

## One Small Step for a County Court . . . One Giant Calamity for the National Legal System

John H. Beisner, Jessica Davidson Miller, and Matthew M. Shors





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## ABOUT THE AUTHORS

John H. Beisner, head of O'Melveny & Myers LLP's 120-attorney Class Action Practice Group, specializes in the defense of purported class actions, mass tort matters, and other complex litigation in both federal and state courts. Over the past 20 years, he has been involved in defending numerous major U.S. and foreign corporations in upward of 450 purported class actions filed in the federal and state courts of 37 states at both the trial court and appellate level. Those class actions have concerned a wide variety of subjects, including antitrust/unfair competition, consumer fraud, RICO, ERISA, employment/discrimination, environmental, product-related, and securities class actions. He has handled numerous matters before the Judicial Panel on Multidistrict Litigation and has also been responsible for proceedings before various federal and state administrative agencies, particularly the National Highway Traffic Administration and the Consumer Product Safety Commission.

John is a frequent writer and lecturer on class action and complex litigation issues and has been an active participant in litigation reform initiatives before Congress, state legislatures, and judicial committees. In recent years, he has frequently testified on class action and claims aggregation issues before the U.S. Senate and House Judiciary Committees and before state legislative committees. His professional activities include membership in the American Law Institute, the District of Columbia Bar, the State Bar of California, and the American Bar Association.

Jessica Davidson Miller joined O'Melveny & Myers in 1996 and is involved in the firm's litigation and regulatory practices, with a focus on strategic counseling and government relations. Prior to joining O'Melveny, Jessica worked for U.S. Senators Bob Graham and Frank Lautenberg. From 1999 to 2000, she worked at the Federal Trade Commission as a staff attorney in the Office of General Counsel, focusing on appellate litigation.

Matthew M. Shors is a member of the Class Action and Strategic Counseling Practice Groups at O'Melveny & Myers. At the appellate level, Matt has drafted numerous briefs before the Supreme Court, including amicus briefs and petitions for certiorari filed on behalf of leading business corporations, several Members of Congress, and national nonprofit organizations. At the trial level, Matt has successfully second-chaired a jury trial in federal court, and he has successfully argued numerous dispositive and other motions in various courts.

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## EXECUTIVE SUMMARY

For centuries, our national litigation system has embraced a bedrock principle: that claims should be pursued and resolved individually, plaintiff-by-plaintiff. In recent years, efforts to aggregate claims have become more frequent. One familiar form of aggregation has provoked a storm of controversy: the class action. Criticisms focus on the many ways class actions may compromise defendants' and plaintiffs' due process rights (*e.g.*, by binding a large group of parties to the same result simultaneously, a risky proposition if the facts surrounding each claim are not highly similar). But class actions are not the only aggregation vehicle through which harms may occur. "Mass actions" are proliferating in some states. In that form of litigation, the claims of large numbers of plaintiffs are joined indiscriminately for simultaneous trial under unusually lenient aggregation standards, depriving the defendants (and sometimes the claimants, as well) of basic due process and trial fairness rights.

Mass actions most frequently involve fraud or personal injury claims involving tobacco, asbestos, pharmaceutical products, or insurance company practices. They join hundreds (or even thousands) of plaintiffs (and often multiple defendants) into a single massive proceeding, even though the individual plaintiffs have no obvious connection to each other. In essence, mass actions are clearly an end-run—an effort by the plaintiffs' lawyers to litigate highly individualized claims in an aggregated, class action style, even though they would not satisfy the prerequisites for class treatment if they were asserted as a class action.

In mass actions, plaintiffs' counsel often find a local plaintiff, well known to the jury pool, who has suffered a serious injury, and then tack on tens or even hundreds of less compelling cases by plaintiffs who live outside the county or outside the state, who essentially free-ride on the main claim. For example, one plaintiff who suffered cancer might be combined with many others who merely fear they may get cancer. In this way plaintiffs' counsel can sway a jury to award huge damages to numerous plaintiffs whose claims would seem far less compelling if they were tried individually.

Mass actions also enable plaintiffs' counsel to overwhelm a jury with evidence in a manner that makes it impossible to reach a fair verdict. For example, when a mass action involves hundreds (or even thousands) of plaintiffs, their counsel are unfairly permitted to piece together evidence from among the various claimants to construct a "perfect plaintiff"—one who, of course, does not exist in the real world—for presentation to the jury. Counsel may pick and choose among the facts presented by the many plaintiffs in attempting to establish all the various elements of the claim and the jury is often left with the indelible impression that the collective evidence counsel offers satisfies each individual plaintiff's particular burden of proof. For example, if one plaintiff had an allegedly misleading conversation with a defendant's representative about the potential side-effects of a drug, that conversation will be repeatedly referenced to the jury, even though none of the other 1,000 plaintiffs in the action had such a conversation. As a result, the jury may come away with the patently false impression that all plaintiffs had such conversations and relied on them in electing to use the drug at issue.

These harms are magnified exponentially when a mass action includes claims against several or many defendants. In such cases, it is difficult for any particular defendant to have a fair opportunity to put on its unique defenses at trial: evidence admitted as to one defendant's knowledge of a defect many years ago will inevitably tar other defendants as well. The jury will also be hopelessly lost in attempting to determine the precise lawfulness of any one particular defendant's conduct. Mass actions thus often become a "thumbs-up, thumbs-down" vote on corporate America, with the lowest common denominator of conduct often being extrapolated to plaintiffs' verdicts against all defendants. And, to make matters worse, the host of state laws that need to be applied in the typical consolidated proceeding, should the state court engage in a proper choice-of-law analysis, inevitably confuse and prejudice the jury.

Unlike class actions, mass actions often seek, and sometimes obtain at trial, millions of dollars for *each* plaintiff. Since these cases are typically brought in counties where seven-figure jury awards are routine, the risk of going to trial can be even greater than in a class action, and the settlement pressure even stronger.

To examine some mass action activity in detail, this study reports on mass action activity in Jefferson County, Mississippi from 1999 through 2001 as compiled by Stateside Associates, a Virginia-based research organization, under the direction of the Center for Legal Policy of the Manhattan Institute. The data reveal several disturbing patterns:

- First, the frequency of filing of mass joinder actions in Jefferson County, Mississippi was vastly disproportionate to the county's population and the overall volume of the court's civil docket. (The total number of plaintiffs outnumbered the total number of residents of Jefferson County.)
- Second, the vast majority of these cases had little (if any) relationship to Jefferson County.
- Third, plaintiffs' counsel consistently included one local defendant to insulate their cases from federal jurisdiction.
- Fourth, the complaints were brought by counsel from all over the country.
- Fifth, plaintiffs' counsel made little, if any, effort to explain in their complaints exactly what the plaintiffs were alleging or why their claims should be litigated jointly; to the contrary, many of these complaints simply included long lists of plaintiffs with no facts regarding their allegations (and often, no addresses), and thus were clearly intended to intimidate defendants into settlement negotiations.

Mid-year in 2001, Jefferson County's only civil judge reversed his position of being quite hospitable to nationwide mass actions and announced that he was only going to allow mass actions to proceed in his court with in-county plaintiffs. Since then, the party has reportedly moved elsewhere—to other Mississippi counties such as Holmes, Jones, and Jasper. Other states—particularly West Virginia—are now welcoming mass actions as well.

The Mississippi experience makes clear that if an isolated state court signals a willingness to cut due process and fundamental fairness corners in order to accommodate aggregated claims litigation, enterprising plaintiffs' counsel will promptly herd claims to that court in droves from distant locations. In the end, however, the results are catastrophic. Defendants are victimized. The courts and their constituencies suffer, because the courts are largely diverted from fulfilling their primary responsibility for resolving local disputes. Often, claimants are not treated fairly, with some being undercompensated to benefit others who are overcompensated. Only the plaintiffs' lawyers are assured of a happy result.





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## ONE SMALL STEP FOR A COUNTY COURT . . . ONE GIANT CALAMITY FOR THE NATIONAL LEGAL SYSTEM

*In two previously published articles, we documented how some county courts elected by (and accountable only to) several thousand residents of their home communities have decided to ignore basic, long-standing principles regarding the class action device to achieve massive aggregations of claims arising nationwide, all with profound—and profoundly negative—effects on our national legal system.<sup>1</sup> Based in part on fresh field research, we conclude in this article that another claims aggregation device—the “mass action”—is being used by some local courts to declare themselves the nationwide arbiters of critical legal issues, all pointedly to the exclusion of federal and other state courts with closer, more legitimate interests in those issues.*

For centuries, our national litigation system has embraced a bedrock principle: that claims should usually be adjudicated separately, on a claimant-by-claimant basis.<sup>2</sup> In recent years, however, efforts to aggregate claims—to assert collections of claims on behalf of multiple individuals and seek to place those claims before a tribunal for simultaneous resolution—have become more frequent. One form of aggregated claims litigation—the class action device—has received considerable attention from legal researchers and commentators. Through that device, a named plaintiff may, in a representative capacity, seek to litigate his/her own claims plus the claims of hundreds or thousands of other similarly situated unnamed plaintiffs. Normally, those unnamed plaintiffs have not given their express consent to being included in the action; unless they have taken affirmative steps to “opt out” of the litigation, their claims are included.

Much of the recent writing on class actions reflects concern that, when used incautiously, class actions threaten the due process rights of both claimants and defendants because they require courts to attempt to bind a large group of parties to the same result simultaneously, a risky proposition if the facts surrounding each claim are not highly similar.<sup>3</sup> Other observers have criticized the fact that certain state courts have become class action “magnets,” attracting to their dockets numerous cases that do not warrant class treatment, including multi-state class actions with little or no connection to the forum. It must be stressed that this magnet effect does not occur because the class action rules of those courts are outside the mainstream; indeed, the class action rules of our federal and state courts are relatively uniform.<sup>4</sup> Rather, the magnet effect apparently occurs because attorneys specializing in class actions quickly discern that a particular venue—often a particular judge—has developed a reputation for less than rigorous application of the due process and fairness protections that are the foundation of all class action rules.

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1. See J.H. Beisner and J.D. Miller, *They’re Making A Federal Case Out Of It . . . In State Court*, 25 HARV. J. L. PUB. POL’Y 143 (2001) (“*Federal Case*”) (previously published as Civil Justice Report No. 3, September 2001); J.H. Beisner and J.D. Miller, *Class Action Magnet Courts: The Allure Intensifies*, 4 BNA CLASS ACTION LITIG. R. 58 (Jan. 24, 2003) (previously published as Civil Justice Report No. 5, July 2002).
  2. See, e.g., *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979) (reiterating the “usual rule that litigation is conducted by and on behalf of the individual named plaintiffs only”).
  3. See, e.g., *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002) (“Efficiency is a vital goal in any legal system—but the vision of ‘efficiency’ underlying this class certification is the model of the central planner. . . . One suit is an all-or-none affair, with high risk even if the parties supply all the information at their disposal.”). See generally *Becherer v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 193 F.3d 415, 425 (6th Cir. 1999) (“the minimum requirements of due process inform . . . [the] class action doctrine[]”).
  4. See *Class Action Fairness Act of 2000*, S. REP. NO. 106-420, 106th Cong., at 8-9 (2000) (“the vast majority of Federal and State courts have adopted (sometimes with minor modifications) the 1966 version of Federal Rule 23. . . . [E]ven the courts that [have not adopted Rule 23] tend to look to the Federal rule and Federal court precedents for guidance on the circumstances in which cases should be certified for class treatment.”)

Further, recent writings express concerns that, in aggregating claims through the class action device, plaintiffs can create exposure risks for defendants that are so substantial that they necessitate settlements, even where the claimants have relatively weak underlying substantive legal theories.<sup>5</sup> These risks are magnified when a single case seeks to adjudicate the claims of class members throughout the nation. Moreover, in approving nationwide class actions, these magnet courts sometimes, in an effort to make mass actions seem more manageable, uncritically apply forum law to dozens, hundreds, or even thousands of claims with no connection to the state.<sup>6</sup> In the process, they effectively set nationwide policy, often undermining the reasoned policy choices made by other states.<sup>7</sup>

These harms are quite real. But class actions are not the only vehicle today through which such harms occur. Another device—the “mass action”—resembles a class action in that it is a lawsuit in which counsel seeks to adjudicate substantial numbers of claims simultaneously. Mass actions, however, effectively are “opt in” class actions—they typically include only those claimants who have affirmatively consented to the inclusion of their claims and who are named as plaintiffs in the action. They often involve claims that courts have previously held are not susceptible to class treatment, such as personal injury product liability claims or fraud claims. Mass actions typically involve one of three devices: joinder, consolidation, or special state court mass litigation rules.

Comparatively less attention has been devoted to mass actions, primarily because the concept is relatively new. But as federal and state courts have, in recent years, become more attentive to the requirements for pursuing class actions, plaintiffs’ counsel have increasingly sought to structure their cases as mass actions (almost invariably in state courts) in order to avoid the procedural prerequisites of the class action rules. Plaintiffs’ counsel invoke the comparatively less rigorous procedural requirements of joinder, consolidation, and special litigation rules to bring hundreds or even thousands of claims together that plainly would not qualify for class treatment. To some extent, counsels’ efforts have been successful because of the willingness of some state courts to apply extremely lenient aggregation standards—despite the fact that, as a case proceeds through these vehicles, it sometimes becomes very difficult (if not impossible) to distinguish it in operation from a traditional class action lawsuit. As these mass actions increasingly resemble the classic class action, it is important to consider the ways in which they threaten the due process rights of both defendants and effectively-absent claimants, as well as how they threaten critical principles of interstate sovereignty and comity by allowing certain magnet courts—and particular local judges—to invent nationwide legislative “solutions” that no legislature, state or federal, has enacted.

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5. See, e.g., *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (“[C]lass certification turns a \$200,000 dispute . . . into a \$200 million dispute. Such a claim puts a bet-your-company decision to Bridgeport’s managers and may induce a substantial settlement even if the customers’ position is weak. This is a prime occasion for the use of [Fed. R. Civ. P.] 23(f), not only because of the pressure that class certification places on the defendant but also because the ensuing settlement prevents resolution of the underlying issues.”); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (“Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere . . . some plaintiffs or even some district judges may be tempted to use the class device to wring settlements from whose legal positions are justified but unpopular.”); *In re Rhone Poulenc Inc.*, 51 F.3d 1293, 1298-1300 (7th Cir. 1995) (directing the lower court to decertify a plaintiff class because defendants might be “forced by fear of the risk of bankruptcy to settle even if they have no legal liability”).
  6. For example, in *Avery v. State Farm Mut. Auto Ins. Co.*, 746 N.E.2d 1242 (Ill. Ct. App. 2001), the Illinois judiciary upheld the certification of a nationwide class and held permissible the application of Illinois consumer fraud law to all claims accruing throughout the nation—despite the fact that the challenged practice (the use of non-original equipment manufactured parts) was not only permitted but actually *required* by other states to reduce insurance costs. See Matthew J. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers*, N.Y. TIMES, Sept. 27, 1998, § 8, at 29.
  7. See *id.* “Call it jackpot justice . . . Trial lawyers do . . . the Madison County phenomenon [] provides a dramatic illustration of the potential for poor public policy when things get carried away. In effect circuit judges end up [with] authority over large corporations doing business and serving customers nationwide.” Editorial, *The Judges of Madison County*, CHIC. TRIB., Sept. 6, 2002.

