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I. INTRODUCTION

Despite its undeniably noble goal of achieving the greatest good for the largest number of people, in the past decade the class action device has been severely criticized for its numerous drawbacks and for its widespread abuse in the modern legal world. The critics scold class actions for the unfair settlements they produce, which primarily benefit lawyers rather than class members. At the same time, the critics condemn plaintiffs and their counsel for evading litigation in federal courts by means of artful pleading. Finally, they argue that plaintiffs' attorneys bring unsupported claims against innocent parties, forcing them to settle rather than risk a large judgment. These problems and many others led Congress to finally pass the Class Action Fairness Act of 2005[1] (hereinafter the Act), the sixth attempt after five previous class action bills died without ever making it to the President's desk.

The Act amends "procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants."[2] It requires stringent judicial scrutiny for settlements under which plaintiffs receive non-cash benefits or which result in a net loss to the plaintiffs.[3] It also provides that contingent fees in coupon settlements shall be based on the value of the coupons actually redeemed, rather than the face value of such coupons.[4] Likewise, it bans settlements that discriminate on the basis of the members' geographical proximity to the court.[5] Finally, the Act grants federal district courts original and removal jurisdiction in class actions if the amount in controversy exceeds five million dollars, provided that minimal diversity exists.[6]

While the measure has many supporters, its critics have voiced a number of objections as well. The opposition points to the fact that the

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1. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

2. *Id.* at pmbl.

3. *Id.* § 3(a).

4. *Id.*

5. *Id.*

6. *Id.* §§ 4-5.

Act disturbs the delicate balance between federal and state court systems[7] and significantly undermines states' rights and state sovereignty.[8] The legislation's critics further argue that the Act will cause an overload in the federal judicial docket[9] and, as an example, point out that Chief Justice Rehnquist himself is strongly opposed to new laws that cause more cases to be brought in federal court.[10] Moreover, they suggest that the Act unjustifiably bashes class action lawyers based on the wrong perception that "lawyers are a ravenous horde seeking to take advantage of others' real or imagined misfortunes."[11]

This article will provide an in-depth analysis of the Act and its impact on the state of class action litigation today. Part II discusses the legislative history of the Act and explains how it changes the procedures applicable to class actions. Part III addresses the arguments in favor of the class action reforms and the major criticisms of the class action device. It then provides rebuttal to the supporters' concerns and suggests possible negative effects of such legislation on class actions. Finally, Part IV concludes that despite extensive opportunities for abuse of the class action device, the courts have many mechanisms they can utilize to minimize the risks of its misuse. The Act, on the other hand, while incapable of resolving the existing issues with class action litigation, can potentially create even more problems.

II. BACKGROUND

A. *History of the Act*

Attempts to pass class action legislation in various forms had been made by Congress since 1998. A bill "[t]o amend title 28, United States Code, to enlarge Federal Court jurisdiction over purported class actions" first appeared in the 105th Congress and was entitled the Class Action Jurisdiction Act of 1998.[12] It simplified the removal procedure and gave federal courts original jurisdiction in class action lawsuits if the amount in controversy exceeded one million dollars or if the suit met one of the

7. *See, e.g.*, 151 CONG. REC. H741 (2005) (statement of Rep. Udall) ("[The Act] excessively tilts the balance between the States and the Federal government . . . .").

8. *See, e.g.*, 151 CONG. REC. H644 (2005) (statement of Rep. McGovern); Mary Alexander, *Double Standards on Capitol Hill*, TRIAL, June 2003, at 9.

9. *See* Policy Paper, Lawyers' Committee for Civil Rights Under Law, The Impact of the "Class Action Fairness Act" on Civil Rights Cases 2 (Apr. 3, 2003), *at* http://www.lawyerscomm.org/publications/press/pdf/classactionmemo.pdf; 151 CONG. REC. H736 (2005) (statement of Rep. Scott); *id.* at H737 (statement of Rep. Inslee).

10. *See* 151 CONG. REC. H751 (2005) (statement of Rep. Jackson-Lee); *see also* 149 CONG. REC. H5273 (2003) (statement of Rep. Frost).

11. Thomas A. Donovan, *Proposed Class Action Legislation Will Not Do Much to Improve a Lawyer's Image*, 50-SEP FED. LAW. 30, 31 (2003).

12. Class Action Jurisdiction Act of 1998, H.R. 3789, 105th Cong. (1998).

minimal diversity requirements.[13] Although the full House never considered that bill, the following year a similar legislation was referred to and then reported out of the House Committee on the Judiciary. This time it was called the Interstate Class Action Jurisdiction Act of 1999,[14] and the House passed it by a close vote;[15] however, the measure was not considered on the Senate floor.

Three years later, efforts to enact this type of legislation were renewed when the House passed the Class Action Fairness Act of 2002 by a 233 to 190 vote.[16] Although the 107th Congress adjourned before the Senate voted on the bill, a new version was reintroduced in the 108th Congress. The Class Action Fairness Act of 2003 was introduced on March 6, 2003.[17] This bill was similar to the 107th Congress's House Bill 2341, but the new bill did not include some of the requirements present in the old one, such as the disclosure of attorney's fees, public records, or a report from the Judicial Conference of the United States on class action fees and settlements.[18]

The Senate's version of the Class Action Fairness Act of 2003, Senate Bill 274, was introduced on February 4, 2003, by Senator Charles Grassley (R-Iowa).[19] Unlike House Bill 1115, the Senate version required disclosure of proposed class action settlements to state and federal officials.[20] The Senate Judiciary Committee also suggested two substantial amendments to the measure. The first amendment increased the amount in controversy required for original federal jurisdiction to five million dollars.[21] The second amendment eliminated the general language barring removal when a "substantial majority" of plaintiffs are not diverse from the defendant.[22] Instead, the revised version of that provision stated that a case must remain in state court if two-thirds of the

13. Class Action Jurisdiction Act of 1998, H.R. 3789, 105th Cong. §§ 2-3 (1998) (ver. 2, Sept. 11, 1998); H.R. REP. No. 105-702, at 2-3 (1998) (report by the Committee on the Judiciary) (reporting favorably on the Class Action Jurisdiction Act of 1998 and recommending that the bill pass as amended by the Committee). House Bill 3789 was shorter than the legislation and contained only five sections.

14. Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong. (1999); H.R. REP. No. 106-320 (1999) (report from the Committee on the Judiciary) (recommending the bill as amended by the Committee pass).

15. *See* 106 CONG. REC. H8594 (1999) (passing the bill with a vote of 222 to 207 with four members not voting).

16. *See* 148 CONG. REC. H885 (2002).

17. *See* 149 CONG. REC. E405 (2003) (statement of Rep. Goodlatte).

18. *Compare* Class Action Fairness Act of 2002, H.R. 2341, 107th Cong. §§ 3(a), 7 (2002), *with* Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003).

19. *See* 149 CONG. REC. S1873 (2003).

20. *Compare* 149 CONG. REC. S1875-77 (2003) (statement of Sen. Grassley and printed bill), *with* H.R. 1115, 108th Cong. (2003).

21. *See Washington in Brief*, WASH. POST, Apr. 12, 2003, at A6.

22. *See* 149 CONG. REC. S1875 (Feb. 4, 2003).

plaintiffs are from the same state as the defendant, and it must be removed to federal court if fewer than one-third of the plaintiffs are from the same state as the defendant.[23] The amendment also gave federal judges discretion to reject removal if more than one-third, but less than two-thirds, of plaintiffs are from the same state as the defendant.[24]

Although the Class Action Fairness Act of 2003 passed in the House in June 2003, the Senate never voted on it. In October 2003, proponents of the bill came only one vote short in their attempt to end a filibuster in the Senate.[25]

The proponents of the Act, however, did not give up easily. Almost immediately they started working on compromise legislation that would both protect plaintiffs' rights and help eliminate some of the abusive practices associated with class actions.[26] After six months of negotiations and compromise, the bill was reintroduced in the Senate in 2004, but it died again in July when Democratic senators attached unrelated provisions.

