Commentary

There Will Be No Exodus:

An Empirical Study Of S. 2062's Effects On Class Actions

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Congress is currently considering legislation — the Class Action Fairness Act of 2004 (S. 2062) — that would expand federal jurisdiction over class actions and implement a number of provisions intended to protect consumer interests in class actions. According to the legislative history, the jurisdictional provisions in the bill have a two-fold purpose.[1] First, they would curb class action abuse by allowing more class actions to be heard in federal courts, which are believed to be much less prone to certify improper classes or approve abusive settlements than state court judges in certain "magnet" jurisdictions.[2] Second, the provisions would ensure that the federal diversity jurisdiction statute comports with the intent of the Framers of the U.S. Constitution, who believed that defendants in interstate commercial cases should have access to federal courts, where there is a lesser chance of local bias.[3] (The bill also includes several provisions intended to protect consumer interests in federal court class actions.)

To achieve these goals, the bill would grant federal courts jurisdiction over class actions in which: (1) there are more than 100 class members; (2) at least one class member is a resident of a different state from one defendant; and (3) the class members seek, in the aggregate, at least $5 million.[4] The bill also includes several exceptions intended to ensure that smaller, more localized class actions remain in state court. Most notably, the bill would leave in state court: (1) shareholder class actions alleging state-law breaches of fiduciary duty; (2) any class action suits in which a state government entity is a primary defendant; and (3) any class actions brought against a defendant in its home state, in which two-thirds or more of the class members are also residents of that state.[5] Finally, the most recent version of the bill includes a "local controversy exception," which would ensure that controversies involving at least one local defendant, local conduct and local injuries would remain in state court.[6]

Despite these exceptions, some critics of the bill have argued that the legislation would shift ***all*** class actions to federal court, depriving state courts of the ability to hear these cases at all, and at the same time, flooding the federal courts with more cases than they can handle.

In an effort to assess the validity of these criticisms, we recently conducted a study in which we examined all class actions for which there were reported decisions on the Lexis or Westlaw legal databases between Jan. 1, 1997 and June 30, 2003, in the state courts of Connecticut, Delaware, Maine, Massachusetts, New York and Rhode Island. The study focused on the state courts of these jurisdictions because they are among the very few for which a substantial body of trial court decisions is available on-line.[7] (For the vast majority of states, the only legal decisions available on-line are those issued by appellate courts.) The survey also reviewed class action complaints filed between 1998 and 2001 in Madison County, Illinois, reputedly a "magnet" court for class actions, to see how cases filed there would be affected by the bill.[8] Because the survey was conducted before the local controversy exception was added to the bill, it did not consider whether any cases would remain in state court under that additional provision of S. 2062. Thus, it is fair to assume that the survey results are conservative and that even more of the cases would have remained in state court under the version of the legislation currently being considered in the U.S. Senate.

The survey data indicate that the Class Action Fairness Act would not sweep all class actions into federal court. Rather, the data suggest that the bill is a targeted solution that potentially will result in moving to federal court a substantial percentage of the nationwide or multi-state class actions filed in class action "mill" jurisdictions (like Madison County, Illinois), while allowing state courts everywhere to litigate truly local class actions (the kinds of class actions typically filed in state courts that do not

endeavor to become "magnet" courts for class actions with little or no relationship to the forum).

Most notably, in each of the six states surveyed, more than half of the class actions for which decisions were available on-line would not be removable under the bill. These included a substantial percentage of class actions that were local in nature and had a clear nexus to the state where they were brought, such as class actions against local businesses and class actions against state governmental entities, as well as suits that clearly involved less than $5 million.[9] The identified cases that could be removed to federal court under the Class Action Fairness Act typically involved multi-state or nationwide classes that would require the court to interpret the laws of many states, the kind of case that should be heard by a federal court to avoid having one local state court impose its views of the law on many other jurisdictions. In addition, a substantial number of the cases that would have been removable to federal court if the Class Action Fairness Act were law involved single state or nationwide class actions against out-of-state defendants that were duplicative of litigation filed throughout the country — *i.e.*, "copy-cat" cases that could be handled far more efficiently under federal court consolidation procedures.

