

Indirect Purchaser Litigation on Behalf of Consumers After CAFA

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THE CLASS ACTION FAIRNESS ACT of 2005 (CAFA) is ostensibly a procedural reform, hailed by its proponents as a means of ensuring that cases of national concern get tried in federal courts and of protecting defendants from bias in state courts.¹ But it is apparent from the legislative history and much of the advocacy in favor of passage that many of the Act's most ardent advocates—primarily corporate interests and their allies in Congress—want something more than to achieve their vision of procedural fairness; they anticipate achieving a substantive change in enforcement of state laws.²

The Act will move most state law class actions, including indirect purchaser class actions on behalf of consumers under state antitrust law, into federal court. Proponents of CAFA hope this will mean that federal courts will certify fewer class actions under Rule 23 than their state court counterparts under analogous state court class action rules. Though congressional proponents largely deny it, the corporate interests that pushed for passage of the Act no doubt also hope that federal courts will look at state law claims with a more jaundiced eye than the state courts would in construing their own laws. Opponents of the Act appear largely to share their view that the Act will result in fewer victories for plaintiffs, although they obviously view that as a bad thing.³

Despite the seeming consensus between corporate and consumer interests about the presumed effects of the Act, it is not clear that those presumptions will prove correct in practice. To the extent outcome is determined by forum, the outcome of any particular case is likely to be determined less by whether it is decided in a federal or state court than by the particular federal court that ultimately decides it, just as is the case now with respect to both state and federal courts.

The Act may result in greater delay and additional expense, particularly in the first few years of application, as litigants ask the courts to infuse the many ambiguities in the Act with meaning. Delay is almost always good for defendants and bad for plaintiffs. But, at least in the context of state indirect purchaser suits, CAFA may actually make it easier for plaintiffs to attack alleged anticompetitive practices nationally by

strategically filing one lawsuit in a federal district court that is favorable to plaintiffs with named plaintiffs from all of the affected indirect purchaser repealer states.⁴

Whereas most state courts have been reluctant to take on such far-flung lawsuits—that called upon them to apply the laws of many states and adjudicate the claims of plaintiffs who have no ties to the forum state (or rule on conduct or transactions that occurred entirely outside the borders of that state)—CAFA should be interpreted as a mandate to federal courts to hear such cases and decide them fairly (i.e., by faithfully affording plaintiffs all of the rights that they have under state laws), even if that means applying the laws of many states in a single lawsuit. Many federal courts have in the past declined to certify class actions involving the laws of multiple states.⁵ But after CAFA, denial of class certification on that basis would work a profound injustice inconsistent with due process and the stated goals of the Senate majority that passed the Act—to create procedural fairness while affording consumers all the rights they have under state law.⁶ It would leave consumers without a remedy by denying them any forum in which to adjudicate their claims as a class action.

CAFA ensures that, as a practical matter, state courts will rarely get to interpret their own state antitrust laws, particularly in indirect purchaser suits, because they are so often brought as class actions. State antitrust laws will almost always be interpreted by a federal judge, a result that unnecessarily tramples on states' rights to construe their own laws under their own procedures. Some federal courts undoubtedly will also be tempted to look to federal antitrust law to fill any gaps in state law, leading to a creeping imposition of federal substantive legal standards on state law (something usually feared by the legislators who passed CAFA).

If CAFA's massive expansion of federal diversity jurisdiction does in fact result in significantly fewer indirect purchaser class actions being certified, or more losses by plaintiffs on the issue of liability even when classes are certified, than has been the case under the old regime of state courts interpreting their own state laws under their own procedures, that is a substantive, not procedural, outcome. It would significantly diminish the states' ability to enforce and construe their own laws, ironically accomplished by the very political forces that usually purport to support federalism.

