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MULTIDISTRICT, MULTIPARTY, MULTIFORUM TRIAL JURISDICTION ACT OF 2001

MARCH 12, 2001.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

MINORITY AND DISSENTING VIEWS

[To accompany H.R. 860]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 860) to amend title 28, United States Code, to allow a judge to whom a case is transferred to retain jurisdiction over certain multidistrict litigation cases for trial, and to provide for Federal jurisdiction of certain multiparty, multiforum civil actions, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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89–006

PURPOSE AND SUMMARY

H.R. 860 would allow a designated U.S. district court (a so-called "transferee" court) under the multidistrict litigation statute [1] to retain jurisdiction over referred cases arising from the same fact scenario for purposes of determining liability and punitive damages, or to send them back to the respective courts from which they were transferred. In addition, the legislation would streamline the process by which multidistrict litigation governing disasters are adjudicated. The bill would save litigants time and money, but would not interfere with jury verdicts or compensation rates for attorneys.

BACKGROUND AND NEED FOR THE LEGISLATION

SECTION 2: MULTIDISTRICT LITIGATION/THE "LEXECON" DECISION

The Administrative Office of the U.S. Courts (the "AO") is concerned over a recent Supreme Court interpretation of 28 U.S.C. § 1407, the Federal multidistrict litigation statute. The case in question is commonly referred to as *"Lexecon."* [2]

Under § 1407, a Multidistrict Litigation Panel (MDLP) "a select group of seven Federal judges picked by the Chief Justice" helps to consolidate lawsuits which share common questions of fact filed in more than one judicial district nationwide. Typically, these suits involve mass torts—a plane crash, for example—in which the plaintiffs are from many different states. All things considered, the panel attempts to identify the one U.S. district court nationwide which is best adept at adjudicating pretrial matters. The panel then remands individual cases back to the districts where they were originally filed for trial unless they have been previously terminated.

For approximately 30 years, however, the district court selected by the panel to hear pretrial matters (the "transferee court") often invoked § 1404(a) of Title 28 to retain jurisdiction for trial over all of the suits. This is a general venue statute that allows a district court to transfer a civil action to any other district or division where it may have been brought; in effect, the court selected by the panel simply transferred all of the cases *to itself*. According to the AO and the current Chairman of the MDLP, this process has worked well since the transferee court was versed in the facts and law of the consolidated litigation. This is also the one court which could compel all parties to settle when appropriate.

The *Lexecon* decision alters the § 1407 landscape. This was a 1998 defamation case brought by a consulting entity (Lexecon) against a law firm that had represented a plaintiff class in the Lincoln Savings and Loan litigation in Arizona. Lexecon had been joined as a defendant to the class action, which the MDLP transferred to the District of Arizona. Before the pretrial proceedings were concluded, Lexecon reached a "resolution" with the plaintiffs, and the claims against the consulting entity were dismissed.

Lexecon then brought a defamation suit against the law firm in the Northern District for Illinois. The law firm moved under § 1407 that the MDLP empower the Arizona court which adjudicated the original S&L litigation to preside over the defamation suit. The

[1] 28 U.S.C. § 1407.
[2] *Lexecon v. Milberg Weiss Bershad Hynes & Lerach, et. al.,* 118 S. Ct. 956 (1998).

panel agreed, and the Arizona transferee court subsequently invoked its jurisdiction pursuant to § 1404 to preside over a trial that the law firm eventually won. Lexecon appealed, but the Ninth Circuit affirmed the lower court decision.[3]

The Supreme Court reversed, however, holding that Section 1407 *explicitly* requires a transferee court to remand all cases for trial back to the respective jurisdictions from which they were originally referred. In his opinion, Justice Souter observed that "the floor of Congress" was the proper venue to determine whether the practice of self-assignment under these conditions should continue.

Section 2 of the bill responds to Justice Souter's admonition. In the absence of a *Lexecon* "fix," the MDLP will be forced to remand cases to their transferor districts, and then have each original district court decide whether to transfer each case back to the transferee district for trial purposes under § 1404. This alternative, to invoke the Chairman of the MDLP, would be "cumbersome, repetitive, costly, potentially inconsistent, time consuming, inefficient, and a wasteful utilization of judicial and litigant resources."[4]

Since *Lexecon*, significant problems have arisen that have hindered the sensible conduct of multidistrict litigation. Transferee judges throughout the United States have voiced their concern to the MDLP about the urgent need to clarify their authority to retain cases for trial. Indeed, transferee judges have been unable to order self-transfer for trial, even though all parties to constituent cases have agreed on the wisdom of self-transfer for trial.[5] Instead, complex multidistrict cases should be streamlined as much as possible by providing the transferee judge as many options as possible to expedite trial when the transferee judge, with full input from the parties, deems appropriate. In other words, there is a pressing need to recreate the multidistrict litigation environment pre-*Lexecon*.

The change advocated by the MDLP and other multidistrict practitioners makes sense in light of judicial practice under the Multidistrict Litigation statute for the past 30 years. It promotes judicial administrative efficiency and will encourage parties to complex Federal litigation to settle.

SECTION 3: MULTIPARTY, MULTIFORUM JURISDICTION OF DISTRICT COURTS/ "DISASTER" LITIGATION

The genesis of § 3 took place during oversight hearings conducted in the 95th Congress by the House Subcommittee on Courts, Civil Liberties and the Administration of Justice (now Courts, the Internet and Intellectual Property). These efforts were joined by those of the Carter Administration to improve judicial machinery by abolishing diversity of citizenship jurisdiction and to delineate the jurisdictional responsibilities of state and Federal courts. These efforts fell short, however, based on Senate opposition. Thereafter the Subcommittee narrowed its focus and began to concentrate on the

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[3] 102 F.3rd 1524 (9th Cir. 1996).

[4] *Hearing on H.R. 2112 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. (June 16, 1999) (statement of the Honorable John F. Nangle, Chairman, Judicial Panel on Multidistrict Litigation, at 5).

[5] *See, e.g.,* MDL-1125 – *In re Air Crash Near Cali, Columbia, on 12/20/95*, S.D. Fla. (Judge Highsmith).

problem of dispersed complex litigation arising out of a single accident resulting in multiple deaths or injuries.[6]

Legislation on this more specific issue was introduced in both the 98th and 99th Congresses. The House of Representatives subsequently approved legislation highly similar to § 3 of H.R. 860 in the 101st and 102nd Congresses; and the full Committee on the Judiciary favorably reported this language in the 103rd Congress as well. Moreover, § 3 of H.R. 860 is highly similar to that set forth in § 10 of the Subcommittee substitute to H.R. 1252, the "Judicial Reform Act," from the 105th Congress, which the House passed in amended form with § 10 fully intact. In addition, during the 106th Congress the House of Representatives passed the precursor to H.R. 860, H.R. 2112, by voice vote under suspension of the rules. The Judicial Conference and the Department of Justice have also supported these previous legislative initiatives.

The need for enactment of § 3 of H.R. 2112 was articulated by an attorney who testified on behalf of a major airline manufacturer at the June 16, 1999, hearing on H.R. 2112.[7] It is common after a serious accident to have many lawsuits filed in several states, in both state and Federal courts, with many different sets of plaintiffs' lawyers and several different defendants. Despite this multiplicity of suits, the principal issue that must be resolved first in each lawsuit is virtually identical: Is one or more of the defendants liable? Indeed, in lawsuits arising out of major aviation disasters, it is common for the liability questions to be bifurcated and resolved first, in advance of any trial on individual damage issues. The waste of judicial resources—and the costs to both plaintiffs and defendants—of litigating the same liability question several times over in separate lawsuits can be extreme.

