Dueling Class Actions: The Problem of Overlapping Suits

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I. **Introduction**

The class action is a unique procedural device that allows a single person to stand in the shoes of hundreds or thousands of individuals and pursue a claim on their behalf. In theory, a class action promotes judicial efficiency by allowing similar or related claims to be resolved in one action. In practice, however, the class action device can have the opposite result: creating inefficiencies, wasting judicial resources, and harming the people it was meant to help. This is so because there is no system for selecting class representatives, for choosing class counsel, or for coordinating overlapping suits. Any class member could serve as a representative and any lawyer or firm could serve as class counsel. The largest classes often involve trivial amounts that would not be worth litigating individually, but in the aggregate offer the potential for significant legal fees for the lawyers bringing the case. With such incentives and no system for selecting class representatives or counsel, it is not unusual for more than one lawyer or law firm to file class actions on behalf of the same or overlapping classes.

Given the lack of coordination procedures, when many lawsuits stem from similar or related circumstances, they are likely to result in duplicated efforts by courts and attorneys and inconsistent results. Obviously, it is wasteful of both litigant and court resources for two courts to simultaneously conduct proceedings directed toward resolution of the same dispute. There are a few procedures, however, to ease some of this inefficiency. When the actions all arise in only one system, for example in federal courts or a state judiciary, there are mechanisms for aggregation and consolidation that can minimize the difficulties inherent where multiple similar suits are filed. In the federal system, even though the actions may arise and be filed in separate district courts across many states, the Judicial Panel on Multidistrict Litigation is authorized to transfer multiple cases with common questions of fact to a single federal court for coordinated
pretrial proceedings. See 28 U.S.C. § 1407. But when some actions are filed in state courts and others in federal courts, the problem of dueling class actions can arise.

As one commentator has observed, “[t]his difficulty is of course inherent in our judicial structure, because decentralization is the key attribute of the federal system. The goal has been to find a good balance between the decentralization which keeps federalism a living system, and the centralization needed to correct its sometimes wasteful effects.” Jerome I. Braun, “The Second Time’s a Charm: Taking a Fresh Look at Judge Schwarzer’s Proposal for Discovery Coordination in Large-Scale Multi-Forum Litigation,” 226 F.R.D. 46 (2005). The challenge is therefore to develop a method of handling claims that span many states and impact many people while preserving a balance between federal and state powers.

This paper explores the problems that arise where two or more class actions are filed on behalf of the same group of people in different jurisdiction as well as the potential of the Class Action Fairness Act of 2005 for reducing the incidence of dueling class actions.

II. The Problems Associated with Dueling Class Actions

A. The GM Fuel Tank Litigation: An Illustration of The Difficulties of Dueling Class Actions

In the early 1990s, General Motors faced a series class action lawsuits related to the allegation that the design of the fuel tanks on its pickups rendered the trucks especially vulnerable to fuel fires in side collisions. See In Re: General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 777 (3rd Cir. 1995). Between 1973 and 1987, GM sold over 6.3 million trucks nationwide with side-mounted fuel tanks. Id. at 779. After announcing previously undisclosed information regarding the safety of the fuel tank placement in GM pickups in October 1992, GM was flooded with class action lawsuits. Id. Ultimately, “dozens of actions were filed in various courts throughout the United States on behalf of
consumer classes.” Id. Many cases were removed to federal court, but some were not removable and remained in state court. Consequently, there were simultaneous federal and state class actions arising from the circumstances.

In November 1992, GM removed several cases to federal court and filed a motion with the Judicial Panel on Multidistrict Litigation (“MDL Panel”) to transfer and consolidate all actions for pretrial purposes under 28 U.S.C. § 1407. Id. at 779. A few months later, the Panel transferred the federal cases to the Eastern District of Pennsylvania for pretrial proceedings to be coordinated or consolidated. See Rhonda Wasserman, “Dueling Class Actions,” 80 B.U.L. Rev. 461, 465 (2000). The transfer, however, did not affect the class actions still remaining in state courts, including a class action filed in Texas. Id. at 466.

GM counsel quickly began attempts to settle both the federal and state cases. Id. By July 1993, GM and the federal class counsel had reached a settlement in principle. Shortly thereafter, the federal plaintiffs filed a motion asking for authorization to send out notice of the settlement to class members. The Court granted the motion, and concluded that the settlement was fair, reasonable and adequate, and certified the class for settlement purposes. Notices were mailed out to 5.7 million federal class members, 6450 of which objected to the settlement and 5203 of which opted out of the class. Id. at 467.

