

The Class Action Fairness Act

Curbing Unfairness and Restoring Faith in our Judicial System

by Walter Dellinger

A rapidly growing number of class actions that are being filed in some of our state courts appear to be doing more harm than good. Under the current regime, most participants in those cases—not just the defendants—tend to be losers. The states whose courts have honorably decided not to play class action games are, contrary to fundamental federalism principles, being forced to transfer authority over their citizens' claims and the interpretation of their own laws to other states whose courts seem to have an insatiable appetite for such lawsuits. Consumers are paying a big price as well. Even though they are supposed to be the beneficiaries of these lawsuits, there is mounting evidence that much (if not most or all) of whatever monetary recoveries are obtained in state court class actions often go to the counsel who brought the actions, not the persons on whose behalf they supposedly were filed. And consumers are ultimately paying the bill for those recoveries in the form of a "litigation tax" that must be added to the prices they pay everyday for products and services. As *The Washington Post* recently editorialized, "no component of the legal system is more prone to abuse" than class actions.¹

The Framers of the U.S. Constitution actually foresaw—and tried to prevent—the types of problems that are raised by these class actions when they gave federal courts "diversity jurisdiction" over cases that involve interstate commerce. Unfortunately, the federal statutes exercising that constitutional authority were drafted before the evolution of the modern class action lawsuit and have been interpreted to exclude most interstate class actions from federal court. The upshot is that even multimillion dollar cases, brought on behalf of tens of thousands of class members living in all 50 states, with

outcomes that set national policy, are heard in state (not federal) courts. Some members of the bar have seized on this opportunity, searching out and finding state court venues where the judges will readily certify cases for very lucrative treatment as either class actions or their kin, mass joinder actions.

Last year, the House of Representatives passed a bill—the Class Action Fairness Act of 2002—that would correct this anomaly and ensure that multistate class actions can be heard in federal courts. Similar legislation was introduced in the Senate in February and in the House last week.² These bills would establish a concept of diversity jurisdiction that would allow the largest interstate class actions into federal court, while preserving exclusive state court control over smaller, primarily intrastate disputes. As several major newspaper editorial boards—ranging from the *Post* to the *Wall Street Journal*—have recognized, enactment of such legislation would go a long way toward curbing unfairness in certain state court class actions and restoring faith in the fairness and integrity of the judicial process.

The Scope of the Problem: Growing Unfairness in Class Action Litigation

Within our legal system, class actions are an important procedural device. Their original purpose was a noble one: to vindicate the rights of large groups of individuals who sought justice for civil rights violations and other wrongs but could not achieve such justice individually. Without question, that intent has been fulfilled in many cases over the years. However, a critical component of this success has been a certain set of important rules—which are followed in the

federal courts and in the courts of most states—to ensure that cases will only be litigated as class actions when doing so will be fair and just both to individual plaintiffs and to defendants. For example, class action rules require that the factual and legal claims in a case be common to every member of a class, and that there be no issues that would divide class members among one another.

These rules are more than procedural requirements; rather, they are intended to protect “unnamed” members of the plaintiff class, by ensuring that their interests will be adequately represented—and protected—in the prosecution of the case by the named plaintiffs and their attorneys. Such rules also protect defendants, because if a class is certified in the absence of these restrictions, a jury could impose a large award that supposedly compensates the alleged injuries of all the class members, even though important differences in the facts and/or law relevant to their individual cases might well have precluded many of them from any recovery if their cases had been tried individually.

The problem is that not all courts have been following these rules with meaningful rigor. In recent years, there have been substantial increases in the number of class action filings in certain state court forums, and it appears that the popularity of those courts is attributable to the fact that they are willing to apply very lax standards in determining which cases are appropriately heard as class actions. The evidence of this trend is, in fact, overwhelming. For example:

- ▶ A preliminary report on a major empirical research project by RAND’s Institute for Civil Justice (ICJ) observed a “doubling or tripling of the number of putative class actions” that was “concentrated in the state courts.”³
- ▶ A survey indicated that while federal court class actions had increased somewhat over the past decade, the frequency of state court class action filings had increased 1,315 percent—with most of the cases seeking to certify nationwide or multistate classes.⁴
- ▶ The final report on the RAND/ICJ class action study confirmed the explosive growth in the number of state court class actions and

concluded that class actions “were more prevalent” in certain state courts “than one would expect on the basis of population.”⁵

- ▶ An empirical research article published in the *Harvard Journal for Law and Public Policy* last year identified certain “magnet” county courts that have earned “class action-friendly” reputations and are experiencing dramatic increases in class action filings. For example, in the Circuit Court of Madison County, Ill., the number of class action filings in the county per year has increased 1,850 percent over the last three years.⁶ Most of these new cases are led by attorneys outside the county, and nearly all sought to certify nationwide classes in disputes that have little, if any, connection to Madison County.⁷