Different expert consultants and witnesses may be retained by the different plaintiffs' lawyers handling each case. The court in each lawsuit can issue its own subpoenas for records and for depositions of witnesses, potentially conflicting with the discovery scheduled in other lawsuits. Critical witnesses may be deposed for one suit and then redeposed by a different set of lawyers in a separate lawsuit. Identical questions of evidence and other points of law can arise in each of the separate suits, meaning that the parties in each case may have to brief and argue—and each court may have to resolve—the same issues that are being briefed, argued, and resolved in other cases, sometimes with results that conflict.

Current efforts to consolidate all state and Federal cases related to a common disaster are incomplete because current Federal statutes restrict the ways in which consolidation can occur—apparently without any intention to limit consolidation. For example, plaintiffs who reside in the same state as any one of the defendants cannot file their cases in Federal court because of a lack of complete diversity of citizenship, even if all parties to the lawsuit want the case consolidated. For those cases that cannot be brought into the Federal system, no legal mechanism exists by which they can be consolidated, as state courts cannot transfer cases across state lines.

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[6] Letter from Michael J. Remington, former Chief Counsel to the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, U.S. House of Representatives, to Representative F. James Sensenbrenner, Jr. (July 14, 1999).

[7] *Hearing on H.R. 2112 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. (June 16, 1999) (statement of Thomas J. McLaughlin, Esq., Perkins Coie, LLP, Attorneys for the Boeing Company at 4–9).

In sum, full consolidation cannot occur in the absence of Federal legislative redress.

The changes set forth in § 3 of H.R. 860 speak directly to these problems. The revisions should reduce litigation costs as well as the likelihood of forum-shopping in airline accident cases; and an effective one-time determination of punitive damages would eliminate multiple or inconsistent awards arising from multiforum litigation.

HEARINGS

H.R. 860 was referred to the Committee on the Judiciary on March 6, 2001. No hearings on the bill were held, given the ample legislative history that preceded it from the 95th Congress through the 106th.

COMMITTEE CONSIDERATION

On March 8, 2001, the House Committee on the Judiciary met in open session and ordered reported the bill H.R. 860 by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

The Committee on the Judiciary rejected a motion by Representative Watt to recommit H.R. 860 to the appropriate Subcommittee for hearings by a vote of 6–23.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

PERFORMANCE GOALS AND OBJECTIVES

Because H.R. 860 does not authorize funding, clause 3(c) of House Rule XIII does not apply.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 860, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 12, 2001.

Hon. F. JAMES SENSENBRENNER, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 860, the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Lanette J. Walker.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure.

H.R. 860—Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001

CBO estimates that enacting H.R. 860 would result in no significant impact on the federal budget. Because this bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply. H.R. 860 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would have no significant effect on the budgets of state, local, or tribal governments.

Enacting this bill would remove existing impediments to the effective consolidation of certain lawsuits within the federal judicial system. Section 2 of H.R. 860 would permit the federal judge before whom the cases were consolidated for pretrial proceedings to consolidate them for trial on the common issues of liability and punitive damages. Under current law, cases related by one or more common questions of fact that are pending in multiple federal judicial districts may be consolidated before a single federal judge only for pretrial proceedings. At the end of those proceedings, each case is required to be remanded for trial to the judicial district from which it had been transferred.

Under certain conditions, section 3 of H.R. 860 would confer original jurisdiction on federal district courts over civil actions involving only minimal diversity that arise out of a single accident that results in multiple deaths or injuries. (Minimal diversity exists if adverse parties are citizens of different states, or if one is a foreign state or a citizen of a foreign state.) Current statutes make it difficult to remove certain cases to federal court, resulting in incomplete consolidation of the cases. Section 3 would make it easier for plaintiffs in such cases to file in federal court and for defendants to remove cases filed in state court to federal court.

CBO expects that enacting this bill would result in a more efficient use of federal judicial resources. However, CBO estimates that any savings realized by the federal court system would be negligible and might be offset by increased court costs that could arise from additional cases being moved from state court to federal court under the bill. Thus, CBO estimates that enacting H.R. 860 would result in no significant impact on the federal budget.

The CBO staff contact for this estimate is Lanette J. Walker. This estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to rule XIII, clause 3(c)(3) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article III, section 1, of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

SEC. 1. SHORT TITLE

The act may be cited as the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001."

SEC. 2. MULTIDISTRICT LITIGATION

Section 2 of H.R. 860 would simply amend § 1407 by explicitly allowing a transferee court to retain jurisdiction over referred cases of a consolidated action for trial, or refer the cases to the respective transferor districts, as it sees fit, unless the terms of § 3 of the bill would apply to the action.

In addition, based on a colloquy between Representative Sensenbrenner and Representative Berman during the July 15, 1999, Subcommittee markup of H.R. 2112, staff was instructed to develop an amendment for consideration at a subsequent full Committee markup on the issue of compensatory damages. Representative Berman expressed his concern that, pursuant to § 3 of the bill, a transferee judge was not permitted to retain referred cases for the adjudication of compensatory damages, unless done so "in the interest of justice and for the convenience of the parties and witnesses." There was no comparable presumption of remand on the matter of compensatory damages for actions litigated under § 2 as originally drafted in the 106th Congress. Accordingly, Representatives Berman and Sensenbrenner proceeded to offer an amendment during the full Committee markup on July 27, 1999, which conformed the compensatory damage remand standard in § 2 with that in § 3. The amendment passed by voice vote and was incorporated in H.R. 2112 as amended and favorably reported at the time. This change has been preserved in § 2 of H.R. 860 as well.

SEC. 3. MULTIPARTY, MULTIFORUM JURISDICTION OF DISTRICT COURTS

Section 3 of H.R. 860 would bestow original jurisdiction on Federal district courts in civil actions involving minimal diversity jurisdiction among adverse parties based on a single accident where at least 25 persons have either died or sustained injuries exceeding $150,000 per person. The district court in which such cases are consolidated would retain those cases for determination of liability and punitive damages.

More specifically, subsection (a) creates a new § 1369 of Title 28 of the U.S. Code which confers original jurisdiction upon the Federal district courts of any civil action

(1) involving minimal diversity between adverse parties

(2) that arise from a single accident

(3) where at least 25 people have either died or incurred injury in the accident
(4) and, in the case of injury, the injury has resulted in damages which exceed $150,000 per person (exclusive of interest and costs) if
  (a) a defendant resides in a state and a substantial part of the accident occurred in another state or other location (regardless of whether the defendant is also a resident of the state where a substantial part of the accident occurred);
  (b) any two defendants reside in different states (regardless of whether such defendants are also residents of the same state or states); or
  (c) substantial parts of the accident occurred in different states.

Subsection (b) of new § 1369 creates an exception to the minimum diversity rule. In brief, a U.S. district court may not hear any case in which a "substantial majority" of plaintiffs and the "primary" defendants are all citizens of the same state; and in which the claims asserted are governed "primarily" by the laws of that same state. In other words, only state courts may hear such cases. (This feature was one of three changes proffered to the Senate in an effort to develop greater support for H.R. 2112 in the waning days of the 106th Congress. The other two revisions—also incorporated in H.R. 860—consisted of an increase in the damages threshold from $75,000 to $150,000, and the deletion of the old choice-of-law section in H.R. 2112. The first two changes make it more difficult to file or remove to Federal court under the terms of H.R. 860. The choice of law section was thought to confer too much discretionary authority on district judges to select the relevant law that would apply in a given case.)