After President Bush's inauguration in January 2005, the measure was immediately reintroduced in the Senate, and this time it swept through, seventy-two to twenty-six.[27] The House followed suit on February 17, 2005, with a 279 to 149 vote,[28] and President Bush signed the Class Action Fairness Act of 2005 into law the very next day.[29]

B. *Summary of the Act*

The Act changes the procedures applicable to interstate class actions in an attempt to create fairer outcomes for all the parties involved. It bans inadequate settlements for the class members and ensures that the attorneys do not receive a disproportionately large amount of the settlements.[30] The Act also aims to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance"[31] and to

23. *See* James Politi, *Senate Moves to Curb Class Action Lawsuits*, FIN. TIMES (London), Apr. 12, 2003, at 7.

24. *See id.*

25. *See* Michael I. Krauss, Liggett Group v. Engle*: A Case Study of Class Action Abuse*, LEGAL BACKGROUNDER, Oct. 31, 2003, at 4.

26. *See Class Action Victory: Sen. Schumer Helps Lead the Way to an Equitable Compromise*, THE TIMES UNION (Albany), Dec. 3, 2003, at A12.

27. *See* 151 CONG. REC. S1249 (2005).

28. *See* 151 CONG. REC. H755 (2005).

29. President George W. Bush, Remarks by the President at the Signing of the Class-Action Fairness Act of 2005 (Feb. 18, 2005). The full text of President Bush's speech delivered at the signing of the Class Action Fairness Act of 2005 is available at www.whitehouse.gov./news/releases/2005/02/20050218-11.html.

30. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 3(a), 119 Stat. 4.

31. *Id.* § 2(b)(2).

"benefit society by encouraging innovation and lowering consumer prices."[32]

The class action measure contains nine sections, five of which warrant a closer look. Section 2 is particularly interesting because it contains the Congress' findings upon which the Act is based. After reiterating the importance of and the general purposes behind class actions, this section explains the various abuses of the class action device that have taken place in the American legal system over the past decade. One of the enumerated problems with class actions is that plaintiffs' lawyers have been garnishing large fees, whereas class members are often left with coupons from the companies whose products harmed them in the first place.[33] Furthermore, the publication of confusing notices "prevent[s] class members from being able to fully understand and effectively exercise their rights."[34] Other findings by Congress are that state and local courts are deciding cases of national importance[35] and are "acting in ways that demonstrate bias against out-of-State defendants."[36] Additionally, Congress found that such exploitation of class actions has undercut the national judicial system, interstate commerce, and the Framers' intent in creating diversity jurisdiction.[37]

Section 3 contains a consumer "Bill of Rights" and is an important part of the Act as it significantly changes the procedures for interstate class actions. First, this section addresses attorney's fees in coupon settlements and provides that class counsel will no longer be able to base their contingent fees on a settlement value that assumes a hundred percent redemption rate.[38] Instead, under Section 3, the attorney's fees must be based on the value of the coupons actually redeemed, and the court is allowed to hear expert testimony as to the "actual value to the class members of the coupons that are redeemed."[39]

Second, Section 3 requires closer judicial scrutiny of proposed settlements under which class members would receive noncash benefits. Specifically, it requires a fairness hearing and a written finding that the settlement is "fair, reasonable, and adequate for class members" before the court can approve such settlements.[40] Additionally, with respect to settlements that result in a net loss to the class members, the court must

32. *Id.* § 2(b)(3).
33. *Id.* § 2(a)(3)(A).
34. *Id.* § 2(a)(3)(C).
35. *Id.* § 2(a)(4)(A).
36. *Id.* § 2(a)(4)(B).
37. *Id.* § 2(a)(4).
38. *Id.* § 3(a).
39. *Id.*
40. *Id.*

find "that nonmonetary benefits to the class member [(injunctive relief, for example)] substantially outweigh the monetary loss."[41]

Third, this section prohibits unequal treatment of class members based solely on their proximity to the court.[42] Thus, settlements awarding a larger portion of the proceeds to the class representative are not allowed under this section unless the representative's larger share is attributable to costs and time spent in representing the class.

Section 4, entitled "Federal District Court Jurisdiction for Interstate Class Actions," is by far one of the most controversial sections in the bill. It amends 28 U.S.C. § 1332 in that it gives federal courts original jurisdiction "of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs."[43] Most importantly, this section allows aggregation of individual class members' claims for purposes of determining whether the $5,000,000 requirement has been satisfied.[44] In such large interstate class actions, the Act requires only that one plaintiff and one defendant be citizens of different states,[45] a concept known as "minimal diversity."

Section 4 also leaves it in the district court's discretion to decline jurisdiction over a case that meets the minimal diversity and the amount in controversy requirements if between one-third and two-thirds of plaintiffs as well as the primary defendants are citizens of the state where the action was originally filed.[46] There are several factors a federal court may consider in deciding whether to exercise its jurisdiction in such cases. They include whether the claims "involve matters of national or interstate interest,"[47] whether the claims will be governed by the laws of other states, whether the class action has been artfully pleaded to avoid federal jurisdiction, and whether the original forum has a "distinct nexus with the class members, the alleged harm, or the defendants."[48]

If, however, more than two-thirds of plaintiffs and at least one significant defendant are citizens of the state in which the action was originally filed, and if the plaintiffs' principal injuries were incurred in that state, the district court may not exercise jurisdiction.[49] Jurisdiction must also be declined if two-thirds or more of class members and the primary

41. *Id.*
42. *Id.*
43. *Id.* § 4(a)(2).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*

defendants are citizens of the same state where the action was filed.[50] Moreover, if there are less than 100 plaintiffs in total, the federal courts shall likewise decline jurisdiction over a class action.[51] Furthermore, Section 4 lists a number of specific cases in which federal courts do not have original jurisdiction under this Act, including claims under the Securities Act of 1933 and the Securities Exchange Act of 1934 and claims relating to internal corporate affairs of certain business enterprises.[52]

Finally, Section 4 introduces a new concept of "mass action," defined as any civil action in which 100 or more persons propose to try their claims jointly.[53] This section provides that even if the plaintiffs in such a mass action do not seek a class certification order, the action will nevertheless be treated as a class action, provided that it otherwise satisfies the additional requirements contained in that section. The proponents of the Act included this provision because "mass actions are really class actions in disguise" and, therefore, lead to the same type of abuses as class actions.[54]

Section 5 of the Act allows for the removal of class action suits by any defendant without the consent of all defendants, even if any defendant is a citizen of the state in which the action was brought.[55] If the district court remands the case back to the state court, the defendants have seven days to appeal the remand order.[56] Unless the appellate court extends the time for appeal, the action on the appeal of a remand order must be complete within sixty days after filing.[57]

Section 6 of the Act requires the Judicial Conference of the United States to prepare and transmit to the House and Senate Judiciary Committees a report on class action settlements within twelve months of enactment.[58] Although this section does not state whether Congress plans to rely on the Judicial Conference's report to pass additional class action reform legislation, a Republican-controlled Congress may seek to legislate further. Section 7 provides for the enactment of Judicial Conference recommendations. Section 8 ensures that the Act does not in

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *See* 151 CONG. REC. H732 (2005) (statement of Rep. Sensenbrenner) (stating that mass actions "involve an element of people who want their claims adjudicated together, and they often result in the same abuses as class actions").

55. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5(a), 119 Stat. 4. Note that the Class Action Fairness Act of 2003 allowed for the removal by either side.

56. *Id.*

57. *Id.*

58. *Id.* § 6(a).

any way restrict the authority of the Judicial Conference and the Supreme Court to prescribe general rules of practice and procedure. Finally, the last section of the bill, Section 9, states that the legislation does not apply retroactively.

III. ANALYSIS

A. *Arguments in Favor of the Act*

Proponents of the Act state that "[t]he class action judicial system has become a joke, and no one is laughing except the trial lawyers . . . all the way to the bank."[59] So what exactly are the supporters of the class action legislation concerned with?