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Political and Legislative History of The Act

Although the business lobby sought passage of similar laws for years, CAFA went through Congress at lightning speed. The House Committee that considered it did not even issue a report. The Senate Committee that ultimately was the driving force behind passage circulated a majority report only after the Act had already been signed into law, a point well-noted by the dissenters on the Committee. Senator Leahy, one of the dissenters, perhaps implicitly arguing that the majority report should not be construed as legitimate legislative history by courts interpreting the Act, noted that it played no part in the Senate's consideration of the bill.⁷

Whatever its value as legislative history, the Senate Report encapsulates the views and motivations of the majority of the Senate Judiciary Committee that reported the bill. Specifically, the report states that the Act "is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant."⁸ The Senate Report asserts that "because interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit, the Committee firmly believes that such cases properly belong in federal court."⁹

Further, the majority claimed to find a "mounting stack of evidence" that "abuses [of class actions] are undermining the rights of both plaintiffs and defendants."¹⁰ The Committee claimed that these abuses had two interrelated sources—unscrupulous plaintiffs' attorneys who "gamed" the system, and incompetent (or, at best, overworked) and biased state courts:

One key reason for these problems is that most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements.¹¹

The majority stated that "many state courts freely issue rulings in class action cases that have nationwide ramifications, sometimes overturning well-established laws and policies of other jurisdictions."¹² The majority also claimed that "state court provincialism" made such courts biased against out-of-state defendants, and pointed to certain supposed "magnet" jurisdictions, such as Madison County and St. Claire County in Illinois, as examples.¹³ The majority also expressed concern about duplicative lawsuits in multiple states with lack of coordination among them.¹⁴ But the majority maintained that, although CAFA is intended to remove most multistate court actions to federal court, it does not preempt or change substantive state law: "In addition, the Act does not change the application of the Erie Doctrine, which requires federal courts to apply the substantive law dictated by applicable choice-of-law principles in actions arising under diversity jurisdiction."¹⁵

Senators on the Judiciary Committee who opposed the bill argued that, while the legislation is described as "procedural," it will actually diminish or eliminate important substantive rights: "[I]n reality [CAFA] will cause a radical revision of the class action rules and diversity jurisdiction requirements. We believe it would bar most state class actions from being heard in state courts and prevent many nationwide class actions from being heard in either state or federal court."¹⁶ They noted that the legislation and previous versions had been opposed by both the federal and state judiciaries, state legislatures and dozens of civil rights, consumer, environmental, and public interest advocates.¹⁷

The majority's sweeping claims about the failures of the state courts are ill-founded, and its assertion that big cases, involving large numbers of people and large amounts of money, naturally "belong" in federal court, rather than state courts that purportedly cannot handle them, is extremely disrespectful of the state judiciary. Claims about true abuses, such as "drive-by" class certifications, have always been based on anecdotal experiences in only a handful of the thousands of state courts in the country.¹⁸ Even if claims by corporate groups about the existence of a few so-called "judicial hell-holes" for defendants were completely true, they hardly justify the massive shift of state law class actions to federal court that CAFA entails. Even the purported "magnet" jurisdictions have been reformed in recent years by their own state courts and legislatures, which have ridden a wave of pro-defendant litigation "reform" that has swept through numerous states.¹⁹

The majority's concern that state courts are improperly certifying nationwide class actions is exaggerated at best. As discussed below, particularly in the context of indirect purchaser suits, examples of state courts rejecting certification of such suits are easier to come by than decisions certifying such classes. Moreover, this concern could have been more narrowly addressed by simply providing for federal jurisdiction only in actions that call for the application of more than one state's laws, rather than the much broader provisions in CAFA that will force nearly all class actions into federal court, even those that involve the laws of a single state and include only plaintiffs that are residents of that same state.

The proponents' concern about "duplicative" lawsuits filed in different states is in one way a criticism of federalism itself. Lawsuits in different states based on the same conduct are not truly "duplicative" if they allege only violations of the laws of the states in which they are brought and include class members that are predominantly residents of the forum state. Plaintiffs have a right to seek redress under the antitrust laws of the state in which they live, and Congress at least purports not to have changed that right under CAFA. The more legitimate concern about multiple state court cases is not that they are duplicative, but that lack of coordination can in some circumstances result in wasteful duplication of litigation efforts, primarily during discovery. While this is a real concern, and one that CAFA may help to ameliorate, even this concern is

overstated, because in practice there is substantial informal coordination among counsel in private multistate litigation.²⁰

What Has Changed?

Expansion of Federal Diversity Jurisdiction. CAFA amends diversity jurisdiction to allow federal courts to hear most class action lawsuits, including indirect purchaser antitrust lawsuits brought entirely under state law.²¹ The Act reverses the old rule requiring complete diversity between each named plaintiff and each defendant, and establishes a rule of minimal diversity. Under the new Section 1332 (d)(2), if “any member” of a plaintiff class is a citizen of a state that is different from “any defendant’s” place of citizenship, the case can be heard in federal court, assuming the other requirements of the statute are met. The former diversity statute disregarded the citizenship of individual class members and only looked to the citizenship of the named plaintiffs for purposes of determining whether complete diversity existed.²² This change to looking at the citizenship of each class member obviously makes it much more likely in a large class action that diversity will exist, because at least one of the class members in all but the most localized of controversies is likely to be a citizen of a different state from one of the defendants in the action.