Unregulated mass actions pose a unique threat to our legal system, and the “solutions” imposed by magnet courts are difficult to override. If a small number of judges are not reliably enforcing state civil procedure rules, or are making novel and dubious interpretations thereof, it is difficult for state policy-makers to respond without upsetting the balanced operation of the state’s civil procedural regime. And by the time that a particular magnet court has become sufficiently notorious that corrective action is taken by appropriate state officials (*e.g.*, state appellate courts or state legislatures), that court often will have already exacted an enormous toll on interstate commerce, most often by forcing settlements that benefit primarily the plaintiffs’ counsel and ignore the legitimate interests of both the claimants and the defendants. Further, the corrective actions are frequently incomplete. And even if state reforms are ultimately successful, plaintiffs’ counsel are likely to respond by moving their cases to other nascent magnet courts (either elsewhere in the state or outside the state). In short, because state solutions are delayed reactions to a problem that has every incentive to migrate, mass actions (as well as other similar efforts by plaintiffs’ counsel to dodge commonsense, due process-based procedural rules) pose significant challenges for conscientious policymakers.

The evolution of the magnet court phenomenon is evident in several state courts around the nation. This article, in part, examines field data summarizing the experience of Jefferson County, Mississippi, as an illustration of the challenges posed by mass actions.

## I. THE CONTOURS AND DANGERS OF THE MASS ACTION PHENOMENON

As we use the term, “mass actions” are cases brought on behalf of large numbers of unrelated plaintiffs against one or more defendants. These cases typically involve personal injury or fraud claims against tobacco, asbestos, pharmaceutical or insurance companies, and they frequently seek to combine hundreds (or even thousands) of plaintiffs and defendants into a single massive proceeding, even though the individual plaintiffs have no obvious connection to each other. In essence, mass actions are an effort by plaintiffs’ lawyers to achieve the tactical benefits of class actions without having to satisfy the prerequisites for litigating a class action. Available data suggest that in recent years, mass actions have been brought most frequently in Mississippi, but their incidence is growing in other states (*e.g.*, West Virginia), where certain courts have demonstrated a willingness to apply loose joinder, consolidation, and special litigation rule standards to such cases.

### A. Available Mass Action Devices

#### 1. Two Old Vehicles Used In New Ways

##### a. Joinder

The first vehicle through which plaintiffs seek to litigate mass actions is the joinder rule. At common law, joinder was subject to rigorous limitations in order to protect against the potential that combined claims would result in arbitrary or inaccurate adjudication.<sup>8</sup> Early in the Twentieth Century, joinder was allowed only where common issues relating to the same transaction (or series of transactions) existed.<sup>9</sup> The federal joinder rule, which has been adopted by most states, now provides:

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or *arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action*. All persons . . . may be joined in one action as defendants if there is

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8. See 7 Charles Alan Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1651 (3d ed. 2001).

9. *Id.*

asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Fed. R. Civ. P. 20(a) (emphasis added). Rule 20(a) thus imposes “two specific requirements to joinder of parties.”<sup>10</sup> The first requirement is that a “right to relief must be asserted by, or against, *each* plaintiff or defendant relating to or arising out of [the] *same* transaction or occurrence.”<sup>11</sup> The second requirement is that “some question of law or fact *common to all parties* must arise in the action.”<sup>12</sup> The overall goal of these twin requirements is to provide “fundamental fairness to all parties.”<sup>13</sup>

The typical mass action meets neither of these established requirements. First, these cases do not arise out of the same transaction or occurrence. To the contrary, they often involve hundreds of people who each purchased products or services (such as cigarettes, pharmaceuticals, or insurance policies) or were exposed to allegedly defective products (such as those containing asbestos) in separate transactions, often involving different defendants, and who each used those products or were affected by the alleged exposure in separate occurrences.

Second, these cases do not involve questions of fact or law common to all parties, because the plaintiffs’ claims are often highly individualized. This is true for two reasons: (a) personal injury and fraud claims, which account for the vast majority of mass actions, almost always require inquiries into each plaintiff’s circumstances (*e.g.*, how long a plaintiff took the drug, smoked the cigarettes, or was exposed to the product at issue; what symptoms he or she allegedly manifested; whether those symptoms were indeed caused by the drugs or asbestos at issue and, if so, whose product caused those symptoms; whether a plaintiff relied on the allegedly fraudulent misrepresentations in a case); and (b) these cases almost always involve plaintiffs from a variety of states (so that different plaintiffs’ claims must be decided under different state laws).

Indeed, it is for these reasons that most courts would refuse to hear these cases if they were asserted as class actions, since class action rules generally require that common issues predominate over individualized issues.<sup>14</sup> As the U.S. Supreme Court explained in an asbestos case, the claimants had been “exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis or from mesothelioma.”<sup>15</sup> Similarly, it is also for this reason that, until recently, mass actions were not filed under the joinder rule at all: that rule was not designed for these kinds of cases.<sup>16</sup> The federal class action rule itself *requires* that claims be so numerous that “joinder is impracticable,” thus suggesting that the drafters of the federal rules contemplated that class actions—not mass actions pursued through the joinder rule—would be used aggregate such myriad claims.

## b. Consolidation

The second vehicle through which plaintiffs seek to litigate mass actions is state consolidation rules, many of which are patterned after (or identical to) the federal consolidation rule: Fed. R. Civ. P. 42. The rule provides that:

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in

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10. *Id.* Notes of Decisions 21.

11. *Id.* (emphasis added).

12. *Id.* (emphasis added).

13. *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001).

14. *See, e.g.*, Fed. R. Civ. P. 23(b)(3).

15. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 624 (1997); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

16. *See* Fed. R. Civ. P. 23(a)(1).

the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.<sup>17</sup>

Thus, under Rule 42(a), consolidated actions must, at a minimum, possess a common question of law or fact. The fact that this requirement is fairly easy to meet itself has historically posed no due process concerns, for two reasons.

First, consolidation has traditionally been invoked simply as a device of convenience, and the Supreme Court has held that it does not “merge the suits into a single cause, or change the rights of the parties.”<sup>18</sup> As we explain below, only the more recently emerging mass actions seek to actually merge the various constituent claims, a tactic that is in conflict with traditional practice.<sup>19</sup>

Second, the key procedural protection in the rule is in Rule 42(b), which prohibits a court from consolidating cases for trial when such consolidation would unduly prejudice a party’s right to present its case or defense.<sup>20</sup> Hence, when consolidation is ordered merely to streamline discovery, such as under the federal Multidistrict Litigation statute for cases pending in federal court, it poses no concern over the due process rights of the litigations.<sup>21</sup> When consolidation is ordered for all purposes, however, including for trial, it may indeed pose that very concern. Consolidations for all purposes may not “deny a party his due process right to prosecute his own separate and distant claims or defenses without having them so merged into the claims or defenses of others that irreparable injury will result.”<sup>22</sup>

As a result of these concerns, federal courts have applied stricter, more consistent standards to joinder and consolidation and have tended to reject their application to all but a handful of personal injury actions.<sup>23</sup> For example, the U.S. Courts of Appeals for the Second and Fifth Circuits have required a judicial determination that a proposed aggregation does not combine cases so factually dissimilar that a joint trial would improperly interfere with a party’s right to litigate its own claims or defenses. Moreover, these courts have recognized that imposing limits on aggregation is not simply a matter of civil procedure, but also an issue of due process and fundamental fairness. Indeed, in invalidating a proposed, consolidated asbestos trial involving 48 cases, the Second Circuit held that “the benefits of efficiency can never be purchased at the cost of fairness.”<sup>24</sup> In another case, the same court invalidated a consolidation order, finding that it would “deny a party his due process right to prosecute his own separate and distinct claims or defenses without having them so merged into the claims or defenses of others that irreparable injury will result.”<sup>25</sup> The Fifth Circuit has applied similar rules, precluding consolidation where it would deprive litigants

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17. Fed. R. Civ. P. 42.

18. *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933).

19. See, e.g., Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029, 1042 (1993) (noting concern that mass consolidations lack the “procedural safeguards that due process and codified rules demand in class actions of similar magnitude”).

20. See, e.g., *Glussi v. Fortune Brands, Inc.*, 714 N.Y.S.2d 516, 518 (N.Y. App. 2000) (“[W]here prejudice to a substantial right is shown . . . a joint trial should not be granted even if common issues of law or fact exist.”).

21. See, e.g., 28 U.S.C. § 1407(a) (allowing transfer of actions for pretrial proceedings, but requiring actions to be remanded to the federal districts from which they were transferred “at or before the conclusions of pretrial proceedings”).

22. *Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973).

23. See, e.g., *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990); *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495-96 (11th Cir. 1985); *Cain v. Armstrong World Indus.* 785 F. Supp. 1448, 1451 (S.D. Ala. 1992).

24. *Malcolm v. Nat’l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993).

25. *Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973).

of their due process right to a “fair opportunity to have [their cases] determined from the evidence in reasonable proceedings.”<sup>26</sup> All of these decisions follow the Supreme Court’s dictate that “consolidation is permitted as a matter of convenience and economy in administration, but does not . . . change the rights of the parties.”<sup>27</sup>

## 2. A New Vehicle: Special State Court Mass Litigation Rules

The third vehicle through which plaintiffs seek mass action treatment is special state court mass litigation rules. This vehicle is different than other mass action vehicles in one fundamental respect. Joinder and consolidation have existed for centuries, and it is only their recent unprecedented application that poses due process concerns. In contrast, special mass litigation rules have been adopted only recently, sometimes in response to a perception that the old aggregation devices are insufficient to facilitate the resolution of large numbers of cases clogging a particular jurisdiction’s docket.

The most prominent example of this vehicle can be found in West Virginia, where as applied, a special mass litigation rule permits the mass aggregation of particular categories of cases. That rule—Trial Court Rule 26.01—was adopted on July 1, 1999 by that state’s highest court in large part because past mass actions (particularly asbestos cases) pursued in West Virginia under its traditional consolidation rule had virtually overrun the state’s judiciary. Put another way, the rule was created because the state’s willingness to approve mass actions had made West Virginia a magnet court, thus requiring even more draconian efforts to resolve a flood of new cases.

For over a decade, West Virginia courts have utilized the state’s consolidation rule (which is identical to Fed. R. Civ. P. 42) to permit mass consolidation of asbestos cases for all purposes, including trial.<sup>28</sup> In 1996, the state’s highest court upheld the consolidation for all purposes of approximately 1,000 cases filed against 17 defendants who owned facilities located in West Virginia.<sup>29</sup> The West Virginia high court held that, as of 1996, it had become necessary to “adopt diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation.”<sup>30</sup>

Following West Virginia’s approval of that mass asbestos action, thousands of additional claimants flooded West Virginia’s courts with personal injury claims. As one judge familiar with the process lamented,

[W]e thought that [an early mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What [we] didn’t consider was that that was a form of advertising. That when we could whack that batch of cases down as well, it drew more cases.<sup>31</sup>

In response to this wave of filings, the West Virginia high court invoked its constitutional supervisory powers to adopt Trial Court Rule 26.01. Rule 26.01 establishes a Mass Litigation Panel with the power to “develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which [is] referred to it.”<sup>32</sup> The Rule does not establish criteria for determining when a case should be referred to the Mass Litigation Panel. Nor does it indicate what transfer entails: whether, for instance, suits transferred have been joined (and thereby merged into one suit) or consolidated (for some purposes or for trial). And apart from its reference to “fairly and expeditiously” disposing of cases, the Rule offers no guidance to the Mass Litigation Panel itself concerning how to resolve cases referred to it.

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26. *Gwathmey v. United States*, 215 F.2d at 148, 156 (5th Cir. 1994); see also *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997) (invalidated pretrial, proposed trial plan in mass consolidation under Due Process Clause).

27. *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933).

28. See Resp. of J. MacQueen, Caldwell Pet. for Writ of Prohibition Before W. Va. S. Ct. of App., May 25, 2001, at 5.

29. See *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 302 (W. Va. 1996).

30. *Id.* at 304.

31. *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha Cty., W. Va. Nov. 8, 2000) (statement of J. A. Andrew MacQueen III).

32. W. Va. T.C.R. 26.01(b)1.

In a series of *ad hoc* decisions, Rule 26.01 has been interpreted to approve the aggregation of the claims of as many as 8,000 plaintiffs alleging exposure to asbestos against over 250 defendants—for resolution in a single mass trial.<sup>33</sup> It has been interpreted to allow the aggregation of these cases for all purposes, and also to allow the denial to 250 defendants of the right to conduct any discovery of the 8,000 plaintiffs—the very discovery needed to file standard pretrial motions (such as those challenging venue and those seeking summary judgment) in order to weed out non-meritorious claims.<sup>34</sup> In addition, although “as many as five thousand” plaintiffs had “no connection whatsoever with West Virginia,”<sup>35</sup> the rule has been interpreted to allow the application of West Virginia law to *all* the thousands of claims.<sup>36</sup>

### ***B. Unregulated Mass Action Vehicles Pose Serious Due Process Concerns***

Regardless of what label a state affixes to a mass action device (*i.e.*, joinder, consolidation, or special mass litigation rule),<sup>37</sup> traditional practice, as well as the due process principles that underpin and inform that practice, should ordinarily preclude mass numbers of individual tort claims from being pursued as mass actions. Such combinations of disparate tort claims may prevent a defendant from adequately defending itself against each of the distinct claims alleged by the various plaintiffs. For this very reason, there is a growing consensus that the class action device should not be used to adjudicate disparate personal injury product liability claims.<sup>38</sup> Unfortunately, some state court judges are allowing these cases to proceed in the new mass action garb, even though they plainly fail to meet the requirements set forth in civil procedure rules and raise serious concerns regarding due process and fundamental fairness.

#### ***1. Tainted Jury Pools, Loose Venue Rules, And Unimpaired Plaintiffs***

Plaintiffs’ counsel often find a local plaintiff, well known to the jury pool, who has suffered a serious injury, and then tack on tens or even hundreds of less compelling cases by plaintiffs who live outside the county or outside the state, who essentially free-ride on the main claim. This practice is particularly prevalent in Mississippi, because of its liberal good-for-one, good-for-all venue rule (*i.e.*, a rule that permits filing on behalf of an unlimited number of claimants if just one has the contact with the forum required by the applicable venue rule).<sup>39</sup> Indeed, the combination of that liberal venue rule with a liberal joinder rule creates enormous opportunities for plaintiffs’ counsel to bring into the jurisdiction tens or hundreds of “rider” plaintiffs with no connection to the state. The same is true in West Virginia, where venue and choice of law rules are scarcely enforced in mass action proceedings pursued under Rule 26.01. In this way, plaintiffs’ counsel can sway a jury to award huge damages to numerous plaintiffs whose claims would seem far less compelling if they were tried individually. For example, even setting aside the

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33. See Trial Scheduling Order, *In re: West Virginia Asbestos Personal Injury Litig.*, Civ. Action No. 01-C-9000 (Sept. 6, 2001).

34. *State of West Virginia ex rel. Mobil Corp. v. Gaughan*, No. 30314 (W.Va. S.Ct. App., Apr. 25, 2002).

35. *Id.* (Maynard, J., concurring).

36. See Tr. of Hr’g at 172-73, *In re West Virginia Asbestos Personal Injury Litig.*, Civ. Action No. 02-C-9004 (Cir. Ct. Kanawha Cty., W. Va., Aug. 12, 2002) (“We understand the argument made regarding choice of law. We understand that there may be plaintiffs that absolutely have no nexus whatsoever. I don’t know. But we do know that in order to get some order out of this asbestos chaos we are going to apply West Virginia law in all aspects of the first phase of the trial . . . and only West Virginia law.”).