A predictable consequence of this phenomenon is injury not just to the corporate defendants subjected to these cases, but to the unnamed plaintiffs who are swept into the litigation with little knowledge of the claims at issue, no direct involvement in litigation strategy choices, and inadequate representation of their interests (as opposed to the interests of the named plaintiffs and counsel who initiated the litigation). The risk to class members’ rights when basic class action rules are ignored is especially acute if a corporate defendant succumbs to pressure to resolve the case (or seeks to game the system) by agreeing to a settlement in which individual class members’ recoveries are small (or even nonexistent) in comparison to the fees paid to the lawyers who filed the action.⁸

In recent years, the federal courts have made heroic efforts to halt the game playing with class actions, particularly by scrutinizing proposed class settlements more carefully. Federal courts have rejected numerous proposed class settlements,⁹ and the federal class action rules on settlements are being substantially improved.¹⁰ The same cannot be said for some state courts that continue to manifest a willingness to approve fee-driven settlements, causing those state courts to become “magnets” for those cases. A recent example illustrates the problem:

H & R Block (the income tax return preparation company) has recently been the target of allegations that it was imposing improper

finance charges for a program that advanced to customers the amounts of their anticipated income tax refunds. The federal court system ultimately rejected as inadequate a proposed class action settlement, under which participants in that refund program nationwide would have been paid \$25 million in cash and the class counsel would have received around \$4 million.¹¹ But apparently perceiving that certain state courts would not apply the same scrutiny to a proposed class settlement, certain lawyers went to a Texas state court and presented for approval a more dubious deal—one under which consumers would get less and the lawyers would get more.¹² Under the deal (which covers only Texas consumers), the class members would get **no cash at all** (only coupons for discounts in buying more tax services), and the lawyers would get **\$49 million**.¹³ Although the state court has not yet approved this heavily criticized deal,¹⁴ the fact that counsel would run into this state court with an even less balanced proposed settlement speaks volumes about the state court class action problem.

According to press reports, numerous other class settlements that have been approved by state courts have been criticized for their one-sided (i.e., lawyer-only) benefits:¹⁵

- ▶ In a nationwide class action, plaintiffs alleged that a bank over-collected for mortgage escrow accounts. In a class settlement approved by an Alabama county court, they were issued refunds ranging from zero to \$8.76. But the settlement also permitted deduction of the \$8.5 million fee award from the accounts of the approximately 300,000 class members—resulting in a net loss for class members. Some class members discovered that \$80 to \$100 had been deducted from their accounts. For example, a Maine resident discovered that although he had recovered \$2.19 under the settlement, the Alabama court had allowed the class counsel to deduct \$91.13 from his account for attorneys' fees.¹⁶
- ▶ In another case, plaintiffs alleged defects in the television sets they had purchased. Under the class settlement approved by an Illinois county court, class members received no

cash—only small rebates if they decided to buy new television sets from the defendant manufacturer. Over protests from the consumer class members,¹⁷ however, the lawyers reportedly received \$22 million in fees and costs.¹⁸

- ▶ A Jefferson County, Texas, state court approved a class settlement in which customers from all 50 states who allegedly were charged excessive late fees by a video rental company will receive \$1 dollar coupons for rentals. Experts predict that few of those coupons will be redeemed. The class attorneys, however, will receive a \$9.25 million fee award.¹⁹
- ▶ In a class action in which various manufacturers were alleged to have misrepresented the surface area of computer screens, a California state court approved a settlement under which the class members received a \$13 rebate that they could use if they wanted to spend hundreds of dollars to buy a new monitor. The class attorneys received approximately \$6 million in fees.²⁰
- ▶ Plaintiffs/customers received no compensation whatsoever in the settlement of a class action concerning cable late fees; the cable operator merely changed policies. The Illinois state court, however, awarded class counsel \$5.6 million in fees.²¹
- ▶ In a settlement of a class action regarding a phone company's wire-maintenance program, consumers received \$5 pay phone cards, which could only be used at pay phones owned by the defendant's parent company. However, consumers in some states complained that they got a raw deal because there were no such pay phones where they live.²² Nevertheless, the state court approved the settlement and awarded class counsel a total of \$16 million in legal fees in two related actions.²³

The evidence is not limited to these (and many other) examples. In a study jointly funded by the plaintiffs' and defense bar, the RAND/ICJ took a more systematic look at where the money

goes in class settlements. The study indicates that in state court consumer class action settlements (i.e., non-personal injury monetary relief cases), the class counsel frequently receives more money than all class members combined.²⁴ Significantly, another study found that this phenomenon was not occurring in federal courts—“[i]n most [class actions handled by federal courts], net monetary distributions to the class exceeded attorneys’ fees by substantial margins.”²⁵

The implication of these findings is **not** that plaintiffs’ lawyers have no legitimate interest in compensation for work done on successful cases, or that all class action settlements are unfair. However, class action filings have increased disproportionately in some jurisdictions for the apparent reason that those jurisdictions are less likely to enforce class action rules and more likely to approve troublesome settlements, thereby hurting the interests of absent class members. As the *Post* recently editorialized: “This is not justice. It is an extortion racket that only Congress can fix.”²⁶

Class Action Legislation: A Modest Solution to Growing Problems in State Court Class Actions

Why the Law Governing Diversity Jurisdiction Generally Excludes Class Actions From Federal Court

The Constitution provides for federal court jurisdiction over cases of a distinctly federal character—for instance, cases raising issues under the Constitution or federal statutes, or cases involving the federal government as a party—and generally leaves to state courts the adjudication of local questions arising under state law. However, the Constitution specifically extends federal jurisdiction to include one category of cases involving issues of state law: “diversity” cases, referred to in the Constitution as suits “between citizens of different states.”

