Restoring the Rule of Law in Class Actions: Congress Considers the Class Action Fairness Act of 2003

*By Brian P. Brooks**

The system of dual sovereignty known as federalism is a fundamental and cherished part of the American constitutional structure. Among other things, a system that respects the sovereignty of the 50 states serves as an engine of innovation, permitting individual states to serve as "laboratories" for social and economic experimentation.[1] But as Justice Brandeis – the author of the "states as social laboratories" concept – himself acknowledged, the sovereign power of the states to experiment with social and economic innovations is a benefit only to the extent that a given state's experiments can be conducted "without risk to the rest of the country."[2]

It has been properly said that federalism requires a respect for the state judicial systems that interpret state laws no less than for the state legislatures that write those laws. But increasingly over the past decade, multistate (and even so-called "nationwide") class actions brought in state courts have raised the question whether state courts are stepping over the bounds of legitimate federalism and into the realm of interstate commerce. The scenario is by now a familiar one: A plaintiff files a purported nationwide class action in state court in one of several "magnet" jurisdictions (among the most notorious are Madison County, Illinois; Jefferson County, Texas; and Orleans Parish, Louisiana), and asks a state court judge to enter an order enjoining the defendant's challenged conduct in all 50 states. Sometimes the plaintiff's attorney argues that the court should simply apply its own state's law to the challenged conduct, regardless of whether that conduct might be perfectly legal, or even required in other states. In other cases, the plaintiffs' lawyer simply asserts that the laws of all 50 states are identical with respect to the conduct. Either way, the state trial court enters an order that effectively regulates the defendant's conduct across the country, regardless of what other states' laws might have to say about it.

Reflecting widespread concern that this kind of state action is not "without risk to the rest of the country," a bipartisan group of House members and Senators have introduced legislation known as the "Class Action Fairness Act of 2003." The legislation's purpose is to address a collection of legal issues that currently permit individual state trial courts to use injunctions and damages awards to influence business activity that has little or no connection to their states. The Senate version of the bill was approved by the Senate Judiciary Committee on a bipartisan vote on April 11, 2003, and awaits action by the full Senate. The House of Representatives overwhelmingly approved its version of the bill on June 12, 2003. Final Senate action is expected this fall.

I. Multistate Class Actions: Defining the Problem

The problem the Class Action Fairness Act was drafted to address – multistate class actions filed in state court – is a problem of relatively recent vintage. A search of all reported state court decisions in the Lexis database reveals that, from the beginning of reported state court decisions in the late nineteenth century through the end of 1989, the phrase "nationwide class" appeared only 28 times. Since January 1, 1990, that phrase has appeared 175 times.[3] But mere statistics do not fully capture the threat both to federalism and to the rule of law that so-called nationwide class actions often represent. On the one hand, nationwide classes are sometimes justified on the ground that the law of a single state (say, the state where the defendant is headquartered) can be conveniently exported to other states, regardless of whether the conduct challenged under the law of the exporting state is considered lawful in the states where most class members reside.[4] Such a justification avoids the problem of managing a case under the substantive law of multiple jurisdictions, but runs headlong into the core federalism concern that no state be permitted to dictate the substantive laws of any other state. On the other hand, proponents of nationwide classes sometimes argue that such sweeping lawsuits can be managed on the basis of general legal principles, without regard to the nuances that differentiate one state's substantive law from another's. Yet this approach – in which, as Judge Richard Posner has evocatively explained, the jury is provided an "Esperanto instruction" that is "in accordance with no actual law of any jurisdiction"[5] – is fairly obviously inconsistent with rule-of-law concerns.

No jurisdictional legislation can fully address such fundamental problems of multistate class actions. Nonetheless, the Class Action Fairness Act seeks to address at least three of the most significant difficulties in the current class-action system: the lack of any formal system for coordinating overlapping class actions being litigated in state courts; the rise of "magnet courts" in which outcomes can be dictated by the political connections between elected judges and plaintiffs' attorneys; and judicial interpretations of the federal jurisdictional statutes that have made it difficult for major class actions to be heard by less-politicized federal judges.