A few months later, the federal district court conducted a fairness hearing. Following the hearing, the Court approved the settlement which provided that each class member would get a $1000 coupon toward the purchase of a new GM truck. Additionally, the Court approved class counsel’s request for $9.5 million in fees and $451,912.21 in costs, all to be paid by GM. Id. The Texas state action promptly followed suit with a nearly identical deal being struck. Id.
When the objectors appealed the settlement, both the Texas Court of Appeals and the Third Circuit Court of Appeals rejected the settlements finding that class counsel and GM would have received a windfall under the settlement (each coupon redeemed was a truck sale for which GM stood to make substantial profits), while truck owners would have released GM from liability even though they had not received anything of real value in exchange. *Id*. at 468.

Undaunted by the unfavorable ruling, counsel for GM and the federal class turned to yet another state class action, this one in Louisiana, and presented the settlement deal that had been rejected by the Texas court and by the Third Circuit. *Id*. The Louisiana court “preliminarily approved the settlement, provisionally certified a nationwide class action, ordered that notice be sent to the class, and scheduled a fairness hearing for November 6, 1996.” *Id*. at 469. On appeal, the Louisiana appellate court found that there was no evidence on which the trial court could have relied in applying the factors stipulated in the class action rules of civil procedure, such as the risk of conflicting adjudications, adjudications dispositive of individuals' interests who were not parties to the action, or predominating common questions of fact or law. Thus, the appellate court found that trial court based its decision on the settlement solely upon its apparent fairness rather than the class certification criteria. *See White v. GMC*, 718 So. 2d 480 (La. App. 1 Cir. 1998). The settlement was ultimately approved, but not before many more rounds of litigation. *See White v. GMC*, 775 So. 2d 492 (La. App. 1 Cir. 2000).

This case illustrates the competing forces at play when multiple class actions are allowed to proceed. Often, the class action turns into a race to the finish line, with class counsel feeling pressure to quickly resolve the case while the class members are perhaps left without the most favorable result that could have been obtained.
B. Dueling Class Actions Can Result in Duplication of Efforts and Inconsistent Findings

One of the most obvious problems with dueling class actions is duplication of effort. When more than one class action is permitted to proceed simultaneously, there is a great risk for inefficiency “fraught with potential for inconsistency, confusion, and unnecessary expense.” Groseclose v. Dutton, 829 F.2d 581 (6th Cir. 1987). Groseclose began as a habeas corpus proceeding filed on behalf of a death row inmate challenging the conditions of his confinement. Id. at 583. The defendants moved to dismiss the case arguing that the plaintiff could bring his claim in a pending class action—the Grubbs case—challenging the constitutionality of the conditions of all Tennessee prisons. Id. After the defendants’ motion was denied, the plaintiff moved to certify a class action as to the death row prison conditions for the death row prisoners. Despite the existence of the Grubbs class action, the district court let the Groseclose action proceed, finding a number of subtle differences that it argued would justify allowing the two class actions to proceed simultaneously. The Sixth Circuit disagreed and required the two cases to be consolidated. In its ruling, the Court noted that the two district courts were already making inconsistent findings and determined that it was not proper to have dueling class actions. “It is hard enough for a single judge to try to supervise the operation of a state prison system, and reasonable people disagree as to whether a court ought to take on such a task at all; be that as it may, it seems to us that to have two or more judicial cooks stirring the same broth in the same penal kitchen would be a recipe for chaos.” Id. at 585; see also Goff v. Menke, 672 F.2d 702 (8th Cir. 1982) (where the court vacated a district court order where the district judge had granted relief in a prison conditions case while a class action covering the whole prison system was pending on another judge’s docket).
C. Increasing the Pressure to Settle by Putting Class Actions in Competition with Each Other

As Congress recognized in adopting reform legislation, settlements in class actions have the potential for abuse. One classic example of class action settlement abuse is Kamilewicz v. Bank of Boston Corp., 92 F.3d 506 (7th Cir. 1996), cert. denied, 520 U.S. 1204 (1997). The plaintiffs in that case “had mortgages serviced by BancBoston Mortgage Corporation, one of the defendants. They were among an estimated 715,000 members of a class in a nationwide class action filed in the circuit court for Mobile County, Alabama. The suit--Hoffman, et al. v. BancBoston Mortgage Corp.--challenged the manner in which BancBoston calculated the amount of surplus each member of the class was required to maintain in their escrow accounts. Deposits to the escrow accounts were paid as part of the class members’ monthly mortgage payments. There was no question regarding the ultimate ownership of the surplus; it belonged to the mortgagor and was to be returned when the mortgage debt was satisfied. The issue in the lawsuit was the propriety of BancBoston's holding the surplus until the time it would be returned to the mortgagor.” Id. at 508. The Alabama judge approved a settlement whereby the class members would receive a refund of up to $8.76 and the plaintiffs’ lawyers were to receive more than $8.5 million in fees, which were directly debited from the individual class members’ escrow accounts. Id. 509. The amount debited from the class members’ accounts often exceed their refund. In Kamilewicz, the plaintiff paid $91.33 in attorneys fees to collect a refund of only $2.19. Id. Because absent class members have very little involvement in the litigation, they may wind up with an unfavorable settlement even without the difficulties presented by dueling class actions.