1. UNFAIR SETTLEMENTS

Among the proponents' numerous complaints is the fact that in too many class action settlements consumers receive coupons or something else of little or no value while their lawyers walk away with millions in legal fees.[60] The endless examples they cite are disturbing indeed. For instance, in one lawsuit brought against Blockbuster over late fees, class members received coupons for one dollar, "buy one, get one free" coupons, and free Blockbuster Favorites video rentals.[61] Attorneys for the plaintiffs, on the other hand, were awarded $9.25 million.[62] A class action against Cheerios over food additives resulted in a settlement producing close to two million dollars in attorney's fees while leaving individual class members with coupons for more Cheerios.[63] In an accounting practice dispute involving Bank of Boston, the settlement produced an $8.5 million attorneys' fee and actually cost the class members because they each had to pay an additional ninety dollars debited

59. 151 CONG. REC. H726 (2005) (statement of Rep. Sensenbrenner).

60. *See, e.g., id.* (statement of Rep. Sensenbrenner) (stating that the present class action system produces "outrageous settlements that benefit only lawyers and trample the rights of class members," and that today's class actions "are too often used to efficiently transfer the large fees to a small number of trial lawyers, with little benefit to the plaintiffs"); 151 CONG. REC. H735 (2005) (statement of Rep. Keller); 151 CONG. REC. H748 (2005) (statement of Rep. Blunt).

61. *See* 149 CONG. REC. H5277 (2003) (statement of Rep. Goodlatte); 151 CONG. REC. H735 (2005) (statement of Rep. Cannon); *id.* at H735 (2005) (statement of Rep. Keller); 151 CONG. REC. S1226 (2005) (statement of Sen. Vitter); Lloyd Milliken, Jr., *Fixing the Broken Class Action Lawsuit System*, RES GESTAE, July-Aug. 2003, at 20.

62. 151 CONG. REC. H735 (2005) (statement of Rep. Cannon); *id.* at H735 (2005) (statement of Rep. Keller); 151 CONG. REC. S1226 (2005) (statement of Sen. Vitter); Milliken, Jr., *supra* note 61, at 20.

63. *See* 151 CONG. REC. H735 (2005) (statement of Rep. Keller); 151 CONG. REC. S1226 (2005) (statement of Sen. Vitter) (assessing the lawyers' fees at the slightly lower amount of 1.75 million dollars); *id.* at S1241 (2005) (statement of Sen. Dole) (reiterating the 1.75 million figure for attorneys' fees).

directly from their mortgage accounts.[64] Yet, the favorite case cited in support of the Act is a lawsuit against Chase Manhattan Bank in which consumers were awarded thirty-three cent checks. In order to accept the thirty-three cent check, however, each class member had to use a thirty-four cent stamp to send in his or her acceptance. Thus, while the consumers suffered a one cent net loss through the award, their attorneys emerged from the litigation with a return of four million dollars in legal fees.[65] In order to prevent abuses like these, the Act aims to protect plaintiffs by prohibiting the payment of bounties to class representatives, barring the approval of net loss settlements, requiring greater scrutiny of coupon settlements, and limiting class counsel's contingent fees.

2. FORUM SHOPPING

The supporters' second major concern with class action abuse is plaintiffs' forum shopping for jurisdictions most likely to approve a prospective plaintiff class and award large monetary decisions. The old system allowed class action lawsuits involving plaintiffs from nearly every state to file suits in those few jurisdictions that are known to be plaintiff-friendly and hostile to out-of-state defendants.[66] For example, the king of the tobacco lawyers, Richard Scruggs, complains that in such jurisdictions "the judiciary is elected with verdict money" and that "it's almost impossible to get a fair trial if you're a defendant."[67]

In some of those infamous "magnet courts," which are known for certifying even the most speculative class action suits, the increase in class action filings has reached considerable proportions. For example:

> There was an 82-percent increase in the number of class actions filed in Jefferson County, [Texas], between the years of 1998 and 2000. During the same time span, Palm Beach County, [Florida], saw a 35-percent increase. The most dramatic increase, however, has occurred in Madison County, [Illinois]. Madison County has seen an astonishing 5,000-percent increase in the number of class action filings since 1998.[68]

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64. *See* 151 CONG. REC. H735 (2005) (statement of Rep. Cannon); *id.* at H736 (2005) (statement of Rep. Moran); 151 CONG. REC. S1226 (2005) (statement of Sen. Vitter).

65. *See* 149 CONG. REC. H5277 (2003) (statement of Rep. Goodlatte).

66. *See* 151 CONG. REC. HH726 (2005) (statement of Rep. Sensenbrenner); *id.* at H735 (2005) (statement of Rep. Keller); *id.* at H741 (2005) (statement of Rep. Hastert); 151 CONG. REC. S1225 (2005) (statement of Sen. Vitter); *id.* at S1227-28 (2005) (statement of Sen. Hatch); *id.* at S1235 (2005) (statement of Sen. Sessions).

67. *Breaking With the Bar*, N.Y. SUN, Nov. 20, 2003, at 8.

68. 151 CONG. REC. S1228 (2005) (statement of Sen. Hatch). It was noted in the House that Madison County, Illinois, the area experiencing the largest growth in class action litigation, is a rural county consisting of a population of 250,000 people. 149 CONG. REC. H5281 (2003) (statement of Rep. Sensenbrenner); *see also* 151 CONG. REC. HH726 (2005) (statement of Rep. Sensenbrenner).

What is more interesting is that a large percentage of all class actions filed in Madison County involved nationwide cases, such as all Sprint customers in the United States ever disconnected on a cell phone, "all Roto-Rooter customers nationwide whose drains were repaired by unlicensed plumbers, and all nationwide customers who purchased a 'limited edition' Barbie doll at a higher price."[69]

Such a large number of class actions filed in Madison County is particularly suspicious, since there appears to be no evidence that the people of that county are "somehow cursed or more plagued by injuries than the average citizen."[70] As one Congressman suggested, the only plausible explanation for this phenomenon is "aggressive forum shopping by trial lawyers to find courts and judges who will act as willing accomplices in a judicial power grab, hearing nationwide cases and setting policy for the entire country."[71] These judges in effect regulate products and services produced elsewhere and sold nationally. Certainly, if a district court can automatically apply its own law to a nationwide class, the plaintiffs can shop for the forum that is most likely to return a favorable verdict or award the greatest damages. A decision binds the class, thereby frustrating the substantive policies of those states whose law could potentially have been applied to the action, but which were avoided by the plaintiff's strategic choice of forum.

3. ARTFUL PLEADING

Related to the problem of forum shopping is one of artful pleading. Proponents of the Act advocate that many defendant businesses are forced to litigate truly interstate class action lawsuits in state courts.[72] Because plaintiffs artfully plead their complaints, defendants are unable to remove actions to a federal court even though they are often significant lawsuits involving a great number of citizens with numerous interstate commerce implications. According to one commentator, the filing of a single class action in a state court often leads to a number of "copycat" cases being filed in other jurisdictions.[73] While on the federal level the Judicial Panel on Multidistrict Litigation has the authority to transfer

69. 149 CONG. REC. H5281 (2003) (statement of Rep. Sensenbrenner).

70. *Id.*

71. 151 CONG. REC. H726 (2005) (statement of Rep. Sensenbrenner); *see also* 149 CONG. REC. H5281 (2003) (statement of Rep. Sensenbrenner).

72. *See* 151 CONG. REC. S1245 (2005) (statement of Sen. Dodd); *see also* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b), 119 Stat. 4 (providing that one of its purposes is to provide "for Federal court consideration of interstate cases of national importance"); *id.* § 4(a)(2) (stating that one of the factors in determining the existence of diversity jurisdiction is "whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction").

73. *See* 151 CONG. REC. S1248-49 (2005) (statement of Sen. Frist); 151 CONG. REC. H735 (2005) (statement of Rep. Cannon); Milliken, Jr., *supra* note 61, at 19-20.

related cases to a single federal district court, these cases cannot be consolidated on a state level. This, in turn, leads to a waste of judicial resources and inconsistent outcomes in different state courts.[74] Before the Act was passed, the two main reasons why the defendants might not have been able to remove an interstate class action to a federal court were: (1) the complaint on its face did not involve a federal question, and (2) the amount in controversy for purposes of diversity jurisdiction was not satisfied or there was no complete diversity in the case.