In addition, whereas in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Supreme Court held that the former diversity statute required that each class member meet the “amount-in-controversy” threshold (now \$75,000 per person), CAFA creates a \$5 million threshold that is determined by aggregating all damages demanded for the entire class.²³ Whereas few class actions involve potential damages of over \$75,000 per class member, most consumer class actions would easily meet the \$5 million aggregate threshold, a figure that would be considered modest for most antitrust cases, even those limited to residents of a single state.

The Senate Report states that the Committee majority’s intent is that where there is any doubt about whether these jurisdictional prerequisites are met, “the court should err in favor of exercising jurisdiction over the case.”²⁴ The Report also purports to put the burden on the plaintiff to show that a case should be remanded to state court,²⁵ even though the Act itself does not explicitly say that, prior law put the burden on the party seeking removal to establish federal jurisdiction, and the removal statute was strictly construed against removal jurisdiction.²⁶ As discussed above, it is not clear that the courts will look to these statements by the Committee majority as legitimate expressions of congressional intent, because the Report was not circulated until after passage of the Act and particularly given that these changes would reverse existing law without an explicit textual basis in the Act.

The Act also removes two other procedural impediments to removal that existed under prior law: the requirement of unanimous consent to removal by all defendants and the requirement that any removal occur within one year after the

case was filed. Under CAFA, any defendant can remove a case to federal court without the consent of any other defendant, and there is no outside time cutoff for removal, although the current requirement that removal occur within 30 days of notice of grounds for removal has been retained.²⁷ Elimination of the one-year time limit for removal could allow defendants to interfere with state court proceedings that are already at an advanced stage. A defendant who does not like the way things are going in a particular state court could get a second bite at the apple by “discovering” a basis for removal even as late as the eve of or during the trial. Such tactics might be subject to reversal and remand on the ground, for instance, that the 30-day rule bars removal because the defendant should have known earlier about the grounds for removal, but a remand certainly could not be presumed, particularly in situations involving more subtle gamesmanship. Ultimately, however, such concerns will likely prove more theoretical than real because most class actions will be brought initially in federal court in order to avoid the unnecessary delay that would come from the procedural wrangling required to keep a case in state court.

Although the Act and the Senate Report purport to be concerned that federal courts hear all interstate class actions, in reality the Act goes further and effectively eliminates the possibility of a single-state class action on behalf of consumers in that state if any primary defendant’s principal place of business or state of incorporation is outside the forum state.²⁸ The Act has two narrow exceptions—the “local controversy” and “home state” exceptions—under which federal courts are required to decline jurisdiction. But those provisions are so narrow that most indirect purchaser actions, no matter how narrow the class definition, are likely to be subject to federal jurisdiction.

The “local controversy” exception provides that the “district court shall decline to exercise jurisdiction” where each of the following factors is present:

- (1) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;
- (2) at least 1 defendant is a defendant (a) from whom significant relief is sought by members of the plaintiff class, (b) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class, and (c) who is a citizen of the State in which the action was originally filed;
- (3) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and
- (4) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.²⁹

This provision contains a number of ambiguous terms (e.g.,

“significant relief,” “significant basis,” “principal injuries,” “similar factual allegations”) that one might expect to result in decades of litigation to determine their meaning, potentially resulting in a significantly greater number of class actions remaining in state court than the general expansion of federal jurisdiction by CAFA would suggest. But the Senate Report states that these ambiguous terms should be construed in favor of finding federal jurisdiction.³⁰ Thus, if a remand decision hinges on whether, for instance, the relief a plaintiff seeks against a particular local defendant is “significant relief,” a court that views the Committee Report as legitimate legislative history would likely resolve any doubt in favor of finding federal jurisdiction.