The Framers established the concept of federal diversity jurisdiction to ensure that local biases would not affect the outcome of disputes between in-state plaintiffs and out-of-state defendants.²⁷ Diversity jurisdiction was designed not only to diminish the risk of uneven justice, but also to

protect the reputation of our courts—“to shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents.”²⁸ The Framers reasoned that some state courts might discriminate against out-of-state businesses engaged in interstate commerce, and that allowing these cases to be heard in federal courts would ensure the availability of a fair, uniform, and efficient forum for adjudicating interstate commercial disputes.²⁹ Thus, since the nation’s inception, diversity jurisdiction has served to guarantee that parties from different states have a means of resolving their legal differences on a level playing field in a manner that nurtures interstate commerce. As one federal appellate judge noted, “[n]o power exercised under the Constitution ... had greater influence in welding these United States into a single nation [than diversity jurisdiction]; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into various parts of the Union, and nothing has been so potent in sustaining the public credit and the sanctity of private contracts.”³⁰

Why, then, can’t most interstate class actions be heard in federal court? The problem is two-fold. In enacting the diversity jurisdiction statute, Congress did not exercise the full authority granted under Article III for diversity jurisdiction. Instead, Congress sought to limit diversity jurisdiction to cases that are large and that have real interstate implications. Thus, under 28 U.S.C. § 1332, an action is subject to federal diversity jurisdiction only where the parties are “completely” diverse (that is, where no plaintiff is a citizen of the same state where any defendant is deemed to be a citizen) and where each plaintiff asserts claims that exceed a threshold amount in controversy—currently set at \$75,000.

Although class actions would usually appear to meet these criteria because they place substantial amounts into controversy (insofar as they encompass many people with many claims) and involve parties from multiple jurisdictions, Section 1332 unwittingly tends to **exclude** class actions from federal courts, while allowing into federal courts much smaller single-plaintiff cases having few (if any) interstate ramifications. Clearly, this result was unintended. No rational person would have intentionally designed a

system that excluded in this way the cases that are most deserving of federal court access—the cases that typically involve more people, more money, and more interstate commerce ramifications than any other sort of lawsuit. But at the time this statutory framework was established in the late 1700's, the modern day class action did not exist. Nevertheless, before class actions became so prominent on the legal scene, two barriers emerged:

First, the diversity jurisdiction statute was interpreted to require “complete” diversity, such that diversity jurisdiction is lacking whenever any single plaintiff is a citizen of the same state as any single defendant.³¹ That means federal jurisdiction in multiple-state cases of national importance can easily be avoided by the simple expedient of including at least one named plaintiff and defendant that share a common state citizenship (e.g., by adding one small local retailer as a defendant in a case that is principally targeted at an out-of-state manufacturer). Last year, at a congressional hearing on class action reform legislation, the Senate Judiciary Committee heard testimony from Hilda Bankston, a former pharmacy owner from Mississippi who has been joined as a defendant in numerous multi-plaintiff actions in Jefferson County, Mississippi against major out-of-state pharmaceutical companies for just this purpose. (Because Mississippi does not have class actions, suits are often brought on behalf of hundreds and even thousands of named plaintiffs.) According to Mrs. Bankston:

[I]n 1999, we were named in the national class action lawsuit brought against the manufacturer of Fen-Phen. Let me stop here to explain why we were brought into this suit. While I understand that class actions are not allowed under Mississippi state law, what is permitted is the consolidation of lawsuits. These consolidations involve Mississippi plaintiffs or defendants who are included in cases along with plaintiffs from across the country. ... By naming us, the only drugstore in Jefferson County, the lawyers could keep the case in a place known for its lawsuit-friendly environment. I'm not a lawyer, but that sure seems like a form of class action to me. ...

Since then, Bankston Drugstore has been named as a defendant in hundreds of lawsuits brought by individual plaintiffs against a variety of pharmaceutical manufacturers. Fen-Phen. Propulsid. Rezulin. Baycol. At times, the bookwork became so extensive that I lost track of the specific cases. And today, even though I no longer own the drugstore, I still get named as a defendant time and again. ...³²

The second barrier that keeps class actions out of federal court is the requirement that each and every member of the proposed class have separate and distinct claims exceeding \$75,000 to meet the amount-in-controversy threshold—it is not enough that the entire action puts \$75,000 in controversy, or for that matter, even \$750,000 or \$7.5 million.³³ Although some federal courts have questioned the breadth and current vitality of this rule,³⁴ even a liberal interpretation (which allows a case into federal court as long as at least one plaintiff's claims raise more than \$75,000 in controversy) still bars most interstate class actions from federal court. Again, a class action can easily be configured to ensure that at least one class member does not satisfy the minimum amount, by, for example, seeking just \$74,999 on behalf of one or more plaintiffs and class members.

