

Class Action Magnet Courts: The Allure Intensifies

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ACKNOWLEDGMENTS

The authors wish to thank Terrell McSweeney, Georgetown University Law Center '05, for her invaluable research assistance. They also wish to acknowledge that the data collection for this study was conducted by Stateside Associates, Arlington, Virginia, under the leadership of Samuel B. Witt, III, Senior Vice President and General Counsel. J. Christian Adams, Esq., of the Adams Law Firm in Fairfax, Virginia, provided project management.

CLASS ACTION MAGNET COURTS: THE ALLURE INTENSIFIES

INTRODUCTION

Last year, we published an article analyzing data gathered by the Manhattan Institute concerning purported class actions filed in three county courts (one in Illinois, one in Texas, and one in Florida) with emerging reputations as “class action magnets.”¹ Those data revealed several patterns in the class actions filed in those state courts between 1998 and early 2001—most notably, a dramatic growth in the frequency of such cases.

Earlier this year, the Manhattan Institute asked the researchers who collected the data for the first report² to update the earlier research in one of the county courts—the Circuit Court of Madison County, Illinois—to test whether the patterns uncovered in the earlier research were continuing. To that end, the researchers retrieved for review the dockets of all the class actions that had been filed there in 2001 and early 2002. That follow-up research revealed that as a general matter, the pattern trends identified in our earlier article on this subject were sustained last year:

Class Actions Continue to Be Filed at a Rate Highly Disproportionate to Madison County’s Population. Madison County, a small rural county that covers 725 square miles in southwest Illinois, is home to just 259,000 people, less than 1 percent of the United States population. Nonetheless, it attracts more class actions each year than some of the nation’s most populous communities. As was reported in our first article, the number of class action filings in the county per year increased exponentially between 1998 and 2000—from two cases to 39.³ That is an increase of 1,850 percent. The follow-up study confirmed that the number of new class action filings increased further in the year 2001, with 43 class action lawsuits (another 10 percent increase) filed in the county. Moreover, early indications suggest that the size of Madison County’s class action docket will grow even more dramatically in 2002. Thirteen class actions were filed in the first two months of the year.

If that pace continues for the remainder of the year, a total of 78 class actions will be added to the Madison County court docket over the course of 2002.

While the absolute number of class action filings may not seem that alarming, these rates are relatively dramatic when considered in the context of Madison County’s size and its relative lack of substantial commerce. Indeed, as reported in our earlier article, if class actions were filed nationwide at the same per-capita rate as they were filed in Madison County in 2000, there would be nearly 43,000 class actions filed in this country each year.⁴

Most of the Class Actions Are Filed on Behalf of Multistate or Nationwide Classes. As was the case in 2000, when 29 of the 39 suits (74 percent) filed in Madison County were brought on behalf of multistate or nationwide classes,⁵ lawyers in the Madison County court continue to press for broad class actions, encompassing claimants from numerous states. Of the 43 cases brought in 2001, 33 (77 percent) sought to certify multistate or nationwide classes, and all of the 13 cases filed in the first two months of 2002 (100 percent) sought approval of classes that crossed state boundaries. Notably, federal courts have been highly skeptical of such multistate or nationwide classes. Indeed, the U.S. Court of Appeals for the Seventh Circuit (which includes the federal courts for Illinois) recently reversed a lower court order certifying a nationwide class against Bridgestone/Firestone, Inc. and Ford Motor Company, finding that “warranty, fraud, or products-liability suits may not proceed as nationwide classes,” because state laws differ on these issues and “[n]o class action is proper unless all litigants are governed by the same legal rules.”⁶ As a result, some class action plaintiffs’ counsel strongly prefer bringing cases in state courts (like those of Madison County), where judges have previously expressed no qualms about certifying nationwide classes.

Nearly All the Madison County Class Actions Involved Non-Madison County Defendants. All of the 43 class actions filed in Madison County

in 2001 involve at least one corporation that is based outside of Madison County and that does not have a retail presence there, and 35 of the 43 cases (81 percent) were brought against at least one corporation that is based outside of Illinois. In addition, only five Madison County companies were sued in any of the 43 cases. Three of those companies were local dealers or retailers that were sued in multiple actions along with different large corporations, almost certainly as a procedural device in order to keep the cases in state court. (See Section IV, below.)

The Madison County Class Action Docket Continues to Be Monopolized by a Small Cadre of Plaintiffs' Counsel. Two Chicago-based plaintiffs' firms (one of which is a spin-off from the other) originated a majority of the purported class actions filed in Madison County in 2001. Collectively, these two firms were involved in nearly 75 percent (32 of 43) of the suits filed in 2001. Thus, the "market share" of these firms in the Madison County class action docket increased from 2000, when they were involved in slightly less than 60 percent of the cases.⁷ Moreover, nearly every case in the docket involves attorneys who practice outside Madison County or outside Illinois and apparently travel to Madison County to bring their lawsuits because they consider it a favorable venue; for example, 40 of the 43 suits filed in 2001 were brought by at least one attorney outside of Madison County.

The Court Docket in Madison County Reflects a Strategy of Filing Separate Cases Attacking Multiple Companies in a Single Industry, with Each Lawsuit Challenging the Same Industrywide Practice. Of the 43 class action suits filed in 2001, 30 challenge alleged practices in the financial service/insurance industry. In most of these cases, counsel filed virtually identical complaints against a number of different insurance carriers on behalf of different-named plaintiffs, challenging the same alleged practice in each case. For example, 11 of the cases filed in 2001 propose nationwide classes challenging automobile insurers' standard method of calculating the value of vehicles that are "totaled" in accidents. (See Section I.A, below.)

