Testimony of

The Honorable Orrin Hatch

April 3, 2003

I am pleased that today we are going to mark up S. 274, the "Class Action Fairness Act of 2003," which I sponsor along with several of my colleagues on Committee - Senators Grassley, Kohl, Specter, Sessions, Cornyn, Chambliss. This reform is needed and has a great deal of support. The American Bar Association sees the need for reform. The Judicial Conference sees the need for reform. This year is certainly our best opportunity to get this done.

We have been working to address the current, well documented, abuses in the class action system for the last few congresses. Over the past decade, it has become clear that abuses of the class action system have reached epidemic levels. It has become equally clear that the ultimate victims of this epidemic are poorly-represented class members and individual consumers throughout the nation. The Class Action Fairness Act of 2003 represents a modest, measured effort to remedy the plague of abuses, inconsistencies, and inefficiencies that infest our current system of class action litigation.

Frequently, plaintiff class members are not adequately informed of their rights or of the terms and practical implications of a proposed settlement. Too often judges approve settlements that primarily benefit the class counsel, rather than the class members. A recent USA Today poll shows that 67% of the public believes that class actions primarily benefit lawyers, and only 9% believe they benefit plaintiffs. There really is a problem here. There are numerous examples of settlements where class members receive little or nothing, while attorneys receive millions of dollars in fees. Multiple class action suits asserting the same claims on behalf of the same plaintiffs are routinely filed in different state courts, causing judicial inefficiencies and encouraging collusive settlement behavior. And state courts are more frequently certifying national classes leading to rulings that infringe upon or conflict with the established laws and policies of other states.

We have all heard of the famous BancBoston case, brought in Alabama state court, which involved the bank=s failure to post interest to mortgage escrow accounts in a prompt manner. Although Ms. Preston of Baraboo, Wisconsin did receive a settlement of about $4, approximately $95 was deducted from her account to help pay the class counsel=s legal fees of $8.5 million. Notably, Ms. Preston testified before our committee five years ago asking us to stop these abusive class action lawsuits, but it appears that B at least thus far B her plea has not been heard. It is important to note that on February 21st of this year, in State of Vermont v. Lending, Inc., even the Supreme Court of Vermont found this BancBoston settlement so offensive that it

declared that at least Vermont citizens were not subject to this class action settlement because among other reasons, clearly the notice given to the class must have been inadequate because no reasonable person would have agreed to it. Unfortunately, this will not help Ms. Preston; we need to enact national reform.

Despite the mountains of evidence demonstrating the drastically increasing harms caused by class action abuses, I am sure that some will attempt to deny the existence of any problem at all. Others will try to confuse the issue with spurious claims that proposed reforms would somehow disadvantage victims with legitimate claims or further worsen class action abuses. Others may even contend that past legislative reforms have contributed to recent financial debacles and that the proposed reforms will encourage more. Such claims are nothing more than red herrings intended to divert the debate from the real issues.

In this regard let me emphasize a few points regarding S. 274. First, this bill does not seek to eliminate state court class action litigation. Class action suits brought in state courts have proven in many contexts to be an effective and desirable tool for protecting civil and consumer rights. Nor do the reforms we will discuss today in any way diminish the rights or practical ability of victims to band together to pursue their claims against large corporations. In fact, we have included several consumer protection provisions in our legislation that I feel strongly will substantially improve plaintiffs= chances of achieving a fair result in any settlement proposal.

There are three key components to S. 274. First, the bill implements consumer protections against abusive settlements by: (1) requiring simplified notices that explain to class members the terms of proposed class action settlements and their rights with respect to the proposed settlement in Aplain English@; (2) enhancing judicial scrutiny of coupon settlements; (3) providing a standard for judicial approval of settlements that would result in a net monetary loss to plaintiffs; (4) prohibiting Abounties@ to class representatives; and (5) prohibiting settlements that favor class members based upon geographic proximity to the courthouse.