Subsection (c) of new § 1369 sets forth certain "special rules" and definitions. They include the following:

(1) *Minimal Diversity.* Exists between adverse parties if any party is a citizen of a state and any adverse party is a citizen of another state, a citizen/subject of a foreign state, or a foreign state.
(2) *Corporation.* Deemed to be a citizen of any state, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business; and is deemed to be a *resident* of any state in which it is incorporated or licensed to do business.
(3) *Injury.* Physical harm to a person, and physical damage or destruction of tangible property, but only if physical harm exists.
(4) *Accident.* A sudden accident, or a natural event culminating in an accident, that results in death or injury incurred at a discrete location by at least 25 natural persons.
(5) *State.* Includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Subsection (d) of new § 1369 permits any person with a claim arising from an accident as defined by the terms of the bill to intervene as a party plaintiff, even if that person could not have brought an action in district court as an original matter.

Pursuant to subsection (e) of new § 1369, a Federal district court in which an action is pending under the terms of the bill must promptly notify the MDLP of the pendency.

Section 3(b) of the act amends the general Federal venue statute[8] by permitting any action under the bill to be brought in any district court in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

Section 3(c) of H.R. 860 creates a new subsection (j)(1) to § 1407. This change allows a transferee court, which acquires jurisdiction over an action under the terms of the bill, to retain the action for determination of liability and punitive damages. The transferee court must remand the action, however, to the district court from which it was transferred for determination of damages (other than punitive damages), unless the transferee court finds, for the convenience of parties and witnesses and in the interest of justice, that the action should be retained for the determination of damages.

New § 1407(j)(2)–(3) sets forth the terms by which an action is remanded, as well as the criteria for an appeal of decisions governing liability and punitive damages. Any decision concerning remand for the determination of damages is not reviewable under new § 1407(j)(4). The transferee court is also empowered to transfer or dismiss an action on the ground of inconvenient forum pursuant to new § 1407(j)(5).

Section 3(d) permits a defendant in a civil action in state court to remove to the appropriate Federal district court under 28 U.S.C. § 1441 if

(1) the action could have been brought under the terms of H.R. 860, or
(2) the defendant is a party to an action which is or could have been brought pursuant to the terms of the bill in a Federal district court and arises from the same accident as the state court action.

New § 1441(e)(2)–(5), as created by § 3(d) of the act, also sets forth the procedure for removal, along with the terms by which an action is remanded back to state court for determination of damages, including appellate procedures governing liability. Any decision under § 1441(e) concerning remand for the determination of damages is not reviewable by appeal or otherwise under new paragraph (6).

Finally, § 3(e) of the bill establishes service-of-process authority for actions brought under its terms.

SEC. 4. EFFECTIVE DATE

The amendments made by § 2 of the bill shall apply to any civil action pending on or brought on or after the date of enactment of the act. The amendments made by § 3 shall apply to a civil action if the accident giving rise to the cause of action occurred on or after the 90th day after the date of enactment of the act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) 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 omit-

[8] 28 U.S.C. § 1391.

ted 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

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PART IV—JURISDICTION AND VENUE

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CHAPTER 85—DISTRICT COURTS; JURISDICTION

Sec.
1330. Actions against foreign states.

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1369. Multiparty, multiforum jurisdiction.

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§ 1369. Multiparty, multiforum jurisdiction

(a) IN GENERAL.—The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 25 natural persons have either died or incurred injury in the accident at a discrete location and, in the case of injury, the injury has resulted in damages which exceed $150,000 per person, exclusive of interest and costs, if—

(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;

(2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or

(3) substantial parts of the accident took place in different States.

(b) LIMITATION OF JURISDICTION OF DISTRICT COURTS.—The district court shall abstain from hearing any civil action described in subsection (a) in which—

(1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and

(2) the claims asserted will be governed primarily by the laws of that State.

(c) SPECIAL RULES AND DEFINITIONS.—For purposes of this section—

(1) minimal diversity exists between adverse parties if any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a foreign state as defined in section 1603(a) of this title;

(2) a corporation is deemed to be a citizen of any State, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business, and is deemed to

be a resident of any State in which it is incorporated or licensed to do business or is doing business;

(3) the term "injury" means—

(A) physical harm to a natural person; and

(B) physical damage to or destruction of tangible property, but only if physical harm described in subparagraph (A) exists;

(4) the term "accident" means a sudden accident, or a natural event culminating in an accident, that results in death or injury incurred at a discrete location by at least 25 natural persons; and

(5) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(d) INTERVENING PARTIES.—In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.

(e) NOTIFICATION OF JUDICIAL PANEL ON MULTIDISTRICT LITIGATION.—A district court in which an action under this section is pending shall promptly notify the judicial panel on multidistrict litigation of the pendency of the action.

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PART IV—JURISDICTION AND VENUE

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§ 1391. Venue generally

(a) * * *

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(g) A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

* * * * * * *

§ 1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated *or ordered transferred to the transferee or other district under subsection (i)*: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim,

or third-party claim and remand any of such claims before the remainder of the action is remanded.

* * * * * * *

(i)(1) Subject to paragraph (2) and except as provided in subsection (j), any action transferred under this section by the panel may be transferred for trial purposes, by the judge or judges of the transferee district to whom the action was assigned, to the transferee or other district in the interest of justice and for the convenience of the parties and witnesses.

(2) Any action transferred for trial purposes under paragraph (1) shall be remanded by the panel for the determination of compensatory damages to the district court from which it was transferred, unless the court to which the action has been transferred for trial purposes also finds, for the convenience of the parties and witnesses and in the interests of justice, that the action should be retained for the determination of compensatory damages.

(j)(1) In actions transferred under this section when jurisdiction is or could have been based, in whole or in part, on section 1369 of this title, the transferee district court may, notwithstanding any other provision of this section, retain actions so transferred for the determination of liability and punitive damages. An action retained for the determination of liability shall be remanded to the district court from which the action was transferred, or to the State court from which the action was removed, for the determination of damages, other than punitive damages, unless the court finds, for the convenience of parties and witnesses and in the interest of justice, that the action should be retained for the determination of damages.

"(2) Any remand under paragraph (1) shall not be effective until 60 days after the transferee court has issued an order determining liability and has certified its intention to remand some or all of the transferred actions for the determination of damages. An appeal with respect to the liability determination and the choice of law determination of the transferee court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the transferee court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination and the choice of law determination shall not be subject to further review by appeal or otherwise.

(3) An appeal with respect to determination of punitive damages by the transferee court may be taken, during the 60-day period beginning on the date the order making the determination is issued, to the court of appeals with jurisdiction over the transferee court.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) Nothing in this subsection shall restrict the authority of the transferee court to transfer or dismiss an action on the ground of inconvenient forum.

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CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

* * * * * * *

§ 1441. Actions removable generally

(a) * * *

* * * * * * *

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination and the choice of law determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination and the choice of law determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1368 of this title for purposes of this section and sections 1407, 1660, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

[(e) The court to which such civil action is removed**]** *(f) The court to which a civil action is removed under this section* is not

precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

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PART V—PROCEDURE

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CHAPTER 113—PROCESS

Sec.
1691. Seal and teste of process.

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1697. Service in multiparty, multiforum actions.

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§ 1697. Service in multiparty, multiforum actions

When the jurisdiction of the district court is based in whole or in part upon section 1369 of this title, process, other than subpoenas, may be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.

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CHAPTER 117—EVIDENCE; DEPOSITIONS

Sec.
1781. Transmittal of letter rogatory or request.

* * * * * * *

1785. Subpoenas in multiparty, multiforum actions.

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§ 1785. Subpoenas in multiparty, multiforum actions

When the jurisdiction of the district court is based in whole or in part upon section 1369 of this title, a subpoena for attendance at a hearing or trial may, if authorized by the court upon motion for good cause shown, and upon such terms and conditions as the court may impose, be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.