The potential for settlement abuse is enhanced by dueling class actions because of competition to be the first to settle. As illustrated by the GM class actions above, class counsel
realize that if competing cases are settled, other pending cases on behalf of their clients raising the same claims will be dismissed on claim preclusion grounds.

As Wasserman has explained, the pressure to settle lurks around every corner in dueling class actions.

Even if the class has a very strong claim on the merits and class counsel would prefer to go to trial rather than settle at a discount, the attorney must acknowledge that she cannot control the pace at which the court will entertain her action. The existence of another simultaneous suit on behalf of the same class before a different court makes the race to judgment very risky. Thus, class counsel most likely will decide that it is in her own best interest to settle the action and guarantee that she is compensated for her work on the case.

Wasserman, 80 B.U.L. Rev. at 473.

But the increased pressures to settle in the context of class actions works both ways. Defendants often face the pressure to settle when confronted with certification of a single class action. Multiple class actions only exacerbate the urgency.

The certification of a class action places tremendous pressure on a defendant to settle, regardless of a case's merit. 'For defendants, the risk of participating in a single trial [of all claims], and facing a once-and-for-all verdict is ordinarily intolerable,' even where an adverse judgment is improbable. As Judge Posner of the Seventh Circuit Court of Appeals observed, certification of class actions forces defendants 'to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.' He explained further: '[Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.' Judge Posner called the resulting settlements 'blackmail settlements.'


Indeed, the Judiciary Committee of the United States House of Representatives has said of class actions:
The perverse result that companies that have committed no wrong find it necessary to pay ransom to plaintiffs’ lawyers because the risk of attempting to vindicate their rights through trial simply cannot be justified to their shareholders. Too frequently, corporate decision makers are confronted with the implacable arithmetic of the class action: even a meritless case with only a 5% chance of success at trial must be settled if the complaint claims hundreds of millions of dollars in damages.

Id. at 491. When a defendant faces multiple class action suits for the same conduct, these pressures are intensified. Instead of facing one threat, they face many, though this may enable a defendant to shop around for the best settlement deal.

D. Race to Settle Can Result in Informational Deficiencies and Underdeveloped Facts

The race to settle can result in a related informational deficiency where proper discovery is not conducted and the true strength of a claim is not fully explored before settlement is reached. Wasserman at 475. In dueling federal/state class actions where the federal case raises claims that are subject to exclusive federal jurisdiction, class counsel in the state litigation has no reason to perform a pretrial investigation of the federal claims and has no incentive to take discovery on the federal claims, but nevertheless may be under pressure to settle the federal claims as part of a global settlement. Id. at 475. Matsushita Electric Industrial Co. v. Epstein, 516 U.S. 367 (1996) involved a class action pending in Delaware state court alleging violations of state law and a class action pending in a California federal court alleging violations of SEC rules. Id. at 370. The settlement agreement entered into in the Delaware class action purported to release “‘All claims, rights and causes of action (state and federal, including but not limited to claims arising under the federal securities law...’).” Id. at 371. When Matsushita attempted to use the settlement to bar further proceedings in the California class action, members of the federal action objected, arguing the Delaware class action could not settle the SEC claims because those claims were subject to exclusive federal jurisdiction. The Supreme Court
disagreed and held that there is no “‘universal right to litigate a federal claim in a federal district court.’” *Id.* at 385 (quoting *Allen v. McCurry*, 449 U.S. 90, 105 (1980)).

In dueling class actions, class members themselves are also at risk of suffering informational deficiencies. Where there are multiple class actions, there will be multiple class action notices. A class member opting out of one class may receive a subsequent notice in another case and not realize that this case is a different case requiring a new opt out notice. Additionally, class members are sometimes deprived of the information necessary to make an informed decision by courts eager to rid themselves of troublesome class actions. Wasserman at 477 citing *In re Oracle Secs. Litig.*, 132 F.R.D. 538, 545 (N.D. Cal. 1990) (noting that “the court, which approves the settlement, clears its docket of troublesome litigation.”); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1445 (1995) (“Eager for docket-clearing settlement, trial courts face a temptation to close their eyes to conflicts and improprieties that they would not tolerate in other contexts.”); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. Davis L. Rev. 805, 829 (1997) (“No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket.”).

