

THEY'RE MAKING A FEDERAL CASE OUT OF IT . . . IN STATE COURT*

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ABSTRACT

Because of an anomaly in the federal diversity jurisdiction statute (28 U.S.C. § 1332), relatively few interstate class actions can be heard by federal courts. For that reason, county or district state courts that are accountable only to their local electorates handle the vast majority of interstate class actions—cases typically involving thousands of persons nationwide whose claims are purportedly worth millions of dollars, are premised on the varying laws of many states, and raise important national policy issues with interstate commerce ramifications. There is growing recognition that this situation should be corrected by amending § 1332 to expand federal diversity jurisdiction over interstate class actions. With that change, such cases could be assigned to federal courts that have national accountability. However, some lawmakers have questioned whether the problems presented by the anomaly are sufficiently grave to warrant congressional action. This article (a) reviews recent debates on this interstate class action jurisdictional issue and (b) examines new empirical data indicating that legislative action on this issue is overdue.

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I. INTRODUCTION

In the last Congress, both houses carefully examined a key judicial policy question: should interstate class actions (that is, large-scale lawsuits with significant interstate commerce implications involving the residents and laws of multiple

States) normally be heard by local county courts (that is, by judges typically elected by the residents of the court's locality) or by federal courts (that is, by judges nominated by the President of the United States and confirmed by the duly elected Senators of all fifty states)? These discussions were prompted by introduction of legislation intended to widen the scope of federal diversity jurisdiction over interstate class actions.¹ After several detailed hearings,² that legislation passed the House.³ Senate hearings were also held on the subject,⁴ and the Senate Judiciary Committee ultimately endorsed enactment of a bill parallel to that passed by the House.⁵ However, the full Senate never considered the measure, and the jurisdiction expansion proposals did not become law. The legislation has been reintroduced in the current session of Congress.⁶

II. THE IMPETUS FOR EXPANDING FEDERAL JURISDICTION OVER INTERSTATE CLASS ACTIONS

The prospect of expanding federal jurisdiction over class actions has taken center stage because of an anomaly in current law that normally causes interstate class actions filed in state courts to remain there, notwithstanding their inherently federal character. In structuring our judicial system, the Framers

1. In the 106th Congress, 2d Session, the House class action jurisdiction bill was denominated H.R. 1875; the House bill in the previous session was labeled H.R. 3789. The former bill passed the House on September 23, 1999. See 145 CONG. REC. H8595 (1999). In the 106th Congress, 2d Session, the Senate bill was S. 353.

2. See *Mass Torts and Class Action Lawsuits: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1998) [hereinafter *March 1998 House Hearing*]; *Class Action Jurisdiction Act of 1998: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1998); *Interstate Class Action Jurisdiction Act of 1999 and Workplace Goods Job Growth and Competitiveness Act of 1999: Hearing on H.R. 1875 and H.R. 2005 Before the House Comm. on the Judiciary*, 106th Cong. (1999) [hereinafter *1999 House Judiciary Committee Hearing*] (transcripts and prepared testimony available at <http://www.house.gov/judiciary/hearings.htm>).

3. See 145 CONG. REC. H8595 (1999). See also *Interstate Class Action Jurisdiction Act of 1999*, H.R. REP. NO. 106-320 (1999) [hereinafter *House Report*].

4. See *Class Action Fairness Act of 1999: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 106th Cong. (1999) [hereinafter *1999 Senate Hearing*]; *Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. (1997).

5. See *Class Action Fairness Act of 2000*, S. REP. NO. 106-420, 106th Cong. (2000) [hereinafter *Senate Report*].

6. The new House bill is H.R. 2341 and the new Senate bill is S. 1712.

established that federal courts would hear cases presenting federal law issues (that is, lawsuits asserting claims based on the Constitution, federal statutes or treaties, or involving the federal government as a party), while leaving to state courts the task of adjudicating local questions arising under state laws. However, the Framers did not stop their line-drawing there. In Article III of the U.S. Constitution, they authorized the extension of federal jurisdiction to one category of cases arising under state law: so-called "diversity" cases, defined as suits "between Citizens of different States." In enacting the Judiciary Act of 1789,⁷ Congress exercised that authority, specifically empowering federal courts to hear diversity cases that met certain criteria. Such cases are thus firmly entrenched in the federal jurisdictional landscape.

The Framers established the concept of federal diversity jurisdiction out of concern that local biases would render state courts ineffective in adjudicating disputes between in-state plaintiffs and out-of-state defendants.⁸ In short, they feared that non-local defendants might be "hometowned." Diversity jurisdiction was designed not only to diminish this risk, but also "to shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents."⁹ The Framers reasoned that some state courts

7. Ch. 20, 1 Stat. 73, 92 (1789).

8. 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 of the litigants resides."); *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1856); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 307 (1816). See also THE FEDERALIST NO. 80 (Alexander Hamilton) ("[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 . . . 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 [up]on which it is founded.").

9. 1999 *Senate Hearing*, *supra* note 4, at 100 (prepared statement of Prof. E. Donald Elliott, Yale Law School). See also James William Moor & 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 the states will administer justice as impartially as those of the nation . . . the Constitution itself . . . entertains apprehensions on this subject . . . [such] that it has established national tribunals for the decision of controversies between . . . citizens of different states.").

might discriminate against interstate commerce activity and out-of-state businesses engaged in such activity and that federal courts therefore should be allowed to hear diversity cases so as to ensure the availability of a fair, uniform and efficient forum for adjudicating interstate commercial disputes.¹⁰ Thus, since the nation's inception, diversity jurisdiction has served to guarantee that citizens of different states have a means of resolving their legal differences on a level playing field in a manner that nurtures interstate commerce. As one constitutional scholar has argued, "No 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."¹¹

In enacting the diversity jurisdiction statute, Congress did not exercise the full authority granted under Article III for diversity jurisdiction. 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 put in controversy an amount in excess of a specified threshold—currently set at \$75,000. In short, § 1332 essentially allows federal courts to hear cases that are large (that is, cases with large "amounts in controversy") and that have interstate implications (that is, cases involving citizens from multiple jurisdictions).

Class actions would usually be expected to meet these criteria because they (a) place substantial amounts into controversy (insofar as they encompass many people with many claims) and (b) involve parties from multiple jurisdictions. Yet, because § 1332 was originally enacted before modern day class actions existed and therefore does not take

10. See John P. Frank, *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).

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

account of the unique circumstances that such cases present, § 1332 tends to exclude class actions from federal courts, while welcoming much smaller single-plaintiff cases having few (if any) interstate ramifications.

Section 1332 has two exclusionary dimensions. First, as noted above, it has been interpreted to require "complete" diversity, so that diversity jurisdiction is lacking whenever any single plaintiff is a citizen of the same state as any single defendant.¹² Wisely, the federal courts have determined that in class actions, this complete diversity inquiry should be made only regarding the parties actually named in the actions; the citizenship of unnamed class members is disregarded.¹³ If not interpreted in this manner, § 1332 would effectively bar all non-federal question class actions from federal court. This is because it is normally impossible to prove the citizenship of all unnamed class members at the outset of a case, given that their identities are generally unknown at that juncture. Still, this commonsense interpretation of § 1332 poses a problem, since a plaintiff can readily avoid federal jurisdiction by simply including a non-diverse named plaintiff or defendant in the complaint.

Second, an even greater impediment is posed by the manner in which the jurisdictional amount requirement is applied in class actions. While for complete diversity purposes, a court looks only at the named parties, the jurisdictional amount requirement has been interpreted as applying to both the named plaintiffs and all unnamed class members. Thus, courts have held that a class action satisfies the jurisdictional amount requirement only if it can be shown that each and every member of the proposed class has separate and distinct claims exceeding \$75,000.¹⁴ Although some federal courts have questioned the breadth and current vitality of this rule,¹⁵ this difficult-to-satisfy prerequisite still bars most interstate class actions from federal court. Indeed, in many class actions, plaintiffs seek to avoid federal court by making affirmative allegations that their proposed class action does not satisfy the diversity jurisdictional amount prerequisite.

12. See, e.g., *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

13. See, e.g., *Snyder v. Harris*, 394 U.S. 332 (1969).

14. See, e.g., *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

15. See note 41 *infra*.

As the Senate Judiciary Committee concluded last year, the combination of these factors leads to a “nonsensical result,” whereby

a citizen can bring a “federal case” by claiming \$75,001 in damages for a simple slip-and-fall case against a party from another State, while a class of 25 million people living in all 50 States and alleging claims against a manufacturer that are collectively worth \$15 billion must usually be heard in State court (because each individual class member’s claim is for less than \$75,000). Put another way, under the current jurisdictional rules, Federal courts can assert diversity jurisdiction over a run-of-the-mill State law-based tort claim arising out of an auto accident between a driver from one State and a driver from another, or a typical trespass claim involving a trespasser from one State and a property owner from another, but they cannot assert jurisdiction over claims encompassing large-scale, interstate class actions involving thousands of [claimants] from multiple States, and hundreds of millions of dollars . . . cases that have significant implications for the national economy.¹⁶

Emerging from the discussion of this subject is a growing recognition that this jurisdictional anomaly should be corrected:

- The leading treatise on federal civil procedure has declared that current principles governing federal diversity jurisdiction over class actions make no sense: “The traditional principles in this area have evolved haphazardly and with little reasoning. They serve no apparent policy. . . .”¹⁷
- In a 1999 decision, the U.S. Court of Appeals for the Eleventh Circuit “apologi[zed]” for its “seemingly arbitrary” and “anomal[ous]” ruling sending a large interstate class action back to state court, noting that “an important historical justification for diversity jurisdiction is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court.”¹⁸ Observing that the out-of-state defendant in that case was confronting “a state

16. *Senate Report*, *supra* note 5, at 14.

17. 14B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 3704, at 127 (3d ed. 1998).

18. *See Davis v. Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 797 (11th Cir. 1999).

court system [prone to] produce[] gigantic awards against out-of-state corporate defendants," the court stated that "[o]ne would think that this case is exactly what those who espouse the historical justification for § 1332 would have had in mind."¹⁹

- In that same case, Judge John Nangle, for many years the chair of the federal Judicial Panel on Multidistrict Litigation, concurred: "Plaintiffs' attorneys are increasingly filing nationwide class actions in various state courts, carefully crafting language . . . to avoid . . . the federal courts. Existing federal precedent . . . mandates that this practice be permitted . . . , although most of these cases . . . will be disposed of through 'coupon' or 'paper' settlements. . . . virtually always accompanied by munificent grants of or requests for attorneys' fees for class counsel. . . . [T]he present [jurisdictional] case law does not adequately accommodate the reality of modern class action litigation and settlements."²⁰
- Similarly, in an opinion by Judge Anthony Scirica (chairman of the Federal Judicial Conference's Standing Committee on Rules and Procedure), the U.S. Court of Appeals for the Third Circuit observed that "national (interstate) class actions are the paradigm for federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises," but that "at least under the current jurisdictional statutes, such class actions may be beyond the reach of the federal courts."²¹

The solution proposed by some legislators is a simple one: to amend the diversity jurisdiction statute to allow more interstate class actions to be heard in federal court. As former Solicitor General Walter Dellinger testified before the House Judiciary

19. *Id.*

20. *Id.* at 798-99.

21. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 305 (3d Cir. 1998). Agreement with this view can also be found in *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1079 (11th Cir. 2000) (noting that there are "persuasive reasons" for viewing the class action in its totality for purposes of determining the existence of federal jurisdiction).

Committee, if Congress were to start over and write a new federal diversity jurisdiction statute, interstate class actions would be the first category of cases to be included within the scope of the statute.²²

The reasons are obvious. In the first place, because these cases clearly have significant interstate commerce ramifications, federal supervision and management of such cases are desirable. As Chief Justice Marshall recognized, the Commerce Clause reflects the substantial federal interest in regulating "that commerce which concerns more States than one" (as opposed to "the exclusively internal commerce of a State").²³ Clearly, that federal interest is implicated by interstate class actions, which typically involve more money, more people in more states, and more interstate commerce ramifications than any other type of lawsuit.

Second, the rationales underlying the constitutionally established concept of diversity jurisdiction apply fully to interstate class actions. Such cases typically involve in-state plaintiffs suing out-of-state defendants, thereby raising the specter of local court biases against the out-of-state defendant.

Third, federal courts are better equipped to deal with the substantial burdens of presiding over the sprawling, complex proceedings that are often triggered by the filing of an interstate class action. While our federal courts are facing substantial burdens, state courts are as well. The civil caseload in state courts has grown much more rapidly than the federal court civil caseload.²⁴ Federal courts have more resources to meet this challenge.²⁵ Virtually all federal court judges have two or three law clerks on staff; state court judges typically

22. See 1999 House Judiciary Committee Hearing, *supra* note 2 (statement of Hon. Walter E. Dellinger, available at <http://www.house.gov/judiciary/dell0721.htm>).

23. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 194-95 (1824).

24. Civil filings in state trial courts of general jurisdiction have increased twenty-eight percent since 1984, whereas the corresponding increase in the federal courts has been only four percent. See EXAMINING THE WORK OF STATE COURTS, 1997: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 13 (Brian Ostrom & Neal Kauder eds., 1998). Most tellingly, in most jurisdictions, each state court judge is assigned an average of 1,000 to 2,000 new cases each year. *Id.* at 13. In contrast, each federal court judge was assigned an average of 500 cases last year. See L.R. MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 REPORT OF THE DIRECTOR 22 (2001). The federal court trend of late is downward. Since 1997, there has been an eight percent decrease in the number of pending civil cases in our federal courts nationwide. *Id.* at 22.

25. *Senate Report*, *supra* note 5, at 16.

have none.²⁶ 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. And federal courts are authorized to transfer and consolidate similar class actions from various states before a single judge in the interest of efficiency;²⁷ state courts lack such consolidation authority and therefore must engage in the wasteful exercise of separately handling such overlapping cases.

Fourth, federal courts have significant institutional advantages over state courts in adjudicating interstate class actions. For example, in recent months, the federal judiciary has been examining the problem of “copy cat” class actions—the strategy under which plaintiffs’ counsel file the same class action before multiple state courts, attempting to convince each state court to certify the matter for class treatment until one finally agrees.²⁸ Recent discussions before the federal Judicial Conference’s Advisory Committee on Civil Rules noted the difficulties that this practice creates:

[S]trategic maneuvering by plaintiffs’ attorneys often results in a proliferation of duplicative class action litigation in different jurisdictions. “As a result of competition among class action attorneys, defendants may find themselves litigating in multiple jurisdictions and venues concurrently, which drives transaction costs upward.” [In addition,] . . . “[t]he availability of multiple fora dilutes judicial control over class action certification and settlement, as attorneys and parties who are unhappy with the outcome in one jurisdiction move on to seek more favorable outcomes in another.”²⁹

Indeed, the congressional record reflects cases in which counsel have effectively asked state courts to overrule the denial of class certification by federal courts.³⁰ This strategy, which takes forum shopping to the extreme, is generally unavailable to the extent that class actions are pending in the

26. *Id.*

27. See 28 U.S.C. § 1407 (1994).

28. See Memorandum to Advisory Comm. on Civil Rules from Judge Lee Rosenthal, Prof. Edward H. Cooper, Prof. Richard Marcus (dated Apr. 10, 2001) [hereinafter *Advisory Comm. Memo.*].

29. *Id.* at 13 (citing DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 15 (1999)) [hereinafter *ICJ/RAND Study*].