More generally, the 2001 and early 2002 cases confirm that class action lawyers have developed a standard formula for class action litigation: (1) find a common industrywide practice, often in the financial services/insurance industry; (2) bring nationwide class actions against several major companies that allegedly engage in the practice; and (3)

carefully tailor the lawsuit complaint to make it difficult (if not impossible) for defendants to gain access to federal court. Notably, one of the two Chicago firms that is involved in a majority of Madison County class actions (more than 60 percent of those filed in 2001) states in its promotional material that it concentrates "its practice exclusively in the area of class action litigation" and has "become particularly adept at managing multi-state and nationwide class actions through an organized, coordinated approach that implements ***an efficient and substantially uniform prosecutorial strategy in order to place maximum pressure on the defendant or defendants.***"⁸ Apparently, part of that "uniform . . . strategy" is choosing Madison County as the venue for numerous class actions targeting different companies that engage in similar practices.

To those unfamiliar with federal jurisdictional laws, it may seem odd that nationwide class actions are being tried in rural county courts as opposed to the federal court system, which would seem to be a more appropriate venue for such "federal" cases. The reason for this is an anomaly in federal jurisdictional law, which enables plaintiffs' lawyers who believe that counties like Madison County will provide them with a favorable venue, to insulate class actions from being removed to federal court. (See Section IV, below.) As discussed later in this article, this result is contrary to the intent of the Framers of the U.S. Constitution, who explicitly gave federal courts jurisdiction over interstate disputes to mitigate concerns about local bias. Moreover, these cases, which essentially ask the judge of one small county court to dictate core state legal policies to all 50 states and the District of Columbia, are clearly contrary to the letter and spirit of federalism, under which each state is empowered to pass its own laws related to the conduct of commerce within its borders.

I. MADISON COUNTY COURTS: OUR NEW NATIONAL FINANCIAL SERVICES/ INSURANCE INDUSTRY REGULATOR?

Of the 43 class action suits filed in Madison County in 2001, 25 propose nationwide classes challenging three common financial services/insurance industry practices allegedly used by 38 major corporate defendants. In other words, the genesis for these cases was not an individual aggrieved consumer seeking out a lawyer to obtain redress from a purported bad actor for an allegedly unscrupulous

tactic. Instead, the lawsuits reflect attorney-driven strategies to challenge standard practices or form contracts—and essentially impose new practices on the entire financial/insurance industry based on the judicial caveat of one state court judge. Why are these cases in Madison County? And do they belong there? Should one state court assume responsibility for nationwide regulation of the insurance and financial industries? A closer look at the 2001 class action docket (and a glimpse at the early 2002 docket) in Madison County illuminates those issues.

A. Cases Involving “Total Loss” Vehicle Insurance Claims

During 2001, 11 new Madison County class actions challenged the manner in which the automobile insurance industry computes the value of vehicles that are “totaled” in accidents. These cases were brought against many major auto insurance companies (e.g., Allstate, AIG, Prudential, Country Mutual, Progressive, Farmers, St. Paul Fire and Marine Insurance Company, CGU Insurance, Hartford Insurance, Geico, and Shelter Insurance), all of which allegedly use similar methodologies in calculating such losses. Notably, all 11 cases were filed by the same collection of law firms; seven of the lawsuits were filed on the same day. Two of the law firms involved in these cases—the Lakin Law Firm in Wood River, Illinois, and Freed & Weiss, a class action firm in Chicago—are the most active law firms in the Madison County class action docket.⁹

The virtually identical complaints in all eleven cases allege that these companies “defraud their insureds” by “provid[ing] them with biased, below-market estimates of total loss vehicle values.”¹⁰ The cases also allege that the standard “appraisal” clause in the form insurance policies used by these companies discourages individuals from seeking their own appraisals.¹¹ Based on these allegations, the cases seek compensation for each of the defendants’ policyholders nationwide whose vehicle was totaled and who received a cash payment from the insurer.¹²

The lawsuit complaints provide no obvious explanation about why these cases were brought in Madison County. None of the defendant insurance companies is based there, and with only 196,510 registered drivers, the county obviously accounts for only a minuscule portion of the insurance companies’ policyholders. Moreover, none of

these practices targets Madison County more than any of the other 3,065 counties in the United States. Indeed, the sole relationship between Madison County and these cases is that plaintiffs’ counsel managed to find one named plaintiff for each case who either lives in Madison County or was involved in a car accident in that forum. Thus, notwithstanding Madison County’s very small stake in this issue, plaintiffs’ counsel have invoked very tenuous Madison County connections as a hook to bring nationwide class actions in that venue, asking the Madison County courts to decide the appropriateness of a standard insurance practice that affects drivers in every other county in the U.S. and implicates the varying insurance laws of 50 states and the District of Columbia.¹³

B. Optional Insurance/Credit Insurance

Another ten cases filed in 2001—about 23 percent of the new Madison County class actions filed during 2001—challenged “optional insurance” policies, which are typically offered in conjunction with credit cards, mortgages, or automobile loans to pay some or all of the insured’s debt obligations in the event of death or disability.¹⁴ Again, the majority of these cases (nine of ten) were brought by the Lakin Law Firm and Freed & Weiss firm (in conjunction with other firms as well). Like the “total loss” cases discussed above, seven of these ten cases involve nearly identical complaints. These cases allege that the form contracts for optional insurance used by automobile dealers “overcharge the cost of optional insurance for vehicle purchasers”¹⁵ and do not make clear that the dealer receives a payment for each sale of optional insurance.