As a result of these two requirements, attorneys bringing a class action can manage to stay out of federal court—and have an action tried in the county of their choosing—even though the case at issue has true multistate implications, and the total amount at stake might exceed hundreds of millions of dollars.

The result, then, is a strange, indefensible situation: Federal courts have jurisdiction over a garden-variety state law claim arising out of an automobile accident between a driver from one state and a driver from another state, or a slip-and-fall by a Virginia plaintiff in a Maryland convenience store—as long as the plaintiff alleges medical bills, lost wages, and other damages amounting to \$75,001. But at the same time, federal jurisdiction does not encompass large-scale, interstate class actions involving thousands of plaintiffs from multiple states, defendants from many states, the laws of several states, and hundreds of millions of dollars—cases that have

obvious and significant implications for the national economy.

Proposed Legislation Would Cure This Jurisdictional Anomaly

Like the class action bill that passed the House last year, new legislation would correct this anomaly by amending the diversity statute to allow some of the larger class actions to be heard in federal court, while continuing to preserve state court jurisdiction over cases that involve smaller sums of money and in which most of the parties are citizens of the same state.

Such legislation would allow federal courts to adjudicate class actions, as well as mass joinder actions (of the type in which Mrs. Bankston was frequently sued) with large numbers of plaintiffs, in which any of the named plaintiffs or defendants come from different states. Moreover, these bills would change the amount-in-controversy threshold to allow class actions into federal court as long as the aggregate claims exceed a substantial threshold amount. Significantly, however, such legislation would not extend federal jurisdiction to encompass “intra-state” class actions, in which the majority of the plaintiffs and the primary defendants are citizens of that state. Importantly, the legislation would preserve the jurisdiction of state courts over situations in which residents of a particular state file a class action against a home state corporation, but the “natural” class definition may nevertheless sweep a significant number of out-of-state claimants. The legislation therefore would allow federal courts to exercise jurisdiction over substantial inter-state class actions with significant nationwide commercial implications, while retaining exclusive state court jurisdiction over more local class actions that principally involve parties from that state and application of that state’s own laws.

Enacting this legislation would make sound sense for a number of reasons:

- ▶ **The legislation would fulfill the Framers’ intent.** This approach to diversity jurisdiction would fulfill the intent of the Framers because the rationales that underlie the diversity jurisdiction concept apply with equal—if not greater—force to interstate class actions. Class actions squarely implicate the Framers’ concern with protecting interstate commerce through the exercise of

diversity jurisdiction. In fact, the substantial federal interest in protecting interstate commerce is an integral part of our constitutional history, as much of the impetus for calling the Constitution Convention stemmed from a general concern that the Articles of Confederation provided the federal government with too little authority to regulate interstate commerce.³⁵ As Chief Justice John Marshall recognized early on, the Commerce Clause embodies the substantial federal interest in regulating “that commerce which concerns more states than one,” as distinguished from “the exclusively internal commerce of a state,” which is more properly the concern of the states alone.³⁶ The large-scale, interstate class actions addressed by the House and Senate bills will, in every instance, involve “that commerce which concerns more states than one.”

In sum, if Congress were starting anew to define what kinds of cases should be included within the scope of diversity jurisdiction, large-scale interstate class actions would surely top the list, since they typically involve the largest amounts of money in controversy, the most people, and the most substantial interstate commerce implications. Extension of federal courts’ diversity jurisdiction to cover interstate class actions is thus entirely in keeping with the scope of the federal judicial power in Article III,³⁷ and also with the Framers’ intent that Congress define the contours of federal jurisdiction (within constitutional limitations) in accordance with the national interest.

- ▶ **The legislation would promote federalist principles.** These bills would help ensure that one state court cannot trample federalism principles by dictating other states’ policies on issues as varied as insurance, property rights, or even plumbing licenses. The principal objection to the House and Senate bills has been that the proposed legislation would entail an unwarranted federal intrusion into the ability of states to experiment with class action lawsuits. That line of reasoning reflects a wholly misguided understanding of federalism—what I would label “false federalism.” In fact, contrary to these concerns, this legislation would protect the ability of states to determine their own laws and policies by restricting state courts from dictating the laws of other states.

Importantly, the class action legislation does not contemplate any federal displacement of state policy choices manifested in substantive law. In fact, the proposed legislation does not touch on substantive law in any manner. Instead, as discussed above, the legislation would apply uniform, federal procedural requirements to a narrow, carefully defined group of lawsuits with national economic impact, thus allowing realization of enhanced efficiencies resulting from federal courts' authority to coordinate and consolidate overlapping pretrial proceedings and their relative familiarity with complex and intricate choice-of-law considerations.