37. As the Supreme Court has explained, although states possess some flexibility in creating their rules of civil procedure, that flexibility is constrained by the Due Process Clause of the Fourteenth Amendment. See *Hansberry v. Lee*, 311 U.S. 32, 40-42 (1940); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (holding that “because minimum requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate”).

38. See, e.g., *Amchem*, 521 U.S. at 629; *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *In re Rhone-Poulenc Rouser*, 51 F.3d at 1299 (7th Cir. 1995).

problem of a plaintiff well-known to the jury pool, by combining the claims of one plaintiff who suffered cancer or was involved in a serious automobile accident, with the claims of other plaintiffs who merely allege fear of cancer or fear of an alleged automobile defect, plaintiffs' counsel can often achieve six- and seven-figure verdicts for plaintiffs who essentially allege no injuries. Liberal joinder rules thus permit unfair manipulation of both the jury pool and the jury's tendency to sympathize with seriously ill plaintiffs.

## **2. The Illusion of the "Perfect" Plaintiff**

Mass actions also enable plaintiffs' counsel to overwhelm a jury with evidence in a manner that makes it impossible to reach a fair verdict, even if there is no lead "sympathy" plaintiff.<sup>40</sup> For example, when a mass action involves hundreds (or even thousands) of plaintiffs, their counsel are unfairly permitted to piece together evidence to show a "perfect plaintiff"—one who, of course, does not exist in the real world—for presentation to the jury.<sup>41</sup> That is, counsel may pick and choose among the facts presented by the many plaintiffs in attempting to establish all the various elements of the claim, and the jury is often left with the indelible impression that the collective evidence counsel offers satisfies each individual plaintiff's particular burden of proof. For example, if one plaintiff had an allegedly misleading conversation with a defendant's representative about the potential side-effects of a drug, that conversation will be repeatedly referenced to the jury, even though none of the other 1,000 plaintiffs in the action had such a conversation. As a result, the jury may come away with the patently false impression that all plaintiffs had such conversations and relied on them in electing to use the drug at issue.

## **3. Mass Actions Against Numerous Defendants Pose Even More Serious Due Process Concerns**

These harms are magnified exponentially when a mass action includes claims against several or many defendants. In such cases, it is difficult for any particular defendant to have a fair opportunity to put on its unique defenses at trial: evidence admitted as to one defendant to show, for example, evidence of that defendant's knowledge of a defect many years ago, will inevitably tar other defendants, as well. The jury will also be hopelessly lost in attempting to determine the precise lawfulness of any one particular defendant's conduct.<sup>42</sup> Mass actions thus often become a "thumbs-up, thumbs-down" vote on corporate America, with the lowest common denominator of conduct often being extrapolated to plaintiffs' verdicts against all defendants. And to make matters worse, the host of state laws that need to be applied in the typical consolidated proceeding (assuming, of course, that the state court engages in a proper choice-of-law analysis), which seeks to join the claims of plaintiffs from numerous states, inevitably further confuse the jury, resulting in further prejudice.<sup>43</sup>

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39. See Miss. R. Civ. P. 82.

40. See *Bradford v. John A. Coleman Catholic High Sch.*, 488 N.Y.S.2d 105, 106 (N.Y. App. Div. 1985) ("Plaintiffs were injured in two separate incidents, and each alleges that his or her injury was caused by similar acts of negligence by defendants' employees. Presentation of both claims to the same jury would tend to bolster each claim, to defendants' disadvantage."); see also *Baker v. Watermann S.S. Corp.*, 11 F.R.D. 440, 441 (S.D.N.Y. 1951).

41. See, e.g., *Broussard v. Meineke Dis. Muffler Shops, Inc.*, 155 F.3d 331, 343-45 (4th Cir. 1998).

42. See, e.g., *Gwathmey v. United States*, 215 F.2d 148, 154 (5th Cir. 1954) (cumulative effect of evidence against some defendants prejudices jury against all defendants in consolidated case); *Cain v. Armstrong World Ind.*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992).

43. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 815 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981) (plurality opinion) ("if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional").

#### **4. Mass Actions As De Facto Class Actions—But Without The Procedural Protections Of The Class Action Rule**

As noted above, one reason for the increase in mass actions in state courts is that counsel often have more success in convincing judges to allow these cases to proceed than in obtaining certification of proposed classes, because the rules governing joinder and consolidation (at least as they relate to mass actions) are not as well developed as those governing class actions. Indeed, as noted above, it is the recent greater judicial attention to the properly rigorous application of class action requirements in many jurisdictions that has led plaintiffs' lawyers to begin utilizing aggregation vehicles like joinder and consolidation rules more aggressively. Similarly, the reason for mass action popularity in Mississippi is the fact that Mississippi never adopted a class action rule; thus, mass actions are one way for plaintiffs' counsel to generate the level of fees available to them in large cases. However, for several reasons, the recent tendency to utilize joinder, consolidation, and special litigation rules to achieve *de facto* class action status arguably raises even more serious due process and civil justice concerns than do actual class actions.

##### **a. Mass Actions Typically Present Myriad Disparate, Serious Personal Injury Claims**

Unlike class actions, plaintiffs in these cases often seek—and sometimes obtain at trial—millions of dollars *each*.<sup>44</sup> And because these cases are typically brought in counties where seven-figure jury awards are routine, the risk of going to trial can be even greater than in a class action, and the settlement pressure even stronger.<sup>45</sup> This is especially true when a few very serious personal injury cases are coupled with many less serious cases (*e.g.*, a wrongful death claim joined with numerous non-injury warranty claims). Such a collection of claims clearly would not qualify for class treatment, because the named plaintiff's claims would not be "typical" of the other plaintiffs. But some courts have allowed such claims to proceed as joinder claims. In that circumstance, plaintiffs can combine numerous dissimilar cases and exert tremendous pressure on defendants to settle all the claims simultaneously, thereby avoiding a jury verdict for all the plaintiffs that is unfairly inflated by the few very serious claims. In mass actions, it is not at all uncommon to hear of plaintiffs' counsel with a large volume of cases refusing to settle serious claims unless the defendant is also willing to "buy out" the claims with lesser merit.<sup>46</sup> Mass actions, which allow these cases involving both serious and unimpaired plaintiffs to be tried together, allow these practices to continue and, indeed, to thrive.

##### **b. Defendants Lack Adequate Notice Concerning The Unprecedented Application of Aggregation Rules in Mass Actions**

As noted above, these cases are being pursued through rules not generally intended to address mass actions, which means defendants have very little precedent to rely upon in seeking to defend themselves. When plaintiffs utilize joinder, consolidation, and special litigation rules in this setting, litigation is often pursued through a series of *ad hoc* decisions detached from any traditional practice, making it easier for courts to apply inconsistent standards to such cases. By contrast, the due process underpinnings of class actions are fairly well established, and create significant procedural protections for defendants.

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44. See M.A. Behrens & B.M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 TEX. REV. L. & POL. 137, 142-43 (2001). Indeed, in the few cases that proceed to trial in magnet courts, a defendant may face a multi-million dollar verdict, much of which may be composed by punitive damages. See, *e.g.*, Terry Hillig, *Former County Judge Wins Record Asbestos-Injury Verdict From Shell*, ST. LOUIS POST-DISPATCH, May 29, 2000, at A1 (noting that \$25 million of a \$34.1 million verdict awarded to a single plaintiff consisted of punitive damages).

45. See, *e.g.*, *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. (1999) ("Especially in state courts, defendants in the typical jumbo consolidation now face an Armageddon scenario if they do not settle on terms favorable to plaintiffs.") (Prof. William Eskridge, Yale Law School).

46. See, *e.g.*, Griffin Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, at 23 (Nat'l Legal Ctr. for the Public Interest, June 2002).

c. Interlocutory Appellate Review is Less Likely to Be Permitted In Mass Actions Than in Class Actions

Interlocutory appellate review is typically more difficult to obtain in mass actions than in class actions. For example, some states have adopted the recent amendment to the federal class action rule, which permits discretionary interlocutory appeals of class certification orders, or had previously adopted a similar rule.<sup>47</sup> Joinder, consolidation, and special litigation rules, on the other hand, do not generally provide for interlocutory appeals.<sup>48</sup>

As a result, a defendant subject to a mass action must run the litigation gauntlet to a final judgment on the merits in order to obtain appellate review of the threshold decision permitting mass aggregation (through joinder, consolidation, or a special litigation rule). As noted above, however, the risks posed by seven-digit verdicts in cases where plaintiffs allege minor injuries are simply too great for most defendants to withstand. Rather, with little prospect of being able to defend themselves against cases that are unfairly combined (for the reasons expressed above), defendants face extreme pressure from the financial markets and other sources to settle these cases *en masse*, regardless of their merit.<sup>49</sup> These pressures are made worse when mass actions include not only many plaintiffs, but many defendants as well.<sup>50</sup> Those pressures are worse still when mass actions are, as typically occurs, structured in “phases,” so that a defendant’s “fault,” for example, is determined before any plaintiff has demonstrated causation and damages.

This intense settlement pressure is far from speculation, and has been recognized by courts and scholars alike. As Professor William Eskridge of Yale Law School has explained: “Especially in state courts, defendants in the typical jumbo consolidation now face an Armageddon scenario if they do not settle on terms favorable to plaintiffs.”<sup>51</sup> Confronted with the possibility of “losing the company on his or her watch,” a company decision-maker will settle even if convinced of the merits of the company’s defenses.<sup>52</sup> The unfortunate result is that the very coerciveness of mass actions often insulates them from appellate review.<sup>53</sup>

47. See Fed. R. Civ. P. 23(f). The advisory committee notes indicate that class certification “may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.” This risk may be even greater in a mass action, where each of the underlying complaints asserts potentially serious personal injury claims. See, e.g., Richard O. Faulk et al., *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 TEX. TECH L. REV. 779, 790 (1998).

48. Federal courts have sometimes granted pre-trial mandamus review of decisions to aggregate cases and recognized that, in mass actions, postponing review is effectively denying review, because the pressure to settle, see *infra*, is too great to withstand. See, e.g., *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1022 (5th Cir. 1997) (Jones, J., concurring); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995).

49. See, e.g., *Castano*, 84 F.3d at 746 (“The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.”). The Supreme Court has expressed concern, for example, about the possibility that class actions could be used to extort settlements which are “out of any proportion to [the class’s] prospect of success at trial.” *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975).

50. See, e.g., *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Com. on the Jud.*, 106th Cong., at 99 (July 1, 1999) (statement of Professor William Eskridge) (noting that presence of many defendants will lead to a “classic prisoners’ dilemma: Although defendants realize that they should bargain as a group with plaintiffs’ counsel, each defendant also understands that it can gain an advantage by settling early, and that it will be disadvantaged if others settle first (the sucker’s payoff)”).

51. See *id.*

52. Lester Brickman, *Lawyers’ Ethics and Fiduciary Obligations in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 243, 252 (2001).

53. See, e.g., *In re Ethyl Corp.*, 975 S.W.2d 606, 610-11 (Tex. 1998) (noting that “paucity of appeals challenging trial settings of multiple claims”); Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT’L L. 179, 190 (2001) (“If the [consolidated] cases are tried, the *potential* for large verdicts against corporate defendants may drive stock prices lower.”) (emphasis added). Indeed, recently amended rules of civil procedure recognize that interlocutory appeals of class certification orders, for example, “provide[] a mechanism through which appellate courts, in the interests of fairness, can restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial.” *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000).

Several examples are worth noting. First, on August 16, 2002, the share value of MeadWestvaco Corporation, a paper and packaging company, declined more than 20% in a single day when the company simply announced that it had been named as a defendant in 500 asbestos cases involving 6,000 plaintiffs—the majority of whose suits had been filed as part of mass actions in *West Virginia, Illinois, and Mississippi*.<sup>54</sup> Second, in a mass consolidation of asbestos cases approved by the West Virginia Supreme Court of Appeals in 1996, there were 1,000 plaintiffs asserting claims against 17 defendants—but not a *single* claim proceeded to a final judgment; all were settled.<sup>55</sup> And in the most recent mass aggregation approved by the courts of West Virginia—this time involving 8,000 plaintiffs and 250 defendants—all but two of the defendants settled before trial. Of the two that remained, one settled during the trial. The other defendant, Dow Chemical Company, that survived the first “phase” of a trial was found liable and assessed with a “punitive damages multiplier” of as-yet undetermined compensatory damages. Dow’s stock price fell a full 9.3% the day of the verdict,<sup>56</sup> and Dow is now litigating the issues of causation and damages in a Phase Two trial against over 2,000 plaintiffs.<sup>57</sup> To this date, no asbestos case consolidated for mass trial in West Virginia has ever proceeded to final judgment.<sup>58</sup>

**d. The Class Action Doctrine’s Concerns Over Unnamed Plaintiffs Also Apply To Mass Actions, Which Increasingly Pose Risks Of “Virtual” Representation**

One potential justification for allowing mass actions even in cases in which class certification could not be obtained is that, unlike a class action, a mass action requires every plaintiff to “opt in” to the lawsuit. For that reason, joinder and consolidation, at least as traditionally understood, pose less of a concern that absent claimants will be bound to the outcomes of lawsuits they never heard about, were inadequately represented in, or otherwise had no wish to participate in. Indeed, several of the Supreme Court’s decisions concerning the due process underpinnings of the class action device focus heavily on the question of whether a particular class action regime affords adequate protections to such absent claimants.<sup>59</sup>

While this justification does explain why joinder, consolidation, and special state court litigation rules contain less robust procedural protections than class action rules, it does not mean that defendants lack any due process interests in the administration of aggregation rules. To the contrary, defendants have well-recognized due process interests in ensuring that they are afforded a fair opportunity to defend themselves, whether the case involves a single claim or hundreds of aggregated claims.<sup>60</sup> That interest is particularly acute in an aggregated proceeding involving not only multiple plaintiffs, but also multiple defendants. Without a careful inquiry into procedural fairness, such a proceeding may easily become so large and confusing that it is impossible for a defendant to present a meaningful defense.

Nor does the fact that mass actions require a plaintiff to “opt in” explain why mass actions that raise the same or similar issues concerning effectively absent plaintiffs should be treated differently than class actions merely because the chosen vehicle is a different one. As explained above, it is not at all uncommon in mass proceedings for plaintiffs’ counsel to refuse to settle serious cases (such as those involving cancer or death) unless a defendant also settles counsels’ other claims, including “unimpaired” claims. In that situation, the settlement value of the serious case is reduced to effectuate an increase in the settlement

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54. See *MeadWestvaco Stock Drops 20% on Fears of Asbestos Liability*, WALL ST. J., Aug. 19, 2002, at C11.

55. See Tr. of Hr’g at 109, *In re Asbestos*, Civ. Action No. 02-C-9004 (Cir. Ct. Kanawha Cty., W. Va. Aug. 12, 2002).

56. See Susan Warren, *Jury Finds Dow Chemical Responsible in Asbestos Cases*, WALL ST. J., Oct. 25, 2002.

57. See *id.* (“The second phase of the trial will consider whether [Dow] caused the injuries against individual workers who have filed claims.”).

58. See, e.g., Tr. of Hr’g at 59, *In re Asbestos*, Civ. Action No 01-C-900, 99-C-183REW (Cir. Ct. Kanawha Cty. Mar. 16, 2001).