A. Overlapping Class Actions and The Lack Of State Court Coordination Mechanisms

In a typical class action, one or more named plaintiffs seek to represent all similarly situated persons with respect to a particular alleged legal injury. For example, a purchaser of an allegedly defective product might seek to represent a class of all purchasers of that product. But what happens when several different lawsuits are filed in which different named plaintiffs seek to represent the same class of product purchasers? In the federal system, the answer is simple: The rules of the Judicial Panel on Multidistrict Litigation

("MDL Panel") are invoked to transfer all similar actions to a single court for coordinated or consolidated proceedings.[6] There is no state-level equivalent to the MDL Panel, however, and so defendants facing multiple lawsuits purportedly brought on behalf of the same class members have no choice but to fight a multi-front war, with the possibility that a loss on any one front will effectively nullify victories on the other fronts.

The problem of overlapping state-court class actions is by now well documented. The Winter 2002 issue of *Class Action Watch* presented the results of a study of the 50 then-most-recent multidistrict proceedings created by the MDL Panel, and found that, in a significant percentage of matters in which similar federal actions had been consolidated pursuant to the MDL Panel's rules, overlapping state-court class actions were being litigated outside the federal multidistrict process – usually with no coordination at all.[7] Of the 35 multidistrict proceedings for which the status of related state-court actions could be determined, state-court class actions involving the same alleged injury or the same alleged class existed with respect to 19 of them.[8] Among "mature" proceedings that had been pending more than one year, well over half involved overlapping but uncoordinated state-court class actions.[9] While no statistics were presented on this precise topic, the usual reason for such overlapping state-court actions is the very jurisdictional problem that the Class Action Fairness Act seeks to correct: an unsuccessful attempt by the defendant to remove the state-court cases to federal court, where multidistrict coordination would be possible.

B. The Rise of "Magnet Courts"

The dramatic rise in multistate class action filings in the past decade has been heavily concentrated in just a handful of state-court jurisdictions, suggesting a belief by plaintiffs' attorneys that the forum they select is likely to determine the outcome of their lawsuit. The most notorious "magnet" jurisdiction to arise in the past several years is Madison County, a tiny jurisdiction in southern Illinois that has become famous as a jurisdiction where class certification is virtually always granted and where damages awards against out-of-state defendants are nearly boundless.[10] "Magnet courts" share several defining characteristics. *First*, the per capita rate of class action filings exceeds national averages. In 1999, for example, the filing rate of class action lawsuits in Madison County, Illinois was 61.8 per million residents, compared to a filing rate of 7.6 per million in the federal system.[11] (Jefferson County, Texas had a per capita class-action filing rate of 59.5.[12]) *Second*, the connection between the named parties and the forum jurisdiction is much weaker than in the average jurisdiction. For instance, among all class actions filed in Madison County in 1999, *no* defendant was located in Madison County, and in 37 percent of cases even the plaintiffs resided outside the county.[13] *Third*, class actions are disproportionately filed by plaintiffs' attorneys from outside the jurisdiction.[14]

The very notion of the "magnet court" raises questions about the role of courts as neutral arbiters of law and fact, and indeed about the fundamental concept of the judiciary as the "least dangerous branch." This concern is particularly acute in states (like Illinois and Texas) in which trial court judges are highly subject to political pressures. Naturally, judges that must stand for election are likely to be much more responsive to the constituencies that elected them (usually local lawyers who, in small, rural counties, are disproportionately likely to represent local plaintiffs rather than out-of-state defendants) than to outsiders. One of the purposes of the Class Action Fairness Act is to improve the ability of out-of-state defendants facing large lawsuits brought by local plaintiffs to gain access to federal courts, where the judges are relatively insulated from political pressure by the protections of Article III. The bill is not likely, as some have suggested, to change the system from one in which plaintiffs always win to one in which defendants always win. Class actions, after all, are frequently certified in the federal courts. Instead, the Class Action Fairness Act is merely likely to change a situation in which class certification is nearly always granted to one in which class certification is only granted where it is appropriate based on a rigorous analysis of the legal and factual issues involved. In short, one of the bill's central purposes is to make the forum in which class actions are litigated less outcome-determinative than presently is the case.