First, a class action might not have been removable because a federal question did not appear on the face of the complaint. The "well-pleaded complaint rule" governs the presence or absence of federal-question jurisdiction in a case. This rule provides that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint."[75] Because a defense is not part of the plaintiff's properly pleaded statement of his or her claim, "a case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case."[76] Thus, when both state and federal law create a cause of action, a plaintiff, as "master of the claim," may obtain federal jurisdiction by raising the federal claim, or, conversely, "may avoid federal jurisdiction by exclusive reliance on state law."[77] In the latter case, it logically follows that any remedy under federal law is waived.

Second, a non-federal question class action may not have been removable before passage of the 2005 Act because complete diversity was wanting or the amount in controversy had not been satisfied. To make sure that actions filed in a state court remained in that court, plaintiffs' counsel tried very hard to draft their complaints in a way that precluded removal on diversity grounds.[78] One commentator noted:

> [S]ome of the fiercest battles now being waged in the class action arena concern the removability of non-federal question class actions filed originally in state court. The jurisdictional issues include whether and how a named plaintiff may voluntarily limit in the complaint the actual damages sought, how the amount in controversy is determined, whether the plaintiff has sought to recast a federal claim into a state claim through "artful pleading," and whether a plaintiff

74. *See* Milliken, Jr., *supra* note 61, at 20; Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 520 (1996).

75. Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987).

76. Rivet v. Regions Bank of La., 522 U.S. 470, 475 (1998) (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 14 (1983)).

77. *Caterpillar*, 482 U.S. at 392.

78. *See* Joel S. Feldman et al., *Consumer Fraud Act Class Actions in State Courts* 67, 82 (ALI-ABA Course of Study, May 2-3, 2002), available in Westlaw SG092 ALI-ABA 67.

has wrongfully sued non-diverse defendants who do not belong in the action in an attempt to defeat jurisdiction.[79]

Before the Act, federal law permitted removal of a non-federal class action only if complete diversity of citizenship between all the named plaintiffs and all the defendants was found.[80] Hence, class counsel could effectively get around removal from a friendly state court either by "naming as a plaintiff a class member who [was] a citizen of the same state as one of the defendants or by naming as a defendant an individual or a corporation that [was] resident in or incorporated in the same state in which one of the named plaintiffs reside[d]."[81]

In examining the second requirement of federal diversity jurisdiction, the amount in controversy, a court has to look at the complaint and accept the amount of damages pled unless it appears to a legal certainty that the plaintiff in good faith cannot claim the jurisdictional amount.[82] "[A] removing defendant must prove by a preponderance of the evidence that the amount in controversy more likely than not exceeds the . . . jurisdictional requirement."[83] Since the plaintiff is the "master" of the complaint, prior to the enactment of the Act, plaintiff's counsel could strategically choose to claim damages in the amount that was less than the currently required $75,000 for each member of the class. This technique, in effect, defeated any possibility of removal by a diverse defendant even though the total amount of damages may have been measured in millions, if not billions, of dollars and, thus, ensured that the action would be tried in the court of plaintiff's choice.

Furthermore, in jurisdictions subscribing to the view that *Zahn v. International Paper Co.*[84] survived the enactment of 28 U.S.C. § 1367,[85] the plaintiff's attorneys could even plead damages in excess of the jurisdictional amount for some of the class members and still defeat removal to a federal court.

The Supreme Court in *Zahn* held that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount" before the

79. *Id.*

80. *See, e.g.*, Snyder v. Harris, 394 U.S. 332, 340 (1969).

81. Donovan, *supra* note 11, at 31.

82. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938). Unless challenged by the opposition or the court, a plaintiff's general allegation that the dispute exceeds the jurisdictional minimum is sufficient to support jurisdiction. *See* Gibbs v. Buck, 307 U.S. 66, 72 (1939).

83. Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1357 (11th Cir. 1996); *see also* Gafford v. Gen. Elec. Co., 997 F.2d 150, 160 (6th Cir. 1993).

84. Zahn v. Int'l Paper Co., 414 U.S. 291 (1973).

85. "[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a) (2000).

lawsuit becomes removable.[86] However, this longstanding construction of the "matter in controversy" requirement of 28 U.S.C. § 1332 was questioned in some circuits subsequent to Congress' passing the Judicial Improvements Act of 1990.[87] For example, in *Free v. Abbott Labs.* the Fifth Circuit decided that § 1367 overruled *Zahn* and that a district court could exercise supplemental jurisdiction over members of a class even if they did not meet the amount-in-controversy requirement.[88] A year later, in *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, the Seventh Circuit followed the decision in *Abbott Labs* in a case with only two named plaintiffs, one of whom met the jurisdictional minimum and one who did not.[89] Relying on *Abbott Labs*, the court in *Stromberg* ruled that § 1367 gave district courts supplemental jurisdiction over individually named plaintiffs who did not meet the jurisdictional minimum, provided that another individually named plaintiff satisfied that threshold.[90] Most recently, in *Allapattah Services, Inc. v. Exxon Corp.*, the Eleventh Circuit joined the Fourth, Fifth, Seventh, and Ninth Circuits in holding that the enactment of supplemental jurisdiction in § 1367 overruled *Zahn*.[91]

The Third, Eighth, and Tenth Circuits, on the other hand, have taken the opposite view – that *Zahn* continues in force notwithstanding the enactment of § 1367. In *Leonhardt v. Western Sugar Co.*, the Tenth Circuit found that § 1367(a) and (b) literally and unambiguously required each member of the plaintiff class to satisfy the *Zahn* definition of "matter in controversy" and to individually meet the $75,000 requirement.[92] Likewise, the Third Circuit in *Meritcare, Inc. v. St. Paul Mercury Insurance Co.* concluded that Congress intended to leave *Zahn* untouched when it passed 28 U.S.C. § 1367.[93] The Eighth Circuit also held that the rule of *Zahn* remained intact despite Congress's enactment of supplemental jurisdiction.[94] Hence, the 30,000-plus members of the plaintiff class in that case had to each satisfy the jurisdictional amount-in-controversy requirement for the district court to exercise subject mat-

86. *Zahn*, 414 U.S. at 301.

87. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

88. Free v. Abbott Labs., 51 F.3d 524, 529 (5th Cir. 1995), *aff'd by an equally divided court*, 529 U.S. 333 (2000) (per curiam).

89. Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 930 (7th Cir. 1996).

90. *Id.* at 931.

91. Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248 (11th Cir. 2003). For analyses of the effect of supplemental jurisdiction on *Zahn* and its progeny from other circuits, see, for example, Rosmer v. Pfizer Inc., 263 F.3d 110 (4th Cir. 2001), and Gibson v. Chrysler Corp., 261 F.3d 927 (9th Cir. 2001).

92. Leonhardt v. W. Sugar Co., 160 F.3d 631, 640 (10th Cir. 1998).

93. Meritcare, Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 222 (3d Cir. 1999).

94. Trimble v. Asarco, Inc., 232 F.3d 946, 962 (8th Cir. 2000).

ter jurisdiction over their claims.[95]

Accordingly, if a class action lawsuit was brought in either the Third, Eighth, or Tenth Circuit, the plaintiff's counsel could defeat diversity jurisdiction and removal by the defendants even though some members of the class claimed damages in excess of the jurisdictional amount. This is because *Zahn* does not permit aggregation for purposes of meeting the amount-in-controversy requirement and requires that each member of a class action satisfy the threshold amount before removal is possible. On the other hand, if the suit was filed in the Fourth, Fifth, Seventh, Ninth, or Eleventh Circuits, plaintiff's counsel had to plead less than the jurisdictional amount for each member of the class to prevent the case from being removed to the district court. While the Act sets forth a provision requiring aggregation of claims to meet the five million dollar removal threshold, it does nothing to resolve the circuits' conflict in interpreting *Zahn*.[96]

4. NEGATIVE EFFECTS ON ECONOMY

Finally, supporters of the Class Action Fairness Act of 2005 argue that current class action abuses have adverse effect on businesses and disrupt the U.S. economy in general because many innocent defendants are forced to settle cases to avoid risking inordinate judgments by local juries.[97] They suggest that sometimes plaintiffs' counsel file multiple suits designed to coerce quick and often unwarranted settlements with a simple settlement demand. "And what company wouldn't pay the defense costs to get out of this type of abusive jurisdiction of the various courts throughout the country."[98] The large amount of fees attorneys receive, proponents of the Act say, "too often do not constitute legitimate harm, because many companies agree to these settlements in order to lower the costs of nuisance lawsuits."[99]

The supporters of the Act further note that this deluge of frivolous

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95. *Id.*

96. *See infra* Part III.C.1.