Once again, the obvious question is why a Madison County court should be deciding these issues. Of course, clarity in consumer contracts is important, and there is a valid public interest in ensuring that insurance forms and other documents fully explain a consumer’s obligations and the terms of agreements. But should a county court in Madison County, Illinois, be charged with establishing national rules on insurance contracting practices? And why do plaintiffs’ counsel repeatedly select certain counties such as Madison County for bringing these suits? These are the policy questions raised by current jurisdictional and procedural laws that allow plaintiffs’ attorneys, like those involved in the “total loss” or “optional insurance” cases, to bring

nationwide class actions against industry practices (like these) in any county court of their choice as long as they can find one cooperative plaintiff.

C. Extended Protection Plans

A few of the new class actions filed in Madison County during 2001 take aim at extended warranties and extended protection plans, which are frequently offered by manufacturers or independent companies on big-ticket items like motor vehicles and major home appliances. In 2001, four class action complaints were filed in Madison County alleging that the form contracts used in extended protection plans violate consumer fraud laws. According to those complaints, the contracts do not make clear that the dealer receives compensation for selling these plans. Although not entirely clear, the complaints appear to suggest that these forms are no longer used—i.e., that they were modified “industry wide” in 1998/1999 “to disclose that the seller/dealer may retain a portion of the proceeds.”¹⁶ Thus, the law firms that brought these cases (once again, the Lakin Law Firm and Freed & Weiss) are apparently challenging the wording of a contract that was changed three years ago. (Not only are the optional insurance and extended protection plan cases brought by the same law firms; there is even repetition among plaintiffs. One of the named plaintiffs in the extended protection cases, Beverly Hodge, is also a named plaintiff in two optional insurance cases.)¹⁷

Notably, the extended protection cases are purportedly brought on behalf of nationwide classes—e.g., “[a]ll persons and entities who, on or after July 5, 1991,” purchased extended insurance with the subject contract.¹⁸ However, in order to ensure that defendants cannot remove these cases to federal courts, plaintiffs have sued one Illinois car dealer in each case in order to destroy diversity jurisdiction. For example, one nationwide class action is brought against General Motors Corporation and Four Flags Motors, Inc., a car dealership in Madison County. Obviously, the “deep pocket” that is the real target of this lawsuit is General Motors, and notwithstanding plaintiffs’ counsel’s ploy of suing Four Flags Motors, Inc., this putative nationwide case has no real connection to Madison County. After all, Four Flags is only one of General Motors’ 7,761 authorized dealerships across the country.¹⁹ At most, Four Flags accounts for a fraction of 1 percent of all the

GM vehicles sold with extended protection plans to potential class members during the period covered by the lawsuit.

II. OTHER NATIONWIDE CLASS ACTIONS—CHICKEN PROCESSING, ENERGY FEES, AND HMO REIMBURSEMENTS

While financial services/insurance cases dominated the Madison County class action docket in 2001, other nationwide consumer class actions filed there last year challenge an array of other business practices. These include:

• **Hotel Energy Fees**—In *Nicoloff v. Wyndham Int’l, Inc.*,²⁰ a Madison County resident who spent two nights at a Wyndham hotel in Chicago purports to represent a nationwide class of individuals who were charged energy fees or charges at Wyndham hotels.²¹ (Plaintiff alleges that he was charged \$2.87 per night.) Notably, the lawyers behind this case include a lawyer from Florida and a lawyer from Texas, suggesting that this, too, is a lawyer-driven (as opposed to a plaintiff-driven) lawsuit. (Indeed, the nationwide class action was filed just one month after the named plaintiff’s two-night hotel stay, leading one to wonder whether the visit was orchestrated to create a lawsuit.) Moreover, this case has little (if any) connection to Madison County. Wyndham is “one of the largest United States based hotel owner/operators with a portfolio consisting of 220 hotels with over 56,600 guest rooms as of December 31, 2001.”²² Wyndham is not an Illinois company, and none of its 56,600 guest rooms is located in Madison County.

• **Chicken Carcass Water Retention**—In *Rogers v. Tyson Foods, Inc.*, the named plaintiffs sought to represent a nationwide class of individuals who purchased Tyson packaged chicken in 33 states.²³ According to the complaint in this lawsuit, “Tyson followed a corporate policy of maximizing the amount of infused water in its fresh pre-packaged chicken.”²⁴ As a result, Tyson allegedly was able to fraudulently “maximize its profits” by selling chickens that weighed more after they were processed than when they were alive.²⁵ Once again, aside from one couple that claims to “regularly purchase