59. See *Hansberry*, 311 U.S. at 32; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

60. See *Cain v. Armstrong World Industr.*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992).

value of the unimpaired claims, yet no provision of the joinder or consolidation rule even requires a court to examine the fairness of those settlements. In the class context, such clear conflicts of interest would clearly prohibit class certification, as the Supreme Court has made clear.<sup>61</sup> And in cases, such as West Virginia's mass asbestos aggregation, in which a court proposes to resolve the claims of 8,000 plaintiffs in a single proceeding, it is fantastical to suggest that each of those plaintiffs is represented in any way other than an absent class member. No caption in that proceeding ever identified the exact parties to the proceeding. As the U.S. Court of Appeals for the Fifth Circuit has expressed, plaintiffs in mass actions are often "actually before the court" in nothing "more than a fictional sense."<sup>62</sup> Indeed, "consolidation can leave claimants with as little control over those cases as unnamed class members in a class action."<sup>63</sup> For this reason, the absent claimant protections that underlie class actions must be read into mass actions as the latter converge upon the former.<sup>64</sup> And defendants themselves have an obvious interest in ensuring that any judgment in an aggregated proceeding binds all the plaintiffs in the future. In this sense, the requirements of notice and adequate representation, well established in the class action arena, protect defendants by affording them some measure of finality at the close of a mass proceeding.<sup>65</sup>

#### e. Special Litigation Rules: Unmoored to Traditional Practice

Unlike consolidation and joinder, which have existed for centuries but which have historically not been invoked to support mass actions, West Virginia's mass litigation rule is new. But its newness carries significant dangers. So far, it has been applied in an *ad hoc* fashion without any meaningful notice to the parties in particular cases. That standardless application itself raises serious constitutional questions.<sup>66</sup> Even more fundamentally, Rule 26.01 is applied without regard to the fact that, as the Supreme Court has made clear, traditional practice provides a touchstone for constitutional analysis.<sup>67</sup> By permitting the mass aggregation of cases in ways not envisioned by the class action, joinder, and consolidation rules—particularly the effective merging of thousands of disparate personal injury claims accompanied by the wholesale denial of pretrial discovery and the application of forum law to thousands of claims with no connection to the forum—the West Virginia courts have failed to consider that these traditional ways of proceeding may well set the constitutional baseline, at least in the absence of an alternative procedure that contains equally robust due process protections.<sup>68</sup>

Indeed, the elimination of discovery, and the resulting effective elimination of pretrial motions, such as motions for summary judgment, combine to raise serious constitutional questions. If state law places "causation" as an element of the cause of action, it is open to serious question whether a state court may permit a jury first to make a vacuous finding of "liability" without permitting defendants to litigate embedded issues like causation.<sup>69</sup> And if the effect of the elimination of pretrial discovery is that defendants

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61. See *Amchem*, 521 U.S. at 625; *Ortiz*, 527 U.S. at 856.

62. *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990).

63. Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 B.Y.U. L. REV. 879, 892 (1995).

64. See, e.g., Steinman, *supra*, 78 IOWA L. REV. at 1042.

65. See *Shutts*, 472 U.S. at 809-10 (holding that defendants have standing to assert deficiencies in notice and adequacy of representation); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

66. See generally *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915).

67. See *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis."); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 30 (1991) (state civil procedure must operate "according to the settled course of judicial proceedings").

68. See *Honda Motor Co.*, 512 U.S. at 430 ("abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause").

69. See *Western Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) (holding that denial of discovery prior to Phase One class action trial would "deny [the defendant] the right to present a full defense on the issues [and would thus] violate due process").

lose the right to raise established pretrial defenses, that too raises serious due process concerns.<sup>70</sup> In short, as the Fifth Circuit has held, “[w]e are . . . uncomfortable with the suggestion that a move from one-to-one ‘traditional’ modes is little more than a move to modernity. Such traditional ways of proceeding reflect far more than habit. They reflect the very culture of the jury trial and the case and controversy requirement of Article III.”<sup>71</sup>

#### f. The Self-Fulfilling Magnet Court Effect

A significant irony of the mass action problem is that it is largely a self-fulfilling one. In West Virginia, for example, new mass actions flooded that state’s courts precisely because the courts there were so amenable to mass actions that effectively deprived defendants of their rights to defend themselves. As one eminent scholar has observed,

[j]udges who move large numbers of highly elastic torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.<sup>72</sup>

Similarly, another irony is that Mississippi made the policy decision to reject the class action rule in order to avoid some of the very problems that are plaguing joinder practice in that state today.<sup>73</sup> As we explain below, Mississippi appears to have more mass actions than any other jurisdiction, as creative plaintiffs’ counsel attempt to invoke joinder to effectuate class action treatment. Of course, Mississippi’s decision **not** to adopt a class action rule does not mean that its courts can simply ignore the due process underpinnings of established class action practice by effectively permitting class treatment for disparate claims.<sup>74</sup> Nor does it mean that Mississippi can abandon traditional due process safeguards that all (or nearly all) other states observe in aggregating cases.<sup>75</sup> This is especially true because the Mississippi joinder rule is identical to the federal joinder rule, the latter of which specifically contemplates aggregated treatment much less aggressive than class action treatment.<sup>76</sup> Indeed, one Mississippi judge whose county became a mass actions magnet in the late 1990s recently appeared to recognize this problem when he stated (in announcing a new policy toward mass actions): “[W]e have some very, very fine legal talent, legal minds in Mississippi that have crafted a class action rule into our joinder rule and that’s not what it was intended for.”<sup>77</sup>

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70. See *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 371 (D.N.J. 1987) (holding that statutorily created defenses constitute “protected property interests” under the Due Process Clause).

71. See *In re Fibreboard Corp.*, 893 F.2d at 710-11.

72. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

73. See *Evans v. Progressive Cas. Ins. Co.*, 300 So. 2d 149, 153 (Miss. 1974) (“Defendants faced with the awesome threat of such expensive, unwieldy, and multi-faceted litigation would logically tend to buckle under and negotiate settlements they would not otherwise consider.”).

74. See, e.g., *Hansberry*, 311 U.S. at 40-42; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (“because minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate”) (alterations in original) (internal quotations omitted).

75. See *Honda Motor Co.*, 512 U.S. at 430 (“traditional practice provides a touchstone for constitutional analysis”).

76. See Fed. R. Civ. P. 23(a)(1) (class must be so “numerous that joinder of all members is impracticable”) (emphasis added).

77. Statement of J. Lamar Pickard, Tr. of Mot. Hearing at 9-10, *Conway v. Hopeman Bros.* (Cir. Ct., Jefferson County, Miss. July 25, 2001).

### C. Why Most Mass Actions Cannot Be Heard In Federal Court

One key reason for the growing mass action problem is that the laws governing federal jurisdiction were unwittingly drafted in a way that keeps most of these cases out of federal courts, where, as explained above, judges have applied far more consistent standards to joinder and consolidation proposals.

As envisioned by the Framers of the Constitution, the concept of diversity jurisdiction (as provided in Article III) was intended to permit defendants to remove a state court action to federal court if it involves “Citizens of different States.” In so providing, the Framers wished to ensure that local biases would not taint the outcome of disputes between in-state plaintiffs and out-of-state defendants, thereby hurting the nation’s burgeoning economy.<sup>78</sup> Since one of the concerns regarding mass joinder actions is the apparent bias against out-of-state defendants in certain state courts, one would expect that mass actions of the type discussed above would be subject to federal jurisdiction. In enacting the diversity jurisdiction statute, however, Congress did not exercise the full authority granted under Article III for diversity jurisdiction. Instead, Congress sought to limit diversity jurisdiction to cases that are large and that have real interstate implications. Thus, under 28 U.S.C. § 1332, an action is subject to federal diversity jurisdiction only where the parties are “completely” diverse (that is, where no plaintiff is a citizen of the same state where any defendant is deemed to be a citizen) and where each plaintiff asserts claims that exceed a threshold amount in controversy—currently set at \$75,000.<sup>79</sup>

Although mass joinder actions would usually appear to meet these criteria because they place substantial amounts into controversy and involve parties from multiple jurisdictions, section 1332 tends to **exclude** these cases from federal courts, because the diversity statute has been interpreted to require “complete” diversity, such that diversity jurisdiction is lacking whenever any single plaintiff is a citizen of the same state as any single defendant.<sup>80</sup> That means plaintiffs’ counsel can avoid federal jurisdiction in a mass action simply by including one plaintiff and one defendant from the same state, even if the case involves

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78. See *Barrow S. S. Co. v. Kane*, 170 U.S. 100, 111 (1898) (“The object of the [diversity jurisdiction] provisions . . . conferring upon the [federal] courts . . . jurisdiction [over] controversies between citizens of different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the state in which one litigant[] resides.”); *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1855); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 307 (1816). See also THE FEDERALIST NO. 80, at 537-38 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“[I]n order to [ensure] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles [u]pon which it is founded.”).

79. Jurisdictional questions concerning class actions, as well as mass actions, are still hotly disputed. To take one example, in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Supreme Court held that the creation of the class action device did not alter the rule that each class member presenting a “separate and distinct” claim must meet the amount-in-controversy requirement. Congress later passed the Supplemental Jurisdiction Statute, codified at 28 U.S.C. § 1367, which confers federal courts with “supplemental” jurisdiction related to actions within the court’s original jurisdiction. Many federal courts of appeal hold that § 1367 overrules *Zahn*, such that, so long as one plaintiff presents a jurisdictionally sufficient claim, the court may exercise supplemental jurisdiction over the claims of other plaintiffs (including absent class members in the class context). See, e.g., *Rosmer v. Pfizer, Inc.*, 263 F.3d 110 (4th Cir. 2001); *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001); *Stromberg Metals Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 2001); *In re Abbott Laboratories, Inc.*, 51 F.3d 524 (5th Cir. 1995), *aff’d by an equally divided Court*, 529 U.S. 333 (2000). On the other hand, other federal courts of appeal hold that *Zahn* remains good law. See *Trimble v. Asarco, Inc.*, 232 F.3d 946 (8th Cir. 2000); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999); *Leonhardt v. Western Sugar Co.*, 160 F.3d 631 (10th Cir. 1998).

80. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

tens or hundreds of other parties who come from different states. Plaintiffs' counsel, eager to avoid the more rigorous analysis of Rules 20 and 42 typically afforded by federal courts, are extremely adept at this tactic. For example, in product liability cases, plaintiffs will sometimes join as a defendant one local retailer (e.g., a supermarket, a prescribing doctor, a car dealership) that sold the product at issue to just *one or a few* of the many plaintiffs in the case. More often than not, this is enough to keep their case out of federal court.

Recently, the U.S. Senate's Judiciary Committee heard testimony from Hilda Bankston, a former pharmacy owner from Mississippi who has been joined as a defendant in numerous mass actions in Jefferson County, Mississippi against major out-of-state pharmaceutical companies for just this purpose. According to Mrs. Bankston:

[I]n 1999, we were named in the national class action lawsuit brought against the manufacturer of Fen-Phen. Let me stop here to explain why we were brought into this suit. While I understand that class actions are not allowed under Mississippi state law, what is permitted is the consolidation of lawsuits. These consolidations involve Mississippi plaintiffs or defendants who are included in cases along with plaintiffs from across the country. . . . *By naming us, the only drugstore in Jefferson County, the lawyers could keep the case in a place known for its lawsuit-friendly environment.* I'm not a lawyer, but that sure seems like a form of class action to me. . . .

Since then, Bankston Drugstore has been named as a defendant in hundreds of lawsuits brought by individual plaintiffs against a variety of pharmaceutical manufacturers. Fen-Phen. Propulsid. Rezulin. Baycol. At times, the bookwork became so extensive that I lost track of the specific cases. And today, even though I no longer own the drugstore, I still get named as a defendant time and again. . . .<sup>81</sup>

Notably, although Bankston Drugstore has been sued in numerous mass joinder actions, the store has *never* been found liable in any of these cases, further evidencing that plaintiffs include it as a defendant solely to avoid federal court jurisdiction.

Frequently, defense counsel seek to remove mass joinder cases to federal court, despite the presence of one non-diverse, tangential defendant (such as a minor retailer), arguing "fraudulent joinder"—i.e., that the inclusion of one insignificant in-state defendant should not be allowed to defeat diversity jurisdiction because plaintiffs do not seriously intend to recover from such defendants and they have only been joined to keep the case out of federal court.<sup>82</sup> As defendants put it in one typical notice of removal involving the Bankston Drugstore:

Plaintiffs joined as the only non-diverse defendants pharmacies which did nothing more than dispense medications to one or more plaintiffs in accordance with a physician's prescription. Plaintiffs do not allege that the defendant pharmacies incorrectly filled their prescriptions. Rather, plaintiffs assert only product liability theories, including strict liability for defective design, failure to warn and breach of implied warranties—precisely the same theories asserted against the manufacturing defendants. Under Mississippi law, no cause of action exists against a pharmacy for correctly filling a physician's prescription for a lawful drug; thus there is no possibility of recovery against the pharmacies.<sup>83</sup>

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81. Testimony by Hilda Bankston, Senate Committee on the Judiciary, July 31, 2002 (emphasis added).

82. See Notice of Removal ¶¶ 7-8, *Ames v. Ford Motor Co.*, No. 01cv20BN (S.D. Miss. filed Feb. 2, 2001).

83. Notice of Removal ¶ 8, *Rankin v. Janssen Pharm., Inc.*, No. 00-CV-190 (S.D. Miss. filed Aug. 4, 2000).

Defendants have also sought removal on other grounds, such as the existence of a federal court class action settlement, or on the grounds that the plaintiffs' claims were misjoined and the court should simply sever the claims of the plaintiffs with relationships to the non-diverse defendants.<sup>84</sup>

However, while some federal courts have been sympathetic to these arguments, the vast majority of cases are remanded. As a typical remand order to Jefferson County, Mississippi put it:

In order to establish that a defendant has been fraudulently joined, the removing party must show either that no possibility exists that the plaintiff would be able to establish a cause of action against the non-diverse defendant under state law or an outright fraud in the plaintiffs' pleading of the facts. All ambiguities in the controlling law of a state must be resolved in favor of the plaintiff. . . . There is some possibility that the supermarkets could be shown to have had knowledge of an alleged defective condition of the cigarettes at the time they sold them to the plaintiff.<sup>85</sup>

Thus, the hypothetical possibility of recovery by just one of 100 plaintiffs against a small local defendant is enough to relegate the overwhelming majority of interstate mass actions to state courts, where they are currently subject to inconsistent standards and where certain judges have agreed to mass trials that are inherently unfair and deny the parties basic due process protections.

## II. CASE STUDY: THE MASS ACTION PHENOMENON IN JEFFERSON COUNTY, MISSISSIPPI

Jefferson County, a rural, economically distressed county in southwestern Mississippi, is home to fewer than 10,000 people<sup>86</sup> and just 22 retail businesses.<sup>87</sup> For many years, Jefferson County was more notable for what it lacked than for what it had. But in 1999, that changed when it began to have a lot of one thing—mass action lawsuits.