30. *Senate Report, supra* note 5, at 21.

federal courts because, as noted previously, "competing federal court class actions can be consolidated for pretrial purposes by the Judicial Panel on Multidistrict Litigation."³¹

Fifth, federalism principles dictate that interstate class actions be heard by federal courts. The classes in such cases normally encompass residents of many states, often all fifty (plus the District of Columbia). Thus, the trial court—regardless of whether it is a state or federal court—must interpret and apply the laws of multiple jurisdictions. During 1998 hearings on this subject, the House Judiciary Committee heard about multiple instances in which state courts handling class actions rode roughshod over the laws of other jurisdictions, telling their sister states' judiciaries what their laws were.³² There is little those sister jurisdictions could do to prevent such behavior, since under the Constitution's Full Faith and Credit Clause, the judgment of a court in one state is generally not reviewable by other states' courts.³³ It is far preferable for a federal court to interpret the laws of various states (a task inherent in the constitutional concept of diversity jurisdiction). What business does a state court judge elected by the several thousand residents of a small county in Alabama have in telling the state of Massachusetts what its laws mean? Why should an Alabama state court judge be rendering interpretations of Massachusetts law that bind Massachusetts residents and that cannot be appealed to or reviewed by Massachusetts courts? Such matters of interstate comity are more appropriately handled by federal judges appointed by the President and confirmed by the Senate. Further, federal courts have the authority (which they frequently exercise³⁴) to use "certified questions" to ask state courts to advise how their laws should be applied in uncharted situations.

Finally, some state courts have been less than proficient in

31. *Advisory Comm. Memo.*, *supra* note 28, at 14.

32. *See* 1999 House Judiciary Committee Hearing, *supra* note 2 (statement of Hon. Walter E. Dellinger, available at <http://www.house.gov/judiciary/dell0721.htm>).

33. *See* U.S. CONST. art. IV, § 1; *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (holding that absent class members from other states are generally bound by a state court's decision in a class action).

34. *See* JONA GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 28, 34-35 (1995) (noting that over a several-year period, federal appeals and trial courts certified hundreds of state law questions to state appellate courts for resolution).

handling interstate class actions. The Senate Judiciary Committee last year issued a report documenting numerous problems that it identified with the adjudication of interstate class actions in state courts, including the failure to apply carefully class certification requirements (some of which have due process underpinnings), the use of the class device as “judicial blackmail” (giving class counsel leverage to obtain unwarranted settlements), and denials of defendants’ due process rights (denying the opportunity to contest plaintiffs’ claims).³⁵ Furthermore, some state courts have shown a tendency to approve settlements that generously compensate class counsel while giving little or nothing to the people on whose behalf the action supposedly was brought—the unnamed class members.³⁶ A recent Institute for Civil Justice/RAND study indicates that in state court consumer class action settlements, class counsel sometimes walk off with more money than all of the class members combined.³⁷ In contrast, a contemporaneous Federal Judicial Center study found that “[i]n most [class actions handled by federal courts], net monetary distributions to the class exceeded attorneys’ fees by substantial margins.”³⁸

Based on all of these concerns, the ICJ/RAND study articulates three reasons often given by critics of interstate class actions as to why federal courts should handle them:

- “[F]ederal judges scrutinize class action allegations more strictly than state judges, and deny certification in situations where a state judge might grant it improperly.”
- “[S]tate judges may not have adequate resources to oversee and manage class actions with a national scope.”
- “[I]f a single judge is to be charged with deciding what law will apply in a multistate class action, it is more appropriate that this take place in federal court than in a state court.”³⁹

Over the past three years, both the House and the Senate have debated whether to amend the federal diversity

35. *Senate Report*, *supra* note 5, at 15-22.

36. *See id.* at 16-17.

37. *ICJ/RAND Study*, *supra* note 29, at 21-22.

38. FEDERAL JUDICIAL CENTER, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 69 (1996).

39. *ICJ/RAND Study*, *supra* note 29, at 28.

jurisdictional statute to fix the anomaly outlined above and thereby to allow more interstate class actions to be heard in federal court. The proponents of change emphasize that state judges elected by (and therefore accountable only to) the relatively small number of voters in their own county or judicial district regularly hear interstate class actions involving thousands (and sometimes millions) of persons from many states—cases that present issues involving the laws of many jurisdictions and that have widespread interstate commerce implications. Further, they argue that the current situation maximizes forum-shopping opportunities, pointing out that since interstate class actions uniquely qualify as “universal venue” cases, they often can be filed in virtually any federal or state court in the country.⁴⁰ As a result, class action lawyers are bringing a large number of cases in a small number of state courts that have become “magnets” for interstate class actions and that thus exercise a wildly disproportionate role in adjudicating national disputes. The proponents have argued that state courts should not play this role—that such matters should be entrusted to federal judges, who are nominated by the President of the United States and confirmed by Senators representing all fifty states.⁴¹

40. In individual lawsuits, venue laws limit the forums in which a plaintiff may sue a defendant. For example, under the federal venue statute, a plaintiff may bring a lawsuit that is based on federal diversity jurisdiction only in (a) “a judicial district where any defendant resides, if all defendants reside in the same State,” or (b) “a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred” (unless there is no such venue, at which point the action may be filed in any “judicial district in which any defendant is subject to personal jurisdiction”). 28 U.S.C. § 1391(a) (1994). In contrast, a nationwide class action often can be filed in almost any federal or state court nationwide. For example, plaintiffs’ attorneys who seek to bring a class action in a certain county challenging a nationally distributed product typically select a named plaintiff who purchased the product in that county and then argue that “a substantial part of the events or omissions occurred” there. Or, plaintiffs who sue multiple defendants from different states often argue that there is no one place where “a substantial part of the events” occurred and that they are therefore free to sue in any judicial district where the defendants are subject to personal jurisdiction (which, in the case of a company that sells its products throughout the country, is usually anywhere).

41. Another impetus for change is the current division among federal courts about the breadth and current vitality of the *Zahn* view that the amount in controversy can only be established in a class action if each unnamed class member seeks damages in excess of the statutory minimum. Four 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.*, 120 S. Ct. 1578 (2000)

Opposing voices have not contended that Congress lacks authority to modify the complete diversity or jurisdictional amount prerequisites for diversity jurisdiction as they are applied to interstate class actions.⁴² And relatively few have urged that expanding federal jurisdiction over interstate class actions would be bad policy. Instead, the primary argument offered against modifying the diversity jurisdiction rules for interstate class actions has been that the empirical case for taking such action has not been made—that there is insufficient evidence that state courts are playing an inappropriate and disproportionate role in the adjudication of interstate class actions.⁴³ Some opponents urge that the federal diversity jurisdiction statute should not be amended until it is demonstrated that the current jurisdictional divides are producing more than anecdotes; they demand proof that there exists a systemic problem.

III. THE EMPIRICAL CASE FOR EXPANDING FEDERAL JURISDICTION OVER INTERSTATE CLASS ACTIONS

A. *The Current Congressional Record*

The congressional record on this subject already spotlights a systemic problem. In particular, it contains substantial evidence

(per curiam; affirmance on tied vote); *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930-34 (7th Cir. 1996); *Rosmer v. Pfizer, Inc.*, 263 F.3d 110 (4th Cir. 2001); *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001). Other courts have found that § 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); *Leonhardt v. Western Sugar Co.*, 160 F.3d 631 (10th Cir. 1998). 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.

42. For example, in confirming the “complete diversity” prerequisite for diversity jurisdiction in *Strawbridge*, the Supreme Court was construing the language of the 1789 Judiciary Act, not the limits of Article III diversity jurisdiction. The Supreme Court has regularly recognized that the decision to require complete diversity and to establish a minimum amount in controversy is a political decision not mandated by the Constitution. *See, e.g., Newman-Green, Inc. v. Alfonzo-Larrian*, 490 U.S. 826, 829 (1989). Congress therefore has the prerogative to broaden the scope of diversity jurisdiction as it chooses, so long as any two adverse parties to a lawsuit are entities of different states. *See State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967). In short, “minimal diversity” is the only prerequisite for federal diversity jurisdiction required by the Constitution.

43. *See, e.g., Statement of Rep. Lloyd Doggett (D-Tex.)*, 145 CONG. REC. H8565 (daily ed. Sept. 23, 1999).

that the frequency with which state courts are being called upon to hear interstate class actions has grown exponentially in recent years. In 1999, the House Judiciary Committee noted that there had been "dramatic increases in the number of purported class actions being filed in State courts, according to data supplied to the Committee."⁴⁴ In that same time frame, a preliminary report on the above-mentioned ICJ/RAND study observed that "class action activity has grown dramatically over the past 2-3 years" and that the growth was "concentrated in the state courts."⁴⁵ Yet another survey indicated that while federal court class actions had increased by 340% over the past decade, state court class action filings had increased 1315%.⁴⁶ Typically, the new state court filings were on behalf of proposed nationwide or multi-state classes.⁴⁷

The congressional record further indicates that this new wave of class actions was not evenly distributed among state courts nationwide. For example, one study submitted to the House Judiciary Committee in 1998 indicated that in the courts of six small, rural Alabama counties, at least ninety-one class actions were filed over a two-year period, often seeking relief on behalf of purported nationwide classes concerning matters of national significance.⁴⁸ And based on a review of various case filings data, the final report of the ICJ/RAND study on class actions concluded that class actions "were more prevalent" in certain states "than one would expect on the basis of population."⁴⁹

B. The 2001 County Court Data Collection Effort

Even though the congressional record already reflects considerable empirical evidence of the disproportionate involvement of state courts in interstate class action litigation,

44. *House Report, supra* note 3, at 9 (citing Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Vol. 1, at ix-x (May 1, 1997) ("Advisory Comm. Working Papers") (memorandum of Judge Paul V. Niemeyer to members of the Advisory Committee on Civil Rules).

45. DEBORAH HENSLER ET AL., PRELIMINARY RESULTS OF RAND STUDY OF CLASS ACTION LITIGATION 15 (1997).

46. *Analysis: Class Action Litigation*, CLASS ACTION WATCH (Federalist Society, Washington, D.C.), Spring 1999, at 3 (Figure 2), available at <http://www.fed-soc.org/Publications/classactionwatch/classaction1-2.pdf>.

47. *Id.* at 2 (Figure 1).

48. *March 1998 House Hearing, supra* note 2, at 140-53.

49. *ICJ/RAND Study, supra* note 29, at 7.

the Manhattan Institute commenced further research on this subject in 2001, producing a substantial quantum of fresh data about state court class actions. The research was prompted by the fact that although the Administrative Office of the U.S. Courts tracks the numbers and subject matters of purported class actions that are filed in federal courts and annually publishes statistical analysis regarding such cases,⁵⁰ no institution systematically gathers comparable comprehensive data regarding purported class actions filed in state courts. Obtaining data on state court class actions is made exceedingly difficult by the failure of many state courts to have any sort of computerized tracking system that distinguishes class actions from other actions. As a result, there is no means of assembling data on the numbers and subject matters of class actions filed in state courts without physically going to state courts individually and reviewing dockets and other records to obtain relevant data.

The Manhattan Institute study sought to identify trends in nationwide class action activity by examining the civil dockets of three county courts and using those courts as a window on what was happening with state court class actions nationwide. For research assistance, the Manhattan Institute enlisted Stateside Associates, a Virginia-based research organization, which had previously conducted research on class actions in Alabama.⁵¹ As the first step, the researchers conducted an exhaustive literature search, focusing on published decisions, litigation publications and general media reports, to obtain some indication of which counties appeared to have had the most new class actions filed between 1998 and 2000.⁵² Then, the

50. See, e.g., MECHAM, *supra* note 24, at 402-408.

51. *March 1998 House Hearing*, *supra* note 2, at 140-53.

52. Obviously, the literature search was not a scientific indicator of where state court class actions are being filed. For whatever reason, commentators and journalists may be focusing on certain locations and ignoring others, skewing the media record toward certain jurisdictions. Nevertheless, the literature review suggests that the local courts of the following counties appear to have had the most class action filings in the 1998-2000 timeframe (listed in descending order of apparent number of class action filings):

1. Los Angeles County, California
2. Cook County, Illinois
3. Madison County, Illinois
4. Dade County, Florida
5. Santa Clara County, California
6. San Diego County, California; Orange County, California

researchers sought to identify which of those counties had systems, rules, computers, and data-keeping practices that might facilitate data collection.

The researchers ultimately elected not to conduct their reviews in the more populous counties identified in the class action literature search—Los Angeles County, California; Cook County, Illinois; and Dade County, Florida—for two reasons. First, these counties (by virtue of their size) had massive volumes of case filings (more than 45,000 per year in Dade County) and outdated filing systems that would have made it difficult to identify and retrieve class action dockets. Second, the larger metropolitan centers tend to experience higher volumes of more complex litigation of all sorts, limiting the ability to assess the specific impact of class actions in those judicial districts.

In the end, the researchers focused on three county courts that had (a) relatively high volumes of class action filings and (b) computer systems that were more likely to enable swift and accurate research and retrieval of class action dockets: Madison County, Illinois; Jefferson County, Texas; and Palm Beach County, Florida. The courts of each of these counties have seen a steep rise in class action filings over the last several years that seems disproportional to their populations. Indeed, in the aforementioned literature search, Madison County ranked third nationwide (after Los Angeles County, California and Cook County, Illinois) in the estimated number of class actions filed each year; and Jefferson and Palm Beach Counties ranked eighth and ninth, respectively.

Once the counties were selected, a group of attorneys and law students went to the clerks' offices of the selected courts and used available research tools to assemble data. The researchers' primary objectives were (a) to identify all purported class actions that were filed in each county during the 1998-2000 timeframe,⁵³ (b) to locate and review the dockets of each of those identified class actions, and (c) to harvest from those dockets certain information about each case, particularly

7. San Francisco County, California

8. Travis County, Texas; Broward County, Florida; Camden County, New Jersey; Jefferson County, Texas

9. Palm Beach County, Florida

53. As detailed below, the researchers also looked at cases filed during the early months of calendar year 2001, to the extent possible.

the complaints, class certification briefings, and status information. The researchers soon found that the computer systems in these county courts were deficient in some respects, and as a result, they ultimately relied on a combination of computer research and manual docket searches to ensure accurate results.

IV. THE COUNTY COURT RESEARCH PROJECT: PRIMARY FINDINGS

The Manhattan Institute research confirmed what the anecdotal analysis had suggested: the three county courts surveyed have experienced a disproportionately high volume of class action filings, given their populations and general case docket size. The study also found that the number of class actions—and most particularly, nationwide class actions—filed annually in each county increased substantially between 1998 and 2000. In Madison County, Illinois, for example, there were only two class actions filed in 1998; last year, thirty-nine class actions were filed there—an increase of 1850%. In the first two months of calendar year 2001 alone, thirteen new class actions were filed in the Madison County courthouse. At that pace, class action filings will grow by another ninety-two percent.

Table 1 provides a year-by-year breakdown of the total number of class actions filed in each county.⁵⁴

54. Researchers in Palm Beach County did not collect cases for 2001. Madison County cases were collected through March 7, 2001. Jefferson County cases were collected through January 2001.

Table 1
Overview Of Research Results

County:	Palm Beach	Jefferson	Madison
Civil Cases Filed (1998-2000)	36,000	10,500	10,368
Class Actions Filed (1998)	29	11	2
Class Actions Filed (1999)	23	15	16
Class Actions Filed (2000)	39	20	39
Class Actions Filed (Early Months 2001)	—	1	13
Total Class Actions Filed (1998-early 2001)	91	47	70
Class Actions As Percentage Of Total Civil Actions Docket (1998-2000)	0.25%	0.45%	0.68%
Percentage Increase In Class Actions (1998 vs. 2000)	34%	82%	1850%

A. The County Courts Experienced Class Action Filing Rates That Were Disproportionate To Their Populations

In order to understand the significance of the research about the frequency of class action filings (e.g., ninety-one class actions being filed in Palm Beach County over three years), one must consider these numbers in light of the counties' demographics and of the class action filing patterns in other counties. Because there are no comprehensive published data on the number of class actions filed each year in state courts, this exercise necessarily involves several steps.