Tyson brand chicken from retail establishments in Madison County,”²⁶ there is no real connection between the allegations in the case and Madison County. Tyson Foods is an Arkansas-based company that sells 150 million pounds of chicken per week throughout the U.S. Obviously, Madison County accounts for only a small fraction of a percentage of that chicken. (Indeed, if all of that chicken went to Madison County, each Madison County household would be consuming 1,470 pounds of chicken per week.)²⁷ Moreover, in order to ensure that these claims could not be removed to federal court, plaintiff’s counsel included one named plaintiff from Arkansas, thereby destroying diversity jurisdiction. Thus, in a forum-shopping feat, plaintiffs’ counsel seeks to challenge Tyson’s practices at “eighty-three (83) plants in twenty (20) states,”²⁸ which affect millions of households throughout the country, while ensuring that no federal court can exercise jurisdiction over these claims. Defense counsel removed this case to federal court on the ground that federal law preempted plaintiffs’ state law claims and the case was then dismissed.²⁹

• **Overpriced Bonds**—*Kellerman v. Marion Bass Sec. Corp.*³⁰ was brought by a South Carolina law firm on behalf of three named plaintiffs, **none of whom lives in Madison County**, against 31 defendants located throughout the United States, **none of which is located Madison County**. The complaint proposes a nationwide class of all individuals who purchased certain tax-free revenue bonds between February 1, 1996, and December 11, 1998.³¹ According to the complaint, defendants violated state securities laws by materially misrepresenting the projects supported by the bonds.³² Nowhere do plaintiffs explain why this action was brought in Madison County, as opposed to the counties where the named plaintiffs live, or one of the states or counties where defendants are based. Nor do they explain why venue is proper in Madison County, except insofar as they allege “[o]n information and belief, there are putative class members . . . who reside in Madison County.”³³ Thus, the only possible explanation for this suit’s presence in Madison County is forum-shopping.

• **HMO Reimbursement Practices**—In *Daum v. Blue Cross & Blue Shield Assoc.*, three doctors, only one of whom practices in Madison County (the other two practice in Cook County, Illinois, and Texas), seek to certify a nationwide class of all physicians, physician practice groups, hospitals, and other health-care providers who had fee-for-service arrangements with Blue Cross & Blue Shield.³⁴ (The one doctor who practices in Madison County, Timothy Kaiser, and the named plaintiff who is a Texas doctor are both also named plaintiffs in a nationwide class action against Cigna, which is pending in Madison County as well.)³⁵ According to the complaint, the defendant Blue Cross companies engage in various tactics, referred to as “short-payment,” “downcoding,” and “bundling,” that result in underpayment for medical claims and therefore breach the fee-for-service arrangements.³⁶ Notably, plaintiffs explicitly disavow any claims under federal law governing health-insurance plans, presumably to ensure that the case cannot be removed to federal court.³⁷

• **Internet Betting**—Another 2001 Madison County class action alleges a conspiracy to violate federal gambling laws among gambling website operators, the National Collegiate Athletic Association, and VISA.³⁸ Unlike any other class action filed in Madison County in 2001, this case is one in which plaintiffs explicitly alleged federal causes of action. As a result, defendants were able to remove this case to federal court, after which plaintiffs voluntarily dismissed their claims.³⁹

III. A GLIMPSE AT THE 2002 MADISON COUNTY DOCKET: MORE OF THE SAME

Not only did Madison County continue to attract class actions at the same rate in 2001, but an early preview of 2002 filings suggests that the number of new class actions may grow even more dramatically this year. All told, there were 13 class action cases filed in Madison County during the first two months of 2002, all of which sought to certify nationwide classes. If this rate continues for the balance of the year, a total of 78 class actions will be filed, an 81 percent increase over 2001. Once again, these cases involve nationwide class actions

challenging broad consumer practices with no obvious nexus to Madison County. For example:

More Insurance Practices under Fire. The latest insurance practice to come under assault in Madison County is how “standard” automobile insurance companies treat customers who previously had “non-standard insurance,” policies typically purchased by drivers who cannot qualify for standard insurance based on various risk factors. Two such cases were filed in February 2002 (one against Allstate Insurance Company and another against General Casualty Insurance Company), alleging that the insurers improperly charge higher rates to individuals who were once insured by nonstandard companies.⁴⁰ As is typical in Madison County class actions, the Allstate case seeks to certify a nationwide class, even though the only connection to the county is that two of the named plaintiffs reside there.⁴¹ If history is any measure, additional cases challenging these practices will be filed, and there will likely be five to ten more similar cases against other insurance companies by the end of the year.

Telephone Bills and Long-Distance Calling Plans. Telephone company billing practices are also coming under attack in Madison County this year. One case filed in late 2001 and two cases filed in early 2002 (all of which were brought by a group of firms that include the ubiquitous Lakin Law Firm and Freed & Weiss firm) challenge the billing practices of AT&T and Sprint. One of the cases alleges that customers were placed on more expensive calling plans without their prior consent.⁴² The other two allege that customers are being overcharged on their telephone bills for the Universal Service Fund, a subsidy that telephone companies must pay to help support telecommunications services for low-income and rural customers, as well as schools and libraries.⁴³ At the risk of belaboring the obvious, plaintiffs’ counsel in these cases have once again selected Madison County courts to be the arbiter of a dispute that affects consumers throughout the country—in these cases, the majority of long-distance customers in the United States. As plaintiffs’ counsel have pointed out, “AT&T is one of the largest long distance telecommunications companies operating throughout the United States.”⁴⁴ Indeed, Sprint and AT&T together account for about 60 million long-distance customers throughout the country, while Madison County has just 101,452 households. Thus, although the complaints in these cases suggest that Madison County is the appropriate venue for these cases because at least one named

plaintiff in each case resides there, these are clearly not local disputes. Moreover, plaintiffs’ counsel have sought to immunize these cases from federal jurisdiction by seeking damages “in no event exceeding \$75,000 per plaintiff or class member.”⁴⁵

Unsolicited Faxes. The docket for the first two months of 2002 also includes six class actions, all brought by the same named plaintiff (a company called “Metro Kirby”) and all brought by the same counsel (a firm that is not involved in any other Madison County suits), involving unsolicited fax advertisements. It is unclear from the complaints in what business the plaintiff company engages. “Metro Kirby” is not listed in the Madison County telephone book (nor has the Madison County Chamber of Commerce heard of this company).⁴⁶ Its only business may be collecting unsolicited fax advertisements and bringing nationwide class actions.