The problem of reaching quick settlements also puts courts, who are charged with approval of settlements, at a disadvantage. Just as counsel is prevented from fully exploring the merits of a case, so is the court when passing on settlement. The Court may not have access to all the information necessary to determine whether the settlement is fair or not.

**E. The Difficulties in Determining the Preclusive Effect of One Class Action Over Another**

In general, when two or more claims arise from the same or related circumstances, the first suit reaching judgment should preclude all related suits. However, in practice, when
duplicative suits result in dueling class actions, the preclusion analysis can be more complex. This creates more inefficiencies in a system that was supposed to ease judicial administration of claims spanning many individuals.

One commentator has suggested that there are three main reasons which make claim preclusions issues complex in dueling class actions. “First, courts address issues that are unique to class action litigation, such as the preclusive effect of a decision declining to certify the class, or whether a plaintiff in a later suit was a class member in the action that went to judgment. Second, because absent class members are not parties to the class action, courts must determine whether to preclude them from litigating not only claims that were presented in the first class action, but also claims that might have been, but were not, raised. Finally, courts must protect due process rights of absent class members.” Wasserman, 80 B.U.L. Rev. at 484.

As Wasserman notes, there is a unique preclusion problem presented in the context of the certification decision. Only parties or their surrogates are bound by court decisions. See Richards v. Jefferson County, 517 U.S. 793 (1996). In a class action, the named plaintiffs do not stand in place of the class until the class is certified. Thus, when certification is denied, the order is not binding on another dueling class action filed by different class representatives. Counsel is generally then free to take his class action to another court and try his luck with a different judge.

When a class is certified and carried through to judgment, different questions arise. Are absent class members barred from suing the defendant on the same claim outside the confines of the first class action, or may they somehow avoid claim preclusive effect? Wasserman observes that

To understand the complexity of the preclusion issues that arise in dueling class actions, first consider the issues that arise whenever a person who was arguably a member of the class attempts to sue individually (rather than on behalf of a dueling class action). The court must first determine whether the plaintiff in the
second suit was an absent class member in the first class action. In addressing this question, courts sometimes grapple with multiple and inconsistent class definitions used in different documents in the first suit. A court applying even a single definition may encounter difficulty in some circumstances. Assuming that the court concludes that the plaintiff in the second suit was a class member in the first class action, it must then determine whether the claim presented in the second suit is the same as the claim presented in the class action. Wasserman at 488.

To determine the scope of the claim litigated in the first class action, many jurisdictions apply a wide “transactional” test that states “the claim extinguished includes all the rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.” Restatement (Second) of Judgments 24(1); see also Porn v. National Grange Mut. Ins. Co., 93 F.3d 31, 34 (1st Cir. 1996) (stating that it determines what constitutes a transaction “pragmatically”). Because these tests are flexible, defendants face the specter of multiple awards and split causes of action. This results in the loss of one of the benefits to class actions—having all claims determined in a single action.

Even though the preclusion analysis can be complex, recent Unites States Supreme Court rulings seem to suggest that the first decision reached in a dueling class action should be entitled to great preclusive effect. In Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996), the Supreme Court dealt with the problem of claims preclusion in dueling class actions. In that case a tender offer resulting in Matsushita Electric Industrial Co.’s acquisition of MCA, Inc., a Delaware corporation, precipitated two lawsuits on behalf of MCA’s stockholders. While the first, a Delaware class action based purely on state-law claims, was pending, the second suit was filed in a California federal court, alleging that Matsushita’s tender offer violated certain Securities and Exchange Commission Rules promulgated under the Securities Exchange Act of 1934. Section 27 of that Act conferred exclusive jurisdiction upon the federal courts in such
suits. Matsushita prevailed in the federal case, and while that judgment was on appeal, the parties to the state action reached a settlement, agreeing, *inter alia*, that class members who did not opt out of the class would waive all claims in connection with the tender offer, including those asserted in the California federal action. The Chancery Court approved the agreement, and the Delaware Supreme Court affirmed. *Id.* at 878.