First, it is important to note that the three counties surveyed account for a very small portion of our nation's population and economic activity. For example, Jefferson and Madison counties—each with a population of about 250,000 (based on 2000 census data)—represent less than one-tenth of one percent of the U.S. population. Even Palm Beach County, which is substantially more populous (with about 1.1 million people), represents less than one-half of one percent of the nation's population. Economic data for these counties similarly reveal that they are not commercial hubs in which one might expect to find a large number of lawsuits filed against locally headquartered enterprises. To the contrary, these counties account for only a minuscule percentage of the gross national product. Jefferson County, which has the largest manufacturing component of any of the counties surveyed, accounts for less than one-half of one percent of manufacturers' shipments in the United States.⁵⁵ Nor are these counties major retail centers. Palm Beach, Florida, the most populous of the three counties, accounts for only about one-half of one percent of total U.S. retail sales,⁵⁶ and Madison County accounts for less than one-tenth of one percent.⁵⁷

Nevertheless, based on the aforementioned literature research, the local Madison County court has been the situs of more class actions in the last few years than all but two other county courts in the United States (Los Angeles and Cook Counties, which have populations larger than Madison County by factors of thirty-eight and twenty-one respectively). And the Manhattan Institute research confirms that the number of filings in these counties is anomalous, although the path to that conclusion is somewhat indirect because of the lack of data on state court class action filings.

Perhaps the best way to assess the Manhattan Institute research is to consider the per capita class action filing rates in the three counties surveyed. As set forth in the table below, these rates confirm that the three counties have highly

55. U.S. Census Bureau, *MapStats: Jefferson County, Texas*, at <http://www.fedstats.gov/gf/states/48/48245.html>.

56. U.S. Census Bureau, *MapStats: Palm Beach County, Florida*, at <http://www.fedstats.gov/gf/states/12/12099.html>.

57. U.S. Census Bureau, *MapStats: Madison County, Illinois*, at www.fedstats.gov/gf/states/17/17119.html.

disproportionate numbers of class actions. For example, if class actions were filed throughout the country at the same per capita rates as Jefferson County's, there would have been 22,331 class actions filed in state courts in 2000. At the Madison County rate, the total number of class actions would have been 42,386. Although we lack published data on the total number of class actions brought each year in state courts, the number probably does not approach 20,000.

A comparison with the federal court system is instructive. Only about 2000 class actions are filed in the entire federal court system each year.⁵⁸ That amounts to a per capita rate of about 7.6 class actions for every million residents. In Madison County in 1999, the rate of per capita state court class actions was about eight times higher—with about sixty-one class actions filed per million people. Even the most populous county surveyed (Palm Beach) has a per capita class action filing rate that is three times the rate in federal court. If class actions were being filed in federal court at the same rate as in Madison County, there would be a total of 17,344 class action filings in federal courts each year. If they were filed at the Palm Beach County rate, there would be 5700.

Table 2
Per Capita Class Action Filings

Court:	Madison County	Jefferson County	Palm Beach County	Federal System
Class Actions Filed In 1999	16	15	23	2,133
Per Capita Class Action Filings In 1999 (per million)	61.8	59.5	20.3	7.6

B. A Surprising Number of Cases Involved Named Parties Who Reside Outside The County Court's Vicinity

A second key finding of the Manhattan Institute research,

58. See MECHAM, *supra* note 24, at 405.

which is consistent with the discussion above regarding the economic demographics of the counties surveyed, is that a large percentage of the cases involved plaintiffs and/or defendants that were not residents of the counties where the class actions were filed. For example, in Madison County, none of the companies listed as defendant was based in Madison County, and only sixty-three percent of the plaintiffs were county residents. Similarly, in Jefferson County, just thirteen of the 173 defendants named in class actions between 1998 and early 2001 were based inside the county, and only sixty-four percent of the plaintiffs were Jefferson County residents. Even in Palm Beach County, which had the largest number of suits against local companies, about half of the defendants sued were based outside the county. This lack of any real nexus between most of these lawsuits and the forums in which they were brought is one of the most important findings of the Manhattan Institute research and is discussed in more detail in Section IV below.

C. The County Courts' Class Action Dockets Are Monopolized By A Small Cadre Of Out-Of-County Plaintiffs' Counsel

In addition to finding an inexplicably large number of class actions in the three surveyed state courts, the research found that a large number of these cases were brought by small groups of plaintiffs' counsel who have developed expertise in bringing massive actions against large corporations in a select number of state courts. In Madison County, the same five firms appeared as counsel in approximately forty-five percent of the cases on the class action docket. Similarly, in Jefferson County, five firms seem to be driving a large percentage of the local class action industry, cumulatively appearing in thirty-two percent of the class action lawsuits included in the survey.

Moreover, most of these firms are not located in the counties where they are choosing to sue. In Madison County, the law firms that filed the purported class actions generally were not based in that locale. Of the sixty-six plaintiffs' firms that were listed on the Madison County case files, fifty-six (or eighty-five percent) listed office addresses outside Madison County. These attorneys reside and practice in far-flung locations, such as New Orleans, Louisiana; Lexington, Mississippi; Washington, D.C.; Houston, Texas; San Francisco, California; and Mobile,

Alabama.

The same trends were evident in the actions filed in the courts of the other two counties. In Jefferson County, Texas, fifty-eight percent of the law firms appearing on complaints listed addresses outside the county. Jefferson County was the venue of choice for attorneys from Houston, Dallas, and San Antonio, Texas; Washington, D.C.; and Baton Rouge, Louisiana. In Palm Beach County, sixty percent of the law firms appearing on class action complaints listed office addresses outside the county.

Another trend discovered in the research was the use of "cut-and-paste" complaints in which plaintiffs' attorneys file a number of suits against different defendants in the same industry challenging standard industry practices. For example, within a one-week period early this year, six law firms filed nine nearly identical class actions in Madison County alleging that the automobile insurance industry is defrauding Americans in the way that it calculates claims rates for totaled vehicles.⁵⁹ Another group of law firms filed two class actions against automobile insurers (one of which lists over twenty defendants) involving reimbursement for replacement parts.⁶⁰ A third group of lawyers filed five class actions in Palm Beach County against companies that sell interests in the life insurance policies of critically ill patients.⁶¹

59. *Schoenleber v. Prudential Prop. & Cas. Ins. Co.*, No. 01-L-99 (Ill. Cir. Ct. Madison County filed Jan. 18, 2001); *Lancey v. Country Mut. Ins. Co.*, No. 01-L-113 (Ill. Cir. Ct. Madison County filed Jan. 29, 2001); *Richardson v. Progressive Premier Ins. Co. of Illinois*, No. 01-L-149 (Ill. Cir. Ct. Madison County filed Feb. 6, 2001); *Edwards v. Mid-Century Ins. Co.*, No. 01-L-151 (Ill. Cir. Ct. Madison County filed Feb. 6, 2001); *Knackstedt v. St. Paul Fire and Marine Ins. Co.*, No. 01-L-153 (Ill. Cir. Ct. Madison County filed Feb. 6, 2001); *Bordoni v. CGU Ins. Group*, No. 01-L-157 (Ill. Cir. Ct. Madison County filed Feb. 6, 2001); *Huff v. Hartford Ins. Co. of Illinois*, No. 01-L-158 (Ill. Cir. Ct. Madison County filed Feb. 6, 2001); *Billups v. GEICO Gen. Ins. Co.*, No. 01-L-159 (Ill. Cir. Ct. Madison County filed Feb. 6, 2001); *Moore v. Shelter Ins. Co.*, No. 01-L-160 (Ill. Cir. Ct. Madison County filed Feb. 6, 2001).

60. *Hobbs v. State Farm Mut. Ins. Co.*, No. 99-L-1068 (Ill. Cir. Ct. Madison County filed Nov. 2, 1999); *Kelly v. Progressive Premier Ins. Co.*, No. 00-L-277 (Ill. Cir. Ct. Madison County filed Apr. 3, 2000).

61. *Schachter v. Mut. Benefits Corp.*, No. 98-4490 AI (Fl. Cir. Ct. Palm Beach County filed July 28, 1998); *Thum v. Accelerated Benefits Corp.*, No. 98-9389 AN (Fl. Cir. Ct. Palm Beach County filed Oct. 21, 1998); *Schwartz v. Dedicated Res., Inc.*, No. 98-9393 AD (Fl. Cir. Ct. Palm Beach County filed Oct. 21, 1998); *Chancellor v. Future First Fin. Group, Inc.*, No. 99-4429 AE (Fl. Cir. Ct. Palm Beach County filed May 6, 1999); *Brackman v. Dedicated Res., Inc.*, No. 99-9361 (Fl. Cir. Ct. Palm Beach County filed Sept. 30, 1999).

When large numbers of very similar lawsuits attacking many players in the same industry appear before the same court and involve the same counsel, the situation does not appear to be mere happenstance. On the contrary, these facts tend to confirm what has long been suspected: the impetus for filing class actions generally comes from lawyers eager for substantial attorneys' fees, not individual consumers seeking redress for their grievances.

In this regard, a glance at the websites of some of the class action law firms active in Madison County is informative. For example, the website of one of the law firms involved in the automobile insurance class actions boasts that the firm has brought twenty-four nationwide class actions in Madison County challenging a broad array of practices in a number of industries. The firm (The Lakin Law Firm) has advertised that it specializes in class actions that seek less than \$500 in damages on behalf of consumers and celebrated its involvement in a number of class actions, including: (1) lawsuits against ten automobile insurance companies over the standard "medical payment" provisions in automobile insurance policies; (2) lawsuits against three automobile manufacturers over allegedly defective paint processes; (3) a lawsuit against UPS for its policies for excess value insurance; (4) a suit against the manufacturers of air purifiers; and (5) a suit against Sprint on behalf of everyone who ever got disconnected on a cell phone call. Another firm that is involved in ten of the class actions identified by the research in Palm Beach County advertises on its website that "more claimants mean greater potential liability for defendants. Because there is greater potential liability, these lawsuits become worthwhile for lawyers to prosecute on a contingent-fee basis."⁶²

D. Many Of The County Court Cases Were "Copy Cat" Class Actions, Duplicative Of Other Pending Litigation

As both the Senate and House Judiciary Committees have noted in recent reports, the jump in the numbers of state court class actions has resulted in part from the increasingly common

62. BERMAN DEVALERIO PEASE TABACCO BURT & PUCILLO, *About Class Action Lawsuits: FAQ*, at <http://www.bermanesq.com/content/classaction-faqasp> (cases filed by Burt & Pucillo prior to merger).

practice of filing "copy cat" class actions: duplicative class actions that assert the same claims on behalf of essentially the same people in different courts.⁶³ Sometimes these class actions are brought by attorneys vying to take the lead role in any potential lucrative settlement with the defendant. In other cases, the strategy is to go fishing in a number of ponds: to file many identical lawsuits before many courts, hoping to land the big one with a favorable judge somewhere. When such "copy cat" class actions are filed in federal courts, the federal judiciary can address this problem by establishing a multi-district litigation ("MDL") proceeding; however, there is no analogous multi-state procedure to address the duplication and waste caused by multiple class action filings in different states.

Not surprisingly, all of the counties surveyed in the study were sites for "copy cat" class actions. For example, *Flanagan v. Bridgestone/Firestone Inc.*,⁶⁴ a Palm Beach County suit, was one of nearly 100 identical class action lawsuits that have been filed against Bridgestone/Firestone, Inc., and Ford Motor Company since the Firestone tire recall was announced in August 2000. Similarly, *Kaiser v. Cigna Corp.* in Madison County, Illinois⁶⁵ duplicates several class actions that have been filed against Cigna on behalf of the same or similarly defined nationwide classes. Other "copy cat" cases discussed below include a suit against Smith Barney involving its employee investment plan that mirrored a case pending in federal court. There were even "copy cat" cases within the survey itself. As discussed in

63. *Senate Report, supra* note 5, at 19 ("Yet another common abuse [of the class action device in state courts] is the filing of 'copy cat' class actions (*i.e.*, duplicative class actions asserting similar claims on behalf of essentially the same people)."). The report further notes that, "sometimes these duplicative actions are filed by lawyers who hope to wrest the potentially lucrative lead role away from the original lawyers, [and] in other instances, the 'copy cat' class actions are blatant forum shopping—the original class lawyers file similar class actions before different courts in an effort to find a receptive judge who will rapidly certify a class." *Id.* When these cases are filed in state courts, there is no way to coordinate or consolidate the cases; the cases must be litigated in an "uncoordinated, redundant fashion." *Id.* "The result is enormous waste — multiple judges of different courts must spend considerable time adjudicating precisely the same claims asserted on behalf of precisely the same people." *Id.* at 19-20. "As a result, State courts and class counsel may 'compete' to control the cases, often harming all the parties involved." *Id.* See also *House Report, supra* note 3, at 9.

64. No. 00-7879 AE (Fl. Cir. Ct. Palm Beach County filed Aug. 15, 2000).

65. No. 00-L-480 (Ill. Cir. Ct. Madison County filed May 26, 2000). The defendants sought to remove this case on the basis that the plaintiffs' claims are preempted by ERISA. The court remanded, finding that the complete preemption doctrine does not apply to this case.

Sections IV.A and IV.B below, several automobile insurance cases filed in Jefferson County sought to certify the same nationwide classes as cases filed in Madison County.

In both the Firestone tire litigation and the HMO litigation, the federal court cases have been consolidated in MDL proceedings (in fact, *Flanagan* was removed to federal court and consolidated in an MDL proceeding before plaintiffs sought to dismiss it voluntarily).⁶⁶ But plaintiffs' counsel often go to great lengths to avoid such MDL proceedings by making their cases "removal-proof" in the hope that they can establish an alternative litigation (ideally in a friendly venue) to the federal court proceeding. This strategizing not only results in judicial waste, but it also pits federal and state court judges against each other on issues like the appropriateness of class certification or proposed settlements, compromising judicial comity. As Chief Justice William Rehnquist has noted, "we can no longer afford the luxury of state and federal courts that work at cross-purposes or irrationally duplicate one another."⁶⁷

V. THE COUNTY COURT SURVEY: THE INDIVIDUAL COURTS AND THEIR CLASS ACTION DOCKETS

As noted above, the two key findings of the survey were that class actions increased in all three counties during the period surveyed and that many – if not most – of these cases bore little relationship to the counties in which they were brought. There were, however, some variations among the county courts' class action experiences. Most notably, Madison County appears to be an outlier among outliers, with an even more disproportionate number of class actions and an even greater percentage of nationwide class actions than the other counties surveyed. In contrast, Palm Beach County had a significant number of class actions with some local orientation (i.e., Florida-specific claims) and fewer class actions per capita. Below, we analyze the survey results on a county-by-county basis and discuss several of the nationwide class actions that were filed in each of the counties during the period surveyed.

66. See *Flanagan v. Bridgestone/Firestone, Inc.*, No. IP00-C-5106-B/S (S.D. Ind. filed Oct. 24, 2000).

67. William H. Rehnquist, *1993 Year-End Report on the Federal Judiciary*, 17 AM. J. TRIAL ADVOC. 571, 572 (1993).

A. Madison County, Illinois: A 1850% Increase In Class Action Filings Over Three Years

Madison County covers 725 square miles in southwest Illinois and borders the Mississippi River.⁶⁸ Its two largest towns are Granite City and Alton, with populations of 31,301 and 30,496, respectively.⁶⁹ The largest private employer is the Olin Corporation, an ammunitions manufacturer, with 4000 employees.⁷⁰ Judges in Madison County are elected by popular vote and serve six-year terms.⁷¹

In the Third Judicial District of Madison County, Illinois, seventy purported class actions were filed between February 1998 and March 2001, of which eighty-one percent (fifty-seven cases) were brought on behalf of putative nationwide classes. The breakdown for each year is listed in Table 3.

Table 3
Class Action Filings in Madison County, Illinois

Year	Filings	Filings on Behalf of Proposed Nationwide Class	% Increase In Total Filings From Prior Year
1998	2	2 (100%)	*
1999	16	15 (94%)	700%
2000	39	29 (74%)	144%
2001 (As of March 7)	13	11 (85%)	92% (projected)

In analyzing the Manhattan Institute research, Madison County stands out even among other counties with disproportionate class action dockets for two distinct reasons: (1) the recent exponential increase in class action filings; and (2) the relative dearth of cases involving local defendants. This

68. See U.S. Census Bureau, *MapStats: Madison County, Illinois*, at <http://www.fedstats.gov/qf/states/17/17119.html>.

69. See U.S. Census Bureau, *Profiles of General Demographic Characteristics: 2000 Census of Population and Housing*, at <http://factfinder.census.gov>.