Obsolete Computer Systems. In *Minadeo v. Alcon Labs., Inc.*,⁴⁷ seven **Texas** plaintiffs are suing a **Texas** company in Madison County, **Illinois**, for breach of contract. According to the complaint, the defendant company promised that the computer program it developed for ophthalmology practices would be updated to be compatible with Windows™ software, but then failed to comply with that promise.⁴⁸ Based on these allegations, plaintiffs seek to certify a nationwide class of all persons and entities that subscribed to the defendant’s computer system.⁴⁹ Nowhere in the complaint do plaintiffs’ counsel attempt to explain why this case was brought in Madison County or why this venue is proper. The complaint does not even suggest that any ophthalmology practice in Madison County subscribed to the system.

In sum, the class action docket for the first few months of 2002 suggests that class action filings will continue to increase this year in Madison County, resulting in even more class actions brought in a jurisdiction to which they have little (if any) relationship.

IV. JUDICIAL SYSTEM ANOMALIES ARE ALLOWING THE CREATION OF MAGNET COURTS LIKE THOSE IN MADISON COUNTY

Why are so many interstate class actions pending in Madison County? And if these are national cases, shouldn’t they be litigated in federal court? The answer to these questions lies in a combination of an anomaly in federal jurisdictional law and lawyers’ tactics.

In structuring our judicial system, the Framers determined that federal courts would hear cases presenting federal law issues as well as interstate cases “between Citizens of different States”—i.e., diversity cases. The Framers established the concept of federal diversity jurisdiction to address the very concerns that the Madison County docket raises—that local biases may render state courts ineffective in adjudicating disputes between in-state plaintiffs and out-of-state defendants.⁵⁰ The Framers reasoned that some state courts might discriminate against interstate commerce activity and out-of-state businesses, and that federal courts (where the judges are more immune from political pressure because they have tenure and salary protection) 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.⁵¹

While these concerns are arguably at their greatest in the case of class actions, the law has developed in such a way that it typically bars class actions from federal court. Under 28 U.S.C. § 1332, the federal diversity jurisdiction statute that implements the Diversity Jurisdiction Clause of the United States Constitution, an action is subject to federal diversity jurisdiction only if 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 if each plaintiff asserts claims that put in controversy an amount in excess of a specified threshold—currently set at \$75,000. The intent of these requirements is essentially to allow 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).

On their face, class actions 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. However, because section 1332 was originally enacted before modern-day class actions existed, it has been interpreted over the years in a way that tends to **exclude** class actions from federal courts, while granting federal jurisdiction over much smaller single-plaintiff cases having few, if any, interstate ramifications.

There are two reasons for this phenomenon. **First**, as noted above, federal law has been interpreted to require “complete” diversity. Under that approach, diversity jurisdiction is lack-

ing whenever any single plaintiff is a citizen of the same state as any single defendant.⁵² As a result, a plaintiff can readily avoid federal jurisdiction by simply including one named plaintiff and non-diverse defendant (such as a local dealer or retailer) in his or her complaint.

Second, 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—it is not enough that the **entire** action puts \$75,000 in controversy.⁵³ Although some federal courts have questioned the breadth and current vitality of this rule,⁵⁴ even a liberal interpretation (which allows a case into federal court as long as at least one plaintiff’s claims raise more than \$75,000 in controversy) still bars most interstate class actions from federal court.

As a result, we have what the Senate Judiciary Committee has described as:

the nonsensical result under which 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.⁵⁵

Plaintiffs’ lawyers have taken advantage of these rules by including in their complaints carefully crafted language that seeks to make the cases “removal proof,” (i.e., to make it impossible for the defendants’ lawyers to remove the cases to federal court) and to thereby evade the jurisdiction of federal courts. In searching for “good” class action tar-

gets that they can keep out of federal court, plaintiffs' counsel typically: (a) file large suits against major corporations in which they also name one local retailer (such as a car dealer or pharmacy); (b) expressly disclaim any federal claims related to their allegations; and/or (c) waive all damages over \$74,999. In large part, this explains the attraction of the Madison County class action lawyers to insurance claims. Insurance has traditionally been a matter of state law in this country, with each jurisdiction establishing and enforcing its own laws. Thus, insurance claims typically do not involve questions of federal law. Moreover, insurance suits typically do not involve large sums of money. After all, plaintiffs do not allege that vehicles were undervalued by \$75,000, or that individuals were overcharged for optional insurance by more than \$75,000 each. Rather, the typical claim involves \$50–500. This makes insurance claims a plaintiffs' lawyer's dream: every driver and homeowner has it—and if you multiply \$500 by millions of consumers, these cases can be very lucrative for plaintiffs' counsel.