The Ninth Circuit found that the Delaware judgment was not a bar to further prosecution of the federal action under the Full Faith and Credit Act, 28 U.S.C. § 1738. The Supreme Court reversed, finding that the Delaware settlement judgment was entitled to full faith and credit, notwithstanding the fact that it released claims within the exclusive jurisdiction of the federal courts. *Id.* at 876. Thus it would appear that the Supreme Court favors broad preclusive effect in certain circumstances helping to eliminate the problem of multiple adjudications. However, this may increase the pressure to settle first where there are dueling class actions.

**III. Change In Legal Landscape of Class Actions—The Class Action Fairness Act**

**A. The Newly Enacted Federal Class Action Statute—An End to Dueling Class Actions?**

If dueling class actions result from a decentralized judiciary, recent federal reforms should help alleviate the problem by creating a more centralized process for the adjudication of class actions. On February 10, 2005, the United States Senate passed Senate Bill No. 5, The Class Action Fairness Act of 2005. 1 Six days later the bill passed through the House of Representatives. This bill, signed by President Bush on February 18, 2005, drastically changes the practice of class action litigation. The main thrust of the Act is procedural. It will permit defendants to remove from state to federal court most damages class actions, particularly those cases based on state law. Most significantly the act will: (1) expand federal court jurisdiction

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over most multi-state class actions; (2) increase judicial supervision over class action settlements and attorneys fees; and (3) require notice to federal and state officials prior to settlement.

In its Findings and Purposes, Congress surveyed class action abuses (including dueling class actions) allowed under current class action devices to demonstrate why a change in the law is necessary. In particular, Congress compared the minimal benefits gained by class members with the attorneys fees awarded to their counsel and the incentives the system created to file overlapping class actions. As the Senate noted in its Committee Report,

Yet another common abuse is the filing of ‘copy cat’ class actions (i.e., duplicative class actions asserting similar claims on behalf of essentially the same people). Sometimes these duplicative actions are filed by lawyers who hope to wrest the potentially lucrative lead role away from the original lawyers. In other instances, the ‘copy cat’ class actions are blatant forum shopping—the original class lawyers file similar class actions before different courts in an effort to find a receptive judge who will rapidly certify a class. When these similar, overlapping class actions are filed in State courts of different jurisdictions, there is no way to consolidate or coordinate the cases. The ‘competing’ class actions must be litigated separately in an uncoordinated, redundant fashion because there is no state court mechanism for consolidating state court cases. The result is enormous waste—multiple judges of different courts must spend considerable time adjudicating precisely the same claims asserted on behalf of precisely the same people.

As a result, state courts and class counsel may ‘compete’ to control the cases, often harming all the parties involved. In contrast, when overlapping cases are pending in different federal courts, they can be consolidated under one single judge to promote judicial efficiency and ensure consistent treatment of the legal issues involved.

109 S. Rpt. 14. In addition, Congress determined that abuses in class action procedure kept cases of national importance out of federal court in contravention of the framer’s intent. Consistent with these findings, Congress expanded federal jurisdiction over class actions to minimize abuses and assure fair and prompt recoveries for class members.
B. The Key to the Act—Expanding Federal Jurisdiction

In their efforts to curb the problems the identified with competing class actions, Congress recognized that federal courts can coordinate ‘copy cat’ or overlapping class actions. The record before the Committee indicates that it is not uncommon to see twenty, thirty, or even 100 class actions filed on the same subject matter. Sometimes, competing lawyers file these cases; other times, they are filed by the same lawyers who are simply forum-shopping for the most receptive judge. When these similar, overlapping class actions are filed in state courts of different jurisdictions, there is no way to consolidate or coordinate the cases. The result is enormous waste, to say nothing of the unfairness. Defendants are forced to defend the same case in many different courts. And class members are harmed because the various class counsel compete with each other to achieve the best settlement for the lawyers. In contrast, if overlapping or similar class actions are filed against the same defendant in two or more different federal courts, the multidistrict litigation process (established by 28 U.S.C. Sec. 1407) permits the transfer and consolidation of those cases to a single judge. The federal court multidistrict litigation system regularly consolidates multiple overlapping class actions in this manner, preventing the waste that occurs in state courts.