70. Telephone Interview with Ed Taft, First Stop Business Information Center (Aug. 14, 2001).

71. ILL. CONST. art. VI, § 10.

comports with anecdotal evidence suggesting that Madison County is a very favorable venue sought out by plaintiffs' attorneys seeking to bring nationwide class actions. The popularity of this venue is evident from the statistics on class action filings over the last several years, which show a steep increase in filings among the class action plaintiffs' bar.

During 1998, two nationwide class actions were filed in Madison County. The first, *Rice v. National Steel Corp.*,⁷² was certified as a nationwide class alleging underpayment on a profit-sharing plan. The second, *Morrow v. J & B Importers, Inc.*,⁷³ was certified for settlement as a national class alleging overcharges on shipping. Those results seem to have started the ball rolling in Madison County. Within two years, the number of class actions filed in that jurisdiction had increased by a factor of twenty, with thirty-nine purported class actions filed in 2000. If the balance of calendar year 2001 keeps pace with the first three months, seventy-five class actions will be filed in the Madison County judiciary this year, an increase of 1850% over calendar year 1998. Moreover, the vast majority of these cases will be nationwide class actions. Clearly, something is drawing plaintiffs' counsel to this court.

A brief summary of some of the nationwide class actions currently pending in Madison County provides a window on the breadth of these lawsuits and reflects the concerns discussed above about the propriety of a locally elected judge resolving disputes with national ramifications—many of which have no real local nexus—from a county courthouse in Madison County.

Automobile Repair—*Wheeler v. Sears, Roebuck & Co.*⁷⁴ is a purported class action on behalf of thirty million consumers, alleging that Sears' tire-balancing service was deceptive and seeking to recover between \$12.50 and \$50 for each purported class member. As the Complaint readily admits, the allegedly offensive conduct took place at "more than 800 Tire and Auto Centers throughout the United States."⁷⁵ The obvious question is, Why is this suit being brought in Madison County? The

72. No. 98-L-98 (Ill. Cir. Ct. Madison County filed Feb. 4, 1998). Although the defendants attempted to remove this case, the case was remanded.

73. No. 98-L-828 (Ill. Cir. Ct. Madison County filed Nov. 6, 1998).

74. No. 99-L-529 (Ill. Cir. Ct. Madison County filed June 15, 1999).

75. Class Action Complaint at 2, *Wheeler* (No. 99-L-529).

Complaint contends that Madison County is the proper venue for this nationwide class action because the single named plaintiff resides there and Sears is authorized to conduct business within Illinois.⁷⁶ That is the sum total of the connection plaintiff's counsel attempts to establish. What the Complaint fails to mention is that there are only eight Sears Automotive Repair shops in the entire state of Illinois—and only one in Madison County.⁷⁷ Thus, despite the fact that the vast majority of Sears tire centers have no nexus whatsoever to Madison County, plaintiff's counsel would have a locally elected county judge resolve this dispute on behalf of a broad class of individuals from all fifty states. Moreover, in alleging claims for violation of consumer fraud law, the Complaint glosses over the substantial differences in various states' laws and policies and simply asserts that the Illinois Consumer Fraud Act applies to the claims of all putative class members nationwide.⁷⁸

Telephone Bills—*Ott v. MCI Worldcom Communications, Inc.*⁷⁹ is a case brought by a Maryland resident (who used to live in St. Clair County, Illinois) against a Delaware corporation headquartered in Mississippi on behalf of a nationwide class of MCI customers. The Complaint seeks class action status for a nationwide class of “thousands” of phone customers who the named plaintiff contends were “bait and switch” victims because they were charged more than the advertised rate for long-distance telephone service. Plaintiff's counsel baldly alleges that his choice of venue is appropriate under Illinois law, but fails to explain exactly why Madison County offers the right forum in which to adjudicate his claim. After all, none of the parties is located in Madison County, and only a very small percentage of MCI's twenty million-plus long-distance customers⁸⁰ live or work there.

Despite the lack of any apparent nexus between the dispute and the selected forum, the Complaint asks the Madison County court to issue an injunction preventing “the defendant

76. *Id.* at 2.

77. Yellow Pages search using www.infospace.com.

78. Class Action Complaint at 11, *Wheeler* (No. 99-L-529).

79. No. 00-L-830 (Ill. Cir. Ct. Madison County filed Aug. 28, 2000).

80. See *Collect Calls*, Oct. 5, 1999, at http://www.pbs.org/newshour/bb/business/july-dec99/phonemerge_10-5a.html.

from continuing the policies and practices [regarding billing]" if the court finds that MCI WorldCom violated, among other home-grown laws and statutes, Illinois' Deceptive Business Practices Act.⁸¹ Here, too, plaintiff's counsel has selected Madison County for a reason that is not immediately apparent from the Complaint, raising the question of whether it is appropriate for a Madison County judge to dictate new national billing policies to a major long-distance company when there is no significant local interest in the case.

Cell Phone Connections—*Snyder v. Sprint Spectrum L.P.*⁸² seeks to certify a class of all Sprint PCS customers who have experienced a "dropped call." According to the Complaint, which is brought by two named plaintiffs (only one of whom is a Madison County resident), Sprint misrepresented the clarity of its cellular phone service by advertising that it would provide "remarkably clear" and "consistent nationwide service."⁸³ The Complaint contends that the Madison County venue is proper because "Sprint conducts substantial business within Madison County" and "the transaction or some part thereof . . . occurred in Madison County."⁸⁴ Of course, Sprint also conducts the vast majority of its business outside of Madison County, Illinois. As plaintiffs' counsel attest, "Sprint is one of the largest cellular telephone service companies in Illinois and throughout the United States."⁸⁵ More specifically, Sprint, which is headquartered in Kansas City, is the fourth largest cellular telephone provider in terms of customers, providing service in more than 4000 cities and communities across the country with more than 12.8 million direct and resale subscribers and more than one million affiliate subscribers.⁸⁶ Even if every member of every household in Madison County

81. Class Action Complaint at 11, 13, *Oil* (No. 00-L-830).

82. No. 00-L-1112 (Ill. Cir. Ct. Madison County filed Nov. 6, 2000). The defendants sought to remove this case to federal court on the ground that the plaintiff's claims were preempted by federal telecommunications laws and regulations. The court disagreed with the defendants and remanded the case to state court, finding that the claims asserted in the case were not preempted by the Communications Act and that it therefore did not have jurisdiction over the state law claims asserted in the Complaint. *See* Order at 2, *Snyder v. Sprint Spectrum*, No. 00-971-GPM (S.D. Ill. filed Feb. 6, 2001).

83. Class Action Complaint at 3, *Snyder* (No. 00-L-1112).

84. *Id.* at 2.

85. *Id.* at 4.

86. Sprint, *Sprint Facts-at-a-glance*, at <http://www.sprintpcs.com/aboutsprintpcs/mediacenter/facts.html>.

(including infants, children, and the elderly) subscribed separately to Sprint's cellular service, they would still account for only 2.2% of Sprint's business. Nonetheless, this class action seeks redress from a locally elected Madison County judge for supposedly countless disconnected phone calls that affected "thousands of persons" throughout the United States,⁸⁷ that occurred for disparate reasons, and that potentially implicate the laws of every state.

Clogged Drains—In *Garvey v. Roto-Rooter Services Co.*,⁸⁸ a lone Madison County resident is suing on behalf of customers residing in thirty-one states and the District of Columbia,⁸⁹ alleging that their drains were repaired by unlicensed plumbers under the defendant's auspices. The Complaint does not allege that the service was performed poorly. Instead, the grievance is that the plaintiff and putative class members allegedly were deceived because the individuals who performed services for them were not licensed plumbers. According to the Complaint, "there are thousands of members of the class whose identities can be easily ascertained by the records and files of ROTO-ROOTER."⁹⁰ At best, only a small number of these putative class members hail from Madison County. There is no Roto-Rooter operation in Madison County; to the extent that the defendant provides service there, it does so through a franchisee based in St. Louis, Missouri.⁹¹ Thus, in this case, the named plaintiff seeks to put a non-Illinois company that does at most a minuscule amount of local business on trial in Madison County for practices that affect citizens in a multitude of states. Moreover, the policies implicated in this case are particularly inappropriate for multi-state resolution because plumbing licenses are a local concern, with each state setting its own standards and regulations. Perhaps it is appropriate for a Madison County court to issue a

87. Class Action Complaint at 4, *Snyder* (No. 00-L-1112).

88. No. 00-L-525 (Ill. Cir. Ct. Madison County filed June 13, 2000).

89. Besides Illinois and the District of Columbia, the states are: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas, Washington, and Wisconsin. See Complaint at 2, *Garvey* (No. 00-L-525).

90. *Id.* at 3-4.

91. Telephone Interview with Roto-Rooter operator based in Addison, Illinois (Aug. 1, 2001).

ruling that interprets Illinois laws regarding plumbing licenses, but how can one county judge possibly adjudicate a matter that involves the disparate plumbing laws and regulations of thirty-two jurisdictions?

Automobile Insurance—Replacement Parts—*Hobbs v. State Farm Mutual Automobile Insurance Co.*⁹² and *Paul v. Country Mutual Insurance Co.*⁹³ allege that car insurance companies have violated their contracts and acted deceptively by refusing to provide original equipment manufacturer (“OEM”) parts to policy-holders involved in car accidents. These two cut-and-paste complaints seek to capitalize on the plaintiffs’ victory in a nearly identical case, *Avery v. State Farm Mutual Auto Insurance Co.*⁹⁴ In *Avery*, another Illinois county court certified a nationwide class on these issues, and at trial, a jury awarded a judgment of \$1.18 billion against defendant State Farm. *Avery* received broad media attention because the judge granted class certification and allowed the jury verdict to stand, even though several insurance commissioners from other states testified that a ruling in favor of the proposed nationwide class by an Illinois court would actually contravene the laws and policies of other states which have enacted laws encouraging (or even requiring) insurers to use less expensive, non-OEM parts in making covered accident repairs to motor vehicles as a means of containing the cost of auto insurance coverage.

In substantially upholding the *Avery* jury’s award earlier this year, an Illinois court of appeals found that “the question of whether laws of different states apply to specific transactions alleged in a class action does not ordinarily prevent certification of the class.”⁹⁵ According to the court, “there were no true conflicts between the substantive laws of Illinois and those of the other states whose residents were part of the class.”⁹⁶ Moreover, the court discounted testimony from “[f]ormer and current representatives of state insurance commissioners [who] testified that the laws in many of our sister states permit and in some cases . . . [even] encourage

92. No. 99-L-1068 (Ill. Cir. Ct. Madison County filed Nov. 2, 1999).

93. No. 99-L-995 (Ill. Cir. Ct. Madison County filed Oct. 13, 1999).

94. 746 N.E.2d 1242 (Ill. Ct. App. 2001).

95. *Id.* at 1258.

96. *Id.*

competitive price control."⁹⁷ According to the appellate court, this testimony was irrelevant because of the trial court's finding that the parts were inferior.⁹⁸ As The New York Times reported at the time, the impact of the Illinois decision was to "overturn insurance regulations or state laws in New York, Massachusetts, and Hawaii, among other places" and "to make what amounts to a national rule on insurance."⁹⁹

Perhaps not coincidentally, the number of insurance cases in Madison County has grown significantly since *Avery*. The willingness of certain Illinois state courts to serve as free-roving insurance commissioners and issue edicts that affect the way insurance companies can do business in forty-nine other states may explain why twenty-six class action lawsuits have been filed in Madison County against insurance companies in the last few years.

The *Paul* Complaint was filed by a geographically dispersed coalition of ten plaintiffs' counsel located throughout the country—and one named plaintiff who resides in Granite City, Illinois—against Country Mutual, an insurance company that is based in Bloomington, Illinois (150 miles from Madison County) and that offers insurance policies in ten states.¹⁰⁰ The *Hobbs* suit was brought by a number of class action law firms spread across the country¹⁰¹ against more than twenty insurance companies. In *Hobbs*, plaintiffs' counsel are suing on behalf both of State Farm customers who made claims for vehicle repairs after *Avery* was decided and of policy-holders from more than twenty other large automobile insurance companies that were not sued in *Avery*.¹⁰² The named plaintiff (since there is only one) is insured by only one of these companies (State Farm). There are no named plaintiffs who claim to have bought policies from any of the other twenty-plus insurance companies targeted by this class action.

In seeking to justify the selection of the Madison County

97. *Id.*

98. *Id.*

99. See Matthew J. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers*, N.Y. TIMES, Sept. 27, 1998, at A29.

100. Class Action Complaint at 3, *Paul* (No. 99-L-995).

101. The plaintiffs' law firms on the complaint list addresses in a number of cities, including Little Rock, Arkansas; Lexington, Mississippi; San Francisco, California; Chicago, Illinois; Mobile, Alabama; and Knoxville, Tennessee.

102. Class Action Complaint at 8, *Hobbs* (No. 99-L-1068).

judiciary as the nationwide arbiter of these car insurance disputes,¹⁰³ the *Hobbs* Complaint alleges simply that “plaintiff Shannon Hobbs, and one or more class members, are residents of this County, each of the defendants conducts substantial business in this State, and the actions at issue in this case took place in significant part in this State.”¹⁰⁴ In fact, a “significant part” – or more accurately, the overwhelming part – of the allegations took place outside of Madison County and outside Illinois. The twenty-plus insurance companies against which this case is brought (none of which is headquartered in Madison County and only eight of which are headquartered in Illinois), account for nearly forty percent of the automobile insurance premiums paid annually throughout the United States.¹⁰⁵ More than ninety-nine percent of these policies are sold outside Madison County, and ninety-seven percent are sold outside Illinois.¹⁰⁶ Indeed, plaintiffs’ counsel readily admit that the proposed class “includes millions of geographically dispersed insureds” (whereas Madison County only has 250,000 residents).¹⁰⁷ Plaintiffs are thus asking a judge to issue an edict affecting the way major automobile manufacturers must handle millions of insurance claims that were issued outside the county – and indeed, outside the state of Illinois.

In short, plaintiffs’ counsel in *Hobbs* seek to put the entire automobile insurance industry on trial in Madison County based on one Madison County resident’s experience with one insurance company. If this case is certified and tried, its ramifications would reach far beyond Madison County. One Madison County judge could be single-handedly responsible for dramatically increasing the price of automobile insurance for all Americans and adversely affecting the non-original manufacturer automobile parts industry. The ability of one

103. In a slight gesture that only addresses one of the problems with the Complaint, plaintiffs’ counsel seek to exclude from the class residents of Massachusetts and Hawaii, where state law *mandates* the use of non-OEM parts.

104. Class Action Complaint at 3, *Hobbs* (No. 99-L-1068).

105. Based on a comparison of the total direct premiums for twenty automobile insurance companies against those for all U.S. insurance companies in 1999. See Lynn Goch, *Car Wars*, BEST’S REVIEW MAGAZINE, Oct. 2000, available at http://www.bestreview.com/2000-10/cover_carwars.html.

106. Estimated percentages are based on total automobile premiums across the nation. See BEST’S INSURANCE REPORTS: PROPERTY-CASUALTY UNITED STATES (2000 ed.).

107. Class Action Complaint at 9, *Hobbs* (No. 99-L-1068).

locally elected judge to exercise that much power raises serious federalism questions.