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BUSINESS MEETING

THURSDAY, MARCH 8, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner (chairman of the committee) presiding.

Now, pursuant to notice, I call up the bill H.R. 860, the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001, for

purpose of markup, and move its favorable recommendation to the House.

[H.R. 860 follows:]

.....
(Original Signature of Member)

107TH CONGRESS
1ST SESSION

H. R. 860

IN THE HOUSE OF REPRESENTATIVES

Mr. SENSENBRENNER introduced the following bill; which was referred to the Committee on _____

A BILL

To amend title 28, United States Code, to allow a judge to whom a case is transferred to retain jurisdiction over certain multidistrict litigation cases for trial, and to provide for Federal jurisdiction of certain multiparty, multiforum civil actions.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001".

SEC. 2. MULTIDISTRICT LITIGATION.

Section 1407 of title 28, United States Code, is amended—

(1) in the third sentence of subsection (a), by inserting "or ordered transferred to the transferee or other district under subsection (i)" after "terminated"; and

(2) by adding at the end the following new subsection:

"(i)(1) Subject to paragraph (2) and except as provided in subsection (j), any action transferred under this section by the panel may be transferred for trial purposes, by the judge or judges of the transferee district to whom the action was assigned, to the transferee or other district in the interest of justice and for the convenience of the parties and witnesses.

"(2) Any action transferred for trial purposes under paragraph (1) shall be remanded by the panel for the determination of compensatory damages to the district court from which it was transferred, unless the court to which the action has been transferred for trial purposes also finds, for the convenience of the parties and witnesses and in the interests of justice, that the action should be retained for the determination of compensatory damages.".

SEC. 3. MULTIPARTY, MULTIFORUM JURISDICTION OF DISTRICT COURTS.

(a) BASIS OF JURISDICTION.—

(1) IN GENERAL.—Chapter 85 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1369. Multiparty, multiforum jurisdiction

"(a) IN GENERAL.—The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 25 natural persons have either died or incurred injury in the accident at a discrete location and, in the case of injury, the injury has resulted in damages which exceed $150,000 per person, exclusive of interest and costs, if—

"(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;

"(2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or

"(3) substantial parts of the accident took place in different States.

"(b) LIMITATION OF JURISDICTION OF DISTRICT COURTS.—The district court shall abstain from hearing any civil action described in subsection (a) in which—

"(1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and

"(2) the claims asserted will be governed primarily by the laws of that State.

"(c) SPECIAL RULES AND DEFINITIONS.—For purposes of this section—

"(1) minimal diversity exists between adverse parties if any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a foreign state as defined in section 1603(a) of this title;

"(2) a corporation is deemed to be a citizen of any State, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business, and is deemed to be a resident of any State in which it is incorporated or licensed to do business or is doing business;

"(3) the term 'injury' means—

"(A) physical harm to a natural person; and

"(B) physical damage to or destruction of tangible property, but only if physical harm described in subparagraph (A) exists;

"(4) the term 'accident' means a sudden accident, or a natural event culminating in an accident, that results in death or injury incurred at a discrete location by at least 25 natural persons; and

"(5) the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

"(d) INTERVENING PARTIES.—In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.

"(e) NOTIFICATION OF JUDICIAL PANEL ON MULTIDISTRICT LITIGATION.—A district court in which an action under this section is pending shall promptly notify the judicial panel on multidistrict litigation of the pendency of the action.".

(2) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 85 of title 28,

United States Code, is amended by adding at the end the following new item:

"1369. Multiparty, multiforum jurisdiction.".

(b) VENUE.—Section 1391 of title 28, United States Code, is amended by adding at the end the following:

"(g) A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.".

(c) MULTIDISTRICT LITIGATION.—Section 1407 of title 28, United States Code, as amended by section 2 of this Act, is further amended by adding at the end the following:

"(j)(1) In actions transferred under this section when jurisdiction is or could have been based, in whole or in part, on section 1369 of this title, the transferee district court may, notwithstanding any other provision of this section, retain actions so transferred for the determination of liability and punitive damages. An action retained for the determination of liability shall be remanded to the district court from which the action was transferred, or to the State court from which the action was removed, for the determination of damages, other than punitive damages, unless the court finds, for the convenience of parties

and witnesses and in the interest of justice, that the action should be retained for the determination of damages.

"(2) Any remand under paragraph (1) shall not be effective until 60 days after the transferee court has issued an order determining liability and has certified its intention to remand some or all of the transferred actions for the determination of damages. An appeal with respect to the liability determination and the choice of law determination of the transferee court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the transferee court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination and the choice of law determination shall not be subject to further review by appeal or otherwise.

"(3) An appeal with respect to determination of punitive damages by the transferee court may be taken, during the 60-day period beginning on the date the order making the determination is issued, to the court of appeals with jurisdiction over the transferee court.

"(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

"(5) Nothing in this subsection shall restrict the authority of the transferee court to transfer or dismiss an action on the ground of inconvenient forum.".

(d) REMOVAL OF ACTIONS.—Section 1441 of title 28, United States Code, is amended—

(1) in subsection (e) by striking "(e) The court to which such civil action is removed" and inserting "(f) The court to which a civil action is removed under this section"; and

(2) by inserting after subsection (d) the following new subsection:

"(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

"(A) the action could have been brought in a United States district court under section 1369 of this title; or

"(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed

could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

"(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

"(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability deter-

mination and the choice of law determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination and the choice of law determination shall not be subject to further review by appeal or otherwise.

"(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

"(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1368 of this title for purposes of this section and sections 1407, 1660, 1697, and 1785 of this title.

"(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.".

(e) SERVICE OF PROCESS.—

(1) OTHER THAN SUBPOENAS.—(A) Chapter 113 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1697. Service in multiparty, multiforum actions

"When the jurisdiction of the district court is based in whole or in part upon section 1369 of this title, process, other than subpoenas, may be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.".

(B) The table of sections at the beginning of chapter 113 of title 28, United States Code, is amended by adding at the end the following new item:

"1697. Service in multiparty, multiforum actions.".

(2) SERVICE OF SUBPOENAS.—(A) Chapter 117 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1785. Subpoenas in multiparty, multiforum actions

"When the jurisdiction of the district court is based in whole or in part upon section 1369 of this title, a subpoena for attendance at a hearing or trial may, if authorized by the court upon motion for good cause shown, and upon such terms and conditions as the court may impose, be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.".

(B) The table of sections at the beginning of chapter 117 of title 28, United States Code, is

amended by adding at the end the following new item:

"1785. Subpoenas in multiparty, multiforum actions.".

SEC. 4. EFFECTIVE DATE.

(a) SECTION 2.—The amendments made by section 2 shall apply to any civil action pending on or brought on or after the date of the enactment of this Act.

(b) SECTION 3.—The amendments made by section 3 shall apply to a civil action if the accident giving rise to the cause of action occurred on or after the 90th day after the date of the enactment of this Act.

Chairman SENSENBRENNER. Without objection, the bill will be considered as read and open for amendment at any point. I yield myself 5 minutes.

I am the author of this bill. It has a long legislative life, having been considered by this committee, in one form or another, since the 101st Congress. This legislation addresses two important issues in the world of complex multidistrict litigation.

Section 2 of the bill would reverse the effects of the 1998 Supreme Court decision in the so-called *Lexicon* case. It would simply amend the multidistrict litigation statute by explicitly allowing a transferee court to retain jurisdiction over referred cases for trial for purposes of determining liability and punitive damages or refer them to other districts as it sees fit. In fact, section 2 only codifies what had constituted an ongoing judicial practice for nearly 30 years prior to Lexicon.