Second, the bill requires that notice of class action settlements be sent to appropriate state and federal authorities to provide them with sufficient information to determine whether the settlement is in the best interest of the citizens they represent.

Finally, the bill amends the diversity-of-citizenship jurisdiction statute to allow large interstate class actions to be adjudicated in Federal court by granting jurisdiction in class actions where there is Aminimal diversity@ and the aggregate amount in controversy among all class members exceeds $2 million. Many have claimed that S. 274 would remove every class action to federal

court, and that is not true and was never our intention. Now I believe our original language is appropriate and well drafted, but I understand that we have worked out language with Senator Feinstein that will further refine this provision in an effort to clarify that those class actions that are truly state class actions remain in state court and I will support her amendment.

Although some critics have argued that this amendment to diversity jurisdiction somehow violates the principles of federalism or is inconsistent with the Constitution, I fully agree with Mr. Walter Dellinger, former Solicitor General in the Clinton Administration, who testified at our Judiciary Committee hearing last fall, that it is "difficult to understand any objection to the goal of bringing to the federal court cases of genuine national importance that fall clearly within the jurisdiction conferred on those courts by Article III of the Constitution."

I urge my colleagues to support this modest and very fair effort to reform the abuses in the current system - abuses that are actually hurting those the system is supposed to help.

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Statement of Chairman Orrin G. Hatch

Before the United States Senate Committee on the Judiciary

Executive Business Meeting on

Fifth Circuit Court of Appeals Judicial Nominations

There has been some discussion about the record in nominations and the confirmation of Judges to the Fifth Circuit Court of Appeals. I want to set the record straight.

Currently there are three vacancies in the Fifth Circuit; all have been classified as judicial emergencies. Three individuals have been nominated to fill these vacancies - Edward C. Prado, Charles W. Pickering, and Priscilla Owen.

There are some who say that the vacancy crisis on the Fifth Circuit is the fault of the Republicans. Some may say that we held up Clinton nominees to the Fifth Circuit just so we could fill the slots with Republican nominees.

This is an inaccurate and unfair criticism. During the Clinton Administration, four judges were confirmed to the Fifth Circuit: Fortunato P. Benavides, Robert M. Parker, Carl E. Stewart, and James L. Dennis.

Now, I know that President Clinton did not get all of his nominees to the Fifth Circuit confirmed. Enrique Moreno, H. Alston Johnson, and Jorge Rangel were not confirmed. Although my Democratic colleagues would have you believe that something more nefarious was at work, the fact of the matter is that the nominations of Jorge Rangel and Enrique Moreno stalled because there was an utter failure of consultation by the Clinton White House.

But Democrats don't have a monopoly on disappointment. The nomination of Sidney A. Fitzwater of Texas, nominated for the Fifth Circuit, was left unconfirmed by the Democrat-controlled Senate in 1992 at the close of the 102nd Congress. An additional 52 nominations of senior President Bush were returned at the end of that Congress.

Furthermore, this Committee has a poor track record when it comes to President Bush's Fifth Circuit nominees. In the last Congress, President Bush nominated three very well qualified individuals to seats on the Fifth Circuit. Only one of those nominees, Edith Brown Clement of Louisiana, was confirmed.

The other two, Priscilla Owen of Texas and Charles Pickering of Mississippi, first nominated back in May of 2001, were denied up or down votes by the full Senate when their nominations were blocked by Committee Democrats in 10-9 party-line votes. This is despite the fact that both nominees had the full support of their home state senators - a fact that distinguishes them from a number of unsuccessful Clinton nominees for the Fifth Circuit.

But instead of harping on the past, I am committed to setting the right course for the future. That is why I held a hearing for Priscilla Owen a few weeks ago. I am pleased that the Committee has completed favorable action on Priscilla Owen and am hopeful that we will do the same for Judge Pickering. Likewise, I am hopeful the Committee will favorably report Judge Prado and that his nomination will be quickly confirmed by the entire Senate.

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