Automobile Insurance—Value Of Wrecked Vehicles—As noted above, a group of six plaintiffs' counsel (only one of whom is actually resident in Madison County) filed nine separate insurance class actions in Madison County over a three-week period in early 2001, alleging that nine major insurance companies have engaged in fraud by miscalculating the value of wrecked vehicles. These cases, also presumably spawned by the *Avery* verdict, were brought against nine major insurance companies, alleging that all the defendants contracted with a company (based in Illinois) to provide "biased, below-market estimates of vehicle values."¹⁰⁸ Among the violations claimed by plaintiffs are violations of the Illinois Consumer Fraud Act and "similar consumer protection statutes" in the other states where the defendant insurance companies do business.¹⁰⁹

All nine of the cases seek to certify nationwide classes that allegedly have thousands of members. For example, in *Schoenleber v. Prudential Property & Casualty Insurance Co.*,¹¹⁰ the Complaint alleges that "[t]he plaintiff class includes thousands of policy-holders whose vehicles have been declared a total loss."¹¹¹ The Complaint also seeks to certify a defendant class that consists of at least "25 Prudential entities" that use the challenged claims adjustment program.¹¹² Similarly, in nearly identical filings in all nine cases, plaintiffs' counsel allege that the proposed plaintiff classes "consist of thousands of persons who reside throughout Illinois and the United States."¹¹³ This is no exaggeration. Prudential, the defendant in *Schoenleber*, is a New Jersey company headquartered in Newark with approximately two million outstanding automobile policies in forty-eight states.¹¹⁴ Geico, the insurance company targeted in *Billups v. GEICO General Insurance Co.*,¹¹⁵ is a Maryland

108. Class Action Complaint at 1, *Schoenleber v. Prudential Prop. & Cas. Ins. Co.*, No. 01-L-99 (Ill. Cir. Ct. Madison County filed Jan. 18, 2001).

109. *Id.* at 15.

110. No. 01-L-99 (Ill. Cir. Ct. Madison County filed Jan. 18, 2001).

111. Class Action Complaint at 9, *Schoenleber* (No. 01-L-99).

112. Plaintiff's Motion for Class Certification at 2, *Schoenleber* (No. 01-L-99).

113. *Id.* at 2.

114. Telephone Interview with Prudential Service Operator (Aug. 7, 2001).

115. No. 01-L-159 (Ill. Cir. Ct. Madison County filed Feb. 6, 2001).

corporation licensed to provide automobile insurance to consumers in forty-eight states and the District of Columbia, with "over 4.7 million policy-holders and 7.3 million automobiles insured as of [December 2000]." ¹¹⁶

Once again, other than alleging that the defendants have "transacted substantial business in Madison County, Illinois," ¹¹⁷ the complaints in these cases offer no compelling nexus between the plaintiffs' broad nationwide claims against non-resident corporations and the small county in which they have sued. Moreover, by alleging that the Illinois-based provider of the valuation software at issue engaged in conspiracy with the insurance companies, ¹¹⁸ plaintiffs in the nine cases have effectively shielded all of the cases from removal to federal court, since all have at least one in-state defendant, thus clearing the way for a Madison County judge to set nationwide policy on yet another facet of the automobile insurance industry.

Automobile Insurance—Medical Treatment—Another cluster of lawsuits filed in Madison County during the time period researched involved ten virtually identical suits against a number of automobile insurance companies alleging that these companies engaged in statutory fraud under the Illinois Consumer Fraud Act "and the substantially similar consumer fraud statutes of sister states" with regard to medical claims resulting from car accidents. ¹¹⁹ According to the complaints in these cases, the defendant insurance companies engaged in fraud because they adjusted accident victims' medical claims by using biased utilization review organizations, medical exams and computer-generated reports. ¹²⁰ Plaintiffs' counsel readily admit that most of these putative class members have no relationship to Madison County. For example, in *Hernandez v. American Family Mutual Insurance Co.*, ¹²¹ the Complaint alleges

116. Geico, *About Geico*, at <http://www.geico.com/infocenter/about/htm>.

117. Class Action Complaint at 6, *Edwards v. Mid-Century Ins. Co.*, No. 01-L-151 (Ill. Cir. Ct. Madison County filed Feb. 6, 2001).

118. *See id.* at 14.

119. Class Action Complaint at 13, *Hernandez v. American Family Mut. Life Ins. Co.*, No. 00-L-629 (Ill. Cir. Ct. Madison County filed July 25, 2000).

120. *Id.* at 2.

121. No. 00-L-629 (Ill. Cir. Ct. Madison County filed July 25, 2000). The defendant sought to remove the case to federal court, but the district court remanded it to state court, finding that plaintiffs' claims did not meet the \$75,000 amount-in-controversy minimum. *See Memorandum and Order* at 4-5, *Hernandez*

that "AFI is one of the largest automobile insurers in the United States. The classes include tens of thousands of policy-holders geographically dispersed throughout the United States, thousands of whom reside in Illinois."¹²² Plaintiffs' counsel do not provide any support for their belief that "thousands" of class members reside in Illinois and offer just one example of a potential class member who lives in Madison County: the single named plaintiff. Given that AFI, a Wisconsin company, has issued more than seven million policies in more than fifteen states, Madison County likely accounts for only a very small portion of its business, and the company's insurance policies are governed by the laws of fourteen other states in addition to Illinois.

Certainly, it is appropriate for the named plaintiff, who was allegedly involved in an automobile accident, to sue his insurance company in Madison County if he believes that he was not properly reimbursed for his medical expenses. The important question is why his lawyers have chosen to sue AFI and several other insurance companies in Madison County on behalf of every American with an automobile policy outside of Madison County, thereby seeking to turn the Madison County judiciary into a nationwide insurance czar. Notably, despite these policy concerns and the substantial difficulties of applying numerous state laws in one judicial proceeding, at least one of the so-called "medpay" class actions has already been certified for nationwide treatment, giving plaintiffs' counsel an incentive to bring even more such lawsuits.¹²³

Barbie Dolls—*Cunningham v. Mattel, Inc.*¹²⁴ is a nationwide class action claiming that consumers paid too much for "limited edition" Barbie dolls that were later sold by Mattel at a lower price through other vendors. Plaintiff, a Madison County resident and purported Barbie doll collector, seeks to represent a class of "thousands" of people throughout the country who have purchased such "limited edition" Barbie dolls. The only explanation plaintiff's counsel provides for bringing this nationwide suit in Madison County is the statement that

v. American Mutual Ins. Co., No. 00-CV-0681-DRH (S.D. Ill. filed Dec. 14, 2000).

122. Class Action Complaint at 9, *Hernandez* (No. 00-L-629).

123. See Order at 1-2, *Littleton v. Shelter Ins. Co.*, No. 99-L-864 (Ill. Cir. Ct. Madison County filed Sept. 7, 1999).

124. No. 99-L-920 (Ill. Cir. Ct. Madison County filed Sept. 15, 1999).

Mattel, a California corporation, is “engaged in the manufacture, sale and distribution of toys, including Barbie dolls, throughout the United States, including Madison County, Illinois.”¹²⁵ Plaintiff does not allege—and there is no reason to believe—that Madison County is a Mecca of Barbie collectors or otherwise has a strong interest in resolution of this suit. While on the surface, a suit about Barbie dolls may not seem to raise important civil justice policy issues, the case does present broader-ranging issues about the responsibility of a manufacturer to maintain the retail value of a product. Thus, once again, a locally elected county judge is being asked to set a policy for fifty states on an issue with potentially wide ramifications for consumers and businesses.

Environmental—*England v. Atlantic Richfield Co.*¹²⁶ and *Mizukonis v. Atlantic Richfield Co.*¹²⁷ are two nearly identical lawsuits filed by the same law firm that seek to hold all of the major gasoline manufacturers in the United States (including ARCO, Exxon Mobil, and Chevron to name a few) liable for allegedly contaminating the nation’s groundwater with methyl tertiary butyl ether (“MTBE”), a fuel additive that was approved by the Environmental Protection Agency (“EPA”) to help reduce carbon dioxide emissions. The two suits are brought on behalf of individuals who own non-commercial property in sixteen states and rely on private wells for their drinking water. Plaintiffs’ counsel claim that there are “hundreds of thousands of members” in their putative class¹²⁸ but that venue is nonetheless appropriate in Madison County “because at least one of the Plaintiffs resides and owns real property wherein a private well is located in Madison County.”¹²⁹

These two cases highlight the inefficiency that results from dueling class actions. *England* has been removed to federal court and transferred to an MDL proceeding.¹³⁰ The *Mizukonis*

125. Class Action Complaint at 1-2, *Cunningham* (No. 99-L-920).

126. No. 00-L-331 (Ill. Cir. Ct. Madison County filed Apr. 11, 2000).

127. No. 00-L-872 (Ill. Cir. Ct. Madison County filed Sept. 6, 2000).

128. Class Action Complaint at 15, *Mizukonis* (No. 00-L-872).

129. *Id.* at 5.

130. See Notice of Removal, *England v. Atlantic Richfield Co.*, No. 3:00cv371 (S.D. Ill. filed May 11, 2000), and Transfer Order, *In re: Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, No. M1358 (Docket No. M21-88) (S.D.N.Y. filed Oct. 16, 2000).

case, however, which plaintiffs sought to make removal-proof by alleging that any damages are "less than Seventy-Five Thousand Dollars" per plaintiff,¹³¹ is still pending in state court in Madison County and is thus being litigated separately from the ongoing, consolidated federal court litigation.

According to the *Mizukonis* Complaint, defendants engaged in negligent and conspiratorial behavior by allegedly failing to perform standard toxicological tests on the effects of MTBE and thus "expos[ing] millions of Americans, including Plaintiffs, to potential harm without warning of the potential health risks associated with MTBE."¹³² Based on these allegations, plaintiffs' counsel is seeking compensation for two subclasses: a testing subclass and an alternative drinking supply subclass. As the Complaint itself attests, MTBE is an issue that has received national and federal attention. In fact, the EPA is currently engaged in a rulemaking proceeding that seeks to address any contamination issues caused by the gasoline industry's use of MTBE and whether the additive should be removed from gasoline.¹³³ Despite the federal role in this wide-ranging environmental policy, plaintiffs' counsel would have a locally elected Madison County judge issue a broad ruling that addresses: (1) whether MTBE "adversely impacts groundwater"; (2) whether the gasoline industry failed to test MTBE adequately; and (3) whether the gasoline industry conspired to conceal the risks of MTBE from, and/or misrepresent them to, government, agencies, regulators and the public at large.¹³⁴ Whatever the court decides, the ruling could have a profound impact on the practices of the entire gasoline industry and the drinking water of millions of Americans who have no connection to Madison County. At the same time, the ruling could undermine the federal government's statutory role in regulating the gasoline industry and protecting the nation's air and water supplies, and it could contradict any ruling by the federal court in New York that is presiding over the MDL proceeding.

Cable Late Fees—In *Unfried v. Charter Communications, Inc.*,¹³⁵

131. Class Action Complaint at 30, *Mizukonis* (No. 00-L-872).

132. *Id.* at 11.

133. *See id.* at 12.

134. *See id.* at 15-16.

135. No. 99-L-48 (Ill. Cir. Ct. Madison County filed Jan. 20, 1999).

a Madison County judge approved a settlement for a nationwide class composed of "[a]ll [Charter] residential cable subscribers located in the continental United States" (with the exception of six states) who were allegedly charged improper cable late fees.¹³⁶ Charter Communications is among the nation's largest cable companies and currently serves approximately 6.4 million customers in forty states.¹³⁷ Clearly, only a very small percentage of those customers reside in Madison County. Indeed, even if every household in the entire county subscribed to Charter, Madison County would still account for just 1.5% of the cable company's customers. In seeking to explain why this suit was filed in Madison County, the Complaint merely states that "Charter received substantial compensation and profits from sales of cable television in Madison County."¹³⁸ This attenuated relationship did not stop a locally elected Madison County judge from entering a settlement order that (1) required Charter to change its late-fee billing policies throughout the country; (2) provided no compensation to the putative class for any past late-fee billing problems; and (3) provided plaintiffs' counsel with \$5.6 million for their efforts (which spanned only twenty-three months).¹³⁹

Shipping Fees—In *Smith, Allen, Mendenhall, Emons & Selby v. Thomson Corp.*,¹⁴⁰ a Madison County judge certified a nationwide class of law firms and other businesses that were allegedly charged extra shipping fees when they purchased certain reference books. The case was brought by three law firms located in Madison County.¹⁴¹ According to the Motion for Class Certification, the class, which includes "[a]ll persons who are subscribers to the defendants' CD-Rom libraries, or who purchased or leased CD-Roms from defendants, and who have been charged transportation and handling costs . . . above the actual cost of transportation and handling,"¹⁴² purportedly

136. Order Granting Preliminary Approval of Settlement at 1-2, *Unfried* (No. 99-L-48).

137. Charter Communications, *Charter Communications' Annual Shareholder Meeting Focuses on Significant Achievements and Aggressive Goals*, June 6, 2001, at <http://www.onlinepressroom.net/chrttr>.

138. Class Action Complaint at 3, *Unfried* (No. 99-L-48).

139. Time span calculated between filing of first Complaint (January 20, 1999) and granting of final order of settlement (December 21, 2000).

140. No. 99-L-120 (Ill. Cir. Ct. Madison County filed Feb. 11, 1999).

141. Class Action Complaint at 1-2, *Smith, Allen* (No. 99-L-120).

142. Motion for Class Certification at 2, *Smith, Allen* (No. 99-L-120).

consists of “thousands of subscribers throughout the United States.”¹⁴³ Although this class potentially includes thousands of law firms and law libraries across the United States, Madison County is home to just eighty-nine law offices¹⁴⁴ and no law schools (and plaintiffs list only the names of three law firms in the county that actually subscribed to the service). Moreover, Thomson is a Canadian company with no business operations in Illinois. Nevertheless, the court certified the widely dispersed class for trial under Illinois and Minnesota law for purchases that were made throughout the United States.¹⁴⁵

Fiber Optic Cable Trespass Claims—*Poor v. Sprint Corp.*,¹⁴⁶ which lists three named plaintiffs (only one of whom owns land in Madison County, Illinois), alleges that Sprint Corp. trespassed on the land of millions of property holders nationwide while installing fiber optic cable. In this case, plaintiffs’ counsel sought to certify a nationwide class that included “all current and former owners of land in the United States that is or was subject to an easement for a limited purpose held by a railroad, pipeline, energy or other utility company on which [Sprint] has entered to install or maintain fiber optic cable without obtaining the consent of the owner of the land.”¹⁴⁷ According to the Complaint, Sprint “agreed to pay tens of millions of dollars to the railroads, pipeline, energy, or other utility companies” that had easements to individuals’ property when it should have entered into individual agreements with each of the property owners.¹⁴⁸ Given that Sprint has installed more than 23,500 route miles of fiber optic cable throughout the United States¹⁴⁹—and that Madison County covers just 900 square miles—the vast majority of the individuals involved clearly live not only outside of Madison County but outside of Illinois. Indeed, as noted above, two of the three named plaintiffs in this action live elsewhere—one in

143. *Id.* at 2.

144. Based on a search of the Martindale-Hubbell Directory for Madison County using Martindale-Hubbell’s website, at <http://www.martindale.com/locator/home.html>.

145. Order at 1-2 (filed Dec. 1, 1999), *Smith, Allen* (No. 99-L-120).

146. No. 99-L-421 (Ill. Cir. Ct. Madison County filed Apr. 30, 1999).

147. Nationwide Class Action Complaint at 3, *Poor* (No. 99-L-421).

148. *Id.* at 9.

149. Federal Communications Commission, *FCC Releases Fiber Deployment Update*, Sept. 9, 1999, at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Fiber/fiber98.pdf.

Tennessee and one in Texas.

The history of this case provides a lens into some of the potential benefits of federal court class action practice over state court practice. The first time Sprint sought to remove the case to federal court, it was remanded because one of the named plaintiffs was from Kansas, where Sprint has its principal place of business.¹⁵⁰ After the Kansas plaintiff was dropped from the case (in whose removal the plaintiffs decided to acquiesce for reasons not apparent from the docket), it was removed again, and a federal judge certified a class.¹⁵¹ The defendants appealed the class certification order under a recently enacted federal rule that allows immediate appeal of class certification orders,¹⁵² and the U.S. Court of Appeals for the Seventh Circuit recently reversed the certification.¹⁵³ (In contrast to this federal rule, the vast majority of states allow appellate review of class certification orders only in very rare circumstances, or deny it altogether.)