Some examples of how plaintiffs' counsel have sought to avoid federal jurisdiction in the 2001 Madison County docket include:

- ***Alleging that “money damages sought by plaintiffs do exceed \$50,000, but are less than \$75,000.”***⁵⁶ For example, in one Madison County case, plaintiffs alleged breach of fiduciary duty by an investment advisor related to a tax-free mutual-fund complex with aggregate assets of \$64.9 billion. The plaintiffs are seeking “the amount of compensation received by Defendant for Fiduciary Services provided by Defendant to the funds in which members of the Plaintiff Class own shares.”⁵⁷ Given that the defendant was the “principal investment advisor” to the fund complex and plaintiffs seek to bring the case on behalf of all investors in the fund complex since January 1, 1991, the aggregate damages in the event of a favorable verdict for plaintiffs could be astronomical. However, since plaintiffs are explicitly seeking less than \$75,000 on behalf of each plaintiff and/or class member, the amount in controversy could well be in the millions and still would not meet the \$75,000 threshold for federal diversity jurisdiction.⁵⁸

- ***“[E]xpressly disclaim[ing] any amount of recovery in excess of \$74,500.”***⁵⁹ One 2001 Madi-

son County example in which plaintiffs' counsel attempted this approach is a nationwide class action against Ford Motor Company regarding F-150 pickup truck trailer packages. Once again, given that the class is broadly drawn to include hundreds of thousands of purchasers nationwide of 2000 and 2001 Ford F-150 pickup trucks,⁶⁰ the aggregate damages could be extraordinarily costly, were plaintiffs to prevail. However, because plaintiffs' counsel (who include the Lakin Law Firm, Much Shelist, and Freed & Weiss) have expressly limited any possible damages to less than \$75,000 per person (and have further insulated themselves from federal jurisdiction by suing a non-diverse Ford dealer located in Alton, Illinois, that likely sold only a fraction of 1 percent of the vehicles at issue), Ford was unable to remove the case to federal court.⁶¹ This is the same tactic used by the same firms in the “total loss” insurance cases, discussed above, which similarly waive damages in excess of \$75,000 on behalf of each plaintiff and have thereby evaded federal jurisdiction, even though they seek to bring claims on behalf of hundreds of thousands of policyholders throughout the country, and clearly involve far more than \$75,000.⁶²

- ***Joining a local dealer, pharmacy, or other retailer.*** Occasionally, plaintiffs' counsel admit that they are seeking more than \$75,000 in damages. However, when that happens, they inevitably sue a local company—along with the major corporation that is the real target of their suit—and use that approach to avoid federal court. For example, in one nationwide case alleging that a drug manufacturer failed to provide adequate warnings regarding a cholesterol drug, the complaint explicitly alleges “an amount in controversy in excess of \$75,000 exclusive of interest and costs, as to herself and each member of the proposed class.”⁶³ In this case, however, plaintiffs' counsel have evaded federal jurisdiction by suing the Walgreen company, which is an Illinois corporation.⁶⁴ Of course, Walgreens has no particular role in the allegations raised by plaintiffs; after all, there are 53,000 pharmacies in the U.S. (most of which probably sold the drug at issue) and only 3,678 Walgreens stores (just seven of which are in Madison County).⁶⁵

Legislation currently pending in Congress would address the jurisdictional anomaly that has led to Madison County's prominence among class action lawyers by allowing class actions into federal court as long as at least one plaintiff and at least one defendant are diverse and the total amount in controversy (per case—*not* per plaintiff) equals or exceeds \$2 million.⁶⁶ This legislation would further the goals of diversity jurisdiction by ensuring that large cases involving plaintiffs and defendants from more than one state can be heard in federal court, where there is no concern regarding local bias and where the judges receive tenure and salary protection—as guaranteed in the U.S. Constitution—and do not stand for election every four or six years. In short, by correcting this anomaly, Congress could ensure that the participants (both plaintiffs and defendants) in interstate class actions receive the same protections as other cases implicating interstate commerce—i.e., that they are adjudicated by federal judges who “operate . . . according to reasonable rules and [are] accountable to the entire country.”⁶⁷

CONCLUSION

Once again in 2001 and early 2002, the locally elected judges in Madison County are being asked to set national policies in the areas of financial services, insurance, and other consumer sectors for 49 other states—and 3,065 counties—in addition to their own. If a judge in Madison County orders automobile insurance companies to pay more for “totaled” vehicles, to change their pricing practices as they relate to drivers with prior insurance problems, and curtail numerous other challenged insurance practices, such actions would have a national impact in terms of higher insurance premiums, more uninsured drivers, or fewer insurance company choices for consumers. Obviously, reverberations from any rulings in these cases will be felt far away from Madison County and its 259,000 residents. And

the amplitude of those reverberations will not dissipate over the distance from Madison County. Indeed, many of those reverberations will be felt *more* strongly in locations remote from those Illinois state courts. Thus, the 2001 Madison County class actions raise the same questions as the previous years' dockets: Should local judges elected by a few thousand votes in a rural county election be charged with responsibility for handling large-scale, interstate class actions involving issues with significant national commerce implications? And if not, what can be done to rectify this anomaly?

