of law, a small business concern against which an agency imposes a civil penalty as defined by section 639(9) may—

(A) within thirty days of receipt of notice of the civil penalty, individually appeal the imposition of the penalty, or part thereof, to the appropriate district court; or

(B) appeal the agency action in the agency or the courts as otherwise provided by law.

(2) The district court shall direct a magistrate to conduct all proceedings, including entry of judgment, in an appeal filed pursuant to paragraph (1) (A).

(3) If an appeal is filed pursuant to paragraph (1) (A), the agency may not enforce the civil penalty until the magistrate decides the appeal or denies jurisdiction, unless the magistrate finds that failure to enforce the civil penalty poses an imminent danger to the health or safety of any person.

(4) The magistrate may—

(A) dismiss the action for want of jurisdiction if he finds that—

(i) the civil penalty is not a civil fine or penalty as defined in section 639(9);

(ii) appeal of the civil penalty is in the jurisdiction of the United States Tax Court, the United States Customs Court, the United States Court of Military Appeals, or the United States Court of Claims;

(iii) determination of the appeal would involve a finding that a rule, regulation, or statute on which the civil penalty is based is unlawful;

(B) review the agency determination under the same standard that would have been applied by a Federal court if administrative remedy had otherwise been exhausted, and—

(i) affirm the imposition of the civil penalty; or

(ii) order the agency to rescind or modify the civil penalty.

(5) A determination of the magistrate under this subsection is final, and may not be reviewed by any agency or court. If the magistrate denies relief because the district court does not have jurisdiction of the action, the small business concern may pursue any other remedy available by law as though no appeal had been taken pursuant to this subsection, and the civil penalty shall, for purposes of determining the time for pursuing such remedy, be considered to have been imposed on the date of the determination by the magistrate.

(g) Notwithstanding any other requirement of law, a consensual magistrate final determination under subsection (b) (3) in a minimum wage or maximum hour action brought pursuant to section 16(b) of the Fair Labor Standards Act, as amended (29 U.S.C. § 216(b)), shall be final and may not be reviewed by any court where—

(1) the amount in controversy is equal to or less than \$2,500; and

(2) the determination of the action does not involve a finding that a rule, regulation, or statute on which the claim is based is unlawful.

* * * * *

§ 639. Definitions

As used in this chapter—

(1) * * *

* * * * *

(5) "Part-time magistrate" shall mean a part-time United States magistrate; [and]

(6) "United States magistrate" and "magistrate" shall mean both full-time and part-time United States magistrates[.];

(7) "small business concern" has the meaning prescribed in section 3 of the Small Business Act (15 U.S.C. § 632);

(8) "agency" means an agency in the executive branch or an independent agency of the United States Government, or a corporation owned or controlled by the United States; and

(9) "civil penalty" means a single civil fine or penalty, or part thereof, against a single small business concern that is equal to or less than the sum or value of \$2,500, exclusive of interests and costs, other than a civil fine or penalty that is within the jurisdiction of the United States Tax Court, the United States Customs Court, the United States Court of Military Appeals, or the United States Court of Claims.

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PART IV—JURISDICTION AND VENUE

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CHAPTER 83—COURTS OF APPEALS

* * * * *

§ 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

* * * * *

(c) The court of appeals shall have the jurisdiction to review in their discretion orders of the district courts dismissing or allowing actions to be maintained as public actions or class compensatory actions pursuant to section 3022(c). A person seeking review shall file a petition for leave to appeal with the court of appeals within twenty days of the entry of the order dismissing or allowing an action as a public action or a class compensatory action.

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Chap.	Sec.
151. Declaratory Judgments.....	2201
153. Habeas Corpus.....	2241
155. Injunctions; Three-Judge Courts.....	2281
157. Interstate Commerce Commission Orders; Enforcement and Review.....	2321
158. Orders of Federal Agencies; Review.....	2341
159. Interpleader.....	2361
161. United States as Party Generally.....	2401
163. Fines, Penalties and Forfeitures.....	2461
165. Court of Claims Procedure.....	2501
167. Court of Customs and Patent Appeals Procedure.....	2601
169. Customs Court Procedure.....	2631
171. Tort Claims Procedure.....	2671
173. Attachment in Postal Suits.....	2710
175. Civil Commitment and Rehabilitation of Narcotic Addicts.....	2901
176. Public and Class Compensatory Actions.....	3001

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CHAPTER 176—PUBLIC AND CLASS COMPENSATORY ACTIONS

SUBCHAPTER A—PUBLIC ACTION

Sec.