In its decision, the Seventh Circuit held that class certification was “decidedly inappropriate” in a case that “involves different conveyances by and to different parties made at different times over a period of more than a century . . . in forty-eight different states . . . which have different laws regarding the scope of easements.”¹⁵⁴ The Seventh Circuit’s strongly worded decision only highlights the inappropriateness of the forum in which the case was originally brought. Had plaintiffs not agreed to drop the Kansas plaintiff (an almost unheard-of step in class action practice), this case would still be proceeding in Madison County, and one local court would have been called upon to issue a broad ruling that affected the property rights of thousands of Americans, even though the claims that plaintiffs allege—trespass, unjust enrichment, and slander of title and property—implicate highly localized laws and policies that vary from state to state and that are (as the Seventh Circuit found) highly unsuitable for class certification.

150. See Memorandum And Order at 6, *Poor v. Sprint Corp.*, No. 99-497-GPM (S.D. Ill. filed Mar. 2, 2000).

151. See Memorandum and Order, *Isaacs v. Sprint Corp.*, No. 00-CV-00155-MJR (S.D. Ill. filed Apr. 6, 2001).

152. FED. R. CIV. P. 23(f).

153. See *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001).

154. *Id.* at 682.

In sum, Madison County judges have been asked over the last few years to set national policy on issues that could affect the daily lives of millions of Americans throughout the country—from what water they drink to how much they pay for their next insurance policy or telephone bill—all from a small courthouse in southwest Illinois.

*B. Jefferson County, Texas: Class Action Filings
Double Over 1998-2000 Period*

Jefferson County, with a population of 252,051 in the 2000 Census, covers approximately 900 square miles and is located seventy-five miles east of Houston.¹⁵⁵ Its two largest cities are Beaumont and Port Arthur, with populations of 113,866 and 57,755, respectively.¹⁵⁶ Judges in Jefferson County are elected by popular vote for four-year terms.¹⁵⁷ The county's largest private employer is the Huntsman Corporation, a chemical company, with 1300 employees.¹⁵⁸ Certainly, it is not the type of place where most people would expect to find complex, civil litigation with a national scope.

While the Manhattan Institute research revealed a smaller number of class actions in Jefferson County than in Madison County, the trends are similarly disproportional. Between April 1998 and January 2001, forty-seven class actions were filed in the 60th Judicial District of Jefferson County, Texas, of which twenty-seven were brought on behalf of putative nationwide classes.¹⁵⁹ Moreover, as with the other locales included in the research effort, the number of class actions grew steadily over the period surveyed. Between 1998 and 2000, the number of class actions filed in Jefferson County nearly doubled, and most of the additional cases involved requests for nationwide classes. The breakdown for each year is shown in Table 4.

155. See U.S. Census Bureau, *MapStats: Jefferson County, Texas*, at <http://www.fedstates.gov/gf/states/48/48245.html>.

156. See U.S. Census Bureau, *Census 2000 Redistricting Data*, at <http://factfinder.census.gov>.

157. TEX. CONST. art. V, § 7.

158. Telephone Interview by Meloni McDougal with Lorna Welborn, Beaumont Chamber of Commerce (Aug. 15, 2001).

159. Nine of these cases were removed to the U.S. District Court for the Eastern District of Texas.

Table 4
Class Action Filings in Jefferson County, Texas

Year	Filings	Filings on Behalf of Proposed Nationwide Class	% Increase In Total Filings From Prior Year
1998	11	4 (36%)	*
1999	15	9 (60%)	36%
2000	20	14 (70%)	33%
2001 (As of January 31)	1	0 (0%)	*

The business sectors under attack in the nationwide class actions pending in Jefferson County courts include technology, automobile insurance, retail practices and medical equipment. In most of the cases, there is no obvious nexus between the alleged dispute and the choice of Jefferson County to adjudicate the plaintiffs' claims. The following sample of the class actions that the Manhattan Institute study found pending in Jefferson County provides a sense of the breadth and potential nationwide ramifications of these cases.

Computers—*Lapray v. Compaq Computer Corp.*,¹⁶⁰ brought by three named plaintiffs in Jefferson County, alleges that Compaq sold certain computers with defective floppy diskette controllers, resulting in the "storage of corrupt data or the destruction of data without the user's knowledge."¹⁶¹ The Complaint seeks to certify two classes: a nationwide equitable relief class and a nationwide damages class.¹⁶² According to plaintiffs' counsel, "the classes consist of thousands of persons making the members so numerous that joinder of all members of any of the classes would be impracticable."¹⁶³

In seeking to explain why plaintiffs' counsel have sued Compaq in Jefferson County, the Complaint simply states that two of the named plaintiffs purchased their Compaq

160. No. A-162,152 (Tex. Cir. Ct. Jefferson County filed Apr. 27, 2000).

161. Plaintiff's Second Amended Original Class Petition at 7, *Lapray* (No. A-162,152).

162. *Id.* at 3-4.

163. *Id.* at 4.

computers in Jefferson County and that all three use their computers in Jefferson County.¹⁶⁴ Jefferson County, as noted above, is a very small county, with just 92,880 households. In contrast, Compaq, a very large company, sold 1.78 million computers in the third quarter of 1999 alone.¹⁶⁵ Clearly, most of its business is going elsewhere. Once again, two questions arise. First, why do plaintiffs' counsel seek out Jefferson County when they wish to file class actions? Second, should a Jefferson County judge be responsible for effectively issuing standards that govern how personal computer manufacturers throughout the country configure and market their computers?

Retailing/Rental Issues—In *Scott v. Blockbuster, Inc.*,¹⁶⁶ plaintiffs' counsel have sued on behalf of a putative nationwide class of individuals who paid late fees for home video rentals. Blockbuster operates 4800 domestic stores—one “within a ten-minute drive of virtually every major U.S. neighborhood”—collectively serving forty-two million American households.¹⁶⁷ Jefferson County, on the other hand, has a total of six Blockbuster stores¹⁶⁸ that serve (at most) 92,880 households.¹⁶⁹ Despite the 41.9 million households who rent videos elsewhere, the plaintiffs claim that Jefferson County is the proper venue because “all or a substantial part of the events or omissions giving rise to the claims occurred in this county.”¹⁷⁰ Notably, although Blockbuster has its principal place of business in Dallas, Texas, plaintiffs have chosen to file their action in Jefferson County (330 miles away), presumably because they consider it to be a more favorable venue. While many would consider video late fees a mere annoyance, this lawsuit could have profound impacts on the way companies do business throughout the country and what types of fees they are (or are not) allowed to charge. Once again, the obvious question raised by these suits is whether a locally elected judge in Jefferson

164. *Id.* at 7.

165. *Dell Computer No. 1 in U.S.*, MILWAUKEE JOURNAL SENTINEL, Oct. 26, 1999, Business Section, at 1.

166. No. D-162,535 (Tex. Dist. Ct. Jefferson County filed Apr. 25, 2000).

167. Blockbuster, *ABOUT US: The Company: BLOCKBUSTER Trivia*, at <http://www.blockbuster.com/bb/about/trivia/0,4429,,00.html>.

168. Blockbuster, *Blockbuster: Locate a Store*, at http://www.blockbuster.com/bb/store_locator/locate_store_enter/0,4301,,00.html?

169. See U.S. Census Bureau, *State and County QuickFacts: Jefferson County, Texas*, at <http://quickfacts.census.gov/qfd/states/48/48245.html>.

170. First Amended Class Action Complaint at 3, *Scott* (No. D-162,535).

County should be making decisions that have broad ramifications for the conduct of commerce and the 99.9% of retail business in the country that occurs outside of Jefferson County.

This question has taken on new significance in light of Blockbuster's reported agreement to settle this case on a nationwide class basis. Under the proposed settlement (which has reportedly received preliminary approval from the Jefferson County court), customers would receive varying amounts of benefits.¹⁷¹ For example, a customer who claimed payment of \$30 in late fees would receive two free movie rentals and five \$1 coupons good toward the purchase of non-food items.¹⁷² Initially, Blockbuster announced that the various coupons to be issued would have a face value of \$460 million, but the company has now acknowledged that fewer than ten percent of the coupons will be used and that it will not change its late fee policy.¹⁷³ If the settlement is approved, plaintiffs' class counsel will be paid \$9.25 million in fees and expenses. One commentator has observed that "the real winners in the settlement are the lawyers who sued the company," who will be paid "in cash, not coupons."¹⁷⁴

Medicine—In *Rawls v. Mentor Corp.*,¹⁷⁵ the plaintiff allegedly sustained injuries after undergoing a breast augmentation procedure performed in Beaumont (a city in Jefferson County). Plaintiff alleges that the saline breast implants she received, one of which later deflated, were defective and caused her pain, mental anguish and disfigurement.¹⁷⁶ She is therefore suing Mentor on behalf of all persons who have been injured by the company's saline breast implants.

171. See Geraldine Fabrikant, *Blockbuster Settles Suits on Late Fees*, N.Y. TIMES, June 6, 2001, at C1.

172. Wendy Wilson, *Blockbuster to Settle Suits on Late Fees*, DAILY VARIETY, June 4, 2001, at 10.

173. Cynthia Corzo, *Settlement Has a Happy Ending for Blockbuster*, MIAMI HERALD, June 10, 2001, at E1.

174. Monica Roman, *A Blockbuster of a Legal Bill*, BUSINESS WEEK, June 18, 2001, at 46.

175. No. E-159,403 (Tex. Dist. Ct. Jefferson County filed July 15, 1998). Defendants sought to remove this case to federal court, but the matter was remanded because one of the companies sued is based in Texas. The federal district court rejected defendants' arguments that the Texas company was fraudulently joined. See Order Remanding Case to State Court at 2, *Rawls v. Mentor Corp.*, No. 1:98cv1818 (E.D. Tex. filed Nov. 13, 1998).

176. Plaintiff's Original Petition at 2, *Rawls* (No. E-159,403).

Mentor Corporation is a medical products company headquartered in California with a manufacturing facility in Irving, Texas (which is near Dallas and not in or near Jefferson County). Last year, the company sold its products in more than sixty countries.¹⁷⁷ Jefferson County has only a handful of plastic surgeons, and Mentor has no corporate presence there. Thus, there is no obvious nexus between the class action allegations and the venue selected by plaintiffs' attorney.

Extended Warranties—Best Buy is a discount electronics retail chain with 400 stores in forty-one states, only one of which is located in Jefferson County.¹⁷⁸ In *Brew v. Best Buy Co., Inc.*,¹⁷⁹ two Jefferson County residents who purchased a computer from Best Buy along with an extended warranty allege that Best Buy violated consumer fraud laws, breached its contracts, and engaged in negligence and common law fraud because the extended warranty turned out to be much narrower than they understood it to be at the time of purchase. According to the Complaint, Best Buy "entered into a corporate-wide scheme to institute high pressure sales techniques involving the extended warranties to reap substantial ill-gotten gains" and "erect artificial barriers to discourage consumers who purchased the 'complete extended warranties' from making legitimate claims."¹⁸⁰

Based on these allegations, plaintiffs' counsel have asked a Jefferson County court to certify a class composed of "[a]ll persons and entities throughout the United States that purchased an extended warranty for merchandise from Best Buy or any of its retail store locations."¹⁸¹ That class, according to plaintiffs, consists of "multiple thousands of members" throughout the United States.¹⁸² In seeking to litigate these nationwide claims in Jefferson County, plaintiffs do not attempt to provide any connection between their allegations and Jefferson County (other than their residence there). Indeed, they do not even allege that they purchased their computer at

177. See Mentor Corporation, *Corporate Profile*, at <http://investor.mentorcorp.com/profile.cfm>.

178. See Best Buy, *About Us*, at <http://www.bestbuy.com/About/index.asp?b=0&m=435>.

179. No. B-163,429 (Tex. Dist. Ct. Jefferson County filed Aug. 4, 2000).

180. Plaintiff's Original Petition at 5, *Brew* (No. B-163,429).

181. *Id.* at 4.

182. *Id.*

the sole Best Buy store that is located in Jefferson County. Nonetheless, they are asking a local court to issue a ruling that would affect Best Buy's business practices throughout the country and could have ripple effects on numerous other companies that offer consumers extended service warranties.

Automobile Insurance—Medical Payment—*Pego v. Allstate County Mutual Insurance Co.*,¹⁸³ seeks to certify virtually the same nationwide class of claimants as two other cases pending in Madison County (discussed in Section IV.A above).¹⁸⁴ The case involves allegations that Allstate breached its contracts and defrauded its automobile policy-holders by failing to pay reasonable and necessary medical expenses resulting from car accidents. Although the named plaintiffs live in Jefferson County, plaintiffs' counsel do not otherwise tie the dispute to the forum in which the suit was brought. To the contrary, the Complaint emphasizes the nationwide implications of the case they have brought and seeks to certify a class of all Allstate policy-holders nationwide who have been denied coverage, in whole or in part, for injuries sustained in car accidents or whose reimbursements were delayed.¹⁸⁵ Allstate, which is headquartered in Illinois, provides automobile insurance to more than twelve percent of insured motorists throughout the country, only a small portion of whom live in Texas (let alone Jefferson County).¹⁸⁶ As discussed above, resolution of these allegations on a nationwide basis in a county court would have broad implications for the insurance industry that would extend far beyond Jefferson County.

Automobile Insurance—Value Of Wrecked Vehicles—*Shields v. Allstate County Mutual Insurance Co.*,¹⁸⁷ brought by three named plaintiffs whose vehicles were totaled in car accidents,

183. No. D-162,802 (Tex. Dist. Ct. Jefferson County filed Apr. 28, 2000).

184. *Strasen v. Allstate Ins. Co.*, No. 99-L-1040 (Ill. Cir. Ct. Madison County filed Oct. 26, 1999); *Ellis v. Allstate Ins. Co.*, No. 00-L-493 (Ill. Cir. Ct. Madison County filed June 2, 2000).

185. Plaintiff's Original Petition at 7, *Pego* (No. D-162,802).

186. Allstate, *About Allstate*, at <http://www.allstate.com/About> (stating that Allstate insures one in eight autos and homes in the United States).

187. No. A-162,049 (Tex. Dist. Ct. Jefferson County filed Feb. 1, 2000). This case was removed to federal court, but the federal district court remanded the case to state court after rejecting defendants' arguments that the plaintiffs had fraudulently joined a Texas-based defendant to defeat removal. See Order Granting Plaintiffs' Motion to Remand at 6, *Shields v. Allstate County Mutual Ins. Co.*, No. 1:00-CV-147 (E.D. Tex. filed June 27, 2000).

seeks certification of a nationwide class of persons who were insured by Allstate, Farmers and Progressive and who received an offer for the value of their vehicle based on a valuation report prepared by CCC Information Services, Inc. The Complaint alleges that CCC prepares "unreliable, inaccurate and biased vehicle valuation reports . . . with the intent of generating vehicle valuations well below the actual cash value or replacement cost of vehicles owned by an insured."¹⁸⁸ As discussed above, a group of plaintiffs' counsel have brought nine lawsuits suing nine insurance companies (including Allstate, Farmers and Progressive) in Madison County and making the same claims; thus, all three of the insurance companies being sued in *Shields* are also targets of nearly identical class actions that are pending in Madison County and that involve prospective class members.¹⁸⁹ (The key difference between the Madison County and Jefferson County cases is the inclusion of CCC as a defendant in the Illinois cases. Presumably, plaintiffs in the Madison County cases included CCC as a defendant because it is an Illinois company and its presence in those cases would therefore prevent defendants from removing the case to federal court; in this case, which is brought in Texas, CCC's involvement would have no such effect, and it is not included as a defendant.)