Section 3 addresses a particular species of complex litigation, the so-called disaster cases, such as those involving airline accidents. The language set forth in my bill is a revised version of a concept which, beginning in the 101st Congress, has been supported by the Department of Justice, the Administrative Office of U.S. Courts, two previous Democratic Congresses and one previous Republican Congress.

Section 3 will help reduce litigation costs, as well as the likelihood of forum shopping in single-accident mass tort cases. All plaintiffs in these cases will ordinarily be situated identically, making the case for consolidation of their actions especially compelling. These types of disasters, with their hundreds or thousands of plaintiffs and numerous defendants, have the potential to impair the orderly administration of justice in Federal courts for an extended period of time.

This committee and the full House unanimously passed the precursor to H.R. 860 in the last term. During eleventh-hour negotiations with the other body, I offered to make three changes, in an effort to show—generate greater support for the bill. As a show of good faith, I incorporate those changes in the bill that is before us today. They consist of the following:

One, the plaintiff must allege at least $150,000 of damages, which is up from $75,000, to file in U.S. District Court.

Two, an exception to the minimum diversity rule is created. A U.S. District Court may not hear any case in which a substantial majority of plaintiffs and the primary defendants are citizens of the same State and in which claims asserted are governed primarily by laws of that same State. In other words, only State courts may hear those cases.

The Choice of Law section will be stricken. On further reflection, I believe it confers too much discretionary authority on a Federal judge to select the relevant law that will apply in a given case.

In sum, this legislation speaks to process, fairness and judicial efficiency. It will not interfere with jury verdicts or compensation rates for litigators. I, therefore, urge my colleagues to join me in a bipartisan effort to support this bill and yield back the balance of my time.

The gentleman from Michigan?

Mr. CONYERS. I ask—I strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CONYERS. This has given me as much concern as anything on the agenda today. And I think we've negotiated a bit on it, and I'm—I have no problems and support the descriptions you've given in all of the sections.

Section 3 is the one that I would like to draw the members' attention to because, from trial lawyers' point of view, it may be the most controversial—the minimum diversity for single accidents involving 25 people.

Now I've traditionally opposed having Federal courts decide State tort issues, naturally, and disfavor the expansion of jurisdiction of the already overloaded district courts. Unlike the class action bill, though, this bill would only expand Federal court jurisdiction in a much narrower class of actions, with the objective of judicial expedience.

So I support the section, with the understanding that it would only apply to a narrowly defined category of cases and does not, in any way, serve as a precedent for broader expansion of diversity jurisdiction. And I'm hoping that the author and those that support this bill will join with me in these feelings that I have.

Chairman SENSENBRENNER. Will the gentleman yield?

Mr. CONYERS. Yes, I will.

Chairman SENSENBRENNER. The gentleman has my assurances that this will not serve as a precedent for other types of litigation reform legislation which we may consider later on during this Congress. This is designed for a specific type of litigation, the airline crash litigation.

And I think it is important to note that the Clinton administration supported last year's version of the bill, which was much more broadly drafted, as does the Administrative Office of the Courts, in that it will provide greater judicial efficiency and thus save money without diminishing anybody's right to sue, any compensation that may be given to a plaintiff that wins their case or any counsel's ability for—to negotiate out compensation for representing their client.

Mr. CONYERS. I'm glad to hear the chairman say that because we don't—I don't want this to serve as the legislative foot in the door or nose under the camel's tent.

It's also my understanding here that mass tort injuries that involve the same injury over and over again, such as asbestos, and breast implants, and the like, would be excluded, and that——

Chairman SENSENBRENNER. Would the gentleman yield?

Mr. CONYERS. Of course.

Chairman SENSENBRENNER. This does not deal with cases like the asbestos case. This is a single-accident case, again, such as a plane crash or a train wreck.

Mr. CONYERS. Right. And so the types of cases that would be included would be plane, trains, bus, boat accidents, environmental spills, which many of which at least can already be brought in the Federal court.

So, with that distinction being made and the chairman's additional comments, I—I feel that I can urge my colleagues on the committee to support this measure.

Chairman SENSENBRENNER. Are there amendments?

The gentleman from California, Mr. Berman?

Mr. BERMAN. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BERMAN. Just a couple of points.

As you had indicated, section 2 is totally noncontroversial.

Section 3 has some concerns. I do want to point out that the chairman agreed, in the last Congress, as the sponsor of the legislation, to include a presumption that cases which are combined in a single district for purposes of judicial efficiency to decide liability and punitive damage issues and pretrial motions, will be—or there will be a presumption that allows those cases to go back to the district in which the action which was originally filed, for the purposes of determining compensatory damages, so that——

Chairman SENSENBRENNER. Will the gentleman yield?

Mr. BERMAN. Yes.

Chairman SENSENBRENNER. That's correct, as well.

Mr. BERMAN. And I support this bill, and agree both with the chairman, and particularly with the comments of my ranking member of the full committee, that no one should construe my support for this as support for an effort to limit or eliminate the ability of State courts to consider class action cases.

Chairman SENSENBRENNER. The gentleman from North Carolina?

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman from North Carolina is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

If this is a good idea, and I, on balance, don't think it is at this point, this is the exact point I was trying to raise before. I think this is a bill that should have gone to the subcommittee, particularly if you are making substantial changes to it.

Mr. BERMAN. Would the gentleman yield?

Mr. WATT. I'd be happy to yield to the gentleman.

Mr. BERMAN. This bill has been through the court——

Mr. WATT. This bill has been substantially revised since any subcommittee dealt with it, but clearly this bill should have gone through the subcommittee. And I can understand the chairman, it's his bill. He wants to move the bill along. He thinks it's not controversial. I think it's a lot more controversial than anybody is making it out to be.

For those of us who have been strong advocates for States' rights, I think this is a radical departure. When you start telling to a plaintiff who lives in a State, who is suing a defendant who lives in the same State, and you are going to apply that State's laws that that case has to be liti—for that plaintiff, he has to go into the U.S. District Court, the Federal court, to litigate his claim, I think that is a radical departure from where we are at this point.

And all of us who claim to be advocates of States' rights, ought to be concerned about that. And that's what this bill does. Don't underestimate what it does. It says, if there are 25 defendants, one of those defendants lives inside the State the—25 people injured, one of the plaintiffs lives in the State the defendant lives—is resident of that State, you've still got to go into Federal court—that's what the bill says—and even if you're applying State law. That is

a radical departure from anything that our law has ever said. And that's way, way removed. There's no diversity there at all between those parties.

Now let me just tell you that every small-town person on this committee ought to be alarmed by this, because in small towns there are not U.S. District Courts. There are, in every county, State courts where individual plaintiffs can walk right down the street, file a lawsuit, and get their claim litigated. You all make it sound like the whole purpose for the court system is for the convenience of the courts. That is not the purpose of the court system. The purpose of the court system is for the convenience of litigants, and that's the way it's always been in this country.

So don't tell me that this is some kind of minor bill that is, you know, business as usual. Yes, you all have gotten together and decided that this is a good idea——

Mr. ISSA. Mr. Chairman, point of order.

Mr. WATT. But this is a major piece of litigation, should have gone through the—I mean of legislation, should have gone through the subcommittee, should have been subjected to the scrutiny of the full process.

Mr. ISSA. Will the gentleman yield?

Mr. WATT. I'd be happy to yield to the gentleman.

Mr. ISSA. Thank you.

Mr. WATT. Whoever is asking me to yield.

Mr. ISSA. Thank you.