Over the next two years, the county attracted large numbers of mass actions, and its juries doled out astounding awards, leading one newspaper to suggest that it was the “best place to sue” in the country,<sup>88</sup> and another newspaper to call it “ground zero for the largest legal attack on the pharmaceutical industry.”<sup>89</sup> Amazingly, the total number of plaintiffs who have filed lawsuits in the county since 1999 outnumbers the total number of residents.<sup>90</sup> The federal judge in the Southern District of Mississippi who is responsible for the Jefferson County area, Judge David Bramlette, is reputed to have the heaviest removal docket of any judge in the U.S. Court of Appeals for the Fifth Circuit, since defendants sued in Jefferson County will try any means to remove a case to federal court. Indeed, it is not uncommon to find a case in which defendants sought to remove a case two or three times.

In addition to its reputation for large jury verdicts, another key reason that Jefferson County attracted so many mass actions beginning in 1999 was that its only civil judge—Judge Lamar Pickard—was perceived as receptive to these cases. As a result of the court's reputation for treating mass actions favorably, the number of mass actions filed annually grew more than four-fold in one year—from 17 in 1999 to 73 in 2000.

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84. Notice of Removal at 3, *Johnson v. Glaxo Smith Kline*, No. 01-CV-160 (S.D. Miss. filed May 23, 2001).

85. Mem. Op. and Order, *Thomas v. R.J. Reynolds Tobacco Co.*, No. 5:97cv14BrS (S.D. Miss. Sept. 15, 1997).

86. UNITED STATES BUREAU OF THE CENSUS, available at <http://quickfacts.census.gov/qfd/states/28/28063.html>.

87. Rezone Demographic Data, 2001.

88. Tim Lemke, *Best Place To Sue? Big Civil Verdicts In Mississippi Attract Major Litigators*, WASH. TIMES, June 30, 2002, at A1.

89. Mark Ballard, *Mississippi Becomes A Mecca For Tort Suits*, NAT'L LAW J., Apr. 20, 2001.

90. See *Mississippi Burning*, INVESTOR'S BUS. DAILY, May 13, 2002, at A16.

For reasons that are not entirely clear (though it was reported that “the change came only because of the practical challenge of having so much litigation tried in a tiny town”),<sup>91</sup> Judge Pickard appeared to reverse course in July 2001, announcing from the bench:

[T]his court is taking a much, much different view as to joinder in this district not because I’ve had a change of heart or anything like that, but it’s because I’ve been trained. I’ve had some very fine lawyers training me on what joinder is, and I think I’m probably in a better position to know whether joinder is proper and whether it’s not in a case, such as in an asbestos case where you have different work sites, different defendants, different exposures, plaintiffs from different places and different injuries. I don’t think joinder is proper in those cases . . .

Joinder rules, like discovery rules or like any other rules are subject to some abuse. And the joinder rule was never intended to be a class rule in Mississippi. . . .

And we have very—we have some very, very fine legal talent, legal minds in Mississippi that have crafted a class action rule into our joinder rule and that’s not what it was intended for.<sup>92</sup>

Since then, Judge Pickard has reportedly allowed new mass actions to proceed in his court only if all the plaintiffs were from Jefferson County and has transferred claims involving non-resident plaintiffs to other counties.

In an effort to better understand the mass joinder phenomenon, the Center For Legal Policy commissioned Stateside Associates, a Virginia-based research organization, to conduct a study of the 1999, 2000 and 2001 civil dockets in Jefferson County, Mississippi. The resulting data identified several disturbing trends:

- First, the frequency of filing of mass joinder actions in Jefferson County, Mississippi, was vastly disproportionate to the county’s population and the overall volume of the court’s civil docket.<sup>93</sup>
- Second, the vast majority of these cases had little (if any) relationship to Jefferson County.
- Third, plaintiffs’ counsel consistently included one local defendant to insulate their cases from federal jurisdiction.
- Fourth, the complaints were brought by counsel from all over the country, who clearly went to great pains to sue in this county—not because of its convenience or the presence of luxury hotels (in fact, there are no hotels in Jefferson County), but because they clearly thought they would find a receptive audience for their mass joinder actions.
- And fifth, plaintiffs’ counsel made little (if any) effort to explain in their complaints exactly what the plaintiffs were alleging or why their claims should be litigated jointly; to the contrary, many of these complaints simply included long lists of plaintiffs with no facts regarding their allegations (and often, no addresses), and thus were clearly intended to intimidate defendants into settlement negotiations, rather than actually give notice of legal claims.

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91. See Tim Lemke, *Best Place To Sue? Big Civil Verdicts In Mississippi Attract Major Litigators*, WASH. TIMES, June 30, 2002, at A1.

92. Statement of J. Lamar Pickard, Tr. of Mot. Hearing at 9-10, *Conway v. Hopeman Bros.* (Cir. Ct. Jefferson County, Miss. July 25, 2001).

93. For purposes of this research project, cases were identified as mass joinder actions if they involved multiple unrelated persons suing at least one out-of-state defendant. Thus, for example, if a family were involved in a car accident, and several members of the family sued the driver or manufacturer of the vehicle, that would *not* be considered a mass joinder action under this research.

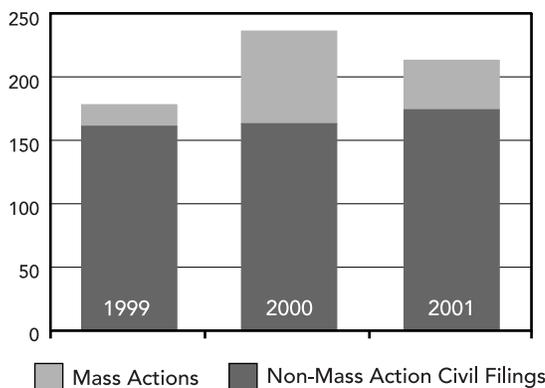
A. Research Study Findings

**1. During The Survey Period, Mass Actions Were Filed In Jefferson County At Rates That Were Disproportionate To The County's Population And The Remainder Of The Docket**

In order to fully appreciate the magnitude of the mass joinder phenomenon in Jefferson County courts during the survey period, it is necessary to understand the diminutive size of the rest of the county's civil court docket. In 1999, only 178 civil lawsuits were filed in Jefferson County. Thirteen of those 178 cases were brought by individual plaintiffs against out-of-state defendants. Seventeen of the 178 cases (ten percent) were mass actions against at least one out-of-state defendant. Amazingly, a single mass action filed during 1999 included more plaintiffs than all of the individual civil cases filed in the county in the whole year combined. Put another way, only thirteen people brought product liability, insurance, tobacco and other tort and negligence cases individually in 1999—but 1,382 people participated in seventeen mass joinder actions involving those issues that year. Of course, the size of the individual civil case docket is not surprising, since Jefferson County has fewer than 10,000 residents. However, the fact that such cases are outnumbered by mass actions evidences the disproportionate nature of mass action filings in the county and the heavy involvement of non-Jefferson County plaintiffs in these cases.

The 1999 trends continued in 2000 and 2001—until Judge Pickard's mid-year announcement that he would henceforth view joinder cases with more skepticism. In 2000, the heyday of mass joinder cases in Jefferson County, the number of mass actions jumped more than four-fold—to 73—involving 3,322 plaintiffs.<sup>94</sup> In 2001, there were 39 mass joinder actions filed in the county, accounting for more than 18 percent of the docket—and once again, significantly surpassing the number of individual cases filed against out-of-state defendants. Despite the decline in mass actions, the number of plaintiffs involved in these 39 cases was 1,079—a figure greater than ten percent of the county's entire population. Moreover, given that almost all of these cases were filed *before* Judge Pickard's mid-year announcement that he would no longer employ such a loose standard for permitting joinder, it is safe to assume that absent that milestone, the number of such cases filed in 2001 would have been even higher than in 2000—and would still be continuing to grow.

**Mass Actions Comprise a Lion's Share of the Jefferson County Docket**



	1999	2000	2001
Total Civil Complaints Filed	178	646 <sup>95</sup>	213
Mass Actions Filed Against Out-of-State Defendants	17	73 <sup>96</sup>	39 <sup>97</sup>
Percentage of Civil Litigation Filed against Out-of-State Defendants	9.56%	11.3%	18.3%

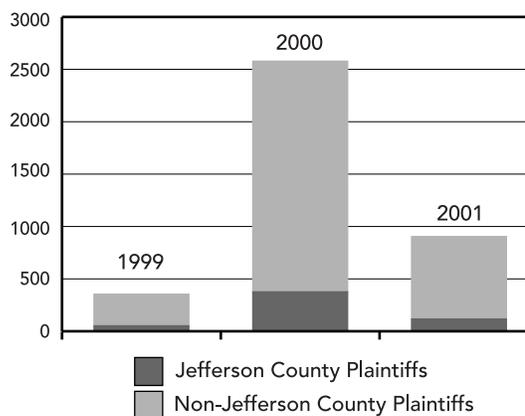
94. Because of an anomaly in filings in 2000 (several hundred individual cases were brought separately to enforce a settlement), we cannot calculate a meaningful percentage for that year.  
 95. This number is artificially inflated because it includes 480 identical asbestos suits filed by plaintiffs from one case to force payment in an asbestos settlement.  
 96. Detailed data about Complaint Nos. 2000-161, 2000-617 and 2000-627 were unavailable.  
 97. Detailed data about Complaint Nos. 2001-22, 2001-66, 2001-74, 2001-117 and 2001-154 were unavailable.

## 2. The Vast Majority Of The Plaintiffs In These Cases Reside Outside Of Jefferson County

While some of the mass actions brought in Jefferson County during the survey period did involve significant numbers of Jefferson County plaintiffs, those cases were in the distinct minority. Most cases in the survey included only a few Jefferson County plaintiffs. Some examples of plaintiff distribution include the following:

- In a case alleging that Ford Explorer vehicles and Firestone tires are defective, just *one* of the forty plaintiffs was from Jefferson County; twenty-eight were from other Mississippi counties, and twenty-one were from other states.<sup>98</sup>
- In a case alleging that certain diet drugs were dangerous, *none* of the 380 plaintiffs were from Jefferson County.<sup>99</sup>
- In a tobacco case brought against several tobacco manufacturers, just *two* of the seventeen plaintiffs were from Jefferson County.<sup>100</sup>
- In a case alleging fraud in the sale of insurance policies, just *four* of the forty-two plaintiffs were from Jefferson County.<sup>101</sup>

**Proportion of Non-Jefferson County Plaintiffs in Jefferson County Mass Actions**



All told, of the 108 cases in the survey in which the complaints actually provided address information for plaintiffs, just 539 of the 3,011 plaintiffs were from Jefferson County.<sup>102</sup>

## 3. The Mass Action Business In Jefferson County Is Dominated By Out-Of-County And Out-Of-State Plaintiffs' Lawyers

There is only one practicing lawyer in Jefferson County, Mississippi. He did not bring any of the mass joinder actions during the survey period. Rather, *all* of these cases were brought by plaintiffs' attorneys from outside Jefferson County—most of whom practice in Jackson, Mississippi; Birmingham, Alabama; and Texas. Indeed, 63 of the 129 cases we reviewed listed at least one law firm outside Mississippi. As Mrs. Bankston noted in her Congressional testimony, these law firms advertise relentlessly for clients:

Jefferson is a poor county, and the attorneys handling these claims have aggressively marketed their actions as the same as winning the lottery. Some days I can't open the newspaper without seeing ad after ad recruiting potential plaintiffs with a warning that "time is of the essence" if folks want the promise of big payouts. Nor are their efforts hurt by rumors that five plaintiffs in the first Fen-Phen case split \$150 million. Plus it is well-known in the community that trial lawyers point to multi-million homes that are built by successful lead plaintiffs as an inducement for signing on.<sup>103</sup>

98. See Compl., *King v. Ford Motor Co.*, No. 2001-21 (Cir. Ct. Jefferson County, Miss. filed Jan. 31, 2001). The authors note that they have participated in the defense of this action.

99. See Compl., *Jefferson v. Am. Home Prod. Corp.*, No. 2000-66 (Cir. Ct. Jefferson County, Miss. filed May 9, 2000).

100. See Compl., *McGee v. Philip Morris Inc.*, No. 2000-596 (Cir. Ct. Jefferson County, Miss. filed Nov. 16, 2000).

101. See Compl., *Barham v. First Family Fin. Servs. Inc.*, Case No. 2000-166 (Cir. Ct. Jefferson County, Miss. filed Oct. 16, 2000).

102. Twenty-one cases in the docket (some of which named over 1,000 plaintiffs) did not include address information for the named plaintiffs. However, based on the patterns observed in the cases in which that information was provided, a similar pattern of resident and non-resident participants should logically be assumed.

103. Testimony by Hilda Bankston, Senate Committee on the Judiciary, July 31, 2002.

One Texas firm that was involved in five of the mass joinder cases in 2000 advertises for diet drug users on its website, which includes an on-line application form, stressing that “Time is of the Essence!” and asking would-be plaintiffs multiple choice questions such as: “Have you ever taken any of the following drugs: “ Fen-Phen, “ Pondimin, “ Redux? Have you experienced the following: “ Shortness of breath, “ Heart Valve Surgery, “ An Echocardiogram?”<sup>104</sup> Another firm from Jackson, Mississippi that appeared in three complaints in 2001 advertises its success in Jefferson County, noting that they “brought the first Rezulin-related cases in the country to trial in November 2001, which settled on the courthouse steps.”<sup>105</sup>

#### **4. In Every Case, Plaintiffs Named At Least One Non-Diverse Defendant To Defeat Federal Diversity Jurisdiction**

Plaintiffs’ efforts to avoid diversity jurisdiction are quite transparent in these cases. Indeed, many of the paragraphs include an allegation specifically stating that federal jurisdiction does not exist over the case because diversity is lacking and because plaintiffs disavow any federal claims. A typical disclaimer states: “[t]o the extent that the Defendants will contend that the plaintiffs are seeking relief under federal laws or federal questions, the Plaintiffs expressly deny said contentions, and the Plaintiffs expressly waive any and all relief under any federal laws or any federal question concerning the allegations of this Complaint.”<sup>106</sup>

As noted above, plaintiffs in pharmaceutical cases typically named Bankston Drugstore and/or a prescribing physician to prevent their cases from being removed to federal court on the grounds of diversity jurisdiction. In other cases, plaintiffs named local wholesalers, retailers or salespeople who clearly had been involved in only a small portion of the claims at issue. Moreover, the facts in the complaints are inevitably aimed at the manufacturers (as are, of course, the six- and seven-figure damages requests). For example:

- In a typical insurance case alleging insurance packing, plaintiffs named as defendants five out-of-state companies and three salespersons who reside in Mississippi, even though the plaintiffs’ allegations center on the conduct of the corporations.<sup>107</sup> Plaintiffs allege that defendant corporations practiced “predatory lending . . . the Defendants strip, flip and pack their way to profit at the expense of trusting and unknowing consumers.”<sup>108</sup>
- In a typical tobacco case alleging personal injury and wrongful death, plaintiffs named eleven major out-of-state tobacco companies as well as three in-state wholesalers and two local convenience stores or supermarkets.<sup>109</sup> The gravamen of their complaint makes clear that this case was not aimed at the stores. After all, the basis of plaintiffs’ claims is that there was a “tobacco industry-

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104. See [www.fleming-law.com](http://www.fleming-law.com).

105. See [www.frazierdavidson.com/profile.html](http://www.frazierdavidson.com/profile.html).

106. Compl. at 8-9, *Carter v. American Gen. Fin. Inc.*, No. 2001-42 (Cir. Ct. Jefferson County, Miss. filed Mar. 1, 2001).

107. See Compl., *Turner v. Citigroup, Inc.*, No. 2001-152 (Cir. Ct. Jefferson County, Miss. filed Aug. 30, 2001).

108. *Id.* ¶ 19.