As discussed above, a number of loopholes in federal jurisdiction laws have resulted in a system under which federal courts have jurisdiction over individual disputes as long as a plaintiff seeks \$75,000 in relief; at the same time, however, federal courts are barred from adjudicating most of the multistate class actions filed in local county courts like those of Madison County—controversies that involve widespread commercial practices in insurance, banking, and other industries that affect millions of Americans and could have substantial impacts on the nation's economy. As a result, 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, are often viewed by plaintiffs' lawyers as willing to “rubber stamp” class certification orders and “coupon” settlements, and are periodically forced to turn to the local bar to fund their reelection efforts.⁶⁸

Congress is currently considering legislation that would solve this problem by expanding diversity jurisdiction to include more interstate class actions. Such legislation would fulfill the intention of the Framers in establishing diversity jurisdiction—by ensuring that large cases that have interstate implications can be adjudicated in federal courts where there are no concerns of local bias, and would also help ensure that one state court cannot trample federalism principles by dictating other states' policies.

NOTES

1. See John H. Beisner and Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARVARD J. OF LAW & PUBLIC POLICY 1 (fall 2001) ("Federal Case").
2. The research was conducted by Stateside Associates, a Virginia-based research organization that had previously conducted research on class actions.
3. *Federal Case*, 25 HARVARD J. OF LAW & PUBLIC POLICY, at 160-61.
4. *Id.* at 163. Because of the decentralized nature of state courts, there are no annual, national state court class action figures. However, the number is certainly *far* lower than 43,000.
5. *Id.* at 169.
6. *In the Matter of Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 288 F.3d 1012, 1015 (7th Cir. 2002).
7. Notably, the number of firms involved in Madison County class actions has dropped, even as the number of those suits has increased. There were 49 firms involved in the 39 cases filed in 2000; in 2001, there were 37 firms involved in the 43 newly filed class actions.
8. See <http://www.freedweiss.com/about.htm> (emphasis added).
9. Two firms, Freed & Weiss, a Chicago firm, and the Lakin Law Firm, a Madison County firm, appear together in 27 of the 43 class action lawsuits brought in Madison County in 2001 (63 percent).
10. See, e.g., Complaint, *Abalos v. Allstate Ins. Co.*, Case No. 01-L1005 (June 13, 2001) ¶ 1.
11. *Id.* at ¶ 7.
12. *Id.* at ¶ 29, Prayer for Relief.
13. These insurance cases threaten to result in a perverse situation where one state court condemns a practice across state lines, even though another state's laws allow or even require it. For example, in a case brought against State Farm in another county in Illinois, regarding the use of original equipment manufacturer parts in insurance claims, an Illinois county court upheld a verdict on behalf of a nationwide class, even though several insurance commissioners testified that their state laws **allowed or even required** insurance companies to engage in the challenged practice. See Matthew J. Wald, "Suit Against Auto Insurer Could Affect Nearly All Drivers," *New York Times*, September 27, 1998, § 1, at 29. The appellate decision upholding the trial court's order has no doubt helped to make Illinois an even more popular venue for bringing nationwide insurance class actions.
14. An 11th "optional insurance" class action was filed in Madison County in early 2002.
15. See, e.g., Complaint, *Phillips v. Union Fidelity Life Ins. Co.*, No. 01 L 1835 (December 13, 2001) ¶ 2.
16. See, e.g., Complaint, *Mincey v. Auto. Prof'ls Inc.*, No. 01 L 1848 (December 19, 2001) n. 2.
17. See Complaint, *Hodge v. Firststar Bank*, No. 01 L 722 (April 20, 2001) (optional insurance); *Hodge v. Firststar Bank*, No. 01 L 1079 (June 28, 2001) (extended protection plan); *Hodge v. American General Assurance Co.*, No. 01 L 1823 (December 10, 2001) (optional insurance).
18. See, e.g., Complaint, *Reynolds v. Gen. Motors Acceptance Corp.*, No. 01 L 1103 (July 5, 2001) ¶ 22.
19. See Arlena Sawyers, "Dealership Total Jumps 124 to 22,131," *Automotive News*, March 18, 2002.
20. Complaint, No. 01L1165 (July 23, 2001).
21. Nicoloff Complaint at ¶ V.
22. Wyndham Corporation for fiscal year ending on December 31, 2001.
23. Complaint, *Rogers v. Tyson Foods, Inc.*, No. 01LM1006 (August 14, 2001).
24. *Id.* at ¶ 27 (B) (1).
25. *Id.* at ¶¶ 17-18, 33.
26. *Id.* at ¶ 3.
27. See Diane Feen, "Activists, Meat Industry Clash Over Antibiotics in Livestock," *O'Dwyer PR Services Report*, March 2001.
28. *Rogers* Complaint at ¶ 6.
29. Judgment, *Rogers v. Tyson*, No. 01cv610 (S.D. Ill. December 4, 2001) (dismissing case with prejudice).
30. Complaint, No. 01-L-457 (March 2, 2001).