Moreover, the legislation's exclusion of federal jurisdiction over intra-state cases would specifically respect and maintain a state's authority to apply its own laws in cases that primarily involve parties from its own state. Under the current system, many state courts faced with interstate class actions have undertaken to dictate the substantive laws of other states by applying their own laws to all other states, resulting in a breach of federalism principles by fellow states (not by the federal government). And because the state court decision has binding effect everywhere by virtue of the Full Faith and Credit Clause, the other states have no way of revisiting the interpretation of their own laws. Certainly, a state does not have any cognizable, federalism-based interest in interpreting, applying, and thereby dictating the substantive law of other states. The current class action bills pending in Congress would curb this disturbing trend.

A good example of the federalism problems inherent in the current system arises out of a nationwide insurance case in Illinois that was upheld by a state appellate court in the face of objections from a host of constituencies—including Public Citizen; the attorneys general of Massachusetts, New York, Pennsylvania, and Nevada; and the National Association of State Insurance Commissioners.³⁸ The specific issue in that multi-billion dollar, nationwide class action was whether auto insurers' use of "aftermarket" auto parts in repairs (as distinguished from parts made by the original manufacturer) amounts to fraudulent behavior. The Illinois court applied Illinois law to all 50 states even though state policy on the use of aftermarket parts varies widely:

Some states, in fact, encourage or require insurers to use aftermarket parts in an effort to reduce insurance rates. According to an article in *The New York Times* about the case, the Illinois court's ruling "overturn[ed] insurance regulations or state laws in New York, Massachusetts, and Hawaii, among other places," creating "what amounts to a national rule on insurance."³⁹

In contrast to this and numerous other examples, federal courts have exhibited particular sensitivity to the variations in substantive law among the different states, in accordance with core principles of federalism.⁴⁰ Moreover, when federal courts apply state law pursuant to their diversity jurisdiction, there is no danger of a bias in favor of any particular state's laws (which is not the case when one state decides to apply its own laws to all other states). Indeed, that is the basic premise underlying diversity jurisdiction.

► **The class action legislation would prevent prejudice—or the appearance thereof—against out-of-state defendants.** The legislation would also eliminate concerns that local prejudices may be stacking the deck against out-of-state defendants in certain local courts that have become class action "magnets." As noted above, a number of recent studies have found dramatic increases in the numbers of class actions filed in a few select rural counties. For example, in Madison County, Ill., a small county that is home to just 259,000 people, the number of class action filings in the county per year has increased from two cases in 1998 to upwards of 78 class actions last year.⁴¹ Other studies have found similar clusters of class actions and mass joinder actions in Jefferson County, Texas, and Jefferson County, Miss. Although these cases could be filed virtually anywhere in the United States (since they typically involve residents from every state and every major city), the cases are disproportionately filed in selected counties where judges are elected, meaning that a judge accountable to a single county can make decisions regulating products and services distributed nationwide. And those courts have demonstrated a tendency to approve settlements that are all but unrelated to the harms that those products and services have allegedly caused and that provide nothing resembling justice to victims of actual corporate misconduct. The existence of such "magnet" courts and

troubling settlements, which undermine public confidence in our judicial system, would be greatly reduced if federal courts had jurisdiction over interstate class actions.

▶ **The legislation would address in part the growing problem of “mass actions,” particularly in the context of the asbestos litigation crisis.** Some state courts (especially those in Mississippi and West Virginia) have permitted the use of “mass actions”—lawsuits in which large numbers of highly differentiated claims are allowed to be joined together for a single trial. These proceedings are a blatant end run—they are cases that proceed as class actions even though they do not come close to satisfying the due process-based prerequisites of the class action rules. For example, in one West Virginia proceeding, a state court permitted the simultaneous trial of over 8,000 asbestos claims, even though the claimants, who asserted widely varying injuries and different theories of recovery, worked at hundreds of locations across the country, in different types of jobs, at different time periods spanning six decades, with greatly varying exposures to hundreds of different asbestos-containing products with different applications, instructions, and warning labels.⁴² Through this proceeding, West Virginia imposed its own asbestos claims solution by forcing defendants nationwide to either settle claims, regardless of their merit, or face the prospect of a wholly unfair trial. The bill would address such proceedings, which involve a patent denial of due process and fundamental fairness, by allowing the removal to federal court of certain such actions if attempts are made to join more than 100 claimants together for a single trial. The federal court system has tended to be more circumspect about protecting the rights of both plaintiffs and defendants before allowing such mass joinder situations.⁴³

▶ **The legislation would not hamper the filing—or litigation—of valid class actions.** Class action reform legislation would not prohibit any class actions from being filed, since they do not address whether class actions may be brought. Indeed, the legislation does not alter substantive law at all; it makes no changes in any person’s rights or ability to assert claims. Instead, it only addresses where a particular type of class action should be adjudicated—namely, interstate class actions that

involve plaintiffs and defendants from several states and that call for the interpretation and application of the laws of many different states. To be sure, this may mean that some class actions currently being certified in some state courts will not be heard as class actions—but only those that should not be class actions, because they do not satisfy the basic requirements of fairness and due process too often ignored in those courts.