97. *See, e.g.*, 151 CONG. REC. H747 (2005) (statement of Rep. Blunt) ("Frivolous lawsuits are clogging America's judicial system, endangering America's small businesses, jeopardizing jobs, and driving up prices for consumers."); 151 CONG. REC. S1226 (2005) (statement of Sen. Vitter); 151 CONG. REC. S1229 (2005) (statement of Sen. Hatch); *see also* Class Action Fairness Act of 2005, H.R. 516, 109th Cong. § 2(a)(6) (2005) ("Abusive interstate class actions have harmed society as a whole by forcing innocent parties to settle cases rather than risk a huge judgment by a local jury, thereby costing consumers billions of dollars in increased costs to pay for forced settlements and excessive judgments.").

98. 151 CONG. REC. S1229 (2005) (statement of Sen. Hatch).

99. 149 CONG. REC. H5278 (2003) (statement of Rep. King).

class actions stunts economic growth and job creation.[100] It also leads to higher prices for consumers: the so-called "Tort Tax makes consumers pay more for the goods and services they use. The Tort Tax adds to the cost of everything we buy because businesses and manufacturers have to cover themselves and their employees – just in case they get sued by a greedy personal injury lawyer."[101] For example, according to House Representative Hastert, the last estimate showed that this Tort Tax "cost the nation's economy $246 billion a year, and by 2006, it will cost the average American nearly $1000 more each year on their purchases because of defensive business practices."[102] Other statistics offered by the proponents of the Act to back up this argument is that the "tort system consumes up to 3 percent of [the U.S.] gross domestic product."[103] Since a 3.5 percent GDP is needed just to sustain the economy, then "our economy has to grow at 6 1/2 percent in order to make up for the 3 percent that is consumed in our tort system."[104] Others reiterate those fears:

> Class action lawsuits also pose a threat to investors and the security of American retirement plans, which are largely invested in equity securities of American corporations. While class action liability can be enormous, news of these lawsuits on Wall Street can drive down any particular stock by as much as 10 points in one day.[105]

B. *Rebuttal to the Proponents' Concerns*

This section addresses the issues with which the Act's supporters are concerned and discusses whether these concerns are warranted.

1. THE "UNFAIRNESS" OF SETTLEMENTS IS EXAGGERATED

Although class action settlements may at first blush seem extremely unfair to class members, especially when one considers solely the examples offered by the supporters of the Act, a closer look at the settlement awards reveals that the degree of "unfairness" is exaggerated. Certainly, when one compares the total amount of attorneys' fees to an individual plaintiff's recovery, as many proponents of the legislation suggest we do, the expected conclusion is that the latter is disproportionately smaller than the former. Coupon settlements, however, take on a different look once the following factors are taken into account: (1) compen-

100. *See* 151 CONG. REC. H723-01, *H735 (2005) (statement of Rep. Cannon); *id.* (statement of Rep. Keller); *id.* at H740-41 (statement of Rep. Hastert).

101. *Id.* at H741 (statement of Rep. Hastert).

102. *Id.*

103. *See* 149 CONG. REC. H5278 (2003) (statement of Rep. King).

104. *Id.*

105. 149 CONG. REC. H5282 (2003) (statement of Rep. Sensenbrenner).

satory damages of individual class members in many class actions are often very small;[106] (2) class actions do not exist only to provide relief for private wrongs – another major purpose behind them is to correct, punish, and deter big corporations;[107] and (3) courts are free to reject proposed coupon settlements where it appears that they are inequitable.

Hence, supporters of the Act somewhat overstate the problems with coupon settlements. While they can be commended on bringing to light many unfair settlements, there is no statistical evidence of a state class action "crisis." In fact, there is empirical evidence to the contrary. For example, according to one Congressman, the RAND Institute for Civil Justice has conducted a study of class action settlements and found that "given the small dollar amount of individuals' losses, it was 'highly unlikely that any individual claiming such losses would find legal representation without incurring significant personal expense.'"[108] Additionally, the study concluded that "class counsel's fees [constitute] a modest share of the negotiated settlements" and that its survey "contradicts the view that damage class actions invariably produce little for class members and that class action attorneys routinely garner the lion's share of settlements."[109]

Another comprehensive empirical study conducted by law professors from Cornell Law School and New York University Law School came to the conclusion that "the amount of client recovery is overwhelmingly the most important determinant of the attorney fee award."[110] The study examined 370 class action settlements reported for the period 1993-2002 in which both attorney's fees and class recovery could be determined. It was conducted to help judges handling large class action settlements determine reasonable attorneys' fees.

Contrary to claims by supporters of class action legislation, this study found no evidence that either plaintiff recoveries or attorneys' fees

106. *See, e.g.*, 151 CONG. REC. H735 (2005) (statement of Rep. Scott) ("[I]f a person at a checkout counter calibrates the machine to just cheat [a customer] out of a few cents, what is one's recovery in that case? Just a few cents.").

107. *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 924 (1998) (arguing that the purpose of a "small claim" class action "is solely to deter the kind of wrong that causes a small injury to a large number"); *see also* 151 CONG. REC. H736 (2005) (statement of Rep. Scott) (opining that "some of these coupon cases are the only way that we can rein in corporate abuse"); *id.* at H751 (2005) (statement of Rep. Jackson-Lee) ("[I]n the settlement comes the punishment for not doing or the incentive to not violate the law again.").

108. 149 CONG. REC. H5281-03, *H5283 (2003) (statement of Rep. Jones).

109. *Id.* (quoting the RAND Institute study). For a list of published studies on class actions and mass torts from the RAND Institute for Civil Justice, see http://www.rand.org/icj/pubs/class.html.

110. Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 27 (2004), *available at* http://papers.ssrn.com/abstract=456600.

increased over the ten year period.[111] Furthermore, the study noted a "scaling effect," showing that "[t]he percent of the recovery that goes to attorneys decreases as the size of the recovery increases."[112] This inverse relationship tends to support the underlying theory of class actions, that consolidation of similar claims promotes judicial economy and benefits clients: "As similar cases are aggregated, the efficiency gains yield an increased net return to clients. This economy of scale carries over to costs and expenses. Costs absorb a lower percent of the recovery as the recovery increases."[113] The study also found that attorneys' fee awards tend to be higher in federal court than in state court.[114] Such a conclusion directly undercuts arguments by congressional supporters of the Act that windfall attorneys' fees in some state class actions justify sending more of the cases to federal court.

The second major concern of the Act's proponents is plaintiffs' forum shopping and the fact that local courts are setting national policy in the country. However, "[w]hen these jurisdictions are studied closely, they're not shown to be out of control."[115] In fact, one of the co-authors of the empirical study discussed in the previous section, Theodore Eisenberg of Cornell Law School, expressed his skepticism "about claims of so-called judicial 'hell holes,' – state courts where judges routinely award huge attorneys' fees at the expense of plaintiffs."[116]

In fact, the dangers of plaintiffs' forum shopping are significantly reduced by the protections embedded in Federal Rule of Civil Procedure 23(e).[117] This Rule prohibits "any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class" without prior approval of the court.[118] The requirement of court approval of dismissals and settlements protects the interests of absent class members and polices the use of class action allegations. If the court must approve dismissal or settlement, plaintiffs are less able to act improperly. If they misuse the class action device, the court has the power to disapprove the settlement, disallow the dismissal, and force the plaintiffs to proceed. This measure reduces the incentive to plaintiffs' counsel to misuse the class action device solely in an effort to leverage a favorable settlement.

In keeping with the court's obligation to police the use of the class

111. *Id.*

112. *Id.* at 78.

113. *Id.*

114. *Id.* at 77.

115. *Study Disputes Rising Attorney Fees, Recoveries in Class Action Settlements*, 72 U.S. L. WK., Jan. 20, 2004, at 2412 (quoting Theodore Eisenberg).