According to the Complaint, venue is appropriate in Jefferson County because the three named plaintiffs live there and "the actions at issue in this case took place in this State and in Jefferson County."¹⁹⁰ Among the pleadings that the researchers found in the case file was a motion by the defendants to transfer venue to Dallas, where Allstate has its principal Texas office.¹⁹¹

Mobile Home Siding—In *Dunn v. Boise Cascade Corp.*,¹⁹² the

188. Plaintiff's First Amended Class Action Petition at 3, *Shields* (No. A-162,049).

189. *Ellis* (No. 00-L-493); *Richardson v. Progressive Premier Ins. Co. of Illinois*, No. 01-L-149 (Ill. Cir. Ct. Madison County filed Feb. 6, 2001); *Edwards v. Mid-Century Ins. Co.*, No. 01-L-151 (Ill. Cir. Ct. Madison County filed Feb. 6, 2001).

190. Plaintiff's First Amended Class Action Petition at 8, *Shields* (No. A-162,049).

191. See Defendants' Motion to Transfer Venue and Motion to Sever, *Shields* (No. A-162,049). There was no order in the file indicating how the judge ruled on the motion. The case did not appear on the electronically available Dallas County court docket as of Aug. 6, 2001.

192. No. A-161,090 (Tex. Dist. Ct. Jefferson County filed June 25, 1999). This case was removed to federal court but was remanded because one of the companies sued is based in Texas and the federal district court rejected

named plaintiff, a mobile home owner in Jefferson County, Texas, is suing Boise Cascade for allegedly defective siding and seeks to certify a class composed of all persons in the United States who own mobile homes with exterior hardboard siding manufactured by Boise.¹⁹³

Although the Complaint alleges that “all or part of the cause of action arose in Jefferson County, Texas,”¹⁹⁴ the defendant in the suit is a company incorporated under the laws of Delaware and headquartered in Boise, Idaho. Moreover, only three of the twenty-eight wholesale building materials distribution facilities and ten wood products manufacturing facilities that Boise operates across the United States are in Texas—and none of these are in Jefferson County.¹⁹⁵ Before Boise discontinued manufacturing the challenged hardboard siding product in 1984,¹⁹⁶ the company was one of just fifteen manufacturers of hardboard siding in the country.

* * *

In the most recent judicial election in Jefferson County, approximately 57,000 people voted for the judge who was elected to the 60th Judicial District.¹⁹⁷ That amounts to just one-tenth of one percent of the 50.4 million people who voted for the President who was elected in the same election¹⁹⁸ and who is responsible—under the U.S. Constitution—for nominating judges to the federal bench. While the Jefferson County judge will face re-election in just four years, federal judges are protected from political pressure because they are granted tenure and salary protection under the U.S. Constitution. The question remains: which of these judiciaries should be charged with responsibility for handling large-scale, interstate class actions involving issues with significant national commercial implications?

defendants’ arguments that the Texas company was fraudulently joined. See Order of Remand, *Dunn v. Boise Cascade Corp.*, No. 1:99cv499 (E.D. Tex. filed Oct. 29, 1999).

193. See Plaintiffs’ First Amended Original Class Action Petition at 3, *Dunn* (No. A-161,090).

194. *Id.* at 2.

195. Boise Cascade Corporation, *Answers to Frequently Asked Questions*, at <http://www.bc.com/other/faqs.html#loc>.

196. Boise Cascade Corporation, *SEC Form 10-Q*, filed Aug. 11, 2000.

197. Jefferson County, Texas Clerk, *Jefferson County Election Results: 11/7/2000*, at http://co.jefferson.tx.us/cclerk/election/results_2000.htm.

198. Federal Election Commission, *2000 Official Presidential General Election Results*, at <http://www.fecweb1.gov/pubrec/2000presgeresults.htm>.

C. Palm Beach County, Florida: Class Action Filings Up By Thirty-Four Percent

Palm Beach County, the most populous of the counties included in the Manhattan Institute research, with 1.1 million people, is located in southern Florida and includes well-known resort towns such as West Palm Beach and Boca Raton, with populations of 82,103 and 74,764, respectively.¹⁹⁹ The largest private employer is Pratt & Whitney, a jet engine manufacturer, with 4700 employees.²⁰⁰ Like their counterparts in the other counties surveyed, Palm Beach County judges are elected by popular vote; their term is six years.²⁰¹

Ironically, Palm Beach County, with a population that is nearly four times that of Madison County, was the site of the same number of class actions overall (and eleven fewer nationwide class actions) as Madison County during calendar year 2000. Still, while Palm Beach County may seem relatively quiet when compared to the other counties in the survey, it has also experienced a substantial increase in class action filings (up thirty-four percent between 1998 and 2000). As noted above, the per capita rate of state court class actions was triple the rate of federal filings in 1999.

The Manhattan Institute research indicates that ninety-one purported class actions were filed in the 15th Judicial Circuit for Palm Beach County between May 1998 and December 2000, of which forty-six (fifty-one percent) were brought on behalf of putative nationwide classes. The annual breakdown is shown in Table 5.

199. See U.S. Census Bureau, *Profiles of General Demographic Characteristics: 2000 Census of Population and Housing*, at <http://factfinder.census.gov>.

200. Telephone interview by Meloni McDougal with Sharon McIntosh, Palm Beach County Chamber of Commerce, (Nov. 13, 2001).

201. FLA. CONST. art. V, § 10.

Table 5
Class Action Filings in Palm Beach County, Florida

Year	Filings	Filings on Behalf of Proposed Nationwide Class	% Increase In Total Filings From Prior Year
1998	29	20 (69%)	*
1999	23	8 (35%)	*
2000	39	18 (46%)	70%

The two key differences between the Palm Beach County suits and those from the other counties included in the study were that many of the Palm Beach lawsuits involved defendants located in Palm Beach (or at least Florida) and that a smaller percentage of the suits sought nationwide class certification. Nevertheless, approximately half of the Florida cases sought to hold defendants liable in a Palm Beach County court for practices that allegedly injured consumers not just in Florida but throughout the country. Below, we summarize some examples of the nationwide class actions brought in Palm Beach County since 1998.

Investment Services—The plaintiff in *Foster v. Cabot Money Management, Inc.*²⁰² is a Florida resident (albeit not a resident of Palm Beach County) who alleges that his investment adviser, Cabot Money Management, Inc. (a Massachusetts corporation), breached its contract with him by failing to adhere to its twenty percent stop-loss policy, under which the advisor agreed to sell any stock if its value fell more than twenty percent below the purchase price.²⁰³ Based on this one plaintiff's alleged experience, the Complaint seeks to represent a nationwide class consisting of all persons with Cabot stock accounts who "were not sold out of any stock when the market value of any one stock fell twenty percent below the person's average purchase price."²⁰⁴ According to plaintiff's counsel, Cabot has "more than 1200 clients" and "actively solicits accounts in Florida and

202. No. 98-2244 AB (Fla. Cir. Ct. Palm Beach County filed Mar. 11, 1998). The parties voluntarily dismissed the case in July 2000. See Order, *Foster* (No. 98-2244 AB).

203. Class Action Complaint at 13-14, *Foster* (No. 98-2244 AB).

204. *Id.* at 11.

throughout the United States.”²⁰⁵ The Complaint does not explain why plaintiff sued Cabot in Palm Beach County rather than his own unnamed county in Florida or in Massachusetts where the company is based.

Dietary Supplements—*Greenfield v. Rexall Sundown, Inc.*²⁰⁶ involves allegations that the defendant, a health products company located in Palm Beach County, engaged in deceptive trade practices in connection with the marketing of a “dietary supplement” called Cellasene that the company allegedly claimed would eliminate cellulite.²⁰⁷ According to the Amended Complaint, “Rexall has generated over \$60 million in Cellasene sales with an annual projection of \$300 million in sales.”²⁰⁸ Rexall’s own advertisements purport that “hundreds of thousands of women across the country are now enjoying the benefits of Cellasene.”²⁰⁹ The case was originally brought by one Palm Beach County resident on behalf of all consumers throughout the United States who have purchased the product. It was later expanded twice, and in March 2001, plaintiffs filed a “Consolidated Complaint,” signed by ten law firms (none of which lists a Palm Beach County address and only one of which is located in Florida).²¹⁰ The Consolidated Complaint drops the sole Palm Beach County resident and lists several new plaintiffs. All told, there are now six named plaintiffs in the case, none of whom is a resident of Palm Beach County and four of whom live outside Florida.²¹¹

Although the named plaintiffs hail from South Carolina, New Jersey, and Pennsylvania, and the Consolidated Complaint alleges that Rexall has sold this product all over the country, plaintiffs’ counsel are bringing this nationwide class action exclusively under Florida’s deceptive trade practices law. “Since all of Rexall’s sales of Cellasene as well as the Company’s marketing of it have their origin in Florida, where Rexall is domiciled,” the Consolidated Complaint posits, “the

205. *Id.* at 2, 12.

206. No. 00-7021 AF (Fla. Cir. Ct. Palm Beach County filed July 20, 2000).

207. Amended Complaint at 1, *Greenfield* (00-7021 AF).

208. *Id.* at 1, 14.

209. Complaint for Injunction and Other Equitable Relief at Exhibit E, *FTC v. Rexall Sundown, Inc.*, No. 00-7016-Civ-Ferguson (S.D. Fla. filed July 19, 2000).

210. After the Palm Beach County plaintiff was dropped, the case was renamed *LaRaia v. Rexall Sundown, Inc.* (Fla. Cir. Ct. Palm Beach County filed Mar. 21, 2001).

211. Consolidated Complaint at 2-5, *LaRaia* (No. 00-7021 AF).

[Florida Deceptive and Unfair Trade Practices Act] is applicable to all members of the Class, including those residing outside Florida."²¹²

Once again in this case, a locally elected court is being asked to issue a ruling under one state's laws on a serious issue—appropriate marketing of health supplements—that could affect millions of consumers throughout the country and effectively impose new standards on health products companies that offer dietary supplements. Moreover, plaintiffs' counsel seek to certify this case even though they themselves allege that the practices they are challenging are under investigation both by the Federal Trade Commission and the Florida state attorney general's office.²¹³ The FTC filed a lawsuit in U.S. District Court in Florida alleging that the company made false and unsubstantiated claims regarding the effectiveness of Cellasene in cellulite reduction.²¹⁴ That case is currently pending in the U.S. District Court for the Southern District of Florida.

Health Insurance—*Beer v. United HealthCare, Inc.*²¹⁵ is one of several lawsuits that have been brought in recent years against health insurers on behalf of patients and doctors, alleging that these companies engage in numerous cost-cutting practices that amount to breach of contract, including denying claims on the ground that various procedures prescribed by doctors are not "medical[ly] necess[ary]."²¹⁶ The Complaint seeks to certify two classes: one on behalf of healthcare providers who have contracts with United ("Provider Class") and another on behalf

212. *Id.* at 10.

213. The researchers also discovered another class action pending against Rexall in Palm Beach County. It was brought on behalf of all holders of Rexall common stock, and it alleges that Rexall breached its fiduciary duty to shareholders by agreeing to unfavorable merger terms. Captioned *Peccatiello v. Desantis* (No. CL 00-4284 AO (Fla. Cir. Ct. Palm Beach County filed May 1, 2000)), the case seeks to recover on behalf of a nationwide class.

214. *FTC v. Rexall Sundown, Inc.*, No. 00-7016-Civ-Ferguson (S.D. Fla. filed July 19, 2000).

215. No. 00-2023 AO (Fla. Cir. Ct. Palm Beach County filed Feb. 28, 2000). Defendants removed the case to the U.S. District Court for the Middle District of Florida on the ground that the plaintiffs' claims were preempted by ERISA and that the case therefore raised a "federal question." The district court remanded the case, however, finding that ERISA preemption did not apply because the named plaintiff would not have standing to sue the defendant under federal law. *See Order Remanding Action to State Court, Beer v. United Health Group, Inc.*, No. 00-8550-CIV-GOLD (S.D. Fla. filed Sept. 21, 2000).

216. Complaint at 6, *Beer* (No. 00-2023 AO).

of consumers who are insured by United (“Subscriber Class”). According to plaintiffs’ counsel, there are more than “320,000 physicians and 3500 hospitals” that qualify for membership in the proposed Provider Class, and “millions” of members in the proposed Subscriber Class.²¹⁷ Clearly, the overwhelming majority of these millions of proposed class members have virtually no relationship with Palm Beach County.

United is a Delaware corporation with its principal place of business in Minnesota²¹⁸ that “operates in all fifty states, the District of Columbia, Puerto Rico and internationally.”²¹⁹ The Complaint alleges that “United’s products and services . . . are provided to more than nine million persons.”²²⁰ Plaintiffs’ counsel further allege that United holds “a majority ownership interest in health plans operating in approximately 40 markets nationwide and in Puerto Rico” and quote United’s CEO, stating that the company serves “nine million individuals.”²²¹ Independent research confirms that United has approximately 8.6 million members in the United States,²²² including 107,000 (1.2%) in Palm Beach County.²²³

While United does have a wholly owned subsidiary in Florida, which is also named as a defendant (almost certainly in order to ensure that the case cannot be removed to federal court), that company operates out of Orlando, Florida—and not Palm Beach County.²²⁴ Moreover, that in-state defendant apparently had no contract or contractual relationship with the millions of consumers outside Florida who subscribe to United’s health plans, and while plaintiffs define their class to include all providers and subscribers who have entered into contracts “with a subsidiary of United to provide health coverage,”²²⁵ the only subsidiary they sue is the one whose citizenship aids their efforts to remain in state court.

217. *See id.* at 8.

218. *Id.* at 4.

219. *Id.*

220. *Id.*

221. *Id.* at 5.

222. United Healthcare, *About UnitedHealthcare: Business Description*, at <http://www.unitedhealthcare.com/about/index.html#description>.

223. Phil Galewitz, *HMO Agrees to \$65,000 Payment*, PALM BEACH POST, Dec. 28, 2000, at 1D.

224. Complaint at 4, *Beer* (No. 00-2023 AO).

225. *Id.* at 6.

Despite the fact that plaintiffs' counsel seek to represent subscribers and providers all over the country, they give short shrift to any discussion of how various state laws would apply to their claims or prohibit the alleged conduct. For example, the Complaint simply alleges that "defendants have uniformly breached or caused the breach of the Florida Administrative Code, Chapter 627 and other similar statutes enacted by other states" and that plaintiffs have "a claim sounding in common law for money had and received, now recognized by Florida case law as an action for restitution to prevent unjust enrichment, as well as in other states wherein United and/or its subsidiaries do business."²²⁶

Claims Processing—In *Kantor v. Vivra Specialty Partners, Inc.*,²²⁷ three medical professionals (two of whom are residents of Palm Beach County) are suing Vivra Specialty Partners ("VSP"), a claims processor incorporated in Nevada and based in California for breach of contract. The Complaint seeks to certify a nationwide class consisting of all medical professionals who are parties to health insurance contracts under which VSP is responsible for payment of fees, and who submitted claims that were either paid late or not paid at all.²²⁸ According to the Complaint, VSP is under contract to provide claims processing to "a substantial number of the country's largest HMOs and other insurers . . . including without limitation Health Options, MetraHealth, United Health Care, Blue Cross/Blue Shield, PCA Health Plans, and others."²²⁹ Other than alleging that "VSP does substantial business within the state of Florida and particularly within Palm Beach County,"²³⁰ plaintiffs do not explain why they have chosen a Palm Beach County court as a venue for their nationwide claims.

Viatical Settlements—Five of the Palm Beach County class actions involve allegations of deception with regard to the marketing of "viatical settlements," investment contracts in which the investor buys an interest in the life insurance policy

226. *Id.* at 13, 18.

227. No. 98-009402 (Fla. Cir. Ct. Palm Beach County filed Oct. 22, 1998).

228. Complaint at 4, *Kantor* (No. 98-009402).

229. *Id.* at 3.