Mr. WATT. And I would, just before I yield to you, I would say——

Mr. ISSA. My yield is very short. Could we have the audio turned down to where it is a normal level.

Mr. WATT. Just before I yield to you, perhaps——

Mr. ISSA. Would the gentleman, please, could we just have the audio turned down to a level that is more pleasant for all of us available? I think it is—I want to listen to the gentleman, but it is so loud it is difficult to do so.

Mr. WATT. Do you want to turn down the audio, Mr. Chairman? I don't have any control over the audio.

Chairman SENSENBRENNER. The only button I have up here is one that would turn you off. You don't want me to push that, do you?

[Laughter.]

Mr. WATT. Well, Mr. Chairman, I move that this bill be sent to the subcommittee that has jurisdiction over it.

Mr. BERMAN. Is that a debatable motion, Mr. Chairman?

Chairman SENSENBRENNER. Is the gentleman's motion in writing?

Mr. WATT. It is not, but I will put it in writing. I ask unanimous consent that the bill be recommitted to the subcommittee on Commercial and Administrative——

Mr. GALLEGLY. Objection.

Chairman SENSENBRENNER. An objection is heard.

The gentleman from California? His hand was up first.

Mr. BERMAN. Oh, well, we don't have a motion before us or—it's being written, so I just—my point of parliamentary inquiry was is this a debatable motion?

Chairman SENSENBRENNER. The answer is, yes, it is debatable.

Mr. BERMAN. When the motion is made, I'd like to be recognized to speak against the motion.

Chairman SENSENBRENNER. For what purpose does the gentleman from New York seek recognition?

Mr. NADLER. Parliamentary inquiry. Was that necessary to have unanimous consent or can we do that by motion?

Chairman SENSENBRENNER. Unanimous consent was objected to.

Mr. NADLER. It has to be in writing?

Chairman SENSENBRENNER. Yeah.

Mr. NADLER. Thank you.

Chairman SENSENBRENNER. Would the gentleman——

Mr. WATT. Mr. Chairman, I ask unanimous consent for 30 additional seconds just to finish my statement. I'll try to modulate down.

Chairman SENSENBRENNER. Without objection, the gentleman is recognized for 30 modulated seconds.

Mr. WATT. I wanted to point out to the freshmen on this committee, further, that when you all don't—when we just rush bills through here, basically, you all are deprived of what you were sent here to do. And if you want to be deprived of it, I mean, you go ahead, but basically you are missing the opportunity to do what your responsibilities are on this committee.

So, having said that, I've given you my arguments. I think you're making a mistake, but I'm not going to prolong this. I'll yield back.

Chairman SENSENBRENNER. The question occurs on the motion to report the bill H.R. 860 favorably.

The gentleman from California?

Mr. BERMAN. I think one point needs to be made, if I might be recognized.

Chairman SENSENBRENNER. The gentleman, without objection, the gentleman is recognized a second time.

Mr. BERMAN. Thank you.

There were three changes made to this bill between the time it went through subcommittee and passed in the last Congress and now. The three changes all made it a better bill, from my point of view. And in the context of the gentleman from North Carolina's comments, while he still may not like the bill, it would be better from his point of view.

The three changes were to raise the damage level from $75,000 to $150,000. Each plaintiff must allege at least $150,000 of damage; secondly, there's an exception created to the minimum diversity rule. A U.S. District Court may not hear any case in which a substantial majority of the plaintiffs and the primary defendants are all citizens of the same State and in which the claims asserted are governed primarily by the laws of that same State. Only State courts may hear those kinds of cases. This is a change from the bill that passed the subcommittee unanimously last year and the House, and was sent to the Senate; and the third change—I will yield in 1 second—and the third change is the Choice of Law section will be—is stricken. This allows the transferor court, not the transferee court, to make the Choice of Law decision.

So I just wanted to put that those are the only changes in the bill. All of them from people who have—the concerns expressed by the gentleman from North Carolina may still be there, but to that degree, they are lessened by these changes.

Mr. WATT. Will the gentleman yield?

Mr. BERMAN. I'd be happy to.

Mr. WATT. I just want to point out that you may be right that this is better than it was, but this could be a much, much better and could really honor the rights of States and individuals who we're supposed to be honoring if we took some time to address the issues that I'm talking about. The issues that you have just described still don't address what I said was the case. An individual in my county who gets injured by a defendant in my county, whose case is governed by the laws of my State, still must find his way to Federal court if there were 25 or more people injured, and I'm telling you that that is unfair to that individual claimant. That is unfair, and it is unprecedented.

And I understand the expediency of the court, but the courts were not built for the expediency of the court, the courts were built for the expediency of the people for whom they are designed to serve.

So what you have said, you are absolutely right. It was better than it was. The question is will we take the time to make it to address the real issues that this bill still presents to us, and particularly those of us who profess to be strong advocates of States' rights.

Ms. JACKSON LEE. Would the gentleman yield?

Chairman SENSENBRENNER. The time belongs to the gentleman from California.

Ms. JACKSON LEE. Mr. Berman, would you yield? Your light is still on.

Mr. BERMAN. Yes, I would be happy to yield.

Ms. JACKSON LEE. Let me I just simply want to add a statement that I have to the record, and I guess I come down on the issue in two manners: One, I want to open the courts to as many people as possible who have been aggrieved and certainly support the gentleman from North Carolina's motion. I do think this legislation is good legislation and answers many of the concerns that I have, and I submit my total statement into the record.

Thank you very much for yielding.

Chairman SENSENBRENNER. Without objection.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF HON. SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

I want to thank Chairman Sensenbrenner and Ranking Member Conyers for convening this markup regarding H.R. 860, the "Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999."

Clearly, consideration of H.R. 860 comes at a time where court dockets continue to rise yet pay salaries for federal judges appear inadequate to deal with the important questions that confront Americans. H.R. 860 is intended to improve the ability of federal courts to handle complex multidistrict litigation arising from a common set of facts. Last Congress the House passed a virtually identical bill, H.R. 2112, by voice vote under suspension of the rules; however, it stalled in the Senate.

There are a few parts of the legislation which merit attention. One provision of the bill allows a transferee court in multidistrict litigation to retain jurisdiction over all of the consolidated cases which the presumption that compensatory damages will be remanded to the transferor court. It also expands federal court jurisdiction by requiring only minimal diversity (as opposed to complete diversity) for mass torts arising from a single incident. Lastly, the bill establishes new federal procedures in these narrowly defined cases for the selection of venue, service of process and issuance of subpoenas.

Under the bill, I am supportive of the expansion of jurisdiction over civil actions arising out of a single accident that result in the death or injury of 25 or more persons, if the damages exceed $150,000 per claim and minimal diversity exists. While the bill contains a number of details, I am reassured that this bill would not apply to mass tort injuries that involve the same injury over and over again, such as, asbestos or breast implants.

In this sense, H.R. 860 is a sharp distinction from the "Interstate Class Action Jurisdiction Act of 1999." Unlike H.R. 860, the class action bill requires only minimal diversity for all civil actions brought as class actions in federal court, regardless of the individual amounts in controversy, the number of separate incidents or injuries that may give rise to a class action, or the state-based nature of the claim. Rather than providing a reasonable, limited modification to diversity jurisdiction, the class action bill—which I strongly oppose—represents a radical rewrite of the class action rules and would ban most forms of state class actions.

Mr. Chairman, I hope that whatever form of H.R. 860 is reported by the Committee today reflects a genuine commitment to providing meaningful access to our courts. Access to our courts is simply essential.

Thank you.

MOTION OF MR. WATT

I move that the bill, H.R. 860, be referred to its subcommittee of jurisdiction for consideration.