116. *Id.*

117. FED. R. CIV. P. 23(e).

118. FED. R. CIV. P. 23(e)(1)(A).

action vehicle, court approval provides the judge with a check against forum shopping. Court approval of dismissals prevents counsel from dismissing class action claims upon discovery of adverse law in a jurisdiction, or upon assignment of the case to an "unfriendly" judge.

Furthermore, the whole premise of big companies' inability to get a fair trial in certain state courts is highly questionable.[119] And even where the infrequent abuse has occurred, such as in Madison County, Illinois, for example, the opponents of the Act contend that the abuse "is not an endemic feature of State judiciaries . . . in fact, many Federal class actions have experienced the same outcomes that attract criticism at the state level."[120]

Likewise, the argument that a few plaintiff-friendly jurisdictions are setting national policies is not justified because any attempt to apply a single state's law to a nationwide class must first overcome the constitutional hurdle raised in *Phillips Petroleum Co. v. Shutts*.[121] The United States Supreme Court in *Shutts* reversed an order certifying a nationwide class of natural gas leaseholders seeking recovery of interest due on delayed royalty payments.[122] The Court held that the Kansas court's application of Kansas law to determine the rights of all plaintiffs violated constitutional due process.[123]

In an effort to curb the so-called "magnet forum phenomenon," the Court in *Shutts* adopted a two-part test for the choice of applicable law in a nationwide class action. First, the Court asked whether the pertinent state's law conflicted with that of the other states represented. If so, then in order for the forum state to have a sufficient interest to justify application of its law to those non-residents:

> [The state whose law is sought to be applied] must have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests," in order to ensure that the choice of [the forum state's] law is not arbitrary or unfair.[124]

Thus, "where different state laws conflict, the contacts between each putative class member's claims and the forum state must be sufficiently great to make it fair for the forum to apply its law to that member's claim."[125]

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119. *See* 149 CONG. REC. H5283 (2003) (statement of Rep. Jones).

120. *Id.*

121. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

122. *Id.* at 822-23.

123. *Id.*

124. *Id.* at 821-22 (citing Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)).

125. Feldman et al., *supra* note 78, at 85.

2. ARTFUL PLEADING

Another concern with class action litigation expressed by the proponents of the Act is the plaintiffs' artful pleading of the complaints to avoid removal. Yet, the courts will not allow a plaintiff to prevent the defendant's access to a federal forum through artful pleading because "the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization."[126] Although the "well-pleaded complaint rule" largely favors plaintiffs by permitting them to choose which law, state or federal, to rely on, provided that the cause of action arises under both, its counterpart, the artful pleading doctrine, compensates for this seeming inequity. According to the artful pleading doctrine, "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint."[127] If the court decides that a plaintiff has "artfully pleaded" her claim in this fashion, it may allow removal notwithstanding lack of federal question on the face of the complaint. In particular, the plaintiff may not avoid federal jurisdiction based on a federal question where federal law completely preempts the plaintiff's state-law claim. Although preemption is normally a defense, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law."[128]

With respect to non-federal question jurisdiction of federal courts, defendants often argue that a local class member or a local defendant has been "fraudulently joined" to ensure that the lawsuit remains in a state court. However, federal courts are quite capable of differentiating between valid and fraudulent claims, and there already exists an appropriate procedural mechanism enabling the defendant to challenge the propriety of joinder. As the United States Supreme Court stated:

> [The] right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. If in such a case a resident defendant is joined, the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent a removal . . . .[129]

One commentator explained that federal courts carefully examine the pleadings to determine whether a party was joined in bad faith:

> The question on a claim of fraudulent joinder is not whether the

126. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 n.2 (1981) (quoting C. WRIGHT ET AL., 14 FEDERAL PRACTICE AND PROCEDURE § 3722, pp. 564-66 (1976)).

127. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 22 (1983).

128. Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987).

129. Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921) (citations omitted).

> plaintiff will prevail, but whether, under the claim alleged by the plaintiff, any possibility of recovery exists. In years past, this required an examination of the plaintiff's pleadings. Unless there was some facial bar to recovery – such as a limitations defense appearing on the face of the pleading or a bar of charitable immunity – the case would be remanded because the pleadings stated a claim for relief. In recent years, however, federal courts have treated fraudulent joinder claims in a manner akin to summary judgment motions: the court determines if any evidence exists to support the plaintiff's claim. Federal courts do not require a plaintiff to pretry his claim, however, or even to submit much evidence, as the defendant carries the burden to show no possibility of recovery.[130]

Thus, even if the supporters of the Act are justified in their concerns about plaintiffs' fraudulently joining parties in order to defeat diversity jurisdiction, federal law already provides a device for dealing with this problem.

3. DISRUPTION OF ECONOMY

Finally, proponents of the Act contend that many "innocent" defendants in today's class action litigation are forced to settle their claims to avoid risking huge judgments by local juries.[131] This argument, however, does not account for the existence of Rule 11[132] protections against frivolous lawsuits. If the defendants are correct in saying that too many class actions nowadays are "meritless,"[133] then why don't they simply utilize a motion to dismiss to eliminate frivolous class actions? Moreover, if a suit is frivolous, it will not survive a Rule 11 motion whether it was filed in a state or a federal court. A motion to dismiss is a customary remedy for a lawsuit without merit, and state courts are quite capable of using it.

Furthermore, some of the Act's supporters claim that a lot of class action lawsuits are frivolous because they result in settlements with miniscule benefits for class members and large attorney's fees. In fact, one advocate of the Class Action Fairness Act went so far as to say that

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130. Fred Misko, Jr. et al., *Managing Complex Litigation: Class Actions and Mass Torts*, 48 BAYLOR L. REV. 1001, 1027 (1996).

131. *See* 151 CONG. REC. H727 (2005) (statement of Rep. Boucher); *id* at H741 (statement of Rep. Blumenauer); 151 CONG. REC. S1226 (2005) (statement of Sen. Vitter); *id.* at S1229 (statement of Sen. Hatch); *see also* Class Action Fairness Act of 2005, H.R. 516, 109th Cong. § 2(a)(6) (2006) ("Abusive interstate class actions have harmed society as a whole by forcing innocent parties to settle cases rather than risk a huge judgment by a local jury, thereby costing consumers billions of dollars in increased costs to pay for forced settlements and excessive judgments.").

132. FED. R. CIV. P. 11.

133. 149 CONG. REC. H5274 (2003) (statement of Rep. Linder).

calling such lawsuits "frivolous" is an insult to frivolousness.[134] First, this is a wrong definition of the word "frivolous." The term does not mean inequitable or unfair, but, rather, lacking legal merit or foundation under the current law.[135] Second, if it were not for the class action device, members of the class would not be able to bring an action in the first place exactly because of such a small amount of damages.[136]

Additionally, removal to federal courts does not address the problem of meritless class actions because both state and federal courts use the same standard for a motion to dismiss. "Most state class certification statutes copy Rule 23 of the Federal Rules of Civil Procedure."[137] Although some states incorporate minor differences, "state courts facing class certification questions generally consider federal case law persuasive authority."[138] For example, "the great majority of state courts, like the overwhelming majority of federal courts, find class treatment inappropriate due to manageability and predominance problems caused by legal and factual variation."[139] Thus, while some of the proponents' concerns with the state of the class action litigation are unwarranted, others can be effectively addressed by utilizing the existing procedural techniques.

C. *The Act's Negative Impact on the Class Action Litigation Today*

Although the Act has seemingly noble purposes behind it and, at least in some instances, is undoubtedly driven by valid concerns about the modern state of class action litigation, the remedy contained in the legislation is more severe than the disease. Some of the potential drawbacks suggested by the opponents of the Act are that in addition to taking away states' rights, obstructing state law, and restricting liability in a wide range of cases, it has a negative effect on interstate commerce and unnecessarily clogs up the already overburdened federal judiciary by expanding diversity jurisdiction.[140] Passage of the Act was strongly opposed by consumer organizations and civil rights groups, such as the American Association of Retired Persons, Consumer Federation of America, Leadership Conference on Civil Rights, and National Associa-

134. 149 CONG. REC. H5284 (2003) (statement of Rep. Smith).

135. Black's Law Dictionary (8th ed. 2004).

136. *See* 151 CONG. REC. H753 (2005) (statement of Rep. Brown) (stating that class actions "do not generally involve huge losses").