It is difficult to predict how courts that take a more skeptical view of the Committee Report would interpret these provisions. Under existing case law, a court would actually do the opposite and construe the grant of federal jurisdiction as narrowly as possible. Because “[f]ederal courts are courts of limited jurisdiction . . . [i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.”³¹

The home state exception to CAFA’s expansion of diversity jurisdiction, 28 U.S.C. § 1332(d)(4)(B), oddly overlaps almost entirely with the local controversy exception but appears to be slightly broader because it does not include all of the limiting conditions of the local controversy exception. The home state exception provides that a federal court should decline jurisdiction if “two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.” This exception introduces a new, undefined term into the Act—“primary defendants”—but otherwise overlaps with portions of the local controversy exception. The home state exception appears to be broader than the local controversy exception in two ways: it does not require specific findings concerning the relief sought from the defendant (i.e., that it can be “significant relief”), and it does not require that removed suits asserting the “same or similar factual allegations” as any other suit filed “during the 3-year period preceding the filing of the class action” remain in federal court.

The Senate Report does not explain the difference between the “local controversy” and the “home state” exceptions. Nonetheless, it seems likely that both of these exceptions will have limited applicability. In most cases, even assuming the class is defined to include only residents of the forum state, the “primary defendant,” however this term ultimately is defined, is likely to be a citizen of a different state.

The Act also creates a category of cases in which a federal court may at its discretion decline to exercise jurisdiction where one-third to two-thirds of the putative class members share citizenship with the primary defendants. However, the Act lists several factors that appear calculated to sharply limit those instances in which courts should remand based

on this exception:

- (A) whether the claims asserted involve matters of national or interstate interest;
- (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
- (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
- (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
- (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
- (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.³²

The Act instructs courts to look at the “totality of the circumstances” but does not give any guidance about whether or how to weight these various factors. But taken together, these factors appear to limit the court’s discretion to remand class actions to a very narrow set of cases involving defendants and plaintiffs that reside primarily in one state, and in which a core nucleus of operative conduct or transactions occurred in that state. In the modern era, very few controversies are likely to satisfy these limitations.

The bottom line is that CAFA was intended to and likely will result in most class actions—particularly indirect purchaser actions—being litigated in federal court. Given this reality, most plaintiffs’ attorneys are likely to file indirect purchaser class actions in federal court to begin with, rather than filing in state court only to have the defendant remove the case and engage in a prolonged and ultimately futile remand battle. CAFA gives a defendant the right to appellate review of a successful remand motion, which creates greater potential for delay and is a further disincentive for plaintiffs to file indirect purchaser suits in state court.

MDL Coordination. Because CAFA likely will result in a greater number of antitrust cases being litigated in federal district court, it also likely will result in a greater number of such cases being consolidated and transferred by the Judicial Panel on Multidistrict Litigation (the MDL Panel).³³ MDL transfers can result in cases being litigated in distant forums, at least up to the point of trial. Thus, the combination of CAFA and the availability of MDL transfers may mean that cases previously litigated in state court will now not only be litigated in federal court, but also will be litigated in federal districts outside of the state in which the cases would otherwise have been litigated.

Antitrust cases have long been a staple of MDL litigation. The MDL statute provides that “[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.”³⁴ To order transfer under this provision, the MDL Panel must make a determination that transfer “will be for the convenience of the parties and witnesses and will promote the just and efficient conduct” of the transferred actions.³⁵ The MDL Panel routinely applies these standards to order consolidation of related antitrust cases. Indeed, the very idea of the MDL statute grew out of the experience of the federal courts in the early 1960s with management of nearly 2,000 private antitrust cases that were brought against certain manufacturers of electrical equipment.³⁶ In its early years, more than a quarter of all cases that the MDL Panel transferred were antitrust cases.³⁷ And, of the currently pending MDL dockets, 53 are antitrust related, involving more than 1,000 separate lawsuits.³⁸ Accordingly, the availability of MDL consolidation of related antitrust cases is well established.

MDL consolidation, by definition, results in the transfer of cases away from the district in which they were initially filed or to which they were initially removed. The MDL Panel does not use any bright-line rules for choosing the transferee court. Rather, it balances a multitude of factors, including whether a majority of the related cases are already pending in a particular district,³⁹ whether a particular district court judge has already invested significant time in developing familiarity with the issues likely to arise in the consolidated cases,⁴⁰ the location of a corporate defendant and its employees and files,⁴¹ the wishes of the parties,⁴² relative docket conditions in various districts,⁴³ and the relative convenience of various districts to the parties and witnesses.⁴⁴ Thus, where a defendant’s antitrust violation impacts consumers across the nation, it is likely that indirect purchaser class actions—in federal court under CAFA—will be subject to MDL consolidation, and will often be transferred away from the state(s) in which they are initially filed.