109. See Compl., *Humphrey v. R.J. Reynolds Tobacco Co.*, Case No. 2000-608 (Cir. Ct. Jefferson County, Miss. filed Dec. 1, 2000).

wide conspiracy by the Defendants” to “mislead, deceive, and confuse the government, and the public, including Plaintiffs, concerning the harmful and debilitating effects [of] smoking.”<sup>110</sup> Obviously, two convenience stores in Mississippi did not play substantial roles in this alleged conspiracy.

- In an asbestos case brought against an Illinois corporation, the plaintiffs joined one plaintiff from Illinois in order to defeat diversity.<sup>111</sup>
- In a case involving an out-of-state automobile manufacturer and out-of-state tire manufacturer, plaintiffs also named fourteen local car and tire dealerships; however, plaintiffs failed to even allege that any of the plaintiffs acquired their tires or vehicles from any of the named dealerships. Moreover, as with other cases, plaintiffs’ allegations center on design and manufacturing issues, which obviously are not aimed at the dealers and for which the dealers could not be found culpable.<sup>112</sup>

### B. A Sampling Of Mass Action Cases Filed In Jefferson County During The Survey Period

Of the 129 mass actions included in the survey, the vast majority (108) fell into one of the following categories: insurance, asbestos, tobacco or pharmaceuticals. The remaining actions included other product liability and personal injury cases.

	1999	2000	2001
<i>Mass Actions Filed Against Out-of-State Defendants</i>	17	73	39
Tobacco	1	10	3
Asbestos	5	18	8
Drugs	3	17	6
Insurance	7	15	16
General Products Liability	0	3	2
Other	1	10	4

A brief summary of some of the mass actions brought in Jefferson County during the survey period provides a window on the breadth of these lawsuits and reflects the concerns discussed above about the propriety of combining disparate claims from all over the country for resolution in a single county court in Mississippi:

#### 1. Insurance

By far, the largest part of Jefferson County’s mass action docket during the period surveyed (38 of the 129 cases) involved insurance claims. For the most part, these cases were brought against out-of-state insurance companies, though plaintiffs often joined an in-state insurance agent as a defendant in an effort to defeat diversity jurisdiction. Some examples of insurance mass actions filed in Jefferson County during the survey period include:

- *Carter v. American General Finance Inc.*<sup>113</sup>—This is one of the thirteen cases filed in Jefferson County during the survey period alleging that numerous defendants improperly required collateral protection insurance for loans, a practice referred to by plaintiffs as “packing.” The plaintiffs in these

110. *Id.* ¶ 1.

111. See Second Am. Compl. ¶ 1, *Eakins v. Illinois Cen. R.R. Co.*, No. 2001-65 (Cir. Ct. Jefferson County, Miss. filed Aug. 9, 2001).

112. See Compl., *King v. Ford Motor Co.*, supra note 98.

113. Compl., *Carter v. American Gen. Fin. Inc.*, No. 2001-42 (Cir. Ct. Jefferson County, Miss. filed Mar. 1, 2001).

cases seek to join their claims even though they procured their loans and insurance products from different lending offices, purchased different types of insurance, and had different loan terms, and even though they allege fraud, an allegation that requires a jury to determine whether an individual relied on the alleged misrepresentations at issue in a case. Obviously, a jury cannot keep the facts straight as to each plaintiff and defendant and fairly determine which, if any, plaintiffs have made convincing claims against which defendants, when a case involves so many different plaintiffs and defendants and numerous different alleged representations.

In the *Carter* case, twenty-two plaintiffs (just half of whom were Jefferson County residents), sued American General Corporation, an Indiana corporation; Merit Life Insurance Company, an Indiana corporation; Yosemite Insurance Company, an Indiana corporation; and USLIFE Credit Life Insurance Company, an Illinois corporation. Once again, plaintiffs joined local defendants—in this case, eight agents for the defendant corporations—in order to prevent removal to federal court. In addition, plaintiffs waived “any and all relief under any federal laws or any federal question concerning the allegations of this Complaint.”<sup>114</sup> Defendants filed three notices of removal in this case. The court rejected the first two;<sup>115</sup> plaintiffs’ remand motion regarding the third removal effort, in which defendants argued that many of the plaintiffs were members of a settlement class in separate federal litigation, is now pending before the federal district court. As with the other alleged “packing” cases in the survey, this case involved different transactions that took place at different times in different places in a range of different circumstances; according to defendants’ motion to sever, the loans at issue were made over the course of several years for different amounts of money by different loan officers with different collateral and different types of credit insurance.<sup>116</sup>

- *Cruel v. American General Life and Accident Insurance Co.*<sup>117</sup>—Twenty-two plaintiffs (fifteen of whom were from Jefferson County), sued American General Life and Accident Insurance Company (“AG”), a Tennessee corporation, for allegedly defrauding customers by failing to disclose the risks and costs of insurance purchases, mislabeling documents, allowing agents to downplay certain information about the policies, and improperly passing taxes onto policy owners.<sup>118</sup> In order to avoid federal court, the plaintiffs joined the local agents that sold the policies.<sup>119</sup> AG attempted to remove the case, arguing that none of the plaintiffs ever had any contact with the local agents joined in the action,<sup>120</sup> but the district court remanded it to Jefferson County.<sup>121</sup> Predictably, the case settled after remand.<sup>122</sup>

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114. *Id.* ¶ 41.

115. See Mem. Op. and Order, *Carter v. American Gen. Fin., Inc.*, No 5:01cv152BrS (S.D. Miss. July 31, 2002) (finding that defendants did not “submit any evidence that gave the Court reason to ‘pierce the pleadings’” with regard to their fraudulent joinder allegations).

116. See Defs.’ Rebuttal Mem. In Supp. Of Their Mot. To Sever, *Carter v. American Gen. Fin., Inc.*, No. 5:01cv152BrS (S.D. Miss. Dec. 2001).

117. Compl., *Cruel v. Am. Gen. Life & Accident Ins. Co.*, No. 99-116, (Cir. Ct. Jefferson County, Miss. filed Aug. 26, 1999).

118. *Id.* ¶¶ 37-40.

119. *Id.* ¶ 36.

120. See Notice of Removal, *Cruel v. Am. Gen. Life & Accident Ins. Co.*, No. 5:00cv221BrS (S.D. Miss. filed Aug. 29, 2000).

121. Order of Remand, *Cruel v. Am. Gen. Life & Accident Ins. Co.*, No. 5:00cv221BrS (S.D. Miss. filed Dec. 19, 2000).

122. See Order, *Cruel v. Am. Gen. Life & Accident Ins. Co.*, No. 99-0116 (Cir. Ct. Jefferson County, Miss. filed Sept. 17, 2001).

- *Smith v. Union National Life Insurance*<sup>123</sup>—This case was brought by eighteen in-state plaintiffs (less than half of whom were from Jefferson County), against Union National Life Insurance (and, as is typical, its local salespersons to avoid diversity jurisdiction), for allegedly misrepresenting the benefits that individuals would receive under “hospital policies,”<sup>124</sup> if they were Medicaid recipients. According to the Complaint, some of the plaintiffs told defendants they were Medicaid recipients, and some did not.<sup>125</sup> In either case, plaintiffs allege, defendants acted fraudulently. However, this distinction among the plaintiffs highlights the very problem with mass actions. After all, a jury could very likely find that plaintiffs who informed the sales representative that they received Medicaid would be differently situated in terms of their fraud claims from plaintiffs who did not mention this information. By joining all these varying claims together, of course, plaintiffs’ counsel typically seek to paper over these differences and, as discussed above, “hide” behind the most compelling plaintiffs.

## 2. Asbestos

Asbestos cases also formed a substantial portion of Jefferson County’s mass action docket during the period surveyed, accounting for 31 of the 129 cases—and more than 4,500 plaintiffs combined (a number equal to approximately half the population of Jefferson County). The presence of so many asbestos cases in a county where just 137 people are employed in construction jobs might be surprising—however, the vast majority of plaintiffs come from outside Jefferson County. Moreover, most of these cases involved far more tenuous exposure to asbestos than construction, and in many instances, plaintiffs simply fail to specify where and how their alleged asbestos exposure occurred.

As noted above, the asbestos cases raise the same concerns as the other mass joinder cases in the survey because they typically involve plaintiffs who were allegedly exposed to asbestos in different places, for different periods of time, and by different employers or defendants, and who allegedly suffered different injuries. (Indeed, it was in the context of an asbestos case that Judge Pickard ultimately decided to apply stricter rules to joinder cases in the future).

- *Anderson v. Owens-Illinois, Inc.*<sup>126</sup>—In this case, 314 plaintiffs sued 90 companies, alleging that they suffered health problems from exposure to products containing asbestos, manufactured or distributed by the defendant companies, while they “worked at or in close proximity to such plants and equipment in Claiborne County.”<sup>127</sup> Notably, the Complaint does not provide residency or citizenship information for the plaintiffs. Instead, the Complaint simply states that plaintiffs are “adult resident[s] . . . of the State of Mississippi, or other states of the United States.”<sup>128</sup> Thus, from the face of the Complaint, it is impossible to determine which (if any) of the plaintiffs were Jefferson County residents. Moreover, plaintiffs’ counsel do not even attempt to justify their choice of venue in Jefferson County; rather, plaintiffs merely allege that the products at issue were used “in and around Jefferson County, Mississippi and various locations throughout Mississippi and other States.”<sup>129</sup> Defendants sought to remove the case to federal court, but they were unsuccessful because four of the ninety defendants were Mississippi companies, thereby destroying diversity.<sup>130</sup>

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123. Compl., *Smith v. Union Nat’l Life Ins. Co.*, No. 2001-35 (Cir. Ct. Jefferson County, Miss. filed Feb. 16, 2001).

124. *Id.* ¶ 47.

125. *Id.* ¶ 43.

126. Fifth Am. Compl., *Anderson v. Owens-Illinois, Inc.*, No. 2000-22 (Cir. Ct. Jefferson County, Miss. filed June 5, 2000).

127. *Id.* ¶ 10.

128. *Id.* ¶ 1.

129. *Id.* ¶ 9.

130. Order Granting Mot. to Dismiss, *Anderson v. Owens-Illinois, Inc.*, No. 01-cv-20 (S.D. Miss. filed Jan. 1, 2001).

- *Arceneaux v. Garlock*<sup>131</sup>—In this case, seventy-eight plaintiffs sued forty-six defendant companies seeking \$10 million in punitive damages and \$5 million in compensatory damages on behalf of **each** plaintiff for alleged asbestos injuries.<sup>132</sup> As with other asbestos cases, the connection with Jefferson County is tenuous—just six of the seventy-eight plaintiffs are from Jefferson County (sixty-four were from other counties in Mississippi, and the remaining eight are from Louisiana, Oklahoma, and Illinois).<sup>133</sup> Plaintiffs’ counsel argue that venue is appropriate because “[o]ne or more of the Plaintiffs cause of action in whole or in part occurred and or accrued in Jefferson County,”<sup>134</sup> but they do not say which one. General Motors, one of the defendants in the case, attempted to remove to federal court—but because three of the forty-six defendants were Jackson, Mississippi companies, the federal court found that the parties were not completely diverse, and the case was remanded to Jefferson County.<sup>135</sup>

As is typical in mass action cases, plaintiffs in this case do not allege specific injuries; instead, they simply claim broadly that “Plaintiffs and Plaintiffs’ Decedents *have developed and/or are at an increased risk of developing the following asbestos related diseases and conditions*: asbestosis, asbestos pleural disease (pleural plaques and/or pleural thickening), asbestos-induced pleural effusion, lung cancer, mesothelioma, colon cancer, rectal cancer, gastrointestinal cancer, laryngeal, pharyngeal and esophageal cancer, stomach cancer, throat cancer, leukemia and lymphoma.”<sup>136</sup> Thus, this is another example of a case in which plaintiffs’ counsel sought to lump together disparate claims—including people who are alive and people who are dead; people who claim they have developed one in a long list of diseases and people who simply claim they are at risk of developing one of these diseases. As in the other mass actions filed in Jefferson County, no jury could methodically sort through all these different claims in one case.

- *Ross v. General Electric Co.*<sup>137</sup>—In this matter, 105 plaintiffs from Mississippi, Alabama, and Florida sued sixty-seven companies, alleging that they were injured by exposure to asbestos-containing products over a period of seventy years. Once again, the relationship of this litigation to Jefferson County is tenuous at best—plaintiffs allege that they were exposed to products containing asbestos at work but do not provide any information regarding their places of employment. Nor do plaintiffs identify the types of injuries they allegedly sustained as a result of exposure.<sup>138</sup> In fact, no individual information is provided about plaintiffs, except their names and social security numbers.<sup>139</sup> And once again, the Complaint does not contain specific allegations supporting plaintiffs’ choice of Jefferson County as the venue for adjudication of their claims.
- *Anderson v. Pittsburgh Corning Corp.*<sup>140</sup>— In this matter, 1,056 plaintiffs from Mississippi and Alabama, sued seventy-four defendant companies, alleging that they were injured by their work at “construction and various other work sites” by asbestos containing products during a forty year period.<sup>141</sup> Plaintiffs sought \$4 million from each defendant (\$2 million in compensatory damages

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131. Second Am. Compl., *Arceneaux v. Garlock, Inc.*, No. 2000-101 (Cir. Ct. Jefferson County, Miss. filed Oct. 4, 2000).

132. *Id.* ¶ 27.

133. *Id.* ¶ 1.

134. *Id.* ¶ 2.

135. Order Granting Mot. to Remand, *Arceneaux v. Garlock, Inc.*, No. 1:01CV526GR (S.D. Miss. filed Jan. 28, 2002).

136. Second Am. Compl. ¶ 3, *Arceneaux v. Garlock, Inc.*, No. 2000-101 (Cir. Ct. Jefferson County, Miss. filed Oct. 4, 2000) (emphasis added).

137. Second Am. Compl., *Ross v. General Elec. Co.*, No. 99-102 (Cir. Ct. Jefferson County, Miss. filed May 10, 2001).

138. *Id.* ¶ 9.

139. *Id.* ¶ 1.

140. Compl., *Anderson v. Pittsburgh Corning Corp.*, No. 99-149 (Cir. Ct. Jefferson County, Miss. filed Nov. 1, 1999).

141. *Id.* ¶¶ 4-5.

and \$2 million in punitive damages). As in other asbestos cases, no specific information regarding when or where the plaintiffs' exposure took place or the plaintiffs' alleged injuries is provided in the Complaint. Instead, the plaintiffs broadly allege that they suffer from "one or more" of a laundry-list of conditions including: asbestosis; pulmonary or bronchogenic carcinoma; mesothelioma; digestive tract, respiratory tract or other cancers; impaired pulmonary capacity; reduced lung volume; pleural plaques; interstitial lung fibrosis; cardiac and circulatory disease; increased susceptibility to one of the foregoing diseases and other illnesses; physical and mental anguish associated with one or more of the preceding conditions; and death.<sup>142</sup> Once again, plaintiffs fail to explain the relationship of the case to Jefferson County. No information regarding plaintiffs' residence is included; nor do plaintiffs make any allegations that tie the location of their exposures to Jefferson County.