Although the survey does not purport to have located all class actions filed in the state courts examined, it presumably captured a substantial percentage — all cases that generated a significant written opinion by a state trial court. The numbers of cases identified by the study suggest that the predictions that the Class Action Fairness Act would cause an overloading of federal courts nationwide are greatly exaggerated.

The following is a state-by-state summary of the survey's results, followed by a summary of the results of the Madison County research:

Connecticut

The survey found 39 class action decisions by Connecticut courts during the relevant time period. Of those class actions, 61 percent (24/39) would not be removable to federal court under the bill. These cases involved a large number of in-state commercial disputes (such as a class action by condominium owners regarding allegedly improper charges[10]) and a number of cases against state and local government officials (such as a suit by state lottery ticket purchasers who thought they held winning tickets due to a misprint[11]).

Notably, the majority of Connecticut cases that would be affected by the bill (9 out of 15) involved multi-state or nationwide class actions that would require a judge to interpret multiple states' laws, precisely the type of case that the Class Action Fairness Act is intended to target and that deserves federal treatment. For example, in *McNerney v. Carvel*,[12] a purported nationwide class of former ice-cream franchisees alleged that Carvel did not supply the promised amount of ingredients and misused mandatory advertising contributions. The governing franchise agreements provided that New York law must govern; thus, had the Connecticut court granted certification, it would have been interpreting New York law, not its own Connecticut law. Indeed, the Connecticut court itself concluded that because of the size and complexity of the litigation, "'the claims could be adjudicated more efficiently and effectively in another forum.'"[13]

Delaware

In Delaware, the survey identified 122 class action decisions during the relevant time period. Not surprisingly, nearly all of these class actions (103) involved shareholder/fiduciary duty cases — cases that the pending legislation would explicitly leave in state court under the so-called Delaware exception. Thus, a very high percentage of Delaware cases — 91 percent — would not be removable if the Class Action Fairness Act becomes law.

However, even limiting the Delaware survey to the 19 non-shareholder class actions, nearly half (9 out of 19 class actions) would have stayed in state court. These cases involved suits against state and local officials and businesses, including a suit alleging violations of a town charter,[14] a class action by condominium owners regarding faulty renovations[15] and a suit against the state government regarding sewer systems.[16] Moreover, eight of the ten Delaware class actions that would have been removable under the bill were brought on behalf of nationwide classes, the very type of case that the bill intends to target. The following are a few examples of Delaware class actions that would be litigated in federal court under the Class Action Fairness Act:

- *Westendorf v. Gateway 2000, Inc.*[17] — This proposed class action was filed against a company with its headquarters in California (and doing substantial business nationally) on behalf of all persons in the United States who purchased Gateway's Internet access service, claiming that the class members did not receive the service for which they had paid.

- *Rinaldi v. Iomega Corporation*[18] — This class action was filed on behalf of a nationwide class alleging that the zip drives manufactured by the defendant had damaged plaintiffs' computer storage disks. Plaintiffs' claims included breach of the implied warranty of merchantability, negligence, consumer fraud, and negligent failure to warn. When this class action settled, the plaintiffs' attorneys received ***$4.7 million*** in fees, while the estimated 28 million purchasers of an Iomega Zip drive between 1995 and March 19, 2001, received coupons for a rebate of between ***$5 and $40*** on future purchases of Iomega products. Thus, this is an example of a state court class action where the class members might have achieved better results if the case had been removable to federal court.

Maine

The data suggest that Maine is not a hotbed of class action activity. The survey turned up just 19 class action decisions during the relevant time period, and again the majority involved local disputes that would be unaffected by the pending legislation. Specifically, 11 of the 19 identified class actions in Maine (58 percent) would not have been removable to federal court under the bill. These 11 cases involved intra-state commercial disputes (including a suit against local retailer L.L. Bean regarding sales tax[19] and a class action suit by employees of Bath Iron Works[20]), as well as a lawsuit against an out-of-state photography studio that would remain in state court under the proposed legislation because it clearly involved less than $5 million.[21]

Again, the cases that would be removable say as much about the bill as those that would not. The removable Maine cases included both nationwide and copy-cat class actions, such as the following:

- *Mazerolle v. Daimler Chrysler Corp.*[22] — This case was brought on behalf of a nationwide class seeking a judicial recall of certain 1994-2001 Chrysler minivans. The suit was brought under the warranty laws and deceptive practices acts of numerous states, and defendants argued that the federal Motor Vehicle Safety Act preempted the class claims. Thus, this case involved potential class members from all over the country, raised legal issues under every state's laws and arguably involved federal law as well. This is precisely the type of case that our Framers intended to have litigated in federal court when they created the concept of diversity jurisdiction.