Prior to the Act, removal jurisprudence had developed to encourage or even require large, multi-state class actions to be litigated in state court. It was very difficult to establish the prerequisites for removal of class actions. Under the former Rule 23, a federal court could exercise jurisdiction only if either a federal question existed or if the requirements of diversity jurisdiction were met. In diversity cases, federal courts were able to exercise jurisdiction over class actions only if complete diversity existed, meaning all named plaintiffs were diverse from all named defendants, and the amount in controversy exceeded $75,000.2

Experience showed that complete diversity was difficult to satisfy in interstate class actions because class members were likely to reside all over the country. In non-class action suits, the Supreme Court had long interpreted the diversity to require complete diversity of

citizenship—all plaintiffs must be citizens of different states than all defendants. See Strawbridge v. Curtiss, 7 U.S. 267 (1806). In class actions based solely on diversity jurisdiction, however, complete diversity of all class members was not necessarily required. In Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921), the court determined that only the named plaintiffs are required to be citizens of states different from those of the defendants. The Court reasoned that so long there was complete diversity between the named plaintiff and the defendants, there was ancillary jurisdiction over the claims of the unnamed class members. Although this would seemingly make federal jurisdiction easier to obtain, in practice plaintiffs could easily defeat diversity jurisdiction simply by naming a class representative from the same state as a defendant.

The larger stumbling block, however, proved to be the amount in controversy requirement. In 1969, the Supreme Court began to use the amount in controversy requirement to close the doors to the federal courthouse. In Snyder v. Harris, 394 U.S. 332, 336 (1969), the Court held that all named plaintiffs with separate and distinct claims must each assert a claim in excess of the statutory minimum for diversity jurisdiction. The Snyder decision did not completely shut the door to small-claim state-law class actions because the amount in controversy could be met if just one named plaintiff met the minimum amount. A few years later, however, the Court completely shut down federal jurisdiction over small-claim class actions.

In 1973, the Supreme Court held in Zahn v. International Paper Co. that every member of a federal court class action with a claim based on state law must have a claim in excess of the amount in controversy requirement of diversity jurisdiction or else the federal court was
precluded from exercising removal jurisdiction.\(^3\) The *Zahn* decision had the effect of eliminating federal jurisdiction over small-claim state-law class actions. In response to this holding, Congress enacted 28 U.S.C. § 1367 which allows federal courts supplemental jurisdiction over all claims related to the case pending before the court. Some Circuits, including the Eleventh Circuit, have relied upon 28 U.S.C. § 1367 to hold that federal courts are allowed to exercise supplemental jurisdiction over a class member’s claim not reaching the amount in controversy requirement.\(^4\) Still, under the former law, “aggregation” of individual claims was not allowed to meet the jurisdictional amount. This led to the anomalous result of class action suits with literally billions of dollars at stake being held in state court while routine disputes for a little over $75,000 were removed to federal court.

The Act alters the amount in controversy requirement for class actions. Under the Act, the amount in controversy is met if the aggregate sum or value of all class members’ claims exceeds $5 million. This departs from the historical approach to the amount in controversy determination, which generally prohibited aggregation of claims for federal jurisdiction purposes.

The first case to address this new aggregation principle under the Act was *Berry v. American Express Publishing Corp.*, No. SA-CV-05-302-AHS (C.D. Cal. June 15, 2005). In that case, the plaintiff filed a class action in California state court seeking injunctive relief, but not monetary relief. The defendants removed the case under the Act and argued that the amount in controversy in the suit for injunctive relief satisfied the $5 million aggregate requirement. Noting the Congressional intent of the Act to liberalize federal jurisdiction over class actions, the court placed the burden on plaintiffs, as the parties opposing removal, to demonstrate that

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remand was appropriate (in that case, demonstrating that the aggregate amount in controversy did not exceed $5 million). The court further held that the amount in controversy can be satisfied either from the view of the aggregate value to the class members or to the defendants. The court ultimately held that the plaintiffs satisfied their burden and granted the motion to remand.

Nevertheless, under the Act, removal to federal courts is now possible in many more class actions. If it was the federal/state system that allowed dueling class actions to occur, then the Act should go a long way to reducing them.

C. Greater Oversight of Settlements—Notice To Governmental Entities

In order to curb abusive settlements and monitor the awarding of attorneys fees, the Class Action Fairness Act requires notice to the “appropriate federal official.” See 28 U.S.C. § 1715. In most cases this requires notice to the Attorney General of the United States. It also requires notice to the appropriate state official, usually the State Attorney General. However, if a state regulator or licensing agent has jurisdiction over the subject matter at issue, that entity must be notified instead. Moreover, the Act requires notification in “each State in which a class member resides”—potentially requiring notification in each of the fifty states. Presumably this notice requirement will result in greater scrutiny of settlements, eliminating one reason contributing to the creation of dueling class actions.