137. Joel S. Feldman, *Class Certification Issues For Non-Federal Question Class Actions – Defense Perspective, in* CLASS ACTION LITIGATION: PROSECUTION & DEFENSE STRATEGIES 194 (PLI Litig. & Admin. Practice Course, Handbook Series No. H0-00MI, 2003), *available at* WL 695 PLI/Lit 85.

138. *Id.*

139. *Id.* at 195.

140. *See* 151 CONG. REC. H751 (2005) (statement of Rep. Jackson-Lee).

tion for the Advancement of Colored People, among others.[141] Likewise, the National Association of Attorneys General[142] and the Conference of Chief Justices (of state supreme courts) were also against the measure.[143]

1. EXPANSION OF FEDERAL DIVERSITY JURISDICTION

Some argue that the Act will have the effect of stripping states of their rights and disrupting the notions of federalism by significantly expanding diversity jurisdiction of federal courts.[144] Before the Act was passed, federal law permitted removal of a non-federal class action only if (1) there was complete diversity of citizenship between all the named plaintiffs and all the defendants, and (2) the amount in controversy, excluding costs and fees, exceeded $75,000.[145] The Act changes these two requirements in several important ways.

First, it simplifies the removal procedure in class actions exceeding $5,000,000 worth of damages by requiring only "minimal diversity," under which sufficient diversity generally exists as long as any one defendant is a citizen of a different state than any one plaintiff.[146] Hence, even if only one defendant in the class action is diverse from the plaintiff or plaintiffs, federal court will still have original subject matter jurisdiction over the case. This substantially limits the plaintiffs' choice regarding whom to name as defendants and whom to include in the plaintiff class if they want the case to remain in a state court.

The "minimal" diversity requirement is qualified, however, by a clause that gives federal judges discretion to decline jurisdiction if between one-third and two-thirds of all plaintiffs and the primary defendants are from the state where the action was originally filed.[147] In deciding whether to exercise such discretion and remand the case back to state court, the district court must look at the totality of the circumstances, including, but not limited to: (1) whether the class action

141. *See id.* at H727 (2005) (statement of Rep. Conyers); 151 CONG. REC. S1248 (2005) (statement of Sen. Reid) (printing into the record a list of the companies which supported Senator Reid's statement against the Class Action Fairness Act of 2005).

142. *See* Letter from National Association of Attorneys General to Sens. Frist and Reid (Feb. 7, 2005) (printed in 151 CONG. REC. H740 (2005)).

143. *See* 151 CONG. REC. S1248 (2005); *Senate Democrats' Secret Negotiations on Consumer Class Action Bill Shut Out Consumer, Environment, Rights Groups*, U.S. NEWSWIRE, Nov. 20, 2003, *available at* http://releases.usnewswire.com/GetRelease.asp?id=23678.

144. *See* 151 CONG. REC. H751 (2005) (statement of Rep. Jackson-Lee) (stating that the Act contains watered down requirements for federal diversity jurisdiction "resulting in the removal of nearly all class actions to Federal court").

145. 28 U.S.C. § 1332 (2000); *see also* Snyder v. Harris, 394 U.S. 332 (1969).

146. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4(a)(2), 119 Stat. 4 (codified as amended at 28 U.S.C. § 1332(d)(2)(A) (2005)).

147. *Id.* (codified as amended at 28 U.S.C. § 1332(d)(3) (2005)).

involves matters of national or interstate interest; (2) whether the claims will be governed by laws of different states; (3) whether the action was artfully pleaded to avoid federal jurisdiction; and (4) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants.[148]

At the same time, another clause provides that if more than two-thirds of plaintiffs and at least one significant defendant are citizens of the state in which the action was originally filed and if the plaintiffs' principal injuries were incurred in that state, the district court may not exercise jurisdiction over the class action.[149] Jurisdiction must also be declined if two-thirds or more of class members and the primary defendants are citizens of the same state where the action was filed or if there are less than 100 plaintiffs in total.[150] Notwithstanding these restrictions, the inevitable result of a changed definition of diversity is a much broader power of federal courts to hear non-federal class action lawsuits.[151] This is because a change from a complete diversity requirement to only a minimal diversity is so drastic that most class actions are now going to be removable notwithstanding all of the exceptions to such diversity jurisdiction contained in the Act.

Second, the Act relaxes the current amount-in-controversy requirement. While in some circuits § 1332 has been interpreted to allow federal jurisdiction only in those class actions where each class member has a claim for more than the amount in controversy,[152] others have allowed class action lawsuits to be heard in federal courts under the doctrine of supplemental jurisdiction if at least one member's claim satisfied the amount-in-controversy requirement.[153] The Act adds another way to get a class action into federal court: it provides for federal diversity jurisdiction if the total amount of damages asserted exceeds $5,000,000, exclu-

148. *Id.*

149. *Id.* (codified as amended at 28 U.S.C. § 1332(4) (2005)). Congressmen referred to this clause as a "home State exception and the local controversy exception." 151 CONG. REC. S1226 (2005) (statement of Sen. Vitter).

150. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4(a), 119 Stat. 4 (codified as amended at 28 U.S.C. § 1332(4), (5) (2005)).

151. *See* Ralph Lindeman, *Class Action Bar Girds for Years of Litigation to Interpret Changes Imposed by Reform Law*, 73 U.S. L. WK., Mar. 8, 2005, at 2515.

152. *See* Trimble v. Asarco, Inc., 232 F.3d 946, 962 (8th Cir. 2000); Meritcare, Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 222 (3d Cir. 1999); Leonhardt v. W. Sugar Co., 160 F.3d 631, 640 (10th Cir. 1998); Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973).

153. *See* Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248, 1254 (11th Cir. 2003); Rosmer v. Pfizer Inc., 263 F.3d 110, 117 (4th Cir. 2001); Gibson v. Chrysler Corp., 261 F.3d 927, 943 (9th Cir. 2001); Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 930 (7th Cir. 1996); Free v. Abbott Labs., 51 F.3d 524, 529 (5th Cir. 1995), *aff'd by an equally divided court*, 529 U.S. 333 (2000) (per curiam).

sive of interest and fees.[154] Additionally, the legislation allows aggregation of the claims of all class members to meet that amount.[155]

Whether or not these provisions of the Act will supersede *Zahn* and its progeny is not entirely certain. On the one hand, the legislation is inconsistent with *Zahn* because it allows aggregation of claims whereas *Zahn* held that plaintiffs are not permitted to aggregate in order to meet the amount-in-controversy requirement. On the other hand, the Act does not explicitly allow or prohibit aggregation of claims for purposes of showing that the current $75,000 amount in controversy has been satisfied. The Act merely states that the individual class members shall aggregate their claims "to determine whether the matter in controversy exceeds the sum or value of $5,000,000."[156] Neither this section nor any other part of the Act makes any mention of whether the claims can be aggregated for purposes of meeting the $75,000 jurisdictional amount under § 1332. Thus, it can reasonably be concluded that the Act did not intend to change the aggregation rules that are in operation now.

Thus, a possible result of this legislation is that the federal court will aggregate the class members' claims to determine whether they amount to $5,000,000 in total. If they do, the case becomes removable even if none of the plaintiffs' claims satisfies the $75,000 amount-in-controversy requirement. If the sum of all claims is less than $5,000,000, the court will still have to apply the law of its circuit on the issue of supplemental jurisdiction. For instance, if the court is in a jurisdiction that follows *Zahn*,[157] it will deny removal unless each class member claims at least $75,000 in damages. If the court is in the jurisdiction that does not follow *Zahn*'s aggregation rules,[158] it will exercise its jurisdiction over the class action suit under the doctrine of supplemental jurisdiction unless no member of the class can claim $75,000.

Thus, the section of the Act concerning aggregation does not make the law on that subject more uniform, but it does bring larger class actions into federal courts. At the same time, it seems to discourage plaintiffs' counsel from strategically claiming smaller damages per

154. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4(a), 119 Stat. 4 (codified as amended at 28 U.S.C. § 1332(d)(2) (2005)) ("The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs . . . .").

155. *Id.* (codified as amended at 28 U.S.C. § 1332(6) (2005)) ("In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.").