230. *Id.* at 2.

of a terminally ill person, typically an AIDS patient.²³¹ Plaintiffs in the five nearly identical lawsuits, all brought by the same group of lawyers, allege that the defendants (only one of which is headquartered in Palm Beach County) brokered or sold viatical settlements and that the companies misled them by concealing the fact that new AIDS treatments are substantially extending the life expectancies of AIDS patients. The complaints thus seek damages or rescission of the contracts "on behalf of all persons and entities who purchased viatical settlements from Defendants between July 1995 through the date of certification of the class."²³²

One of the law firms listed as counsel for plaintiffs in *Thum*, in *Schwartz*, and in *Chancellor*—Investors' Law Center in Palm Beach, Florida—is also listed as a plaintiff in *Schachter* because it allegedly invested in viatical settlements itself in 1996.²³³ According to the firm's website, Investors' Law Center is a class action plaintiffs' firm that specializes in bringing class action lawsuits on behalf of investors. It is unclear whether the firm purchased a viatical settlement as a financial or a litigation investment.

While the Chancellor Complaint does not provide an estimate for the size of the proposed class,²³⁴ the nearly identical *Schachter* Complaint alleges that there are more than 1000 putative class members who purchased viatical settlements through the named defendant in that case—Mutual Benefits Corporation—and that these individuals reside throughout the United States.²³⁵ Similarly, Mutual Benefits' website states that the company has "worked closely with more than 18,500 satisfied purchasers of policies and more than

231. *Schachter v. Mut. Benefits Corp.*, No. 98-4490 AI (Fla. Cir. Ct. Palm Beach County filed July 28, 1998); *Thum v. Accelerated Benefits Corp.*, No. 98-9389 AN (Fla. Cir. Ct. Palm Beach County filed Oct. 21, 1998); *Schwartz v. Dedicated Res., Inc.*, No. 98-9393 AD (Fla. Cir. Ct. Palm Beach County filed Oct. 21, 1998); *Chancellor v. Future First Fin. Group, Inc.*, No. 99-4429 AE (Fla. Cir. Ct. Palm Beach County filed May 6, 1999); *Brackman v. Dedicated Res., Inc.*, No. 99-9361 (Fla. Cir. Ct. Palm Beach County filed Sept. 30, 1999).

232. Complaint at 4, *Chancellor* (No. 99-4429 AE).

233. Complaint at 3, *Schachter* (No. 98-4490 AI).

234. Complaint at 4, *Chancellor* (No. 99-4429 AE).

235. Complaint at 5, *Schachter* (No. 98-4490 AI). Similarly, according to the *Brackman* Motion for Class Certification, "members of the [c]lass are geographically diverse, residing all over the nation." Motion for Class Certification at 5, *Brackman* (No. 99-9361).

11,000 viators throughout the United States."²³⁶ Notably, although plaintiffs' counsel in these cases are suing nationwide businesses "on behalf of all persons and entities" who purchased the investments at issue, they seek to resolve all the claims of this proposed nationwide class under two Florida-specific statutes which prohibit: (1) untrue statements and omissions in connection with offer or sale of investment; and (2) misleading advertisements.²³⁷

*Bad Trades—Handler v. Florida Marlins Baseball, Ltd.*²³⁸ seeks reimbursement on behalf of all Florida Marlins' season ticket-holders on the ground that the team owner reneged on his promise that he would field a "World Class baseball team." This case was brought by a Palm Beach County attorney who purchased season tickets to the Florida Marlins and was apparently disgusted by the team's performance and by certain management decisions to trade key players and reduce the team's payroll. In class actions, attorneys often file cases listing themselves as the plaintiffs until they can find "real" plaintiffs to substitute. That is apparently what happened in this matter. Less than a month after filing the original complaint, the plaintiff/lawyer found two other plaintiffs, who were also Marlins season ticket-holders, and substituted them for himself.²³⁹

According to the Amended Complaint, the proposed class consists of "all persons who purchased" season tickets to see the Marlins play at home in 1998.²⁴⁰ The Complaint alleges that there are approximately "ten thousand (10,000) members" in the proposed class "who live throughout South Florida and . . . elsewhere."²⁴¹ While this case clearly has a Florida connection, the relation to Palm Beach County is attenuated since the team is headquartered in Dade County and plays its games in Miami. Once again, the question remains: why would a lawyer choose Palm Beach County as the venue to sue a defendant

236. Mutual Benefits Corp., *Corporate Profile*, at <http://mutualbenefitscorp.com/company.html>.

237. Complaint at 10-11, *Schachter* (No. 98-4490 AI).

238. No. 98-4460 AO (Fla. Cir. Ct. Palm Beach County filed May 18, 1998).

239. See Amended Complaint and Demand for Jury Trial, *Wolfe & Irizarry v. Florida Marlins Baseball, Ltd.*, No. 98-4460 AO (Fla. Cir. Ct. Palm Beach County filed June 25, 1998).

240. Amended Complaint at 5, *Wolfe & Irizarry* (No. 98-4460 AO).

241. *Id.*

located elsewhere—especially in this case, when the defendant resides in a county that is just a few miles down the road?

Check Cashing Policies—*Elliott v. First Union National Bank*²⁴² challenges certain procedures instituted by First Union—the nation's sixth largest bank—for processing checks when a customer's account contains insufficient funds. Plaintiff alleges that First Union acted improperly under both Florida law and federal law²⁴³ by paying checks when plaintiff's account was overdrawn and then assessing substantial overdraft fees when her account was replenished. Based on these allegations, the Complaint seeks to certify a class consisting of "all persons . . . who presently maintain or have maintained in the past a First Union checking account and who have been improperly assessed overdraft . . . charges or similar fees" because First Union allegedly did not follow its published check posting procedures.²⁴⁴

Plaintiff's counsel in this matter seek to certify both a multi-state class and a Florida subclass.²⁴⁵ According to the Complaint, the proposed multi-state class members "are geographically dispersed throughout the United States and within the State of Florida."²⁴⁶ Indeed, as the Complaint readily admits, First Union operates in "12 states and Washington, DC [sic]" and "serves a customer base of more than 12 million."²⁴⁷ While the Complaint attempts to draw some connection between the controversy and the State of Florida by alleging that First Union has more than "500 banking branches" in Florida and controls more than "17% of the retail banking market in Florida,"²⁴⁸ the Complaint offers no real explanation as to why this case was brought in Palm Beach County. The one named plaintiff does not reside there, nor does the complaint allege that she banked at a Palm Beach branch. Rather in seeking to explain why venue is proper, the Complaint simply

242. No. 98-5853 AJ (Fla. Cir. Ct. Palm Beach County filed July 1, 1998).

243. First Union might have been able to remove this case to federal court because it alleges a violation of federal law. It is unclear from the docket whether it attempted to do so, or if not, why it chose to defend the case in state court. A federal docket search did not yield any references to this case.

244. Amended Complaint at 3, *Elliot* (No. 98-5853 AJ).

245. *Id.*

246. *Id.*

247. *Id.* at 2.

248. *Id.*

alleges that “plaintiff resides in Florida, and First Union transacts business in Palm Beach County and maintains numerous places of business in Palm Beach County.”²⁴⁹ In fact, while First Union has fifty-one branches in Palm Beach County, the vast majority of its branches (97.6%) are located in other states or other Florida counties. Nonetheless, plaintiff’s counsel seeks not only to bring this multi-state matter in Florida but also to recover on behalf of all putative class members—including those who live outside Florida—under Florida’s banking statute.²⁵⁰ According to the Complaint, First Union has “been unjustly enriched” by virtue of its violation of the Florida law and should compensate all proposed class members for that violation.²⁵¹

Despite the lack of any obvious connection between the overdraft dispute and Palm Beach County, plaintiff is asking a Palm Beach County court to issue a ruling under Florida law that would condemn First Union’s practices not just in Florida but in all of the states in which the bank conducts business. Moreover, a ruling by a Palm Beach County court regarding the legality of overdraft fees would inevitably lead to a host of “copy cat” class actions against other banks with similar policies—much like the OEM parts cases in Illinois. Thus, plaintiff is essentially asking a local judge in Palm Beach County to set national policy regarding when banks can and cannot process checks and charge overdraft fees.

Employee Investment Plan—Two of the class actions filed in Palm Beach County involved challenges to employee investment plans run by Travelers Group, Inc., and Smith Barney, Inc., both of which are now subsidiaries of Citigroup. The first, *Josephs v. Smith Barney, Inc.*,²⁵² was brought by two former employees of Smith Barney, Inc., who worked in the investment company’s Broward County, Florida office and allegedly were forced to forfeit their earnings in the company’s Capital Accumulation Plan (“CAP”), described by plaintiffs as a mandatory investment program.²⁵³ The two named plaintiffs,

249. *Id.*

250. *Id.* at 13-14.

251. *Id.* at 14.

252. No. CL 00-4170 AN (Fla. Cir. Ct. Palm Beach County filed Apr. 27, 2000).

253. The other case is *Berman v. Travelers Group, Inc.*, No. CL-00-2334A0 (Fla. Cir. Ct. Palm Beach County filed Mar. 7, 2000).

who do not allege any connection to Palm Beach County, seek to certify a nationwide class of all current or former employees of Smith Barney and Salomon Bros. (now Salomon Smith Barney) whose income was partially withheld under the CAP program.²⁵⁴ This case is another example of the "copy cat" phenomenon; at the time the case was brought, a virtually identical class action was already pending in the United States District Court for the Middle District of Florida.²⁵⁵

In seeking to justify their odd choice of a forum, plaintiffs' counsel allege that Salomon Smith Barney has forty Florida branches, three of which are located in Palm Beach County.²⁵⁶ On that basis alone, the Complaint alleges that "Palm Beach County is the most appropriate forum for this action."²⁵⁷ This conclusion is not supported by other allegations in the Complaint, indicating that the challenged practice has occurred throughout the United States and has no particular relationship to Florida or Palm Beach County. For example, the Complaint alleges that Smith Barney "has done business through approximately 450 offices in the United States and . . . has employed approximately 28,000 individuals."²⁵⁸ The Complaint also alleges that Salomon Smith Barney has 35,000 employees,²⁵⁹ and that there are currently "37 to 40 million shares of the Company stock owned by employees [that] are subject to forfeiture under CAP."²⁶⁰

* * *

Significant sectors of the United States economy are on trial in Madison, Jefferson, and Palm Beach Counties, including long-distance carriers, gasoline producers, insurance companies, computer manufacturers, and pharmaceutical developers. As a result, the locally elected judges in these county courts are being asked to set national policies in areas as diverse as the scope of warranties, land use rights and environmental protection, the propriety of advertising campaigns, bank billing practices, the legality of employee

254. Complaint at 1, *Josephs* (No. CL-00-4170 AN).

255. See Defendants' Motion to Stay, *Josephs* (No. CL-00-4170 AN).

256. Complaint at 4, *Josephs* (No. CL-00-4170 AN).

257. *Id.* at 10.

258. *Id.* at 2.

259. *Id.* at 3.

260. *Id.* at 13.

investment plans, automobile insurance practices, viatical settlements, and numerous other broad-ranging issues for forty-nine other states—and 3065 counties—in addition to their own. While some of the class actions pending in these jurisdictions may seem trivial (e.g., Blockbuster late fees, the price of Barbie dolls), these cases (particularly if they are decided incorrectly) can have a dramatic impact on commerce by limiting how companies can market and charge for their products. Other class actions turned up in the research could have broad ramifications in a host of industries including cosmetic surgery, automobile insurance, and computers. If a judge in Madison County orders automobile insurance companies to provide only manufacturer parts, to provide broader coverage on all medical claims, and to pay consumers more when their cars are totaled (three issues that are the subject of multiple class actions included in the survey), the price of car insurance could skyrocket and result in more Americans taking the risks of driving uninsured. The question is simple. Who should be charged with responsibility for handling such large-scale, interstate class actions involving issues with significant national commerce implications: federal judges who are selected by the President and confirmed by the U.S. Senate or state court judges who are elected by a few thousand votes in a rural county election? As the Senate Judiciary Committee has noted, “[c]learly, a system that allows State court judges to dictate national policy from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism.”²⁶¹

VI. CONCLUSION

By assembling another substantial body of data confirming that certain state courts have become “magnets” for multi-state and nationwide class actions, the Manhattan Institute research further demonstrates the need for federal legislation to address current anomalies in the federal diversity jurisdiction statute. These anomalies have resulted in a system under which federal courts have jurisdiction over “slip-and-fall” cases in which a plaintiff steps over state lines, injures his back and seeks \$75,000 in lost wages and chiropractic fees; at the same time,

261. *Senate Report, supra* note 5, at 20.

however, federal courts are barred from adjudicating most of the multi-state class actions identified in the Manhattan Institute research—controversies that involve widespread commercial practices in insurance, banking, computing and other industries that affect millions of Americans and could have substantial reverberations on the nation's economy. Many of these interstate class actions are being heard by locally elected county judges, who typically have only scant resources to devote to such complex cases, who are often viewed by plaintiffs' lawyers as willing to "rubber stamp" class certification orders and "coupon" settlements, and who are periodically forced to turn to the local bar to fund their efforts at re-election.

Congress is currently considering legislation that would rectify these unintended consequences of federal jurisdictional law by expanding diversity jurisdiction to include more interstate class actions. Such legislation would meet several important objectives. First, it would fulfill a major intention of the Framers in establishing diversity jurisdiction: ensuring that large cases that directly touch large numbers of citizens in more than one state and that have broad ramifications for interstate commerce can be adjudicated in federal courts. Second, it would eliminate concerns that local prejudices are stacking the deck against out-of-state defendants in many local courts that have become class action "magnets." Third, it would increase judicial efficiency by enabling federal courts to coordinate a greater percentage of duplicative class actions through multidistrict litigation procedures. Fourth, it 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. And finally, it would provide access to a forum that by its very design has more resources and is less susceptible to political pressures than local county courts. Such a law would ensure that when attorneys seek to make a "federal" case out of a client's personal disputes with a defendant by bringing a class action on behalf of millions of people living in all fifty states, the parties will have access to a federal court that can provide the constitutional safeguards that the Framers considered necessary for the fair and efficient adjudication of such interstate commercial disputes.

APPENDIX A

STATISTICAL TABLES

Table A-1

Populations Of Counties Surveyed, With Comparisons To
Other Counties With Large Class Action Dockets

County	Population of County	% of National Population
Palm Beach, FL	1,131,184	0.40%
Madison, IL	258,941	0.09%
Jefferson, TX	252,051	0.09%
Los Angeles, CA	9,519,338	3.4%
Cook County, CA	5,376,741	1.9%

Table A-2

Retail Sales by County, with Comparisons to State and
National Values

County	Retail Sales, 1997 (in \$1000)	% of State Retail Sales	% of National Retail Sales
Palm Beach, FL	11,731,186	7.8%	0.48%
Madison, IL	2,057,045	1.9%	0.08%
Jefferson, TX	2,570,929	1.4%	0.10%

Table A-3

Manufacturing Shipments by County, with Comparisons to
State and National Values

County	Mfg. Shipments, 1997 (in \$1000)	% of State Mfg. Shipments	% of National Mfg. Shipments
Palm Beach, FL	6,344,506	8.2%	0.17%
Madison, IL	7,676,517	3.8%	0.20%
Jefferson, TX	15,920,187	5.3%	0.41%

Table A-4
Per Capita Class Action Rate Of Counties Surveyed

County	Per Capita Class Action Rate For 2000 (Per Million)	Projected Number Of Total US Class Actions At Per Capita Rate
Palm Beach, FL	35.4	9,951
Madison, IL	150.6	42,386
Jefferson, TX	78.4	22,331

Table A-5
Appearances By Plaintiffs' Counsel

County	Total Appearances	Firms Appearing	% of Appearances Attributable to Top Five Firms	Firms Appearing Only Once
Palm Beach, FL	181	115	26.5%	96
Madison, IL	222	67	45.5%	40
Jefferson, TX	75	45	32%	30