- *Millett v. Atlantic Richfield Co.*[23] — In this statewide case, plaintiffs alleged that their wells had been contaminated with MTBE, a gasoline additive. This suit overlaps with numerous other class actions that have been filed against gasoline refiners across the country alleging potential MTBE dangers. The cases that were filed in or removed to federal court were transferred into a multidistrict litigation proceeding in the Southern District of New York, so that a single federal judge could coordinate all of the cases. Had this case been removable, it could have been included in that proceeding, resulting in considerable efficiencies for both the courts and the parties.

Massachusetts

In Massachusetts, the survey identified 49 class action decisions; once again, a substantial majority of these cases, 61 percent, would not have been affected by the bill. These suits included: a suit by apartment tenants against the Massachusetts Institute of Technology,[24] a suit by residents of Pittsfield alleging that the city's water contained a parasite,[25] and a suit by transportation authority employees alleging that their employer's practice of tape recording their phone conversations violated Massachusetts law.[26]

As with other states surveyed, most of the cases that would be affected by the bill (10 of 19) involved nationwide classes and several involved "copy-cat" class actions that would be perfect candidates for consolidation if they could be removed to federal court. Examples of Massachusetts cases that would have been removable under the Class Action Fairness Act include:

- *Aspinal v. Philip Morris Cos.*[27] — This statewide class action was brought on behalf of all purchasers of Marlboro Lights cigarettes in Massachusetts, alleging that the class was misled by false packaging and advertising suggesting that light cigarettes had lower tar and nicotine levels. This litigation is duplicative of numerous lawsuits being filed around the country, and the court specifically noted conflicting results in similar lawsuits in three other jurisdictions. Once again, such lawsuits could be litigated more efficiently in the federal courts, where the cases could be coordinated before a single judge.

- *Ciardi v. F. Hoffman-La Roche, Ltd.*[28] — This case was brought on behalf of a class of Massachu-

setts purchasers of vitamins alleged price-fixing and other anti-competitive conduct by several vitamin manufacturers. The court specifically noted that this case was "one small part of nationwide litigation against defendants," including suits in 23 other jurisdictions.[29] Once again, these lawsuits could have been litigated more efficiently in the federal court system, where the various cases could have been coordinated through the multidistrict litigation process.

New York

Since New York was the most heavily populated state surveyed, it is not surprising that the survey found the largest number of class actions — 155 — in that state. But though New York had many more class actions, the findings in New York were remarkably consistent with the findings in the other six states. Most notably, 63 percent of the New York class actions located in the study (98/155) would not have been affected by the Class Action Fairness Act's jurisdictional provisions. The New York cases that would remain in state court under the bill included a substantial number of suits against state government officials (21), as well as suits against local government and intra-state commercial disputes brought by consumers and employees against New York companies. Examples of New York cases that would remain in state courts include: a suit against a cemetery alleging failure to maintain certain plots,[30] a class action against a medical practice for allegedly misrepresenting the success rates of certain fertility treatments,[31] and a suit against a developer by local businesses who were forced to close for a day due to the collapse of a section of an office building wall.[32]

Once again, a substantial majority of cases that would be removable to federal court under the bill (40/57) involved nationwide class actions. For example:

- *Hazelhurst v. Brita Products. Co.*[33] — This nationwide class action was brought on behalf of all purchasers of Brita water filters against the German manufacturer and Clorox, a California corporation that owns the U.S. rights to distribute Brita products. The action alleged misrepresentations — that Brita filters do not last as long as their promotional material suggests. In decertifying the class, the court of appeals applied New York law and found that it would have had to conduct individualized inquiries to determine which potential class members were actually injured by the alleged misrepresentations. The court did not address how it would have dealt with non-New York claims, which would have implicated the laws of other states.