3001. Public action; prerequisite; district court jurisdiction.

3002. Public action commenced by relator; assumption by the United States.

3003. Costs; litigation expenses; incentive fee.

3004. Public recovery; judgment.

3005. Public recovery fund; payments to injured persons.

SUBCHAPTER B—CLASS COMPENSATORY ACTION

Sec.

3011. Class compensatory action; prerequisites; district court jurisdiction.

3012. Proof of damage; separate determination of liability and damages; judgment.

SUBCHAPTER C—JUDICIAL MANAGEMENT OF PUBLIC AND CLASS COMPENSATORY ACTIONS

Sec.

3021. Initial discovery.

3022. Preliminary hearings scope of action; notice in class compensatory action; sampling.

3023. Transfer and consolidation.

3024. Effect of judgment.

3025. Settlement.

3026. Applicability of civil procedure rules; separate trials; examination of attorney's fee request.

3027. Definition; other class action provisions.

SUBCHAPTER A—PUBLIC ACTION

§ 3001. Public action; prerequisites; district court jurisdiction

(a) (1) A person whose conduct in the manufacture, rental, distribution, sale, purchase or offer of realty, goods or services, including securities, gives rise to a civil right of action for damages under a statute of the United States shall be liable to the United States in a public action is—

(A) such conduct injures two hundred or more named or unnamed persons, each in an amount not exceeding \$300;

(B) the combined amount of the injury to such persons exceeds \$60,000;

(C) the injuries arise out of the same transaction or occurrence or series of transactions or occurrences; and

(D) the action presents a substantial question of law or fact common to the injured persons.

(2) An action for civil damages by or for persons whose injury each does not exceed \$300, under statutes of the United States other than those giving rise to a public action under subsection (a) (1), may be brought as a class compensatory action notwithstanding the amount of individual injury if the prerequisites of section 3011(a) are otherwise met.

(b) The district courts of the United States shall have jurisdiction, exclusive of the courts of the States of actions brought under this

section, but such jurisdiction shall not extend to cross-claims, counterclaims, pendent claims based on State law, or actions removed from the State courts which do not meet the requirements of subsection (a) (1). A State court in the exercise of its concurrent jurisdiction expressly conferred by any statute of the United States described in subsection (a) (1) shall employ procedures provided by that statute or by the State.

(c) A public action may be brought in the name of the United States—

(1) by the Attorney General of the United States, unless an agency is authorized pursuant to paragraph (2) of this subsection;

(2) by an executive or independent agency of the United States if such agency—

(A) has exclusive authority to seek civil enforcement of the statute giving rise to a public action under section 3001(a)

(1) before the district courts of the United States by counsel designated by it; or

(B) is authorized by the Attorney General to bring such action; or

(3) by a person or relation who has suffered injuries not in excess of \$300.

(d) If a public action is brought against the United States, the court—

(1) may order that the action not be assumed, or referred to an attorney general of a State, as otherwise provided in section 3002(b) (1) or 3002(b) (3); and

(2) shall issue any other order appropriate to assure that counsel defending the action against the United States will act independently of counsel prosecuting the action.

§ 3002. Public action commenced by relator; assumption by the United States

(a) Except when the United States is a defendant, a relator who commences a public action shall serve upon the Attorney General of the United States at the commencement of the action a copy of the summons and of the complaint, together with a written disclosure of all relevant information or material known to him.