At present, MDL consolidation is for pretrial purposes only. Although for many years the generally accepted practice was for transferee judges to “self-transfer” cases to themselves for purposes of trial, the Supreme Court held in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,⁴⁵ that this practice was not authorized under the MDL statute. For the past several years, the House of Representatives has passed bills for the purpose of overruling *Lexecon*, and permitting transferee judges to retain jurisdiction of MDL cases for trial as well as pretrial purposes, at least for the limited purpose of determining liability and/or punitive damages.⁴⁶ To date, however, the Senate has not acted on those bills. Thus, *Lexecon* still requires that MDL cases that reach the point of trial must be sent back to their forum of origin, absent consent of the parties, for trial to proceed in the transferee court. Nevertheless, important pretrial proceedings will be handled by transferee judges, including motions to remand,⁴⁷ class certification

motions,⁴⁸ and summary judgment motions.⁴⁹ Thus, many of the most significant decisions in MDL cases are made by the transferee judge, and the prospect of retransfer back to transferor courts for trial may be of little consolation to plaintiffs who would prefer to have their claims litigated in their home states.

Class Certification Prospects Under CAFA. Another fundamental question in assessing the impact of CAFA is whether federal courts as a general matter will be less likely to certify indirect purchaser class actions under Rule 23 than state courts have been under their own state class certification rules. This clearly is the expectation of the Act’s proponents, but there is little supporting evidence for this view. Under the old regime in which both federal and state courts have decided class certification issues, federal and state courts have certified class actions at about the same rate.⁵⁰

The decision of whether or not to certify an indirect purchaser class often turns on whether injury to the class can be shown on a classwide basis or whether it requires individual proof for each class member.⁵¹ Both state and federal courts have gone both ways on this issue depending upon the particular facts of the case and the particular laws of the individual states. Numerous state courts have denied class certification in indirect purchaser actions under state rules analogous to Federal Rule 23 on the grounds that injury could not be proven on a classwide basis because individual questions predominated.⁵² Indeed, one commentator has noted, that as of 2001, state courts in Alabama—a state that has been called one of the “worst” states for class actions for defendants by the U.S. Chamber of Commerce’s Institute for Legal Reform⁵³—had denied class certification to every indirect purchaser class action that had been brought in that state.⁵⁴ On the other hand, state courts have certified classes where the plaintiff has presented a plausible model to show injury on a classwide basis.⁵⁵ In some instances, state courts have disagreed with each other regarding whether class certification is appropriate in cases based on the same facts.⁵⁶ State courts also have not been hesitant to throw out indirect purchaser suits on procedural grounds—such as lack of antitrust standing—unrelated to class certification standards.⁵⁷

At the same time, some federal courts have certified indirect purchaser class actions in similar circumstances.⁵⁸ In determining that classwide injury could be shown, at least one federal court has carefully scrutinized and followed the manner in which the individual states at issue would make the class certification decision, finding that some states have a presumption in favor of certification, whereas others take a more skeptical view.⁵⁹

A truly *national* indirect purchaser damages class action—i.e., an action seeking damages on behalf of residents of all 50 states and the District of Columbia—would be impossible because a significant minority of states either follow *Illinois Brick* and forbid such actions or have not explicitly repudiated this doctrine.⁶⁰ But there have been attempts in both

state and federal courts to certify multistate class actions on behalf of indirect purchasers in the states that have repealed *Illinois Brick*. State courts have been particularly reluctant to certify multistate classes of indirect purchasers, based largely on the same policy concerns that, according to the Senate Committee majority, require removing class action cases from state courts.⁶¹ Contrary to the portrait painted by proponents of the Act of state courts reaching out to bind non-resident plaintiffs and interfering with the application of other states' laws, most states no doubt share the view of the California courts that "[n]either our busy trial courts nor our citizens who fund them can afford the luxury of volunteering to handle the nation's class actions."⁶² In contrast, some federal courts have certified multistate indirect purchaser class actions despite the complexities involved in applying indirect purchaser statutes and case law from different states.⁶³

Conclusion

Although critics have rightly observed that many federal courts have in the past been reluctant to certify multistate class actions,⁶⁴ CAFA should now be read as a mandate for

federal courts to decide such class actions, including indirect purchaser class actions. The need to make decisions based on the laws of multiple states should no longer be an accepted basis for a federal court to deny certification, if it ever were. Previously, a federal court that denied certification on these grounds could plausibly argue that plaintiffs could take their cases to their respective state courts. But a federal court that refuses to certify a class action on those grounds now would effectively deny plaintiffs a remedy by denying them any viable forum.