31. *Kellerman* Complaint at ¶ 42.
32. *Id.* at ¶ 43.
33. *Id.* at ¶ 4.
34. See Complaint, *Daum v. Blue Cross & Blue Shield Assoc.*, No. 01L1012 (June 14, 2001) ¶ 42.
35. See *Kaiser v. Cigna*, No. 00L480 (May 26, 2000) (alleging that Cigna engaged in the same practices in violation of its preferred provider contracts).
36. *Daum* Complaint at ¶¶ 37, 43.
37. *Id.* at ¶ 9.
38. See Complaint, *Crocker v. Dempsey*, No. 01L762 (April 27, 2001).
39. See *Crocker et al. v. Dempsey*, No. 01-CV-303 (S.D. Ill. 2001).
40. See Complaint, *Clutts v. Allstate Ins. Co.*, No. 02L226 (February 6, 2002); *Sullivan v. Gen. Casualty Co. of Ill.*, No. 02L325 (February 21, 2002).
41. See *Clutts* Complaint at ¶¶ 1–3.
42. See Complaint, *Donaldson v. Sprint Communications Co.*, No. 01L1660 (November 3, 2001).
43. See, e.g., Complaint, *Ragan v. AT&T Corp.*, No. 02L168 (January 23, 2002).
44. See *id.* at ¶ 32.
45. See *id.* at Prayer for Relief.
46. Telephone interview with Madison County Chamber of Commerce (May 30, 2002).
47. Complaint, No. 02L321 (February 20, 2002).
48. See *Minadeo* Complaint at ¶¶ 13, 22.
49. *Id.* at ¶ 25.
50. See *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) (“The object of the [diversity jurisdiction] provisions . . . conferring upon the [federal] courts . . . jurisdiction [over] controversies between citizens of different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the State in which one litigant . . . resides.”); *Pease v. Peck*, 59 U.S. (18 How.) 518, 520 (1856); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat) 304, 307 (1816). See also *The Federalist* No. 80, at 537–38 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961) (“[I]n order to [ensure] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles [up]on which it is founded.”).
51. 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).
52. See, e.g., *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).
53. See, e.g., *Zahn v. Int’l Paper Co.*, 414 U.S. 291 (1973).
54. Two federal appeals courts have held that in enacting 28 U.S.C. § 1367, Congress has overridden *Zahn* and that federal courts can preside over a class action as long as one plaintiff meets the amount-in-controversy minimum. See *In re Abbott Lab.*, 51 F.3d 524, 526–27 (5th Cir. 1995), *aff’d sub nom.*, *Free v. Abbott Labs.*, 529 U.S. 333 (2000) (per curiam; affirmance on tied vote); *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930–34 (7th Cir. 1996). Other courts have found that section 1367 did not abrogate the holding in *Zahn* and continue to require that each potential class member independently meet the amount-in-controversy minimum. See, e.g., *Trimble v. Asarco, Inc.*, 232 F.3d 946, 959–62 (8th Cir. 2000). Because the *Abbott* decision was affirmed by an equally divided Supreme Court, *Abbott* controls only in the Fifth Circuit, and the conflict among the Circuits on this point remains.
55. See *Class Action Fairness Act of 2000*, S. REP. NO. 106-420, 106th Cong. (2000), at 14.
56. See Complaint, *Meyers v. Brinson Advisors, Inc.*, Case No. 01-L1684 (November 13, 2001).
57. *Id.* at Prayer for Relief.

58. Despite plaintiffs' efforts to make their case removal-proof, this case was removed to federal court by defendants. See Notice Of Removal, *Meyers v. Brinson Advisors, Inc.*, Case No. 02cv222 (S.D. Ill. March 28, 2002). Plaintiffs subsequently moved to remand the case to Madison County, but the court has not yet ruled on their motion. See Motion By Plaintiffs To Remand To Madison County, Case No. 02cv222 (S.D. Ill. April 12, 2002).

59. See, e.g., Complaint, *Miller v. Ford Motor Co.*, Case No. 01-L1594 (October 12, 2001) at ¶ 3.

60. Plaintiffs allege that Ford "sold hundreds of thousands of model year 2000 through 2001 F-150 pickup trucks equipped with the Trailer Package." *Id.* at ¶ 17.

61. This case was recently voluntarily dismissed by plaintiffs' counsel because they were pursuing a nearly identical case in Texas state court that was proceeding more quickly. Order, *Miller v. Ford Motor Co.* (February 14, 2002).

62. See Complaint, *Hanke v. AIG Specialty Auto*, Case No. 01-L851 (May 15, 2001) at ¶ 22.

63. See Complaint, *Mueller v. Bayer Corp.*, Case No. 01-L1457 (September 17, 2001) at ¶ 7.

64. See <http://www.nacds.org/wmspage.cfm?parm1=72>; "Walgreens 'has plenty of room to grow'; State of the Industry" *Chain Drug Review*, April 29, 2002.

65. Defendants did attempt to remove this case to the U.S. District Court for the Southern District of Illinois, but the Court remanded it to Madison County. See Order, *Mueller v. Bayer Corp.*, Case No. 01cv696 (S.D. Ill. January 15, 2002).

66. The House bill, the Class Action Fairness Act of 2002 (H.R. 2341), passed on March 13, 2002, by a vote of 233–190. The Senate bill, the Class Action Fairness Act of 2001 (S. 1712), was introduced November 15, 2001, and remains pending.

67. *Actions Without Class*, *Washington Post*, August 27, 2001, at A14 (editorializing in favor of the House class action bill).

68. See *Restoring Class to Class Actions*, *Washington Post*, March 9, 2002, at A22 (editorial) ("Though plaintiff classes can involve people from all over the country, the cases are disproportionately filed in selected counties where judges are elected—meaning that a judge accountable to a single county can make decisions regulating products distributed nationwide.").

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