(b) Except as provided in section 3001(d), when a public action is filed by a relator, the Attorney General of the United States, prior to or at the conclusion of the preliminary hearing provided for in section 3022, may—

(1) determine in his discretion that the conduct referred to in section 3001(a) may have injured substantial numbers in at least ten States, enter an appearance and assume control of the action: Provided, That the Attorney General shall refer the action to an agency authorized to bring such action pursuant to section 3001(c) (2) (A), and may refer the action to any other agency, within ten days of the service provided in subsection (a). Any such agency may enter an appearance and exercise the authority of the Attorney General under this subchapter. When the Attorney General or an agency has brought a public action under section 3001(c) (1), the Attorney General or agency may assume any other public action arising out of the same transaction or occurrence or series of transactions or occurrences;

(2) decline to enter an appearance and permit the action to be prosecuted by the relator;

(3) refer the action to the attorney general of a State in which reside a substantial number of persons alleged to have been injured, if the Attorney General determines in his discretion that such State attorney general will represent adequately the interests of the United States. The attorney general of such State may—

(A) assume control of the action by entering an appearance within sixty days from the date of reference and may petition the court to stay the action after the conclusion of the preliminary hearing pending his assumption decision;

(B) decline to enter an appearance and permit the action to be prosecuted by the relator; or

(C) file with the court a written statement of reasons why the public interest referred to in subsection (b) (4) would not be served by allowing the action to continue as a public action. Upon the filing of such a statement, the action shall be dismissed as a public action unless the relator demonstrates to the court's satisfaction that the public interest would be served by allowing the action to proceed as a public action; or

(4) (A) decline to enter an appearance and file with the court a written statement of reasons why the public interest would not be served by allowing the action to continue as a public action. Such a statement may include, but is not limited to, showings that—

(i) prosecution of the action is not appropriate; and

(ii) the relator or his counsel will not adequately represent the interests of the United States.

(B) Upon the filing of such a statement, the action shall be dismissed as a public action unless the relator demonstrates to the court's satisfaction that the public interest would be served by allowing the action to continue as a public action.

(c) (1) In an action assumed pursuant to subsection (b)—

(A) the court may permit the relator, or any person injured not in excess of \$300, to intervene; and

(B) the attorney general or agency may allow private counsel to participate in the conduct of the action by the United States or State under the direction and control of that attorney general or agency.

(2) Any person participating in an action under this subsection may receive costs and reasonable litigation expenses, including attorney's and incentive fees, described in section 3003(a).

(d) The Attorney General of the United States shall promulgate regulations governing the exercise of his authority under this section.

§ 3003. Costs; litigation expenses; incentive fee

(a) If the United States prevails or settles in a public action brought by a relator, the defendant shall be ordered to pay to the relator as a part of the judgment and in addition to the public recovery provided for in section 3004—

(1) taxable costs and reasonable litigation expenses incurred by the relator prior to and after the commencement of the action, including attorney's fees if such fees are otherwise allowed by law.

Notwithstanding any law to the contrary, if the public action is settled the award of such expenses shall be allowed and shall be made in addition to the public recovery;

(2) an incentive fee to the relator, if any, equal to 20 per centum of the first \$25,000 of public recovery plus 10 per centum of the next \$50,000 of public recovery unless the relator substantially relied upon a judgment, upon the product of a civil action, or upon the product of an investigation, grand jury proceeding, or criminal prosecution conducted by a State or by the United States. Such fee shall be paid directly to the relator and may not be paid directly or indirectly to his attorney. If the court finds that a person other than the relator has measurably advanced the effective prosecution of the action by the filing of an additional complaint on relation, or otherwise, the court may award costs and reasonable litigation expenses, including attorney's fees, pursuant to paragraph (1) and a portion of the incentive fee to such person. If the action is separated into more than one public action, the sum of any incentive fees ordered in all such actions shall not exceed \$10,000.

(b) (1) If the Attorney General, a State, or an agency assumes control of a public action pursuant to section 3002(b) (1) or 3002(b) (3)

A—

(A) as soon as practicable after such assumption, a relator who measurably advanced the initiation of the action shall be paid reasonable expenses, including attorney's fees, by the Department of Justice, a State or an agency. Payment shall include expenses incurred by the relator at any time prior to the date of assumption.

(B) the Department of Justice, a State or any agency may retain a relator or other private counsel to litigate, under its direction and control, the action on behalf of the United States—

(i) on an hourly basis; or

(ii) on a contingent fee basis.

(2) To the extent taxable costs and reasonable expenses are paid by the United States or a State under this subsection, the defendant shall pay costs and expenses provided in subsection (a) (1) to the clerk of the court who shall deposit it in a public recovery fund established under section 3004(e).

(3) All such payments, or the authority to enter contracts to make such payments, shall be in effect for each fiscal year only to the extent or in the amounts as are provided in advance in appropriations Acts.