- *Lacoff v. Buena Vista Publishing*[34] — This nationwide class action was brought on behalf of all purchasers of *The Beardstown Ladies' Common-Sense Investment Guide*, alleging that the book falsely reported the Beardstown Ladies' annual return on their investments. Once again, a court assessing these claims would have to consider what law should apply to individuals who purchased the book in various states around the country.

- *Gordon v. Ford Motor Company*[35] — This suit was brought on behalf of a nationwide class of Lincoln Continental owners alleging breach of warranty. Notably, the court found that a class could not be certified because the case involved as many as 60,000 persons whose claims would vary based on circumstance and because legal issues would vary among class members from different states. Though the New York court rejected certification of this case, finding that it did not meet the requirements for adjudicating claims together, the result likely would have been different in a "magnet" state court where class certification is rarely denied. Decisions like this also explain why so many more large commercial class actions are brought in Madison County, Illinois each year than in New York, the commercial capital of this country.

Rhode Island

Rhode Island, like Maine, does not appear to be a popular class action venue. The survey found just 12 reported class action decisions for the period surveyed. Once again, most involved local cases that would remain in state court under the proposed legislation; specifically, in Rhode Island, 7 of 12 reported class actions (58 percent) would not have been removable under the bill. These suits included: a class action by landowners against a local municipality regarding a water connection fee[36] and a suit by apartment residents who alleged that their vehicles were improperly towed during snow storms.[37]

Notably, ***all*** of the five Rhode Island cases identified in the survey that would be removable under the bill involved multi-state or nationwide class actions against out-of-state corporations. For ex-

ample, *Zarrella v. Minnesota Mutual Life Insurance Co.*[38] was brought on behalf of a nationwide class of owners of a certain adjustable life policy issued by Minnesota Mutual Life Insurance Company. The court pointed out that Rhode Island choice of law doctrine might have led to the state court having to apply varying statutes of limitations and burdens of proof from across the fifty states. Similarly, *Kennedy v. Acura and American Honda Motor Co.*[39] was a nationwide class action brought on behalf of vehicle owners who alleged transmission problems with their cars. Since plaintiffs alleged violations of consumer protection law, this case would also have involved application of numerous states' laws.

Madison County, Illinois

In addition to the six states discussed above, the survey also considered the likely effect of the Class Action Fairness Act on Madison County, Illinois, perhaps the best known of the "magnet" state courts — *i.e.*, courts that attract disproportionate numbers of interstate class actions that often have little or no relationship to the jurisdiction where they are brought.

Notably, the results for Madison County were a mirror image of the results for the six states. In contrast to the states, where most class actions would stay in state court if the pending legislation becomes law, the opposite is true in Madison County. Specifically, ***of the 113 class actions brought in Madison County between 1998 and early 2002, 86 percent (98/113) would be removable to federal court under the bill.***

Most of the Madison County cases that would be affected by the bill (69/98) involved cases in which purported classes, 99% of whose members lived outside of Madison County, sued corporations based outside of Illinois concerning acts that did not occur in Madison County. The remaining suits involved either: (1) Illinois-only suits against out-of-state businesses (the very type of case that diversity jurisdiction was intended to address); or (2) multi-state or nationwide suits against Illinois corporations (all of which involve application of numerous states' laws).

In contrast to the six states surveyed where a large number of class actions clearly had a local flavor, none of the class actions in Madison County was brought against a local business, a local municipality, or the state government. Rather, all of the cases (including the 15 that would remain in state court under the bill because they involved less than $5 million or suits by Illinois plaintiffs against an Illinois defendant) involved large commercial disputes that had little or no connection to the forum county. Thus, in contrast to the states surveyed, the suits brought in Madison County — and particularly those that would be affected by the bill — arrived there as a result of forum shopping, not because of any legitimate nexus to the county. Examples of the Madison County cases that would be removable under the pending legislation include:

- A multi-state class action against RotoRooter on behalf of customers alleging that their drains were repaired by unlicensed plumbers;[40]