C. The Federal Courts' Historically Narrow Interpretation Of Diversity Jurisdiction

The federal diversity jurisdiction statute creates federal jurisdiction over actions between citizens of different states in which the amount in controversy exceeds a specified amount (currently $75,000).[15] While nothing in the text of the statute requires it, judicial interpretations of the statute over the past two decades have made it increasingly difficult for major multistate class actions to be heard in federal court. For one thing, federal courts increasingly have held that the diversity jurisdiction statute requires all named plaintiffs to be citizens of different states from all defendants, even in a class action in which no class member other than the named plaintiff has a claim against the non-diverse defendant. The classic situation is this: a named plaintiff sues an automobile manufacturer on behalf of a nationwide class of automobile purchasers. To avoid removal to federal court, the named plaintiff adds as a defendant the local car dealer from which she bought her vehicle – even though only a tiny percentage of class members (if any) bought their vehicles from this in-state defendant. Despite the fact that more than 99 percent of class members have no connection to this non-diverse defendant, courts have held that the claim by one named plaintiff against a local defendant is sufficient to destroy the diversity required for removal to federal court.[16] Thus, cases of nationwide significance become stuck in state court because a handful of plaintiffs (out of potentially millions) assert a claim against an in-state defendant with no

real significance for the underlying issues in the case.

Federal courts also have increasingly taken a narrow view of what it takes to satisfy the amount-in-controversy requirement for access to federal court. Without relying on any particular language in the diversity statute itself, courts now often refuse to accept jurisdiction over class actions if the claims of at least one named plaintiff does not, by itself, exceed $75,000. Thus, even if the ***total*** damages sought by the class is in the billions of dollars; even if the named plaintiff seeks millions of dollars in punitive damages; and even if the relief sought is injunctive relief compliance with which will cost, federal courts often reject class actions on the ground that the amount in controversy is not sufficiently large to justify federal jurisdiction.[17] This non-aggregation principle has had the anomalous effect of barring from federal court nationwide class actions affecting millions of consumers and threatening billions of dollars of liability to major corporations, while accepting jurisdiction over single-plaintiff auto-accident cases involving two parties from different states and damages of just over $75,000.

II. The Class Action Fairness Act's Solution: Expanding Federal Jurisdiction While Respecting Federalism Concerns

The Class Action Fairness Act proposes a modest expansion in federal jurisdiction to permit the most significant multistate class actions to be heard in federal court, while minimizing any federalism concerns that might be raised by permitting an increased number of cases to be removed from state to federal court. To qualify for federal jurisdiction under the Class Action Fairness Act, a class action must satisfy three preliminary criteria: (1) the purported class must include more than 100 class members; (2) the claims asserted by the class must exceed $5 million in the aggregate; and (3) at least one plaintiff must be a citizen of a state different from at least one defendant.

The bill contains a provision expressly drafted to address federalism concerns that might otherwise arise in connection with legislation designed to increase the number of cases that are removed from state to federal court. In particular, the bill provides that any case brought in the defendant's home state, in which at least two-thirds of the purported class members are citizens of that state – in other words, any case in which the particular state court has an especially strong interest in adjudicating the dispute, and in which fairness risks to the defendant are small – may not be removed on diversity grounds. By contrast, cases in which fewer than one-third of the purported class members are citizens of the forum state are automatically removable to federal court if they satisfy the three preliminary criteria described above. Cases falling in the middle – those in which between one-third and two-thirds of purported class members are citizens of the forum state – are subject to a discretionary balancing test on removal, based on statutorily specified factors.