It is impossible to make predictions with certainty about the impact CAFA will have on indirect purchaser litigation. If CAFA is read as an implicit mandate to decide these types of cases, it will create opportunities for plaintiffs to bring multistate indirect purchaser actions with subclasses from each of the 36 repealer states, assuming the facts show impact in each of those states. Such an undertaking might require greater resources than bringing suit in a single state, but it would also entail the possibility of obtaining relief for all affected indirect purchasers from states that provide them a cause of action in a single lawsuit. ■

¹ S. REP. NO. 109-14, at 4–6 (2005) [hereinafter SENATE REPORT]; Warren W. Harris & Erin Glenn Busby, *Highlights of the Class Action Fairness Act*, 72 DEF. COUNS. J. 228, 228–29 (2005); Press Release, U.S. Chamber of Commerce, Chamber Celebrates Landmark Victory in Fight against Lawsuit Abuse (Feb. 17, 2005), available at <http://www.uschamber.com/press/releases/2005/february/05-33.htm>; Institute for Legal Reform, Issues—Class Action, at <http://www.instituteforlegalreform.com/issues/index.php?p=issues>.

² See sources *supra* note 1.

³ SENATE REPORT at 86 (The Committee dissenters argued that “with respect to those states which have enacted an analog to Rule 23, the federal courts are likely to represent a more difficult forum for class certification to occur.”).

⁴ Indirect purchasers are purchasers who buy goods from an intermediary in the chain of distribution and not directly from the party alleged to have violated the antitrust laws. The Supreme Court held in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), that indirect purchasers did not have standing under § 4 of the Clayton Act, 15 U.S.C. § 15, to sue for damages. Many states subsequently passed laws or interpreted their state antitrust laws to permit indirect purchasers the right to sue under state law. These laws are often referred to as “indirect purchaser repealers,” because they effectively repeal the *Illinois Brick* doctrine under state antitrust laws.

⁵ SENATE REPORT at 86–87.

⁶ *Id.* at 4.

⁷ *Id.* at 79.

⁸ *Id.* at 43.

⁹ *Id.* at 5.

¹⁰ *Id.* at 4.

¹¹ *Id.* at 4 (“To make matters worse, current law enables lawyers to ‘game’ the procedural rules and keep nationwide or multistate class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests.”).

¹² *Id.*

¹³ *Id.* at 6, 13.

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 49.

¹⁶ *Id.* at 82.

¹⁷ *Id.* at 82–83.

¹⁸ Public Citizen, Class Action “Judicial Hellholes”: Empirical Evidence Is Lacking, Public Citizen Congress Watch, Jan. 2005, at 3, at <http://citizen.org/documents/OutlierReport.pdf>.

¹⁹ *Id.* at 6–8.

²⁰ Dan E. Gustafson, Prepared Statement for the Antitrust Modernization Commission 4–5 (June 27, 2005), available at http://www.amc.gov/commission_hearings/pdf/Gustafson.pdf.

²¹ See 28 U.S.C. § 1332(d)(2).

²² *Snyder v. Harris*, 394 U.S. 332 (1969).

²³ 28 U.S.C. § 1332(d)(2).

²⁴ SENATE REPORT at 42; see also *id.* at 35 (“[T]he overall intent of these provisions is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications.”).

²⁵ *Id.* at 43.

²⁶ See *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999).

²⁷ 28 U.S.C. § 1453(b).

²⁸ See 28 U.S.C. § 1711(b)(2); SENATE REPORT at 39–41.

²⁹ 28 U.S.C. § 1332(d)(4)(A). See also SENATE REPORT at 39 (referring to § 1332(d)(4)(A) as the “Local Controversy Exception”).

³⁰ SENATE REPORT at 39 (“[T]his is a narrow exception that was carefully drafted to ensure that it does not become a jurisdictional loophole. Thus, the Committee wishes to stress that in assessing whether each of these criteria is satisfied by a particular case, a federal court should bear in mind that the purpose of each of these criteria is to identify a truly local controversy—a controversy that uniquely affects a particular locality to the exclusion of all others.”).