Mr. WATT. Mr. Chairman, I have a motion at the desk.

Chairman SENSENBRENNER. The clerk will report the motion.

The CLERK. Mr. Watt moves that H.R. 860 be referred to the appropriate Subcommittee.

Chairman SENSENBRENNER. The question is on the motion.

Those in favor will signify by saying aye.

Opposed, no.

The noes appear to have it. The noes——

Mr. WATT. Mr. Chairman, I ask for a recorded vote.

Chairman SENSENBRENNER. The question is on the motion to refer the bill to subcommittee.

Those in favor will, as your names are called, answer aye; those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Gekas?

Mr. GEKAS. No.

The CLERK. Mr. Gekas, no. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

[No response.]

The CLERK. Mr. Barr?

Mr. BARR. No.

The CLERK. Mr. Barr, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Hutchinson?

[No response.]

The CLERK. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Graham?

[No response.]
The CLERK. Mr. Bachus?
Mr. BACHUS. No.
The CLERK. Mr. Bachus, no. Mr. Scarborough?
[No response.]
The CLERK. Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no. Mr. Green?
Mr. GREEN. No.
The CLERK. Mr. Green, no. Mr. Keller?
[No response.]
The CLERK. Mr. Issa?
Mr. ISSA. No.
The CLERK. Mr. Issa, no. Ms. Hart?
Ms. HART. No.
The CLERK. Ms. Hart, no. Mr. Flake?
Mr. FLAKE. No.
The CLERK. Mr. Flake, no. Mr. Conyers?
Mr. CONYERS. No.
The CLERK. Mr. Conyers, no. Mr. Frank?
[No response.]
The CLERK. Mr. Berman?
Mr. BERMAN. No.
The CLERK. Mr. Berman, no. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no. Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
Ms. BALDWIN. No.
The CLERK. Ms. Baldwin, no. Mr. Weiner?
Mr. WEINER. Yes.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Are there additional members in the chamber who wish to cast their votes or change their votes?
The gentleman from Virginia?

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no.

Chairman SENSENBRENNER. The gentleman from South Carolina?

Mr. GRAHAM. No.

Chairman SENSENBRENNER. The gentleman from Arkansas?

Mr. HUTCHINSON. No.

Chairman SENSENBRENNER. The gentleman from Ohio?

Mr. CHABOT. No.

Chairman SENSENBRENNER. Anybody else wish to—the gentleman from Massachusetts?

Mr. DELAHUNT. May I have a moment?

[Laughter.]

Chairman SENSENBRENNER. Of course.

The CLERK. Mr. Delahunt?

Mr. DELAHUNT. Yes.

The CLERK. Mr. Delahunt, aye.

Chairman SENSENBRENNER. The clerk will—the gentleman from California, Mr. Gallegly.

Mr. GALLEGLY. Votes no.

The CLERK. Mr. Gallegly, no.

Chairman SENSENBRENNER. The clerk will try again to report.

The CLERK. Mr. Chairman, there are six ayes and 23 nays.

Chairman SENSENBRENNER. And the motion is not agreed to.

The question now occurs on the motion to report the bill, H.R. 860 favorably. All those in favor will signify by saying aye.

Opposed no.

The ayes appear to have it. The ayes have it, and the motion is agreed to.

Without objection, the Chairman is authorized to move to go to conference pursuant to House rules.

Without objection, the staff is directed to make any technical and confirming changes, and all members will be given 2 days, as provided by House rules, in which to submit additional dissenting, supplemental or minority views.

MINORITY VIEWS

H.R. 860 is intended to improve the ability of federal courts to handle complex multidistrict litigation arising from a common set of facts. This bill represents a means by which to improve the manageability of complex litigation. In this narrow circumstance, we are willing to support this expansion of federal court jurisdiction.

There are two operative sections of this legislation. Section 2 of the bill allows a transferee court in multidistrict litigation to retain jurisdiction over all of the consolidated cases with the presumption that compensatory damages will be remanded to the transferor court. We strongly support this provision, which we believe works well as a matter of judicial expedience when cases are transferred to one federal district court by a Multidistrict Litigation Panel.

Section 3 expands federal court jurisdiction by requiring only minimal diversity (as opposed to complete diversity) for mass torts arising from a single incident; provides for the consolidation of these cases into a single district; and establishes new federal procedures in these narrowly defined cases for the selection of venue, service of process and issuance of subpoenas. We can support section 3 as a matter of judicial efficiency, but with the understanding that it does not in any way serve as a precedent for the broader expansion of diversity jurisdiction.

It is important to note that three positive changes were made to the disaster litigation section of the bill as introduced this Congress: the amount in controversy requirement for a plaintiff to file in U.S. District Court is raised from $75,000 to $150,000; an exception to the minimum diversity rule is created providing that a U.S. District Court may not hear any case in which a "substantial majority" of plaintiffs and the "primary" defendants are all citizens of the same state and in which the claims asserted are governed "primarily" by the laws of that same state; and the choice-of-law section is stricken as it is believed to confer too much discretionary authority to a U.S. District Court judge to select the relevant law that applies in a given case. We consider these changes to be improvements in that they provide additional safeguards to the limited expansion of federal court jurisdiction allowed under the bill.

The following views clarify the reasoning behind our support of both sections of H.R. 860:

Section 2—Overturns Lexecon v. Milberg

Section 2 of H.R. 860 reflects an intention to overturn the decision of the United States Supreme Court in *Lexecon* v. *Milberg Weiss Bershad Hynes & Lerach*,[1] interpreting 28 U.S.C. section 1407, the federal multidistrict litigation statute. In *Lexecon*, the Supreme Court held that a transferee court (a district court as-

[1] 118 S.Ct. 956 (1998).

signed to hear pretrial matters by a multidistrict litigation panel in multidistrict litigation cases) must remand all cases back for trial to the districts in which they were originally filed, regardless of the views of the parties.

While a hearing was not held on the bill this Congress, during the 106th Congress, the Courts and Intellectual Property Subcommittee did hold a hearing on this issue.[2] Experts testified that for some 30 years the transferee court often retained jurisdiction over all of the suits by invoking a venue provision of Title 28, allowing a district court to transfer a civil action to any other district where it may have been brought. In effect, the transferee court simply transferred all of the cases to itself. The Judicial Conference testified that this process has worked well because the transferee judge becomes the expert on the case as a result of supervising the day-to-day pretrial proceedings.

Criticism had been heard at the Subcommittee hearing, however, that the text was arguably more expansive than what was necessary to overturn *Lexecon*. It was argued that section 2 went far beyond simply permitting a multidistrict litigation transferee court to conduct a liability trial, and instead, allowed the court to also determine compensatory and punitive damages. The absence of the presumption that compensatory damages would be remanded to the transferor court, it was asserted, would work an unfairness on victims in personal injury cases by making it more difficult for them to prove the damages for which they are seeking to be compensated. Many contended that the difficulty and added expense incurred by plaintiffs and their witnesses by having to testify in the transferee as opposed to the original local court posed an unfair burden.

As a result of discussions between the minority and majority, Rep. Berman successfully offered a bipartisan amendment to section 2 of the bill addressing this concern at the Full Committee markup, which was included this year in the original language of the bill. The provision provides that to the extent a case is tried outside of the transferor forum, it would be solely for the purpose of a consolidated trial on liability, and if appropriate, punitive damages, and that the case must be remanded to the transferor court for the purposes of trial on compensatory damages, unless the court to which the action has been transferred for trial purposes also finds, for the convenience of the parties and witnesses and in the interests of justice, that the action should be retained for the determination of compensatory damages.

We support this section in order to achieve the worthwhile objective of overturning the *Lexecon* decision for reasons of judicial efficiency.