D. Reigning In Coupon and In-Kind Settlements

As mentioned above, the GM class actions resulted in a coupon settlement that was virtually worthless to class members. As such, non-cash, coupon, or “in-kind” settlements have come under criticism in recent years because class members often receive de minimis benefits while class counsel is awarded a large cash fee. Merely requiring judicial findings to protect class members from undesirable settlements may do little to curtail the actual filing of
duplicative class actions. Historically, courts have approved these types of settlements despite the relatively minimal benefits to the class. See, e.g., In re Cendant Corp. Prides Litig., 51 F. Supp. 2d 537, 540-41 (D.N.J. 1999) (court approved settlement consisting of convertible stock “rights”); In re Del-Val Fin. Corp. Sec. Litig., 868 F. Supp. 547, 550-51 (S.D.N.Y. 1994) (partial settlement approved that provided common stock, notes, cash and various forms of nonpecuniary consideration); Cusack v. Bank United of Texas FSB, 159 F.3d 1040, 1041 (7th Cir. 1998) (discount certificates for credits against mortgage closing costs approved); Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 959-61 (E.D. Tex. 2000) (approving settlement in which class members received “Toshiba Bucks” good only for purchase of Toshiba products); In re Superior Beverage/Glass Container Consol. Pretrial, 133 F.R.D. 119, 122 (N.D. Ill. 1999) (discount purchase certificates made available to class members upon proof of claim and redeemable for rebates on future glass container purchases from defendant Owens Illinois); Weiss v. Mercedes Benz, 899 F. Supp. 1297, 1299-1300 (D.N.J. 1995) (approving settlement providing for certificates to each class member usable to off-set the purchase or lease of one of defendant's Mercedes-Benz automobiles); In re Mexico Money Transfer Litig., 164 F. Supp. 2d 1002, 1018-19 (N.D. Ill. 2000) (approving settlement that granted coupons good for future discounts on money transfers to Mexico), aff’d, 267 F.3d 743 (7th Cir. 2001), cert denied sub nom., Garcia v. Western Union Fin. Servs., 535 U.S. 1018 (2002).

The Act responds to concerns regarding coupon or non-cash settlements by regulating the award of attorney’s fees in such cases. See 28 U.S.C. § 1712. Specifically, the Act provides that, to the extent any portion of a contingent fee is based on amounts attributable to the value of coupons such amounts must be figured based on the value to the class members of the coupons that are “redeemed.” Only coupons actually redeemed by class members may be considered in
determining the attorney’s fee award. Thus, by its terms, the Class Action Fairness Act allows for the calculation of attorney’s fees only after the time for redemption of the coupons has expired. Section 1712(d) allows a court to receive expert testimony or “the actual value to the class members of the coupons that are redeemed.” 28 U.S.C. § 1712(d). A court must hold a hearing to determine whether the settlement is fair, reasonable, and adequate and make a written finding of fairness before it can approve a settlement based on coupon or in-kind consideration. See 28 U.S.C. § 1712(e); see also Fed. R. Civ. P. 23(e)(1)(c).

E. The Impact of the Act—Will Class Size Change?

While it is clear that the Act will open the federal court to more class actions, the Act is also sure to change class action litigation in other ways as lawyers adapt to its innovations. While the Act has the potential to reduce the numbers of class actions, there is also the possibility that the act will encourage an increase in the number of class members. Class actions already draw large numbers of claimants. As one federal judge stated “[t]he drum beating that accompanies a well-publicized class action . . . may well attract excessive numbers of plaintiffs with weak to fanciful cases.” In re Agent Orange Prod. Liab. Litig., 818 F.2d 145, 165 (2d Cir. 1987).

If the Act encourages one and only one class action, there may be increased pressure to have the class definition be as broad as possible to ensure all recovery that is possible is realized. There is also the possibility that class definitions will be narrowed in an attempt to make them appear more like “local controversies” over which federal courts will not gain jurisdiction.
F. Effective Date and Application of the Class Action Fairness Act

By its terms, the Act’s provisions apply to cases “commenced on or after” the February 18, 2005 date of enactment. Thus, to the extent the Act will lessen dueling class actions, it does so without regard for the docket of dueling class actions that was already pending prior to enactment. Several defendants in class actions that were filed prior to February 18, 2005 have attempted to remove those cases following the Act’s effective date on the basis that the term “commenced” means the date that the notice of removal was filed. Those efforts have been uniformly unsuccessful. See, e.g., Pritchett v. Office Depot, Inc., 404 F.3d 1232, 1238 (10th Cir. 2005) (“[W]e remain convinced that the term ‘commenced’ in the Act refers to the initial filing, not the removal date.”), aff’d 360 F. Supp. 2d 1176 (D. Col. 2005); Sneddon v. Hotwire, Inc., 2005 WL 1593593 at *2 (N.D. Cal. June 29, 2005) (“So far as this Court is aware, all courts which have addressed this issue under CAFA have held that the commencement of an action refers to the date the action is filed in state court, not when the case is removed to federal court.”) (citing other cases). See also Knudsen v. Liberty Mut. Ins. Co., 411 F.3d 805 (7th Cir. 2005) (significant change in class definition following the Act’s effective date did not result in case being “commenced” for purposes of removal under CAFA; remand affirmed); Lander and Berkowitz P.C. v. Transfirst Health Services, Inc., 374 F. Supp. 2d 776 (E.D. Mo. May 19, 2005) (the Act was enacted on February 18, 2005, the day it was signed into law by the President, not on February 17, 2005, the day the Act was passed by Congress; thus case filed in state court on February 17, 2005 was improperly removed).