³¹ *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

³² 28 U.S.C. § 1332(d)(3).

³³ 28 U.S.C. § 1407(a).

³⁴ *Id.*

³⁵ *Id.*

- ³⁶ Report of the Co-Ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28 (1965), reprinted in *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 498–502 (J.P.M.L. 1968).
- ³⁷ Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1004 (1974) (Table A, classifying cases that had been considered up to that point by the MDL Panel and showing that 35 of the 112 transferred cases had been antitrust cases).
- ³⁸ *Distribution of Pending MDL Dockets (as of July 11, 2005)*, available at http://www.jpml.uscourts.gov/Pending_MDLS/pending_mdls.html.
- ³⁹ See, e.g., *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, in Dec., 1984, 601 F. Supp. 1035, 1036 (J.P.M.L. 1985) (choosing transferee district because, inter alia, it had “more pending actions than any other district”).
- ⁴⁰ See, e.g., *In re L.E. Lay & Co. Antitrust Litig.*, 391 F. Supp. 1054, 1056 (J.P.M.L. 1975) (choosing transferee judge in part because that judge was “thoroughly acquainted with the issues in this litigation and, therefore, is in the best position to supervise these actions toward their most expeditious termination”).
- ⁴¹ See, e.g., *In re Thaxton Group Inc. Securities Litig.*, 323 F. Supp. 2d 1374, 1375 (J.P.M.L. 2004) (transferring cases to district in which common corporate defendant was headquartered because “witnesses and documents are likely located there”).
- ⁴² See, e.g., *In re Rivastigmine Patent Litig.*, 360 F. Supp. 2d 1361, 1362 (J.P.M.L. 2005) (choosing transferee district based on “the agreement of all parties”).
- ⁴³ See, e.g., *In re Silica Prods. Liability Litig.*, 280 F. Supp. 2d 1381, 1383 (J.P.M.L. 2003) (choosing transferee judge because, inter alia, he had a “relatively low civil caseload”).
- ⁴⁴ See, e.g., *In re USF Red Star Inc. Workers Notification Litig.*, 360 F. Supp. 2d 1365, 1366–67 (J.P.M.L. 2005) (choosing Eastern District of Pennsylvania as transferee district because, inter alia, that “district is relatively conveniently located for parties and witnesses located primarily in the Northeastern United States”).
- ⁴⁵ 523 U.S. 26 (1998).
- ⁴⁶ See Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. (as passed by the House of Representative on April 19, 2005). Under this bill, a transferee court could, under some circumstances, hold a trial to determine liability and punitive damages; issues of compensatory damages would still need to be determined by the transferor court.
- ⁴⁷ See, e.g., *In re Western States Wholesale Natural Gas Antitrust Litig.*, 290 F. Supp. 2d 1376, 1378 (J.P.M.L. 2003) (ordering consolidation, despite pending remand motions, because such motions “can be presented to and decided by the transferee judge”).
- ⁴⁸ The MDL Panel stated in *In re New York City Municipal Securities Litigation*, 439 F. Supp. 267, 269–70 (J.P.M.L. 1977), that “there is no reason, in light of the overriding factors here favoring coordinated or consolidated pretrial proceedings in a single district, why the class determinations regarding the [consolidated] actions should not be made by the transferee judge,” and, “[i]ndeed, the transferee judge’s participation in this important pretrial process will better enable him to coordinate the pretrial proceedings regarding the common factual questions and to thereby effect the simplification of issues through control of discovery and other means.”
- ⁴⁹ Indeed, fairly early in its existence, the MDL Panel noted that the possibility of consistent rulings on summary judgment motions was one factor that favored MDL consolidation. See, e.g., *In re Butterfield Patent Infringement*, 328 F. Supp. 513, 514–15 (J.P.M.L. 1970).