Section 3—Minimal Diversity for Single Accidents Involving 25 People

Section 3 of H.R. 860 expands federal court jurisdiction over civil actions arising out of a single accident that results in the death or injury of 25 or more persons, if the damages exceed $150,000 per

[2] *The Multiparty, Multiforum Jurisdiction Act of 1999 and the Federal Courts Improvement Act of 1999: Hearing on H.R. 2112 and H.R. 1752 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. (1999).

claim and minimal diversity of citizenship exists.[3] A U.S. District Court, however, may not hear any case in which a "substantial majority" of plaintiffs and the "primary" defendants are all citizens of the same state and in which the claims asserted are governed "primarily" by the laws of that same state. Section 3 also requires the district court to notify the Multidistrict Litigation Panel of the pendency of the action so that the Panel may assist in consolidating the lawsuits in a single district court. Additionally, section 3 establishes new federal procedures in this narrowly defined category of cases for the selection of venue, service of process and issuance of subpoenas. It is our understanding that, in effect, section 3 would only apply to a very narrowly defined category of cases, such as, plane, train, bus, boat accidents and environmental spills, many of which may already be brought in federal court. However, it would not apply to mass tort injuries that involve the same injury over and over again such as asbestos and breast implants.

During the Subcommittee hearing last Congress, two broad concerns were raised regarding section 3 of the bill: (1) that section 3 is an incursion on the state courts' traditional jurisdiction—state courts are more than competent to handle personal-injury and wrongful death cases and (2) that section 3 expands the jurisdiction of the already overloaded district courts which will result in victims having far slower access to justice.

We share these concerns. We generally oppose having federal courts decide state tort issues where complete diversity is not present, and disfavor the expansion of the jurisdiction of the already-overloaded federal district courts. But we also believe that in the narrow circumstance of single accident injuries with multiple parties from different states, there may be legitimate reasons to consolidate cases concerning the same accident in one federal forum. Litigating the same liability question several times over in separate lawsuits may waste judicial resources and may be costly to both plaintiffs and defendants. We believe the consolidation of these cases in one federal forum could prove to be beneficial in reducing delays, litigation costs, and drains on court resources. Section 3 would only expand federal court jurisdiction in a narrow class of actions with the objective of judicial efficiency. It is for this reasonable purpose, and in this narrow category of cases, that we are willing to support this legislation.

In this respect, H.R. 860 can very easily be distinguished from the broader class action reform proposal which we unequivocally opposed during the 106th Congress.[4] Unlike H.R. 860, the class action bill requires only minimal diversity for all civil actions brought as class actions in federal court, regardless of the individual amounts in controversy, the number of separate incidents or injuries that may give rise to a class action, or the state-based nature of the claim. Rather than providing a reasonable, limited modification to diversity jurisdiction, the class action bill represents a radical rewrite of the class action rules and would ban most forms of

[3] Under the bill, minimal diversity exists between adverse parties if any party is a citizen of a state and any adverse party is (1) a citizen of another state, (2) a citizen/subject of a foreign state, or (3) a foreign state.

[4] See H.R. 1875, "The Interstate Class Action Jurisdiction Act of 1999," 106th Cong. (1999).

state class actions. Thus, it would have a far more damaging impact on the federal courts than H.R. 860. It is imperative for us to note here that while the Judicial Conference supported the bill last year, they too opposed the broader class action bill, recognizing, among other things, its detrimental impact on the workload of the federal judiciary and traditional state court prerogatives.[5]

JOHN CONYERS, Jr.
HOWARD L. BERMAN.
ZOE LOFGREN.
SHEILA JACKSON LEE.
WILLIAM D. DELAHUNT.
ANTHONY D. WEINER.

[5] See Letter from Secretary Leonidas Ralph Mecham, Judicial Conference of the United States to Henry J. Hyde, Chairman, U.S. House Judiciary Committee (July 26, 1999) (on file with the Judiciary Committee Minority Staff) [hereinafter Judicial Conference Letter] and Department of Justice Class Action Testimony. The class action bill is also opposed by the Conference of State Chief Justices. See Letter from President David A. Brock, Conference of Chief Justices to Henry J. Hyde, Chairman, U.S. House Judiciary Committee (July 19, 1999) (on file with the Judiciary Committee Minority Staff).

DISSENTING VIEWS

I opposed reporting H.R. 860, the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act," to the full House at the March 8, 2001 Judiciary Committee markup because I objected to the process under which the bill was considered and because I objected to certain substantive provisions of the bill.

I objected to the process because this bill was marked up by the full Committee only 2 days after it was introduced and received no consideration at the Subcommittee level. Those who support the bill contend that the bill did not warrant hearings or a Subcommittee markup because the bill was the subject of a hearing by the Subcommittee on Courts and Intellectual Property in the 106th Congress. However, the version of the bill introduced in the 107th Congress has undergone substantial changes from its predecessor. At the hearing on this legislation during the 106th Congress the Subcommittee heard testimony from a witness who expressed serious concerns about the bill's expansion of Federal jurisdiction.[1] I believe a hearing should have been held in this Congress to evaluate the revised bill and to determine whether the revisions addressed the serious federalism issues raised by this bill or made them worse. For this reason, I offered a motion at the Committee markup to refer this bill back to the Subcommittee for further consideration. Unfortunately, the motion was defeated and the bill was rushed through Committee.

I also objected to certain substantive provisions of H.R. 860 which would expand Federal court jurisdiction for civil actions arising out of a single accident[2] because I believe this proposed expansion of Federal jurisdiction is inappropriate. The bill's expansion of Federal jurisdiction would infringe on the traditional jurisdiction of state courts which are better equipped to handle personal-injury and wrongful death cases. Expanding Federal jurisdiction would also add an additional burden to the Federal courts at a time when our Federal courts are already overcrowded and backlogged.[3] The bill's impact on plaintiffs would also be substantial. Under the bill an injured victim who chose to file suit in a state court could have his case involuntarily removed to a Federal court that may be hundreds of miles from his home. While this may be justified where diversity jurisdiction currently provides access to the Federal court, I see absolutely no reason to force a victim into Federal court

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[1] See *Hearing on H.R. 2112 Before the House Subcommittee on Courts and Intellectual Property, 106th Cong.* (1999) (statement of Brian Wolfman, Staff Attorney, Public Citizen).

[2] Section 3 of the bill would create Federal jurisdiction for civil actions arising out of a single accident that results in the death or injury of 25 or more persons, if the damages exceed $150,000 per claim and minimal diversity exists. Under the bill minimal diversity exists between adverse parties if any party is a citizen of a state and any adverse party is (1) a citizen of another state (2) a citizen/subject of a foreign state, or (3) a foreign state.

[3] See Chief Justice William Rhenquist, An Address to the American Law Institute, *Rehnquist: Is Federalism Dead?* (May 11, 1998), in *Legal Times* (May 18, 1998)(criticizing Congress for enacting legislation which brings more and more cases into the Federal court system).

where the defendant resides or has a place of business in the state and where the applicable law is state law. While the bill may result in increased judicial efficiency for the Federal courts, it would do so by encroaching on the jurisdiction of state courts and states' rights and would do so at the expense of accident victims. I think we have lost sight of the fact that the courts are for the convenience of litigants, not judges and administrators.

While some may characterize this bill as a "non-controversial" piece of legislation that should be quickly moved through the legislative process, I believe we failed to properly exercise our responsibility as members of the Judiciary Committee by not conducting a more extensive review of this bill. Consequently, while I favor some of the provisions of the bill I opposed reporting H.R. 860 to the full House.

MELVIN L. WATT.

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