§ 3004. Public recovery; judgment

(a) In a public action in which the defendant is found liable, the judgment shall include a public recovery in an amount to be determined under this section.

(b) (1) Except as provided in subsection (d), the public recovery shall be in an amount equal to—

(A) the monetary benefit or profit realized by the defendant from conduct injuring persons not in excess of \$300 each; or

(B) the aggregate damage to persons injured not in excess of \$300 each.

(2) If a judgment includes a public recovery, the court may also include in the judgment appropriate equitable or declaratory relief. The United States and any person prosecuting a public action in the name of the United States shall have standing to enforce such relief.

(c) (1) In electing the measure of public recovery to be applied under subsection (b), the court shall consider among other relevant factors—

(A) the intent of Congress embodied in the statute giving rise to the public action under section 3001(a) (1);

(B) the relative expeditiousness of proof; and

(C) the degree of uncertainty in the law upon which liability is based prior to the filing of the complaint.

(2) This determination shall be based upon any reasonable means of ascertaining benefit, profit, or damage provided by law and by section 3022(f). Separate proof of damage to persons injured not in excess of \$300 each shall not be required except as necessary to conduct any sampling that the court may direct.

(d) If the statute under which the action was brought provides for—

(1) an award of a multiple of the damage or the recovery, the multiple shall be applied to the public recovery;

(2) a limitation on aggregate liability, that limitation shall apply to the public recovery; and

(3) punitive damages, such damages shall, if awarded, be added to the public recovery.

(e) Within sixty days after entry of judgment against the defendant, or within such time as the court may otherwise order, the defendant shall pay to the clerk of the court the amount of the judgment, which shall be used to establish a public recovery fund under the supervision of the court.

§ 3005. Public recovery fund; payments to injured persons

(a) The public recovery fund established under section 3004(e) shall be used for—

(1) payments to persons injured in an amount not exceeding \$300 by conduct giving rise to the public action; and

(2) administrative expenses incurred in carrying out the provisions of this section.

(b) The court shall determine whether the court or the Director of the Administrative Office of the United States Courts shall administer the payment of claims. If the court determines that the Director shall administer the payment of claims, the amount of the public recovery shall be transmitted to the Administrative Office, where it shall be deposited in a public recovery fund. The Director shall administer such claims according to any condition and direction the court may provide. Claims shall be paid within one year from the date of notice. If the public recovery is adjusted as described in section 3004(d), claim payments shall be proportionately adjusted. Notice may be by publication and such other means as the court or Director determines are reasonably likely to inform persons eligible to file claims. The court or Administrative Office may utilize a payment procedure which will distribute payments in a reasonably accurate manner without requiring submission of claims. If the court or Administrative Office finds that it is impracticable to determine with reasonable accuracy the identities of all or some of the injured persons, or the amount of all or some of the individual damages, the court may order that payments not be made to such persons for such damages.

(c) If the public recovery is greater than the payments referred to in subsection (a) and a State has not prosecuted the action, the clerk of the court shall transfer the excess amount to the general fund of the Treasury. If a State has prosecuted the action, such excess shall be paid to that State as general revenues.

(d) The Director shall issue such regulations as are necessary and appropriate to assure the prompt, fair, and inexpensive claim administration by the Administration Office pursuant to subsection (b). The court or Director may compensate a relator or other private counsel for assistance in claim administration.

(e) There are hereby authorized to be appropriated such sums as may be necessary to pay the expenses of a relator or other private counsel as provided in section 3003(b): Provided however, that the amount of the appropriation shall not exceed the amount of funds transferred to the general fund of the Treasury pursuant to subsection (c).

SUBCHAPTER B—CLASS COMPENSATORY ACTION

§ 3011. Class compensatory action; prerequisites; district court jurisdiction

(a) A person whose conduct gives rise to a civil right of action for damages under a statute of the United States shall be liable individually or as a member of a class to the injured persons in a civil class compensatory action if—

(1) such conduct injures forty or more named or unnamed persons each in an amount exceeding \$300, or creates liabilities for forty or more persons, each in an amount exceeding \$300;

(2) the injuries or liabilities arise out of the same transaction or occurrence or series of transactions or occurrences; and

(3) the action presents a substantial question of law or fact common to the injured or sued persons.