- *Eakins v. Illinois Central Railroad Co.*<sup>143</sup>—In this case, 171 plaintiffs (just eighteen of whom were from Jefferson County), sued Illinois Central Railroad Company, an Illinois railroad company that operates north-south rail lines between Canada and New Orleans, alleging that they were exposed to asbestos on the job. Plaintiffs avoided federal court by including just one Illinois plaintiff, James Ira Bowling of McClain County, Illinois.<sup>144</sup> Again, plaintiffs make no individual allegations regarding where exposure allegedly took place. The Complaint contains only a general allegation connecting the plaintiffs' cause of action with Jefferson County "Plaintiffs' causes of action, or some of them, occurred and/or accrued in Jefferson County, Mississippi. During some or all of the time during which Plaintiffs were exposed to asbestos in their job duties . . . Defendant was doing business in Jefferson County."<sup>145</sup>

### 3. Prescription Drugs

Of the 129 mass actions brought in Jefferson County between 1999 and 2001, twenty-six involved prescription drugs. These cases, which typically include 100 to 600 plaintiffs, seek a variety of damages on behalf of separate individuals, all of whom allegedly took the drugs at issue and suffered various medical consequences. The prescription drug cases further highlight the due process concerns raised by mass actions; in most of these cases, the plaintiffs took different drugs for different periods of time and allegedly suffered different problems. Moreover, many of the plaintiffs allege injuries such as chest pains, headaches, and shortness of breath that could have been caused by numerous factors. Once again, mass joinder of such disparate allegations denies defendants the ability to adequately defend themselves on these grounds. Rather, by throwing in numerous claims involving similar drugs, plaintiffs can often evade causation requirements and force settlements for questionable claims.

As noted above, although the damages sought in these matters are quite extensive, plaintiffs' counsel almost always manage to stay out of federal court by naming at least one Mississippi defendant—which turned out, more often than not, to be the one and only drugstore in Jefferson County. At a recent congressional hearing, Hilda Bankston, the pharmacy's previous owner, testified that mass actions transformed her life from "the American dream" to a "legal nightmare." In Ms. Bankston's words:

No small business should have to endure the nightmares I have experienced. Class action attorneys have caused me to spend countless hours retrieving information for potential plaintiffs. I've searched record after record and made copy after copy for use against me. I've had

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142. *Id.* ¶ 9.

143. Second Am. Compl., *Eakins v. Illinois Cen. R.R. Co.*, No. 2001-65 (Cir. Ct. Jefferson County, Miss. filed Aug. 9, 2001).

144. *Id.* ¶ 1(s).

145. *Id.* ¶ 3 (emphasis added).

to hire personnel to watch the store while I was dragged into court on numerous occasions to testify. I have endured the whispers and questions of my customers and neighbors wondering what we did to end up in court so often. And, I have spent many sleepless nights wondering if my business would survive the tidal wave of lawsuits cresting over it.<sup>146</sup>

The drugstore has not actually been found liable in any of these cases and has thus paid nothing in verdicts or settlements.<sup>147</sup>

Some examples of pharmaceutical mass joinder actions brought in Jefferson County during the survey period include:

- *Washington v. American Home Products Corp.*<sup>148</sup>; *Jefferson v. American Home Products Corp.*<sup>149</sup>—These are two of the ten mass action cases filed in Jefferson County during the survey period alleging injuries from diet drugs. In the *Washington* case, 872 plaintiffs from seventeen states (less than half of whom were Mississippi residents) sued a number of out-of-state drug manufacturers, alleging that their use of certain appetite suppressants caused shortness of breath, chest pain, swelling, or other heart conditions. In order to avoid federal jurisdiction, plaintiffs named Bankston Drugs as a defendant. The extent of the alleged relationship between the plaintiffs' claims and Jefferson County is tenuously asserted in the complaint: "some of the Plaintiffs reside in this Judicial District."<sup>150</sup> In fact, just twenty-two of the 872 plaintiffs are residents of Jefferson County; *the remaining 850 plaintiffs were from twenty-one different states*, including Colorado, Delaware, Illinois and Michigan. Defendants asked the court to hold separate trials for the plaintiffs, arguing that "[t]he plaintiffs made no attempt in the complaint to identify which pharmaceutical products their physicians prescribed for them, but they alleged as a group that they took any one or more of 11 different medications for the treatment of obesity."<sup>151</sup> Defendants also argued that the plaintiffs consumed the drugs at issue for different periods and that they alleged a "panoply of disparate injuries, including chest pain, peripheral swelling, heart valve damage, and brain injury."<sup>152</sup> After a trial of just five plaintiffs' claims, in which a jury awarded \$150 million in compensatory damages, and before the punitive damages phase, the case settled for an undisclosed amount.<sup>153</sup>

In the *Jefferson* case, 380 plaintiffs sued the manufacturer of diet medications Fenfluramine/Pondimin and Defenfluramine/Redux, 137 physicians, and fifty-six drug stores and pharmacists (including some from Mississippi, of course, to destroy diversity). Remarkably, *none* of the 380 plaintiffs are residents of Jefferson County. The only party with a connection to Jefferson County is *one* of the 127 defendant physicians, whose office is located in Fayette,<sup>154</sup> and who prescribed Redux to one

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146. *Class Action Litigation: Hearing Before the Senate Committee on the Judiciary*, 107th Cong. (2002) (statement of Hilda Bankston).

147. Tim Lemke, *Best Place to Sue? Big Civil Verdicts in Mississippi Attract Major Litigators*, WASH. TIMES, June 30, 2002 at A1.

148. Compl., *Washington v. Am. Home Prod. Corp.*, No. 99-35 (Cir. Ct. Jefferson County, Miss. filed April 1, 1999)

149. First Am. Compl., *Jefferson v. Am. Home Prod. Corp.*, No. 2000-66 (Cir. Ct. Jefferson County, Miss. filed May 9, 2000).

150. *Washington* Compl., supra note 148, ¶ 15.

151. See *id.* Defs. Am. Home Prods. Corp. & Wyeth-Ayers Labs. Company's Mot. For Separate Trials at 2, Sept. 28, 1999.

152. *Id.* at 3.

153. See *AHP Settles MS Suit After Jury Awards Plaintiffs \$150M In Economic Damages*, CONSUMER PRODUCT LITIG. R., Jan. 2000.

154. *Jefferson* First Am. Compl., supra note 149, ¶ 384.

out-of-county plaintiff.<sup>155</sup> Though defendants attempted to remove the case, the federal court remanded it to Jefferson County.<sup>156</sup>

- *Ryan v. Janssen Pharmaceutica, Inc.*<sup>157</sup>; *Rankin v. Janssen Pharmaceutica, Inc.*<sup>158</sup>—These are two of the six mass action cases involving Propulsid, a reflux drug, that were filed in Jefferson County during the survey period. In the *Ryan* case, sixteen plaintiffs from Mississippi, Louisiana and Georgia (only two of whom were Jefferson County residents), sued the makers of Propulsid for allegedly failing to adequately warn patients about the alleged risks of heart rhythm abnormalities associated with the drug, and for breaching an express warranty regarding the safety of the drug. Plaintiffs sought compensation for economic loss, pain and suffering and medical care and monitoring as well as punitive damages. In order to prevent removal to federal court, plaintiffs' counsel destroyed diversity by naming as defendants Bankston Drugs and individual pharmacists and physicians who are residents of Mississippi. In seeking to explain why plaintiffs' counsel (Silvestri & Massicot and Armstrong & Guy, both of New Orleans, Louisiana), brought a complex products liability suit in circuit court in Jefferson County, the Complaint simply states that two of the sixteen plaintiffs reside in the county and purchased Propulsid there.<sup>159</sup> Given that plaintiffs in this suit allege that they suffered "pain and suffering" from the drug and required medical care as a result (allegations that involve highly individualized inquiries), this type of suit highlights the problems raised by mass joinder cases.

In *Rankin*, 155 plaintiffs, thirty-nine of whom were not from Jefferson County, sued to recover compensatory damages of \$200 million and punitive damages of \$1 billion for injuries they allegedly suffered as a result of taking Propulsid.<sup>160</sup> In addition to naming the drug manufacturers, Janssen and Johnson & Johnson, as defendants, the plaintiffs' counsel also joined three Mississippi pharmacies (including Bankston Drug Store) in order to avoid federal jurisdiction. Defendants sought to remove the case to federal court, arguing that "no cause of action exists against a pharmacy for correctly filling a physician's prescription for a lawful drug, thus there is no possibility of recovery against the pharmacies."<sup>161</sup> Although it remanded the case for lack of complete diversity, the district court expressed skepticism regarding the joinder of the local pharmacies, noting: "the court considers it doubtful that a state court would conclude that a viable cause of action has been asserted against any of the pharmacy defendants."<sup>162</sup> Nevertheless, after the case was remanded to Jefferson County, Judge Pickard denied Janssen's motion to sever, which would have enabled some of the parties to remove to federal court again.<sup>163</sup> On the eve of trial, defendants moved for a change of venue because seventy percent of the jury pool consisted of plaintiffs in the case or relatives of plaintiffs in the case.<sup>164</sup> Judge Pickard moved the

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155. *Id.* ¶ 522.

156. Order Remanding Action to Cir. Ct. of Jefferson County, *Jefferson v. Am. Home Prods. Corp.*, No.00-cv-183 (S.D. Miss. filed Aug. 11, 2000).

157. Compl., *Ryan v. Janssen Pharm., Inc.*, No. 2001-40 (Cir. Ct. Jefferson County, Miss. filed Sept. 21, 2001).

158. First Am. Compl., *Rankin v. Janssen Pharm., Inc.*, No. 2000-020 (Cir. Ct. Jefferson County., Miss filed July 6, 2000).

159. *Ryan* Compl., supra note 157, ¶ 4.

160. *Rankin* Compl., supra note 158, ¶ 36.

161. Notice of Removal ¶ 8, *Rankin v. Janssen Pharm., Inc.*, No. 00cv190 (S.D. Miss. filed Aug. 7, 2000).

162. *Id.* Order Remanding Action to Circuit Court of Jefferson County (Oct. 31, 2000).

163. Order Denying Mot. to Sever, *Rankin v. Janssen Pharm., Inc.*, No. 2000-020 (Cir. Ct. Jefferson County, Miss filed June 8, 2001); *id.* Order Denying Mot. for a Change of Venue (June 8, 2001).

164. See *id.* Motion for Change of Venue Under Miss. Code Ann. § 11-11-511 and For Alternative Relief (filed May 6, 2002).

trial to an adjacent county, where he is also the presiding judge, even though defendants argued that the same problems existed there as well. A Claiborne County jury heard the claims of the first ten plaintiffs together and awarded them \$100 million (\$10 million each), though Judge Pickard later reduced that award to \$48 million.<sup>165</sup> Defendants have appealed the case, arguing that there was no basis for the award and that the plaintiffs alleged varied medical histories, ages and damages claims, resulting in an unfair trial.<sup>166</sup> A second trial, scheduled to begin in September 2002, was postponed due to the Legislature's special session.<sup>167</sup>

- *Johnson v. Glaxo Smith Kline*<sup>168</sup>—This case was brought by six plaintiffs who sued Glaxo Smith Kline, a North Carolina pharmaceutical company that manufactured Latronex, a drug for Irritable Bowel Syndrome, which was removed from U.S. markets after it was linked to gastrointestinal-related injuries. In order to avoid federal jurisdiction, plaintiffs joined four local defendants (including the ubiquitous Bankston Drug Store, at which just one of the plaintiffs had allegedly purchased Latronex), and three doctors who had prescribed the drug. Plaintiffs sought to remove this case alleging fraudulent joinder, but it was remanded by the district court because of the presence of the in-state defendants.<sup>169</sup>

#### 4. Tobacco

Fourteen of the mass actions filed in Jefferson County between 1999 and 2000 involved tobacco allegations. In these cases, plaintiffs typically sued manufacturers and local cigarette distributors seeking damages for illness or wrongful death. Once again, these cases sought to bring together plaintiffs with disparate experiences and injuries for one massive trial. Examples include:

- *McGee v. Philip Morris Inc.*<sup>170</sup>—Seventeen plaintiffs (only two of whom were from Jefferson County), sued eight out-of-state tobacco companies, a local supermarket, and a convenience store owner, alleging that they “sustained personal injuries such as emphysema, lung cancer, throat (esophagus) cancer, etc. including deaths resulting from lung cancer.”<sup>171</sup> Allegations regarding the suit's connection to Jefferson County are similarly vague. In support of their venue allegations, plaintiffs merely state that “Jefferson County, Mississippi, is the county where one or more of the defendants can be found and the county where the cause of action occurred and/or accrued.”<sup>172</sup> Like the other cases reviewed in the survey, the personal circumstances of the plaintiffs would make it impossible for a jury to fairly adjudicate each plaintiff's claims. As defendants noted in their motion to sever, “[p]laintiffs have nothing in common other than they all smoked and claim to have developed disease as a result. Each plaintiff has both a unique smoking history and medical history that will bear on the outcome of the matter. . . . A jury could never be expected to determine the claims of one plaintiff without being influenced by hundreds of facts relating to the other plaintiffs' claims.”<sup>173</sup>

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165. See *Judge Slashes Jury's Award Of \$100 Million Against Makers Of Propulsid*, A. P., Mar. 5, 2002.

166. See *Miss. Judge Lowers Awards To Propulsid Users; Plaintiffs Accept*, MASS TORT LITIG. R., May 2002.

167. See Jimmy E. Gates, *Special Session Delays 2nd Propulsid Trial*, CLARION-LEADER, Sept. 4, 2002, at 7A.

168. Compl., *Johnson v. Glaxo Smith Kline*, No. 2001-59 (Cir. Ct. Jefferson County, Miss. filed Mar. 27, 2001).

169. Order Granting Mot. to Remand, *Johnson v. Glaxo Smith Kline*, No. 01cv160 (S.D. Miss. Mar. 29, 2002).

170. Compl., *McGee v. Philip Morris Inc.*, No. 2000-596 (Cir. Ct. Jefferson County, Miss. filed Nov. 16, 2000).

171. *Id.* ¶ 91.

172. *Id.* ¶ 29.

173. *Id.* Defs.' Mot. To Sever The Individual Pls.' Claims Pursuant To Rule 21 Or, In The Alternative, For Separate Trials Pursuant To Rule 42(b) (Oct. 2001).