- Numerous nationwide class actions against telecommunications companies, including a nationwide class action on behalf of all Sprint PCS customers who experienced a dropped call;[41]

- Numerous nationwide lawsuits against insurance companies alleging that they improperly refused to provide original equipment manufacturer ("OEM") parts to policy-holders involved in car accidents;[42] and

- A nationwide class action alleging that a hotel chain based outside of Illinois improperly charged an energy surcharge.[43]

Conclusion

The Class Action Fairness Act seeks to diminish class action abuse and restore the intention of the Framers by allowing large interstate class actions to be heard in federal court. However, the bill would not result in the removal of all class actions from state court, as some critics have charged. Indeed, in the states surveyed in this study, most class actions would remain in state courts. Moreover, the survey clearly indicates that the jurisdictional elements of S. 2062 are quite discriminating. The legislation would allow most large interstate and nationwide class actions to be heard in federal court, while ensuring that local disputes continue to be litigated in the state court forums where they properly belong. To be sure, the bill will move nearly all of Madison County's class actions to federal court because the cases filed there almost all involve large interstate disputes; but in Connecticut, Delaware, Maine, Massachusetts, New York, Rhode Island and numerous other jurisdictions that are not magnets for nationwide class actions, most class actions would remain right where they are — in state court. Thus, the Class Action Fairness Act would "demagnetize"

magnet state courts, while allowing other state courts to continue adjudicating local disputes and smaller class actions, which have a real nexus to the forum in which they are brought.

ENDNOTES

1. S. 2062, introduced on February 10,, 2004, reflects a compromise reached between the bill's supporters and Senators Chris Dodd (D-Conn.), Mary Landrieu (D-La.) and Charles Schumer (D-N.Y.), who opposed a prior version of the bill. A prior version of the bill, S. 274, was reported favorably by the Senate Judiciary Committee (on a 12-7 vote) on April 11, 2003. A slightly revised version of the bill (S. 1751) was brought to the floor on October 22, 2003, but failed to achieve cloture by one vote (59-39) on a motion to proceed. A House bill (H.R. 1115), which contains some parallel jurisdictional provisions, was passed by the House with a 253-170 vote on June 12, 2003.

2. S. Rep. No. 108-123, at 5-15 (2003); H.R. Rep. No. 108-144, at 10-22 (2003).

3. *See* S. Rep. No. 108-123, at 10 (*citing* John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22-28 (1948); H. J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928)).

4. S. 2062, 108th Cong. § 4(a) (2004); H.R. 1115, 108th Cong. § 4(a) (2003).

5. *Id.*

6. *Id.*

7. The survey does not purport to be an exhaustive review of all cases filed in these states during a specified period. Rather, by looking at five years of judicial decisions involving class actions in these states, the survey provides insights about the types of class actions filed in these states and how they would be affected by the pending legislation.

8. The Madison County complaints had been gathered in connection with two previously published research projects. *See* John H. Beisner & Jessica Davidson Miller, *They're Making A Federal Case Out Of It . . . In State Court*, 25 HARV. J. L. & PUB. POL'Y 1 (Fall 2001); John H. Beisner & Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, 4 BNA CLASS ACTION LITIG. R. 58 (Jan. 24, 2003).

9. The cases identified in the survey were categorized in a conservative manner, erring on the side of presuming the existence of federal jurisdiction under the bill if the available facts were unclear. For example, in many cases, it was difficult to discern how much money was at stake from the reported rulings. In such cases, the survey simply assumed that the $5 million threshold was met and that the case would be subject to federal jurisdiction under the bill. Moreover, as noted above, because the survey was conducted before the introduction of S. 2062, it does not reflect the local controversy exception. Thus, it is likely that an even higher percentage of cases would remain in state court under the compromise bill currently being considered by the U.S. Senate.

10. *Ghent v. G&W Property*, No. CV 980147022S, 1998 WL 867276 (Conn. Super. Ct. Dec. 3, 1998).

11. *Plourde v. Connecticut Lottery Corp.*, X06CV9801565575, 2000 Conn. Super. LEXIS 3463 (Conn. Super. Ct. Dec. 18, 2000).