(b) The district courts of the United States shall have jurisdiction, exclusive of the courts of the States, of actions brought under this section. A State court in the exercise of its concurrent jurisdiction expressly conferred by any statute of the United States described in subsection (a) shall employ procedures provided by that statute or by the State.

§ 3012. Proof of damages; separate determination of liability and damages; judgment; escheat

(a) The amount of injury to each person who remains in or enters a class compensatory action shall be proved by any method permitted or required by section 3022(f) or other law.

(b) If the court orders separate trial, or trials, of liability issues pursuant to section 3026(b), and a defendant is found liable, he shall be ordered by the court, at his own expense, to—

(1) make reasonable effort to identify from his records or other reasonably available sources the persons likely to have been injured in excess of \$300 each by his conduct and the amount of individual injury;

(2) give individual notice of the finding of liability to such persons; and

(3) with respect to all other persons injured or likely to have been injured, give such notice as is reasonably calculated to assure that a substantial percentage of such persons is informed of the finding of liability.

(c) The court may, in addition to an award of damages, order appropriate equitable or declaratory relief.

(d) If the recovery is greater than the sum of payments of claims and the expenses incurred in their distribution, and the court determines that the calculation of damages under subsection (a) was reasonably accurate, the clerk of the court shall transfer the excess amount to the general fund of the Treasury.

SUBCHAPTER C—JUDICIAL MANAGEMENT OF PUBLIC AND CLASS COMPENSATION ACTION

§ 3021. Initial discovery

(a) (1) Prior to the preliminary hearing provided in section 3022, discovery for each side shall be limited to—

(A) thirty interrogatories;

(B) the lesser of not more than ten deposition days, or depositions of not more than ten persons; and

(C) requests for production of documents.

(2) For good cause shown, the court may expand or further limit discovery prior to the preliminary hearing.

(b) Before or after the preliminary hearing, no discovery of injured persons shall be undertaken without leave of court, upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Failure of an injured person to respond to such discovery shall not be grounds for excluding him from recovery, except where the court determines that no other sanction is adequate to protect the interest of the person seeking discovery.

(c) Notice of discovery to be taken by a relator in a public action shall be served on the Attorney General of the United States, who may examine material discovered by the relator. The filing or prosecution of a public action by a relator or by a State shall not preclude issuance of civil investigative demands by the United States pursuant to the Antitrust Civil Process Act (15 U.S.C. § 1312(a)).

§ 3022. Preliminary hearing; scope of action; notice in class compensatory action; sampling

(a) (1) Within thirty days after a public or class compensatory action is commenced, the court shall give notice to the parties and to the relator, if any, of a preliminary hearing to be held to determine whether, and in what manner, the action shall proceed. The hearing shall be held no later than one hundred and twenty days from the date of the commencement of the action.

(2) In a public action the court may, on the petition of the United States within sixty days of service upon it of the complaint and summons in an action brought on relation pursuant to section 3002(a), grant a reasonable postponement of the hearing to permit the comple-

tion of a related Federal or State investigation in progress on the date of the commencement of the action or promptly commenced after the service upon the United States.

(3) No motion, other than a discovery motion or motion seeking immediate injunctive relief, shall be heard or disposed of prior to the preliminary hearing.

(b) At or immediately after the preliminary hearing, the court shall make a preliminary determination on the basis of the pleadings, affidavits, materials produced during discovery, any statement filed in a public action by an attorney general or agency pursuant to section 3002(b)(3)(C) or 3002(b)(4), and any other matter presented at the hearing—

(1) whether there is a reasonable likelihood that the action meets the prerequisites of section 3001(a) or 3011(a);

(2) whether there are sufficiently serious questions going to the merits to make them fair grounds for litigation;

(3) whether in a public action the relator has demonstrated that the action should proceed as a public action, if an attorney general or agency has filed a statement pursuant to section 3002(b)(3)(C) or 3002(b)(4); and

(4) whether the relator and his counsel in a public action not assumed by an attorney general or agency, or the class representative and his counsel in a class compensatory action, will adequately protect the interests of the United States or the class.