156. *Id.*

157. The Third, Eighth, and Tenth Circuits have taken the view that *Zahn* continues in force notwithstanding the enactment of § 1367. *See supra* notes 92-96 and accompanying text.

158. The Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits have ruled that enactment of supplemental jurisdiction statute overruled *Zahn*. *See supra* notes 86-91 and accompanying text.

member in order that removal be impossible. The provision, however, does nothing to prevent such artful pleading in cases involving less than $5,000,000 worth of damages. Nor does it stop counsel from tactically claiming a lesser total amount to ensure that the case stays in a state court. In effect, this provision could discourage plaintiffs' attorneys from notifying as many potential class members as possible because if the amount of damages exceeds $5,000,000, the case will be subject to removal to a federal court. Yet, $5,000,000 is not a large amount for current class action lawsuits, and many of them involve well over that amount just in compensatory damages alone. Only time will tell whether plaintiffs' counsel strategically pleading less than five million dollars in damages will become a problem.

2. THE OVERBURDENING OF FEDERAL COURTS

Regardless of the effect that the Act might have on plaintiffs' artfully pleading their complaints, it expands the original jurisdiction of federal courts in cases involving state law. This, in turn, has the potential to "choke Federal court dockets and delay or foreclose the timely and effective determination" of class actions.[159] For example, "[t]he Congressional Budget Office estimates that the newly enacted class action legislation will move a projected 300 complex class action lawsuits from the states into the federal courts over the coming months."[160] According to Leonidas Ralph Mecham, director of the Administrative Office of the United States Courts, "[t]he Judiciary has neither the financial nor personnel resources to cover these new workload requirements."[161]

In addition, "handling class actions that originated in state court is likely to be a low priority for federal judges . . . [since] among other things the high number of criminal drug prosecutions in the federal system . . . demand attention due to speedy trial laws."[162] One Congressman pointed out that Citicorp's Smith Barney subdivision stated in correspondence to all their investors that the class action legislation "is designated to funnel class action suits with plaintiffs in different States out of State courts and into the Federal court system, which is typically much less sympathetic to such litigation."[163] Smith Barney further advised its clients that the likely practical effect of the change will be

159. 151 CONG. REC. H726 (2005) (statement of Rep. Conyers).

160. *Sentencing Appeals and Class Action Lawsuits Will Cost the Judiciary*, THE THIRD BRANCH (Administrative Office of the U.S. Courts, Washington, D.C.), Mar. 2005, *available at* http://www.uscourts.gov/ttb/mar05ttb/appeals/.

161. *Id.*

162. Lindeman, *supra* note 151, at 2516.

163. 151 CONG. REC. H733 (2005) (statement of Rep. Markey).

that "many cases will never be heard given how overburdened Federal judges are, which might help limit the number of cases."[164] Indeed, the federal judiciary has a significantly smaller number of judges than the state judiciaries. As Chief Justice Rehnquist noted, "[i]f Congress enacts and the President signs new laws, allowing more cases to be brought into the Federal courts, just filling the vacancies will not be enough. We need additional judgeships."[165]

Not only are class action plaintiffs likely to face delays in federal courts, but they will also have to come before judges who are less familiar with the state laws at issue.[166] The legislation puts federal judges in a difficult position of interpreting a host of state law issues that do not belong in federal courts in the first place. Many of the cases, in fact, should remain in state courts because state judges are more familiar with the law in their own states.

By expanding the federal courts' original jurisdiction to more class action lawsuits that do not involve federal questions, the Act would often require federal judges to apply state law to the facts of the case. However, as one commentator noted, "federal courts are often more timid in applying state law because when they do, federal judges view themselves as interpreting somebody else's law."[167] If the case involves a novel issue, the judge will be inclined to request that a state court clarify a particular issue of state law, even though the case was removed to federal court. Hence, the more cases are filed in or removed to federal courts pursuant to the Act, the more questions are going to be certified for state courts to answer, thus, in effect, defeating the purpose behind the Act's new jurisdictional provision.

3. ELIMINATING COUPON SETTLEMENTS

The Act allows a federal court to approve a proposed settlement under which class members would be awarded coupons only after a fairness hearing.[168] It also imposes limits on attorneys' fees in settlements involving coupons by requiring that a fee award be based on the value of the coupons actually redeemed, rather than on the coupons issued.[169] Hence, class counsel will no longer be able to base their attorney's fees

164. *Id*; *see also id.* at H726 (statement of Rep. Conyers) (noting that a case winding its way through the federal judicial system "will take far longer to resolve and is far less likely to be certified").

165. *Id.* (statement of Rep. Jackson-Lee) (quoting Chief Justice Rehnquist).

166. *See* Lindeman, *supra* note 151, at 2516.

167. April Rockstead Barker, *Wisconsin Legal Observers Believe Class Action Law Raises Jurisdictional Issues*, WIS. L.J., Mar. 23, 2005.

168. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 3(a), 119 Stat. 4 (codified as amended at 28 U.S.C. § 1712(e) (2005)).

169. *Id.* (codified as amended at 28 U.S.C. § 1712(a) (2005)).

on a settlement value that assumes a hundred percent redemption rate. These new requirements may effectively eliminate coupon settlements as an option because plaintiffs' lawyers will be reluctant to agree to postpone the determination of the fees until the coupons are redeemed.

Before passage of the Act, class action plaintiffs' attorneys routinely based their fees on a percentage of the total dollar value of the settlement, rather than coupons redeemed. They also sought court approval of their fees when the settlement was reached. Under the Act, however, the true value of the settlement will not be known until long after settlement – until either all the coupons are redeemed or the coupons have expired. Since attorneys are not likely to be willing to wait for several years before recovering their fee or to allow an expert to estimate the value of the redeemed coupons, as provided under the Act, one commentator noted that "[t]he result is that there will probably be more pure cash settlements."[170]

4. UPSETTING THE BALANCE BETWEEN STATE AND FEDERAL JUDICIARIES

The Act is contrary to the notions of federalism because it interferes with the states' role as "laboratories for experimentation" devising "various solutions where the best solution is far from clear."[171] Without state court interpretations, states' bodies of law will not develop such different solutions to new problems and will fail to guide future conduct of businesses. Furthermore, according to one commentator, "[i]f all of the decisions in an area of state law are issued by federal courts, that could stunt the development of that field of law."[172]

Moreover, deference to states' rights is one of the cornerstones of the U.S. democracy, but the essence of the Act is the view that state judiciaries are somehow less competent than federal courts. Quite to the contrary, federal judges are not automatically more knowledgeable or less biased as a result of their federal appointments. In addition, state courts are held to the very same standards of due process as their federal counterparts. State judiciaries are capable of self-regulation, and if state judges fail to perform their duties appropriately, states have adequate mechanisms for reprimanding them:

> Where real problems with the certification process have occurred, the offending States have responded with reforms aimed at improvement.

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170. Lindeman, *supra* note 151, at 2516 (quoting John M. Majoras, a Washington, D.C. attorney).

171. Grutter v. Bollinger, 539 U.S. 306, 342 (2003) (quoting United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)).

172. Barker, *supra* note 167 (quoting Scott Moss, Assistant Professor at Marquette University Law School).

> In Alabama, the often-cited "swamp justice" State according to the proponents of this legislation—both the legislature and the judiciary have been acting to tighten class action procedure in response to accusations for "drive-by" certifications.[173]

Altering the delicate balance between state and federal judiciaries established by the drafters of the Constitution and carefully engineered by their contemporaries may prove to be a dangerous mistake.

IV. CONCLUSION

One can hardly deny that the class action device has significant potential for abusive practices by the class counsel. Congress has been struggling to come up with a solution to these problems since 1998, but the severe criticisms by the opposition precluded the measure from making it to the President's desk until this year. The Class Action Fairness Act of 2005 will likely lead to unwanted consequences because it is very broad in scope, drastically changes the procedural law on class actions, and fails to resolve the issues that worry its supporters. Finally, there already exist numerous procedural mechanisms that the courts can use to minimize class action abuse. Although there has been misuse of the class action device, the abusive practices cannot be eliminated entirely without eliminating the class actions themselves.

173. 149 CONG. REC. H5284 (2003) (statement of Rep. Jones).