As a practical matter, the Class Action Fairness Act is not expected to dramatically change class action practice in any but the most notorious "magnet court" jurisdictions. A recent study found that, in most states, a majority of state-court class actions would remain in state court even after passage of the bill (generally because those actions were brought against defendants in their home states on behalf of classes consisting predominantly of state residents).[18] According to the study, which was based on class action filings between January 1, 1997 and June 30, 2003 in six states for which trial court decision are readily available, 62.5 percent of class actions filed in Connecticut state courts, 91 percent of class actions filed in Delaware state courts, 58 percent of class actions filed in Maine state courts, 61 percent of class actions filed in Massachusetts state courts, 63 percent of class actions filed in New York state courts, and 62 percent of class actions filed in Rhode Island state courts would have remained in state court even if the Class Action Fairness Act had been in place at the time such actions were filed. By contrast, the study found that, in Madison County, Illinois, nearly 87 percent of class actions filed between 1998 and early 2002 would have been removable had the bill been in place – reflecting the fact that class actions filed in such "magnet courts" are qualitatively different from class actions in other jurisdictions where the forum is not perceived as outcome determinative.

III. Conclusion

The Class Action Fairness Act represents a fine balance between concern for the rule of law and respect for federalism principles. If enacted, the bill is likely to affect only those class actions that common sense dictates should be heard in federal court – class actions involving citizens of many different states, seeking to recover millions of dollars from out-of-state defendants. Other class actions will remain in state court, just as under the present system. While it is never possible to predict the outcome of legislative votes, the fact that the Class Action Fairness Act is supported by a bipartisan coalition of legislators ranging from prominent Democrats (such as Sen. Herb Kohl and Rep. Jim Moran) to well-known Republicans (including Sens. Charles Grassley and Orrin Hatch and Rep. Robert Goodlatte) makes it a promising candidate for passage this fall.

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Footnotes

[1] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 (1932) (Brandeis, J., dissenting).

[2] *Id.*

[3] Results retrieved on August 4, 2003 by searching for "nationwide class & date bef 1990" and "nationwide class & date aft 1989" in Lexis's STCTS database.

[4] *See, e.g., Washington Mutual Bank, FA v. Superior Court*, 24 Cal.4th

906 (2001) (reversing certification of nationwide class in which plaintiff sought to apply California law to claims of mortgage borrowers residing in all 50 states, regardless of relevant mortgage banking laws of states other than California).

[5] *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).

[6] *See* 28 U.S.C. § 1407 (establishing multidistrict litigation process).

[7] *Do Federal Class Actions Compete Against State Class Actions In A Race To The Courthouse?*, Class Action Watch (Winter 2002) (available at www.fed-soc.org).

[8] *Id.*

[9] *Id.*

[10] *See* John H. Beisner & Jessica Davidson Miller, *They're Making A Federal Case Out Of It . . . In State Court*, 25 Harv. J.L. 7 Pub. Pol'y 143 (2001); John H. Beisner & Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, 4 BNA Class Action Litig. R. 58 (Jan 24, 2003).

[11] Beisner & Miller, *They're Making A Federal Case*, 25 Harv. J.L. & Pub. Pol'y at 163.

[12] *Id*.

[13] *Id.* at 164.

[14] *See id.* at 154 (noting that 85 percent of plaintiffs' attorneys listed on class-action filings in Madison County in 1999 listed office addresses outside the county, with many based in New Orleans, Houston, San Francisco, and Washington, D.C.).

[15] 28 U.S.C. § 1332.

[16] *See, e.g., Triggs v. John Crump Toyota, Inc.*, 154 F.2d 1284 (11th Cir. 1998).

[17] *See, e.g., In re Ford Motor Co./Citibank (South Dakota), N.A. Cardholder Rebate Litig.*, 264 F.3d 952 (9th Cir. 2001) (citing cases).

[18] *See The Impact Of S.274 And H.R. 1115 On State Court Class Actions: An Empirical Study* (2003) (on file with author).