(c) If the court makes a negative determination at the preliminary hearing, or at any time prior to the entry of judgment, with respect to a matter listed in subsection (b), the court shall dismiss the action as a public or class compensatory action: Provided, That where a public action meets the prerequisites of section 3011(a)(1), or a class compensatory action meets the prerequisites of section 3001(a), the court shall permit amendment of the complaint to allow the action to proceed as a class compensatory action or a public action. If the action proceeds as a public action, the court shall make orders necessary to permit the parties to comply with section 3002.

(d) If the action is not dismissed as a public or class compensatory action, the court shall enter an order describing the scope of the action, including a description of the transaction giving rise to the action and a statement of the substantial question of law or fact common to all injured persons. Such order shall be conditional and may be altered or amended before judgment is entered.

(e) (1) At or immediately after the preliminary hearing in a class compensatory action, the court in its discretion shall determine whether some or all injured persons will be excluded from or included in the class only if they so request by a specified date. In determining whether persons shall be excluded from the class unless a specific request to be included is made, the court shall consider whether there is a substantial likelihood that—

(A) the amount of their injury or liability makes it feasible for them to pursue their interests separately; and

(B) they have sufficient resources, experience, and sophistication in business affairs to conduct their own litigation.

(2) The court shall promptly thereafter give notice reasonably necessary to assure adequacy of representation of all persons in-

cluded in the class and fairness to all such persons. Such notice shall describe the persons, if any, by name or category who are to be excluded from the action unless a request to be included is made. The judgment, whether or not favorable to the class, will include all persons who remain in or enter the action pursuant to this subsection.

(f) Except as provided in section 3004(c)(2), where the defendant's liability or the amount or extent of damages is contested, the court may permit sampling to determine these issues. Each sample shall be sufficiently numerous to determine the issues with a reasonable probability of accuracy: Provided, That in a class compensatory action such a determination shall be conditional. If the court relies on sampling and conditionally awards a recovery, it may make a partial award of reasonable expenses, including attorney's fees if otherwise allowed by law upon award of a recovery. Before the entry of final judgment, the defendant may contest any such conditional determination on the grounds that claims and defenses by the defendant against persons filing claims against the fund demonstrate that such a determination is erroneous.

§ 3023. Transfer and consolidation

(a) A district court shall promptly notify the judicial panel on multidistrict litigation of the commencement of a public action or a class compensatory action. Counsel in such an action, or in an action arising out of the same transaction or occurrence as such an action, shall inform the panel of any civil proceeding of which he has knowledge, other than a public action or class compensatory action, that may be consolidated with a public action or a class compensatory action. Notwithstanding section 1407 of this title, to the extent feasible and consistent with the interests of justice, the panel shall transfer to and consolidate for all purposes in a single district court public actions, class compensatory actions, and other civil actions that arise out of the same transaction or occurrence, or series of transactions or occurrences, and that present a substantial question of law or fact common to the injured or sued persons. Such transfer may be to any district court.

(b) Subsection (a) shall not apply to—

(1) Securities and Exchange Commission civil actions for equitable relief described in section 21(g) of the Securities Exchange Act of 1934 as amended (15 U.S.C. § 78u(g)); and

(2) Civil actions for equitable relief by the United States pursuant to the antitrust statutes specified in section 1407(g) of this title.

§ 3024. Effect of judgment

(a) When in accordance with the principles of equity, a judgment on the merits in a public action, unless otherwise limited by its terms, shall be conclusive in any other action for damages arising out of the same transaction or occurrence, or series of transactions or occurrences, against—

(1) a person for or against whom the public action judgment was entered as a defendant;

(2) a person injured in an amount not exceeding \$300 represented in the action, and the United States, or any State, suing on his behalf. In an action not filed or assumed by the United

States, the judgment shall be conclusive against the United States in any other action only to the extent that the United States sues on behalf of such person.

(b) When in accordance with the principles of equity, a judgment on the merits in a class compensatory action, unless otherwise limited by its terms, shall be conclusive in any other civil action for damages arising out of the same transaction or occurrence, or series of transactions or occurrences, against—

(1) a defendant for or against whom the class compensatory action judgment was entered; and

(2) an injured person who remained in or entered the action pursuant to section 3022(e), and any State suing on his behalf.