Accordingly, defendants should assume that they cannot remove to federal court a class action that was filed prior to the February 18, 2005 effective date. Those cases remain governed by pre-Act law, and are still subject to the problem of dueling class actions.
G. Where Dueling Class Actions are Still Possible

Though the Act expands federal jurisdiction over class actions, it does not mandate that all class actions be funneled into the federal system. To understand where we will continue to see dueling class actions, it is important to examine the types of class actions that the Act will not cover.

Under the act, judges are granted the discretion to decline jurisdiction if the “primary” defendants and more than one-third, but fewer than two-thirds, of the class members are citizens of the state where the case was filed. The Act requires the federal court to evaluate whether, “in the interests of justice and looking at the totality of the circumstances,” the court should exercise jurisdiction. 28 U.S.C. § 1332(d)(3).

In making the determination whether to exercise jurisdiction, the Act directs federal courts to consider the following factors:

1. “whether the claims asserted involve matters of national or interstate interest”;
2. “whether the claims asserted will be governed by the laws of the State in which the action was originally filed or by the laws of other States”;
3. “whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction”;
4. “whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants”;
5. “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 disbursed among a substantial number of States”; and

(6) “whether, during the three-year period preceding the filing of that class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.”


Federal courts have yet to interpret the discretionary jurisdiction provision in any reported cases, but it should be expected that such interpretations will be forthcoming in the near future. Given federal courts’ traditional hostility to removal efforts generally, it will be interesting to learn how federal courts—both district and appellate—interpret a statute that is obviously designed to liberalize removal efforts in class actions when the federal courts developed many of the rules that prevented removal of class actions.5

In addition to giving courts discretion to decline to exercise jurisdiction in certain instances, the Act requires federal courts to decline jurisdiction over the putative class action in two circumstances. First, the federal court must decline jurisdiction if the “primary defendants” (a term not defined in the text of Act but that is discussed in its legislative history) and two-thirds

5 Before 2005, orders remanding a class action largely were unappealable. See 28 U.S.C. § 1447(d). The newly-enacted 28 U.S.C. § 1453 alters that rule going forward in class actions. That law permits either party—plaintiff or defendant—to seek an immediate appeal of an order denying or granting a motion to remand. See 28 U.S.C. § 1453(c)(1) (“a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than seven days after entry of the order”).

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or more of the putative class members are citizens of the forum state. This is known as the “home state” exception and is set forth at 28 U.S.C. § 1332(d)(4)(B). This exception leaves corporations open to defending one class action in their home state and defending another class action somewhere else in the country.

The second circumstance under which the federal court must decline jurisdiction is called the “local controversy” exception. Under that exception, the court must decline jurisdiction if:

(1) at least one of the defendants from whom “significant relief” (an undefined term) is sought and whose conduct forms a “significant basis” (also undefined) for the claims and more than two-thirds of the class members are citizens of the forum state;

(2) the “principal injuries” (also undefined) resulting from the conduct of each defendant were suffered in the forum state; and

(3) there have been no other class actions in the previous three years making the same or similar allegations against any of the defendants.


For this “local controversy” exception, one can envision a scenario where the first case filed is not removable because of factor number three, but where subsequent classes are removable. Therefore it is possible that the Act may invite dueling class actions in certain situations.
Because the Act clearly contemplates that state courts will continue to play a role in adjudicating class actions, dueling class actions will likely continue, but presumably in smaller numbers.

IV. Conclusion

Dueling class actions present logistical and legal challenges for the judiciary and those litigating the cases. With the passage of the Class Action Fairness Act there will likely be a decrease in the types of cases that have traditionally resulting in overlapping. However, because the Act does not give federal courts jurisdiction over all class actions, instances of competing class actions will likely continue, but it is too soon to know exactly what these cases will look like and the unique challenges they will present.