- ⁵⁰ THOMAS E. WILLING & SHANNON R. WHEATMAN, AN EMPIRICAL EXAMINATION OF ATTORNEYS’ CHOICE OF FORUM IN CLASS ACTION LITIGATION 35 (Federal Judicial Center 2005). Some defense counsel may perceive that they will gain an advantage in federal courts through the application of federal evidentiary standards, such as *Daubert*, and summary judgment standards—but neither should make a difference. There is no evidence that state courts have been routinely admitting “junk science” in indirect purchaser actions, leading to runaway jury verdicts, and it therefore seems unlikely that application of *Daubert* will affect the outcome in federal court. Nor should application of federal summary judgment standards change the outcome of indirect purchaser suits. Most states have summary judgment standards that are analogous to Federal Rule of Civil Procedure 56. Moreover, in determining whether the record creates a genuine issue of material fact as to defendant’s liability, the federal courts will be required to look to the underlying substantive laws of the state(s) and the state court decisions interpreting those laws.
- ⁵¹ See William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 ANTITRUST L.J. 1, 6 (1999) (“The predominance of common issues is most often disputed concerning the ‘fact of injury’ or ‘impact.’”).
- ⁵² See *id.* at 3 (“In recent years . . . trial courts in a number of the jurisdictions have effectively terminated indirect purchaser class actions by refusing to certify them under the state counterparts of Rule 23 of the Federal Rules of Civil Procedure.”) (citing 26 such state court denials of certification between 1981 and 1999).
- ⁵³ Public Citizen, *supra* note 18, at 4 & n.18 (citing Harris Interactive Inc., “State Liability Systems Ranking Study,” Mar. 8, 2004).
- ⁵⁴ Joel M. Cohen & Trisha Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, ANTITRUST, Summer 2001, at 29, 31 & n.15 (collecting cases).
- ⁵⁵ See, e.g., *Goda v. Abbott Labs.*, 1997 WL 156541 (D.C. Super. Ct. 1997) (finding that repealer statute created presumption in favor of certification and expert theoretical damage model plausible); *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341 (1987).
- ⁵⁶ *Compare Durden v. Abbott Labs.*, No. CV-93-663 (Ala. Cir. Ct. Calhoun Cty. Jan. 16, 1996) (infant formula) (denied); *Donelan v. Abbott Labs.*, No. 94-C-709 (Kan. Dist. Ct. Sedgwick Cty. May 3, 1995) (infant formula) (granted).
- ⁵⁷ See, e.g., *Knowles v. Visa U.S.A. Inc.*, 2004 WL 2475284 (Me. Super. Ct. 2004) (rejecting consumer class action against Visa/Mastercard that followed successful nationwide merchant suit on antitrust standing grounds).
- ⁵⁸ *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 276 (D. Mass. 2004) (while making certification decision based on analysis of each state’s law, stating that “end payor plaintiffs’ assertion of common injury appears persuasive” and recognizing that “[s]everal courts have found or presumed classwide injury cognizable under federal law under analogous circumstances”); *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 674 (S.D. Fla. 2004) (granting motion for class certification of numerous state-wide classes).
- ⁵⁹ See *Relafen Antitrust Litigation*, 221 F.R.D. at 276 (“[S]tate law defines the elements of the end payor plaintiffs’ claims and, in turn, proves relevant to determining the demonstration of common injury necessary for certification.”) (citations omitted).
- ⁶⁰ See Kevin J. O’Connor, *Is the Illinois Brick Wall Crumbling?*, ANTITRUST, Summer 2001, at 34, 35 (noting that 36 states and the District of Columbia permit private rights of action for indirect purchasers).
- ⁶¹ See, e.g., *J.P. Morgan & Co. v. Superior Ct.*, 113 Cal. App. 4th 195, 215–22 (2004) (reversing certification of nationwide class action on grounds (1) that California courts should not decide laws of 18 states; (2) conflicts among class members who operated at multiple levels of distribution; and (3) lack of predominance in showing of classwide injury). The only state court case that we have located certifying a nationwide indirect purchaser class action was ultimately voluntarily dismissed without prejudice by the plaintiffs. See *Robinson v. EMI Music Dist., Inc.*, 1996 WL 495551 (Tenn. Cir. Ct. 1996) (certifying class); *Robinson v. EMI*, 1997 WL 33378783 (Tenn. Cir. Ct. 1997) (dismissal).
- ⁶² *J.P. Morgan*, 113 Cal. App. 4th at 222 (citations omitted).
- ⁶³ See *Relafen Antitrust Litigation*, 221 F.R.D. at 288 (certifying multistate class action); *Terazosin Hydrochloride Antitrust Litigation*, 220 F.R.D. at 674 (same).
- ⁶⁴ SENATE REPORT at 80. Senator Leahy argued that “[c]ynics might even speculate that is what the business groups behind this purported ‘procedural’ change are really seeking, the dismissal of meritorious cases on procedural grounds by federal courts.”