§ 3025. Settlement

(a) Settlement of a public or class compensatory action shall become effective only with the approval of the court after a hearing and upon the entry of a judgment stating the terms of a proposed settlement. The court may require or permit limited discovery on the merits supervised by the court to determine the fairness of a settlement. If a settlement is reached before the making of the determinations required by section 3022(d), the court shall include in the judgment findings as to the scope of the action, including a description of the transaction giving rise to the action, and the substantial question of law or fact common to all injured or sued persons included within or represented by the action. The proponents of a settlement shall have the burden of demonstrating its fairness to the court.

(b) (1) Except as provided in section 3001(d), in a public action conducted by a relator or a State by reference, notice of a proposed settlement and hearing shall be given to the United States, and the United States may participate in the hearing.

(2) In a class compensatory action, notice of a proposed settlement and hearing shall be given to the members of the class at a time and in a manner found by the court to assure adequacy of representation and fairness.

§ 3026. Applicability of civil procedure rules; separate trials; examination of attorney's fee request

(a) Public actions and class compensatory actions brought pursuant to this chapter are civil actions and shall be governed by the Federal Rules of Civil Procedure, except as provided in this chapter or other statute of the United States. The court may make all orders, not otherwise prohibited by law, reasonably necessary for the efficient and fair management of these actions.

(b) To the extent permitted by the Constitution, the district court shall first try issues relating to liability or violation, before trying issues relating to damages, unless the party opposing such trials demonstrates to the court that they will not expedite final resolution of the action.

(c) To assure the reasonableness of an attorney's fee awarded in a public or class compensatory action the court shall convene a separate fee hearing and may—

(1) in a public action conducted by a relator, request the views of the United States; and

(2) in a public or class compensatory action, designate a magistrate or special master to advise the court.

(d) The court may dismiss a public or class compensatory action if the court determines that full utilization of all the provisions of this chapter and the Federal Rules of Civil Procedure will not enable the court adequately to manage the proceeding: Provided, That the court has first allowed amendment of the complaint to permit a manageable action to proceed.

§ 3027. Definition; other class action provisions

(a) For purposes of this chapter, "person" means an individual, corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, estate, society, union, club, church, or other association of persons, and includes a State or political subdivision of a State or a foreign state or political subdivision of a foreign state. The United States is deemed to be a person for purposes of an action against the United States pursuant to section 3001 or 3011 and for purposes of sections 3004, 3005, and 3012.

(b) If a public action or class compensatory action is brought pursuant to section 16(b) of the Fair Labor Standards Act, as amended (29 U.S.C. § 216(b)), the provisions of that Act shall apply to the extent that they are inconsistent with the requirements of this chapter.

(c) Sections 3021(a), (b); 3022(a)(1), (a)(3), (b)(2), (f); 3023; 3025(a); and 3026(b), (c)(2), (d) of this chapter shall be employed by the court to manage parens patriae actions filed pursuant to the provisions of the Hart-Scott-Rodino Antitrust Improvements Act (15 U.S.C. § 15c et seq.) to the extent they are not inconsistent with the provisions of that Act.

(d) If a public action or a class compensatory action is brought pursuant to sections 110(d)(3) and 110(e) of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (15 U.S.C. §§ 2310(d)(3), 2310(e)), only the provisions of that Act concerning cure of illegal conduct, aggregate claims and minimum individual harm shall apply to the extent that they are inconsistent with this chapter.

(e) If a recovery under a public action or a class compensatory action is based upon section 130(a)(2)(B) of the Truth-in-Lending Act, as amended (15 U.S.C. § 1640(a)(2)(B)), section 813(a)(2)(B) of the Fair Debt Collections Practices Act (15 U.S.C. § 1692k(a)(2)(B)) or section 706(b) of the Equal Credit Opportunity Act, as amended (15 U.S.C. § 1691e(b)), the limitations on aggregate liability specified in those Acts shall apply to all judgments entered pursuant to this chapter.

(f) Nothing in section 18(i) of the Deepwater Port Act of 1974 (33 U.S.C. § 1517(i)) shall affect the right of a relator to bring a public action when a private action is permitted pursuant to that subsection. Subsection (i)(2) of that section shall define notice requirements to the extent inconsistent with section 3022(e) of this chapter.