12. CV00579244, 2001 Conn. Super. LEXIS 619 (Conn. Super. Ct. Feb. 23, 2001).

13. *Id.* at *31 (quoting *Crowley v. Banking Center*, No. CV 87 0237599S, 1992 Conn. Super LEXIS 704, at *17 (Conn. Super. Ct. Mar. 6, 1992)).

14. *Dale v. Town of Elsmere*, C.A. No. 99M-01-15-VAB, 2001 Del. Super. LEXIS 161 (Del. Super. Ct. Apr. 27, 2001).

15. *Fisher v. Council of the Devon*, C.A. No. 17190, 1999 Del. Ch. LEXIS 239 (Del. Ch. Dec. 17, 1999).

16. *Kerns v. Dukes*, 707 A.2d 363 (Del. 1998).

17. C.A. No. 16913, 2000 Del. Ch. LEXIS 54 (Del. Ch. Mar. 16, 2000).

18. C.A. No. 98C-09-064 RRC, 1999 Del. Super. LEXIS 563 (Del. Super. Ct. Sept. 3, 1999).

19. *Flippo v. L.L. Bean*, No. CV-00-446, 2002 Me. Super. LEXIS 81 (Me. Super. Ct. Apr. 9, 2002).

20. *Gayer v. Bath Iron Works Corp*, No. CV-94-472, 1997 Me. Super. LEXIS 270 (Me. Super. Ct. Sept. 10, 1997).

21. *Tungate v. MacLean-Stevens Studios, Inc.*, 695 A.2d 564 (Me. 1997).

22. No. CV-01-581, 2002 Me. Super. LEXIS 149 (Me. Super. Ct. Sept. 19, 2002).

23. 760 A.2d 250 (Me. 2000).

24. *Freeman v. Massachusetts Institute of Technology*, 97-00179, 1997 Mass. Super. LEXIS 59 (Mass. Super. Ct. Oct. 21, 1997).

25. *Mattoon v. City of Pittsfield*, 775 N.E.2d 770 (Mass. App. Ct. 2002).

26. *Dillon v. Massachusetts Bay Transportation Authority*, 729 N.E.2d 329 (Mass. App. Ct. 2000).

27. No. 02-J-4, 2003 WL 21297272 (Mass. App. Ct. May 27, 2003).

28. 762 N.E.2d 303 (Mass. 2002).

29. *Id.* at 305 n.5.

30. *Lichtman v. Mount Judah Cemetery*, 705 N.Y.S.2d 23 (N.Y. App. Div. 2000).

31. *Karlin v. IVF America, Inc.*, 712 N.E.2d 662 (N.Y. 1999).

32. *5th Avenue Chocolatiere, Ltd. v. 540 Acquisition Co.*, 712 N.Y.S.2d 8 (N.Y. App. Div. 2000).

33. 744 N.Y.S.2d 31 (N.Y. App. Div. 2002).

34. 705 N.Y.S.2d 183 (N.Y. Sup. Ct. 2000).

35. 687 N.Y.S.2d 369 (N.Y. App. Div. 1999).

36. *Paul v. Woonsocket*, 745 A.2d 169 (R.I. 2000).

37. *Ames v. Oceanside Welding & Towing Co.*, 767 A.2d 677 (R.I. 2001).

38. C.A. No. 96-2782, 1999 R.I. Super. LEXIS 161 (R.I. Super. Ct. Apr. 14, 1999).

39. C.A. No. 01-4063, 2002 R.I. Super. LEXIS 121 (R.I. Super. Ct. Aug. 28, 2002).

40. *Garvey v. Roto-Rooter Services Co.*, No. 00-L-525 (Ill. Cir. Ct., Madison County filed June 13, 2000).

41. *Snyder v. Sprint Spectrum L.P.*, No. 00-L-112 (Ill. Cir. Ct., Madison County filed Nov. 6, 2000).

42. *See, e.g., Hobbs v. State Farm Mutual Automobile Ins. Co.*, No. 99-L-1068 (Ill. Cir. Ct., Madison County filed Nov. 2, 1999).

43. *Nicoloff v. Wyndham International, Inc.*, No. 01-L-1165 (Ill. Cir. Ct., Madison County filed July 23, 2001). ■

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