▶ **The legislation would also increase judicial efficiency.** Class action reform legislation would increase judicial efficiency because federal courts have more resources to adjudicate large, interstate class actions. Federal courts can coordinate a greater percentage of duplicative class actions through multidistrict litigation procedures. For example, when 25 (or more) duplicative class actions are filed in different state courts (a frequent occurrence), each is separately litigated in a different court system, and the parties and the court must therefore engage in the wasteful exercise of separately handling such overlapping cases. In contrast, when numerous duplicative class actions are filed in different federal courts, they are typically consolidated for pretrial proceedings in a multidistrict litigation proceeding under a federal statute that allows for such coordination—28 U.S.C. § 1407. In addition, federal courts have more resources to meet the challenges posed by large class actions. Virtually all federal court judges have two or three law clerks on staff; state court judges often have none. And federal court judges are usually able to delegate some aspects of their class action cases (e.g., discovery issues) to magistrate judges or special masters; such personnel are usually not available to state court judges.

Some opponents of class action reform have suggested that the federal judiciary uniformly opposes any expansion of diversity jurisdiction over class actions on the grounds that it would unnecessarily increase the workload of federal courts. In that regard, I would note that last year, two key committees of the federal Judicial Conference—the Standing Committee on Rules and Procedure and the Advisory Committee on Civil Rules—specifically endorsed the concept of enlarging federal jurisdiction over certain class actions through “minimal diversity legislation.”⁴⁴ Both committees embraced a finding that the wave of class actions in various state courts competing

with each other and with class actions in federal courts:

. . . create[s] problems that: (a) threaten the resolution and settlement of such actions on terms that are fair to class members, (b) defeat appropriate judicial supervision, (c) waste judicial resources, (d) lead to forum shopping, (e) burden litigants with the expenses and burdens of multiple litigation of the same issues, and (f) place conscientious class counsel at a potential disadvantage.⁴⁵

The committees also concluded that:

[L]arge nationwide and multistate class actions, involving class members from multiple states who have been injured in multiple states, are the kind of national litigation consistent with the purposes of diversity litigation and appropriate to jurisdiction in federal court. Federal jurisdiction protects the interests of all states outside the forum state, including the many states that draw back from the choice-of-law problems that inhere in nationwide and multi-state classes.⁴⁶

► **The legislation would protect consumers.** Although no one doubts the importance of effective class action procedures, serious problems in current class action practice have caused significant injury to consumers and have led to widespread dissatisfaction with the system. Public opinion research suggests a bipartisan public perception that lawyers (rather than class members) tend to be the primary beneficiaries of class actions. The public dissatisfaction is fed—and properly so—by a host of abusive practices and by the dissemination of unintelligible class action notices. The legislation seeks to address those serious public concerns by creating a series of special consumer protections. For example, the legislation would require federal courts to give special scrutiny to non-cash settlements (e.g., settlements in which consumers receive coupons to buy more goods and services,

but no cash), would bar approval of class settlements that result in net losses to some or all class members, and would prohibit settlements that unreasonably give more money to the class representatives than is received by class members. The legislation also contains provisions requiring that class notices provide information in “plain English” and more readable formats.

Conclusion

Class action reform legislation, incorporating the concept of expanded federal diversity jurisdiction over interstate class actions, would substantially ameliorate present problems with state-court class actions by giving federal courts jurisdiction over the largest interstate class actions and thereby making it harder to avoid the more consistent scrutiny that is typically afforded to the class action rules and class action settlements by federal judges. At the same time, it would comport with the intention of the Framers, who envisioned that large, multistate cases would be heard in federal court.

As explained above, current law has resulted in an anomaly under which federal courts have jurisdiction over “slip-and-fall” cases, while at the same time, federal courts are barred from adjudicating most interstate class actions even though these cases typically involve millions of dollars and implicate more “national” issues. By ensuring that the largest interstate class actions can be heard by federal courts, such legislation would not only fulfill the intention of the Framers, but would also substantially diminish class action abuse, promote federalism principles, and allow for the more efficient resolution of duplicative class actions that are filed in different courts. At the same time, the legislation would not grant federal jurisdiction for intra-state class actions that are genuinely matters of state control; nor would it affect the substantive law that governs a plaintiff’s ability to file a class action suit. In short, this legislation would eliminate many of the current problems with class actions without impinging on the ability of state courts to adjudicate truly intra-state disputes, or otherwise affecting the litigation of valid class actions.

Endnotes

¹ “Making Justice Work,” *The Washington Post*, November 25, 2002.