(g) Nothing in this chapter shall affect any existing right to secure damages under the provisions of rule 23 of the Federal Rules of Civil Procedure remaining in force.

RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) Prerequisites to a class action

* * * * *

(b) Class actions maintainable

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) * * *

* * * * *

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole [; or].

[(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.]

(c) Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

[(2) In any class action maintained under subdivision (b) (3), 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. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.]

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. [The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.]

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may

be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

* * * * *

FAIR LABOR STANDARDS ACT

* * * * *

PENALTIES

SEC. 16. (a) * * *

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. [An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.] No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3).

* * * * *

DEEPWATER PORT ACT OF 1974

* * * * *

LIABILITY

SEC. 18. (a) (1) * * *

* * * * *

(i) (1) The Attorney General may act on behalf of any group of damaged citizens he determines would be more adequately represented as a class in recovery of claims under this section. Sums recovered shall be distributed to the members of such group. If, within 90 days after a discharge of oil in violation of this section has occurred, the Attorney General fails to act in accordance with this paragraph, to sue on behalf of a group of persons who may be entitled to compensation pursuant to this section for damages caused by such discharge, any member of such group may maintain a class action to recover such damages on behalf of such group. Failure of the Attorney General to act in accordance with this subsection shall have no bearing on any class action maintained in accordance with this paragraph.

(2) In any case where the number of members in the class exceeds 1,000, publishing notice of the action in the Federal Register and in local newspapers serving the areas in which the damaged parties reside shall be deemed to fulfill the requirement for public notice established by [rule 23(c) (2) of the Federal Rules of Civil Procedure] section 3022(e) of title 28, United States Code.

* * * * *

PUBLIC LAW 94-305

AN ACT To amend the Small Business Act and Small Business Investment Act of 1958 to provide additional assistance under such Acts, to create a pollution control financing program for small business, and for other purposes

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

TITLE I—SMALL BUSINESS DEVELOPMENT

* * * * *

TITLE II—STUDY OF SMALL BUSINESS

* * * * *

STUDY

Sec. 202. The primary functions of the Office of Advocacy shall be to—

(1) * * *

* * * * *

(9) recommend specific measures for creating an environment in which all business will have the opportunity to compete effectively and expand to their full potential, and to ascertain the common reasons, if any, for small business successes and failures; [and

(10) determine the desirability of developing a set of rational, objective criteria to be used to define small business, and to develop such criteria, if appropriate.]

(10) determine the desirability of developing a set of rational, objective criteria to be used to define small business, and to develop such criteria, if appropriate; and

(11) advise, cooperate with, and consult with the Attorney General of the United States, a Federal agency, or a State in the performance of its duties pursuant to sections 3001(c), 3002(b) (1), and 3003(b) of title 28 of the United States Code in order to facilitate collective relief to small business for violations of anti-trust and other Federal statutes.

* * * * *

REPORTS ON FEE AND COST AWARDS

Sec. 207. The Chief Counsel for Advocacy, not later than March 31, 1981, and every two years thereafter, shall submit a report to the President and to the Congress on—

(1) the number and character of the actions brought by or on behalf of small businesses pursuant to section 3001 and 3011 of title 28 of the United States Code;

(2) the expense to small businesses, the delay in redress, and the nature of redress in such actions; and

(3) the degree and nature of resources devoted to such actions by the Attorney General, a Federal agency, or a State pursuant to sections 3001(c), 3002(b), and 3003(b) of title 28.

REPORTS ON CIVIL PENALTY APPEALS

Sec. 208. The Chief Counsel for Advocacy shall also submit a report to the President and to the Congress not later than two years after the date of enactment of this Act concerning the implementation of section 636(f) of title 28 of the United States Code. The report shall include—

(1) an assessment of whether section 636(f) has promoted expeditious resolution of small business disputes with Federal agencies; and

(2) an analysis of the civil penalties appealed under that section, including an analysis of the number of appeals taken from the actions of each Federal agency.

AUTHORIZATION

Sec. [207.] 210. There are authorized to be appropriated not to exceed \$1,000,000 to carry out the provisions of this title. Any sums so appropriated shall remain available until expended.

TECHNICAL AMENDMENT

Sec. [208.] 211. Section 5(e) of the Small Business Act is hereby repealed.