- *Colenberg v. R.J. Reynolds*<sup>174</sup>—In this case, nineteen plaintiffs (all of whom were from Jefferson County) represented by nine law firms from three states (Texas, North Carolina and Mississippi), sued ten tobacco companies and several retailers, alleging that they “are all persons who have developed debilitating diseases as a result of cigarette smoking or whose wrongful death decedents developed debilitating diseases as a result of cigarette smoking.”<sup>175</sup> Based on these allegations, plaintiffs sought \$5 billion in compensatory damages and a “reasonable” amount in punitive damages.<sup>176</sup> Again, the Complaint fails to identify the specifics of each plaintiff’s allegations—how long he or she smoked, what symptoms he or she alleges, *etc.* Moreover, because all the plaintiffs are from Jefferson County, Judge Pickard is still allowing plaintiffs’ counsel to bring these types of cases in Jefferson County despite his 2001 announcement. The case settled in August 2001.<sup>177</sup>

##### 5. Other Cases

- *Banks v. Illinois Central Railroad Company*<sup>178</sup>—Thirty former Illinois Central Railroad employees sued Illinois Central, an Illinois corporation, for hearing losses they allegedly sustained from exposure to “constant extremely loud levels of noises throughout their daily work.”<sup>179</sup> Based on these allegations, plaintiffs sought one million dollars each in compensatory damages.<sup>180</sup> Once again, the connection of the claims in this case to Jefferson County is minimal—just four of the thirty plaintiffs are residents of Jefferson County. Though Illinois Central Railroad operates a railroad between Chicago and New Orleans that passes through part of Jefferson County, the complaint contains no specific factual allegation tying the plaintiffs’ alleged hearing loss to work performed in Jefferson County. Moreover, although there was no Mississippi defendant in this case, plaintiffs’ counsel joined one plaintiff from Champaign, Illinois in order to destroy diversity.<sup>181</sup>
- *Ames v. Ford Motor Company*;<sup>182</sup> *King v. Ford Motor Company*<sup>183</sup>—These are two of a number of mass joinder actions brought in Jefferson County against Ford Motor Company and Bridgestone/Firestone, Inc., in the wake of the August 2000 recall of certain Firestone tires.<sup>184</sup> The *Ames* case was brought on behalf of thirty-eight people, only two of whom are from Jefferson County.<sup>185</sup> The remaining plaintiffs are from places as distant as Illinois, Arizona, California and Maryland.<sup>186</sup> Although plaintiffs allege in the Complaint that their claims involve “common issues of fact and/or law,” they allege numerous different injuries, ranging from “tread separation/rollover” to “blow outs” to simply having purchased the Firestone tires at issue.<sup>187</sup> Similarly, in the *King* case, *none* of the seventy-three plaintiffs (who reside in six different states), lists a Jefferson County address,<sup>188</sup>

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174. Compl., *Colenberg v. R.J. Reynolds*, No. 2000-169 (Cir. Ct. Jefferson County, Miss. filed Oct. 18, 2000).

175. *Id.* ¶ 6.

176. *Id.* ¶ 209.

177. See *Colenberg* Agreed Order of Dismissal (Aug. 16, 2001).

178. Compl., *Banks v. Illinois Cen. R.R. Co.*, No. 99-0178 (Cir. Ct. Jefferson County, Miss. filed Dec. 28, 1999).

179. *Id.* ¶ 6.

180. *Id.* ¶ 23.

181. *Id.* ¶ 1(e).

182. Compl., *Ames v. Ford Motor Co.*, No. 2000-624 (Cir. Ct. Jefferson County, Miss. filed Dec. 28, 2000).

183. Compl., *King v. Ford Motor Co.*, No. 2001-21 (Cir. Ct. Jefferson County, Miss. filed Jan. 31, 2001).

184. The authors note that they were involved in this defense of these actions on Ford’s behalf.

185. See *Ames* Compl., Ex. A.

186. *Id.*

187. *Id.* ¶ 1, Exhibit C.

188. See *King* Compl., Attach. A.

although the Complaint alleges that “[v]enue is exclusive in this Judicial District, as one or more of the Plaintiffs reside in the Judicial District and/or one or more of the Defendants can be found in this Judicial District and at least one of the accidents referred to in the Complaint occurred in Jefferson County, Mississippi.”<sup>189</sup> Moreover, in this Complaint, the plaintiffs do not even provide the minimal three-word descriptions that the *Ames* plaintiffs provided in an appendix to the Complaint regarding their claims; rather, the *King* Complaint simply states generally that the plaintiffs experienced “accidents and/or incidents,” including “rollovers, tread separations, blow outs, and other similar occurrences,” resulting from “tire tread separation and/or defective tires.”<sup>190</sup> Plaintiffs’ proclivity for filing such cases in state court is not surprising. It is hard to imagine that any federal court would allow plaintiffs’ counsel to baldly allege that venue for a large number of disparate claims from six states is “exclusive” in one jurisdiction and pursue joinder based on a complaint that does not even bother to set forth exactly what injuries plaintiffs allege.<sup>191</sup>

## CONCLUSION

Magnet courts that uncritically facilitate mass actions pose a serious threat to the judicial system. That threat occurs through an unfortunately familiar cycle:

- A state court begins to facilitate the use of mass actions.
- As a result, more mass action claims (including those with tenuous connections to that forum) are filed.
- As the court becomes increasingly overrun by increased filings, it deems it necessary to embrace even more sweeping mass actions to clear the docket.
- In approving sweeping mass actions that make it very difficult to defend against particular claims (or to dismiss claims for improper venue, or to challenge the application of the forum’s law), defendants are forced to settle many cases, regardless of merit.
- Those settlements eliminate any post-trial appeals that might otherwise test the limits of the court’s interlocutory decision to aggregate large numbers of disparate tort cases.
- When a record finally develops showing that a court has a proven history of ignoring, among other things, the due process limits on aggregations, severe damage to the national economy has already been inflicted (through, among other things, declines in shareholder value, bankruptcies, and business relocations), and it is difficult for policy-makers at the *macro* level to adopt well-targeted reforms based on the *micro* decisions of particular courts; and, if policy-makers are able to adopt appropriate legislation, plaintiffs’ counsel begin looking for the next state court that would be willing to embrace mass actions. The unfortunate cycle then begins again.

The recent experience of Mississippi is an excellent example of this cycle. While the number of mass joinder actions in Jefferson County, Mississippi, receded somewhat following Judge Pickard’s mid-2001 announcement, the party reportedly has moved elsewhere—to other Mississippi counties (like Holmes, Jones, and Jasper), where some judges reportedly have seemed willing to allow such cases to proceed on an aggregated basis. For example, in one Holmes County asbestos case, a jury awarded \$25 million each—or

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189. *King* Compl., *supra* note 183, ¶ 12.

190. *Id.* ¶ 10.

191. These cases were removed to federal court and transferred to a multi-district litigation proceeding in Indiana, where plaintiffs’ remand motions are still pending. The authors of this article have served as counsel for Ford in these cases.

a total of \$150 million—to six plaintiffs who alleged that they were exposed to asbestos at several workplaces in Mississippi, including schools, shipyards and industrial boiler rooms.<sup>192</sup> Thus, the problem appears to be getting worse, and Judge Pickard's announcement had only a minor salutary effect, even in Jefferson County itself.<sup>193</sup>

More recently, in December 2002, at the *macro* level, the Mississippi legislature—partly in response to a recognition that the state's overall receptiveness to mass actions was exacting a staggering toll on Mississippi's economy—enacted tort reform legislation. That legislation, among other things, adopts a system of graduated caps on punitive damages awards, and places an outer limit on such awards at \$20 million (for companies whose net worth exceeds \$50 million).<sup>194</sup> The legislation also tightens Mississippi's venue requirements,<sup>195</sup> limits a defendant's liability to its proportional share of blame for non-economic damages,<sup>196</sup> and protects local retailers from being held liable for selling allegedly defective products that they neither designed nor produced.<sup>197</sup>

Although very significant, that legislation does not eliminate the threat of mass actions in Mississippi. In the first place, the new statute does not eliminate the good-for-one, good-for-all provision of the Mississippi rules of civil procedure which permits mass actions to be venued in any district in which *any* single plaintiff resides.<sup>198</sup> Moreover, it remains to be seen how the legislature's efforts will play out in courthouses like those in Holmes and Jefferson Counties.

The experience of Madison County, Illinois is similarly instructive. Perhaps no court has earned more of a reputation for being a magnet for class actions than the one located in Madison County, Illinois. Madison County is "famously hospitable, in a Will Rogers sort of way. They have, their critics say, never met a class-action lawsuit they did not like."<sup>199</sup> Indeed, Madison County experienced an 1,850 percent increase in class action filings during the period 1998 to 2001, making it an "outlier among outlier[] [magnet courts]."<sup>200</sup> In response to significant criticism concerning the application of its civil procedural rules, the Illinois Supreme Court recently changed the rules governing civil appeals to facilitate the interlocutory appeal of class certification orders. Again, this reactive enactment, which took effect on January 1, 2003, did not occur until millions of dollars had been spent on settlements and judgments in nationwide or multi-state class actions that should have been rejected at the outset. And the Illinois Supreme Court has already changed that rule to water it down significantly.<sup>201</sup>

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192. See Miss. Jury Awards \$150M to Workers Exposed to Asbestos, *ASBESTOS LITIG. R.*, Dec. 13, 2001.

193. See Gregg Mayer, *Massive Jury Awards Decline*, *CLARION-LEADER*, Feb. 9, 2003, at 1A (noting that, between 1995 and 2003, there were 20 multi-million dollar verdicts awarding plaintiffs a combined total of \$82 billion); Jimmie Gates, *Hitting the Jackpot in Mississippi Courtrooms*, *CLARION-LEADER*, June 19, 2001, at 1A.

194. See 2002 MS H.B. 19, § 6 (enacted on Dec. 3, 2002).

195. See *id.* at § 1.

196. See *id.* at § 3.

197. See *id.* at § 4.

198. Mississippi did eliminate this provision for medical malpractice cases. Reform legislation passed late in 2002 requires malpractice actions to be brought in the county in which the alleged negligent act occurred. 2002 MS H.B. 2, § 1(2) (enacted on Oct. 8, 2002).

199. Adam Litpak, *Court Has Dubious Record as a Class-Action Leader*, *N.Y. TIMES*, Aug. 15, 2002, at A14.

200. See *Federal Case, supra*, 25 *HARV. J.L. & PUB POL'Y* at 168-70.

201. First, the Illinois Supreme Court eliminated the provision that the appeal would be a matter of right. Instead, the revised rule (Ill. S. Ct. Rule 306) allows a party merely to seek leave for an interlocutory appeal, allowing the court of appeals discretion whether to hear that appeal. This change is particularly significant in the district governing Madison County, which is, in the eyes of many observers, decidedly receptive to class action certifications. Second, the Court provided that the rule only applied to cases filed on or after January 1, 2003, whereas previously the proposed rule could plausibly have been read to allow appeals of any class certification *order* issued on or after January 1, 2003.

Finally, the West Virginia experience follows in the magnet court mold. Even today, the courts of West Virginia have shown no signs of tightening up the aggregation standards required by Trial Court Rule 26.01. To the contrary, as explained above, the West Virginia Supreme Court recently approved the standardless, *ad hoc* aggregation of 8,000 plaintiffs' claims against over 250 defendants simply because every complaint subject to the mass action contained the word "asbestos" in it. That case also involved as many as 5,000 claims with no connection to the state, as even one concurring justice on the West Virginia Supreme Court of Appeals, as well as the trial court, acknowledged. On the other hand, the state's Senate Judiciary Committee, in February 2003, endorsed legislation that would prohibit non-residents from suing in state court unless "a substantial part" of the lawsuit occurred in West Virginia.<sup>202</sup> The endorsed legislation would also require *each* plaintiff in a civil action to "independently establish proper venue."<sup>203</sup> Taken together, these provisions, if enacted, would be enormously helpful in easing West Virginia's burden as a magnet court. Yet, it has taken several mass trials involving thousands of claims of individuals with no connection to the forum, intense media coverage, and the threat of serious business relocations even to get this legislation out of committee. And, if it is ultimately enacted, plaintiffs' counsel presumably will look to other nascent magnet courts to begin the cycle again.

None of this should suggest that the enacted Mississippi legislation, the proposed West Virginia legislation, or the Illinois Supreme Court rulemaking effort, are unwelcome developments. To the contrary, state legislation, such as Mississippi's and, even more so, West Virginia's proposed legislation, that makes it harder—and less profitable—for plaintiffs' counsel to bring and sustain these suits definitely reacts to the problem of mass actions in a sensible manner. Stricter laws regarding the award of non-economic damages against defendants, the awards of punitive damages, and the limits of venue rules will reduce the incentives for filing mass actions. Hopefully, Mississippi, West Virginia, and Illinois' efforts will also make it much more difficult to lump geographically disparate claims into one receptive court.

At the same time, it is worth noting that because these state solutions are reactive to what is essentially a nationwide problem, it is important to consider other alternatives. One is for Congress to enact legislation that would allow at least some of these mass action cases to be heard in federal court. Congress could enact legislation that would permit mass actions to be removed to federal courts, where judges subject to fewer local political pressures have collectively applied far more consistent standards regarding aggregation. As noted above, Congress would not act outside the scope of its constitutional powers by amending the long-standing interpretation of federal jurisdiction laws (developed before the advent of these cases), that requires "complete" diversity between all plaintiffs and all defendants for federal diversity jurisdiction to exist. As a result of this current loophole, plaintiffs can easily insulate their cases from federal jurisdiction, and mass joinder actions are being heard by locally elected county judges, even though these cases raise the very issues that motivated the Framers to create federal diversity jurisdiction in the first place, and even though many state court judges have demonstrated a willingness to allow these cases to proceed to trial despite clear due process concerns.

As the Senate Judiciary Committee has concluded with regard to class actions, which raise similar jurisdictional issues:

[U]nder the current jurisdictional rules, Federal courts can assert diversity jurisdiction over a run-of-the-mill State law-based tort claim arising out of an auto accident between a driver from one State and a driver from another, or a typical trespass claim involving a trespasser from one State and a property owner from another, but they cannot assert jurisdiction over claims encompassing large-scale, interstate class actions involving thousands of [claimants] from multiple States, and hundreds of millions of dollars—cases that have significant implications for the national economy.<sup>204</sup>

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202. See 2003 Bill Text WV S.B. 213 (Feb. 13, 2003).

203. *Id.*

204. See *Class Action Fairness Act of 2000*, S. REP. NO. 106-420, 106th Cong. (2000), at 14.

Congress is currently considering legislation that would address this problem (at least in part) by expanding federal diversity jurisdiction to include more interstate mass actions. Such legislation would fulfill the intentions of the Framers in establishing diversity jurisdiction by enabling defendants to remove more interstate mass actions to federal courts where judges have shown a more consistent regard for due process principles and there are no concerns of local bias.

Finally, defendants must continue to make efforts to demonstrate to would-be magnet courts that procedural shortcuts, however well-intended in particular cases, only exacerbate the problems confronting the court. Defendants should argue not only that the traditional limits imposed on aggregation are required as a matter of due process, but also that they benefit the court and society alike. If state court judges applied the same requirements and set the same limits for joinder and consolidation that are being applied in federal courts, plaintiffs' counsel would no longer be able to use the mass action device to deny corporations the basic right to a fair trial. Similarly, if state courts rejected supposedly "innovative" approaches that remove a defendant's right to weed out meritless suits, or that eliminate a defendant's right to challenge venue or the application of the forum's law, the system as a whole would benefit enormously. Courts should, for example, "strictly apply" aggregation rules and should use consolidations narrowly for "discovery and other pretrial matters" while at the same time "weed[ing] out non-meritorious cases that often accompany a mass case. While a daunting task in the face of thousands of joined claims, disaggregation of claims can make causation and damages issues easier to resolve. With disaggregation, claims that have survived by their 'parasitic attachment' to stronger claims can be seen for what they are and disposed of on summary judgment."<sup>205</sup> To take a final example, if Mississippi courts (and other magnet courts) narrowed the permissible limits of the joinder rule, they could "sever" the claims of improperly joined plaintiffs and, in the case of improperly joined plaintiffs with *no* connection to the forum, dismiss or transfer those cases.<sup>206</sup> In the long run, conscientious attempts like these to confine the operation of mass action rules will promote respect for the rule of law, preserve the rights of defendants, improve the nation's economic well-being, and reduce the mass filings of claims by plaintiffs lacking plausible claims.

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205. See generally Barry F. McNeil & Beth L. Fanscal, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 503-04 (Jud. Conf. 1996).

206. See Miss. R. Civ. P. 82(c) (authorizing courts to "transfer the action to the court in which it might properly have been filed").

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