² Sens. Charles Grassley (R-Iowa), Herbert Kohl (D-Wisc.), Tom Carper (D-Del.), and Orrin Hatch (R-Utah) introduced S.274 on Feb. 4, 2003. Reps. Rick Boucher (D-Va.), Bob Goodlatte (R-Va.), Cal Dooley (D-Calif.), and Jim Moran (D-Va.) introduced the House version, H.R. 1115, on March 6, 2003. The bills would amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.

³ Hensler, Deborah R., et al., *Preliminary Results of Rand Study of Class Action Litigation*, RAND Corporation, p. 15, 1997.

⁴ The Federalist Society, “Analysis: Class Action Litigation,” *Class Action Watch*, p. 3, Spring 1999, <http://www.fed-soc.org/publications/classactionwatch/classaction1-2.pdf>.

⁵ Hensler, Deborah R., et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, RAND Corporation, p. 7, 1999.

⁶ Beisner, John H. and Jessica Davidson Miller, “They’re Making A Federal Case Out Of It ... In State Court,” 25 *Harv. J. L. & Pub. Pol’y* 1 (Federal Case), Fall 2001.

⁷ A recent update of the research in that article indicates that this tidal wave of cases is growing more intense (p. 161-64). See Beisner, John H. and Jessica Davidson Miller, “Class Action Magnet Courts: The Allure Intensifies,” *Civil Justice Report*, Center for Legal Policy, July 2002.

⁸ For example: “Lawyers Win Big in Class-Action Suits: Is It Justice or Greed?,” *Charleston Daily Mail* (South Carolina), June 19, 2001, p. 4A; Heaster, Jerry, “Enough Already With Lawsuits,” *Kansas City Star*, July 10, 1999, p. C10; “American Airlines Settles Lawsuits Over Frequent Flier Program,” *Forth Worth Star-Telegram*, June 22, 2000; “Toyota Buyers’ Suit Yields Cash—For Lawyers,” *The Commercial Appeal* (Memphis), Feb. 15, 2002, p. A1.

⁹ For example: *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519 (D. Md. 2002) (rejecting proposed antitrust settlement because it would itself have had anticompetitive effects); *Cope v. Duggins*, 2001 WL 333102 (E.D. La. 2001) (rejecting proposed settlement because attorneys’ fees were disproportionate to class benefits); *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561 (E.D. Pa. 2001) (same); *Levell v. Monsanto Research Corp.*, 191 F.R.D. 543 (S.D. Ohio 2000) (same); *Sheppard v. Consolidated Edison Co.*, 2000 WL 33313540 (E.D.N.Y. 2000) (same); *Polar Int’l Brokerage Corp. v. Reeve*, 187 F.R.D. 108 (S.D.N.Y. 1999) (rejecting settlement of “little benefit”).

¹⁰ The proposed rule changes that have been proposed to the U.S. Supreme Court by the federal judiciary’s rulemaking apparatus can be found on the judiciary website: <http://www.uscourts/rules/supct1202.html>.

¹¹ *Reynolds v. Beneficial National Bank*, 288 F.3d 277 (7th Cir. 2002).

¹² “H & R Block Accord Draws Fire,” *Wall Street Journal*, Dec. 24, 2002, p. C1.

¹³ *Ibid.*

¹⁴ For example: “[Consumers] can count their coupons, while the lawyers count their money.” (“Class-action lawsuits—Class-action ripoff,” *Topeka Capital Journal*, Dec. 30, 2002, p. A15.)

¹⁵ I was not directly involved in any of these cases and therefore cannot vouch for the details of the settlements.

However, press reports and other materials give strong indications that these cases did not provide meaningful recoveries to the plaintiffs.

¹⁶ “Prevailing Plaintiffs In Mortgage Class Action Lawsuit Lose Challenge To Their Lawyers’ \$8.5 Million Fee Award,” *Chicago Daily Law Bulletin*, Aug. 9, 1996.

¹⁷ “2,640 Television Owners Tune Out Class Action Suit,” *Belleville News-Democrat* (Illinois), Aug. 19, 2001.

¹⁸ “Thomson Antes Up \$100 Million Settlement,” *Belleville News-Democrat* (Illinois), Mar. 12, 2001.

¹⁹ “Judge OKs Blockbuster Plan On Fees,” *The Associated Press*, Jan. 11, 2002.

²⁰ “‘Coupon Settlements’ Fall Short,” *The Washington Post*, Sept., 12, 1999.

²¹ Final Order of Settlement, *Unfried v. Charter Communications, Inc.*,

²² “Ameritech Customers Unhappy With Phone Cards Given In Settlement,” *The Associated Press*, Aug. 16, 2001.

²³ “Metro East Class-Action Suits Are Increasing, And The Biggest Rewards Are Going To Lawyers,” *St. Louis Post-Dispatch*, Sept. 22, 1999.

²⁴ Hensler, Deborah R., et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, RAND Corporation, 1999.

²⁵ Federal Judicial Center, *Empirical Study of Class Actions in Four Federal District Courts*, 1996, p. 68-69.

²⁶ “Making Justice Work,” *The Washington Post*, November 25, 2002.

²⁷ See *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) (“The object of the [diversity jurisdiction] provisions ... conferring upon the [federal] courts ... jurisdiction [over] controversies between citizens of different States of the Union ... was to secure a tribunal presumed to be more impartial than a court of the state in which one litigant [] resides.”); *Pease v. Peck*, 59 U.S. (18 How.) 518, 520 (1856); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat) 304, 307 (1816). See also *The Federalist* No. 80, p. 537-38 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) (“[I]n order to [ensure] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles [upon which it is founded].”).

²⁸ Moor, James William and Donald T. Weckstein, “Diversity Jurisdiction: Past, Present and Future,” 43 *Tex L. Rev.* 1, 16

(1964). See also *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) (“[Even if] tribunals of states will administer justice as impartially as those of the nation, to the parties of every description, ... the Constitution itself ... entertains apprehensions of the subject ... , [such] that it has established national tribunals for the decision of controversies between ... citizens of different states.”)

²⁹ Frank, John P., “Historical Bases of the Federal Judicial System,” 13 *Law & Contemp. Probs.* 3, 22-28 (1948); Henry J. Friendly, *The Historic Bases of Diversity Jurisdiction*, 41 *Harv. L. Rev.* 483 (1928).

³⁰ Parker, John J., “The Federal Constitution and Recent Attacks Upon It,” 18 *A.B.A. J.* 433, 437 (1932).

³¹ *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

³² Testimony by Ms. Hilda Bankston, Senate Committee on the Judiciary, July 31, 2002.

³³ See, e.g., *Zahn v. Int’l Paper Co.*, 414 U.S. 291 (1973).

³⁴ Two federal appeals courts have held that in enacting 28 U.S.C. § 1367, Congress has overridden *Zahn* and that federal courts can preside over a class action as long as one plaintiff meets the amount-in-controversy minimum. See *In re Abbott Labs.*, 51 F.3d 524, 526-27 (5th Cir. 1995), *aff’d sub nom.*, *Free v. Abbott Labs.*, 529 U.S. 333 (2000) (per curiam; affirmance on tied vote); *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 930-34 (7th Cir. 1996). Other courts have found that section 1367 did not abrogate the holding in *Zahn* and continue to require that each potential class member independently meet the amount-in-controversy minimum. See, e.g., *Trimble v. Asarco, Inc.*, 232 F.3d 946, 959-62 (8th Cir. 2000). Because the *Abbott* decision was affirmed by an equally divided Supreme Court, *Abbott* controls only in the Fifth Circuit, and the conflict among the Circuits on this point remains.

³⁵ Stern, Robert L., “That Commerce Which Concerns More States Than One,” 47 *Harv. L. Rev.* 1335-41 (1934).

³⁶ *Gibbons v. Ogden*, 9 *Wheat.* 1, 194 (1824).

³⁷ As noted above, the Supreme Court long ago held that “complete diversity” is not required by Article III. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967). Moreover, although current class action law technically requires “complete” diversity, it need only be “complete” with respect to the named plaintiffs and defendants because it is only the named plaintiffs whose citizenship is relevant for diversity purposes in the class action context. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921). In other words, “minimal” diversity—i.e., diversity jurisdiction where at least one plaintiff is a citizen of a different state than the defendants, despite the presence of additional, nondiverse plaintiffs—is, as a practical matter, well-established in class action procedure. See *Tashire*, 386 U.S., p. 531 & n.7 (citing class actions as an example of minimal diversity authorized by Article III). The current bills simply modify the class action minimal diversity rule by permitting diversity jurisdiction where any plaintiff, named or not, is a citizen of a different state than any defendant—thereby preventing plaintiffs from defeating diversity through the simple artifice of naming a nondiverse plaintiff to be the class representative.

³⁸ *Avery v. State Farm Mut. Auto Ins. Cos.*, 746 N.E.2d 1242 (Ill. Ct. App. 2001).

³⁹ Wald, Matthew J., “Suit Against Auto Insurer Could Affect Nearly All Drivers,” *The New York Times*, Sept. 27, 1998, p. 29.

⁴⁰ *In The Matter of Bridgestone/Firestone, Inc. Tire Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002). *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

⁴¹ See *Class Action Magnet Courts*, *supra*, p. 2.

⁴² See *Petition for Writ of Certiorari, Mobil Corp. v. Adkins*, No. 02-345 (U.S. Sup. Ct.).

⁴³ See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

⁴⁴ See the official website of the Administrative Office of the U.S. Courts: <http://www.uscourts.gov/rules/index.html>.

⁴⁵ Memorandum of Hon. David F. Levi (United States District Judge, Eastern District of California, and Chair, Advisory Committee on Civil Rules), p. 15-16, Apr. 24, 2002.

⁴⁶ *Ibid.*, 16.

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