OVERLAPPING CLASS ACTIONS

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Large-scale class actions pose unique problems that challenge the traditional norm of allowing parallel litigation to continue in the courts of different jurisdictions. Professor Miller argues that the existing system represents a series of compromises between the need for both the efficient and orderly disposition of disputes and a residual concern for the principle of separate sovereignty. The efficiency concern in the large-scale litigation setting moves to the forefront because of the massive difficulties faced by the courts in disposing of such litigation in an expeditious and accurate manner. The interest in respecting separate sovereignty, however, is of diminished importance because of the inherently interstate nature of this type of litigation. To accommodate this weighing of public policies, a number of innovations have been adopted, and still others proposed, which move toward an exclusive forum model—the model in which litigation arising out of a single complex of operative fact should proceed in one and only one forum. Professor Miller recommends additional reforms that would move the conduct of class action litigation in the direction of the exclusive forum model. Specifically, he recommends that (1) the removal power should be broadly construed to authorize federal courts to take over overlapping state class action cases when the federal court litigation offers the opportunity for the complete and adequate resolution of the claims asserted in state court; (2) federal courts with jurisdiction over a class action should interpret the Anti-Injunction Act to authorize antisuit injunctions against overlapping state class actions, in situations where the state-court proceeding threatens to obviate the federal-court litigation by means of a comprehensive settlement that extinguishes the federal law claims, at least when the federal court concludes that there is a substantial probability that the federal litigation will result in a fair and adequate settlement or judgment that affords relief to the members of the plaintiff class; and (3) federal courts should continue to experiment with the auction approach to class action litigation, and in furtherance of this end, should view the possibility of a litigation auction as an additional consideration favoring the centralization of overlapping class cases in a single federal forum.

INTRODUCTION

The class action, because it can dispose of multiple claims in a single proceeding, represents a potentially effective mechanism for privately enforcing the law, deterring wrongful conduct, and compensating victims. Despite these advantages, the class action—especially the large-scale securities and mass-tort class actions that have emerged during the past generation—has been subjected to harsh criticism for alleged favoritism towards one or another of the interested parties: plaintiffs who extort excessive settlements by threatening de-

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fendants with ruinous liability,[1] defendants who play off competing groups of plaintiffs in order to buy cheap protection against liability,[2] or plaintiffs' attorneys who favor their own interests over everyone else's.[3]

The consolidation of many claims into a single proceeding, which typifies the large-scale class action, creates still another vexing problem: the filing in different jurisdictions of numerous class actions based on a single transaction or occurrence. This Article attempts to categorize and systematize the surprisingly complex set of rules that govern the conduct of such overlapping litigation.[4]

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[1] For an early but typical view, see Milton Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 9 (1971) (likening threat of litigation to compel settlement as "a form of legalized blackmail").

[2] See John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1372 (1995) (comparing some multiple-defendant class actions to game theory's classic "prisoner's dilemma" which almost inevitably leads to suboptimal outcome).

[3] Representative of this school are the extensive earlier writings of Professor Coffee. See John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 879 (1987) (noting that the plaintiffs' attorney may "treat all plaintiffs in the class as if their claims had roughly equivalent settlement values"); John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, 42 Md. L. Rev. 215, 218-19 (1983) (exploring "the dangers latent in class action litigation brought by the hunter, who, in effect, lacks an actual client to constrain him"); John C. Coffee, Jr., Rethinking the Class Action: A Policy Primer on Reform, 62 Ind. L.J. 625, 627 (1987) (discussing how and why plaintiffs' attorneys engage in "entrepreneurial litigation" in large class actions); John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 677 (1986) (noting that when client cannot monitor attorney's conduct, attorney's self-interest shapes litigation decisions); John C. Coffee, Jr., The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, Law & Contemp. Probs., Summer 1985, at 5, 12 (suggesting policy reforms designed to align better attorney's interests with those of group he represents). For an extended analysis applying the economic theory of agency to the role of the plaintiff's attorney in large-scale suits, see Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 3 (1991) (using agency theory to demonstrate that "[t]he absence of client monitoring raises the specter that the entrepreneurial attorney will serve her own interest at the expense of the client").

[4] For prior work on overlapping class actions, some of it now dated, see generally Richard D. Freer, Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit, 50 U. Pitt. L. Rev. 809, 813-15 (1989) (advocating packaging of claims to eliminate duplicative litigation for reasons of efficiency and fairness); Arthur R. Miller & David Crump, Jurisdiction and Choice of Law in Multistate Class Actions After *Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 38-56 (1986) (proposing analysis for determining propriety of mandatory class certification involving considerations of equity, efficiency, distant forum abuse, and individual control); Thomas D. Rowe, Jr. & Kenneth D. Sibley, Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction, 135 U. Pa. L. Rev. 7, 10-11 (1986) (espousing general support for federal subject-matter

Three main situations are presented: (1) overlap between two federal courts (federal-federal cases); (2) overlap between the courts of two states (state-state cases); and (3) overlap between a federal court and a state court (federal-state cases). In each situation, the court may have any of three basic options: (1) proceed as if no overlapping cases were filed; (2) stay its hand in deference to the parallel case; or (3) attempt to stymie the litigation in the other court. The applicable law also depends on whether both cases are still pending, or whether one of them has been reduced to a final judgment.

I argue that, as regards multiforum litigation in general and overlapping class actions in particular, the law as presently administered represents a compromise between two values: efficient enforcement of the law, on the one hand, and respect for the principle of multiple sovereignty, on the other. These values are mutually inconsistent. The value of efficient enforcement suggests an *exclusive forum* model, under which a single jurisdiction exercises power to resolve the whole case, and overlapping litigation is foreclosed. The value of jurisdictional respect suggests a *parallel litigation* model, under which all courts with jurisdiction and competence to hear aspects of the case can proceed to final judgment, even if parallel litigation is ongoing or has been completed in another jurisdiction. The complex of rules actually applied represents a mixed model with elements of both systems. The general rule in the state-state and federal-state contexts is the parallel litigation model, but it is subject to exceptions and limitations that reflect the competing values underlying the exclusive forum model. In the federal-federal context, on the other hand, the gov-

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jurisdiction for multiparty, multiforum litigation); William W Schwarzer et al., Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts, 78 Va. L. Rev. 1689, 1691 (1992) (concluding that "when litigation spans state and federal courts, informal coordination can advance judicial economy, efficiency and fairness"); Edward F. Shearman, Class Actions and Duplicative Litigation, 62 Ind. L.J. 507, 509 (1987) (proposing that "the availability of a class action should be a significant factor for triggering antiduplicative litigation devices"); Jay Tidmarsh, Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power, 60 Geo. Wash. L. Rev. 1683, 1691 (1992) (trying to determine "whether particular procedural rules are necessary for complex cases, and if so, what are the boundaries of those rules"); George T. Conway, III, Note, The Consolidation of Multistate Litigation in State Courts, 96 Yale L.J. 1099, 1100 (1987) (arguing that Judicial Panel on Multidistrict Litigation should consider substantive law of transferee jurisdiction as factor in determining whether to consolidate civil actions in state courts); Kevin Keating, Note, Parallel State and Federal Court Class Actions, 12 Loy. U. Chi. L.J. 277, 280 (1981) (examining criteria by which federal courts determine propriety of granting class action status when class has been certified in parallel state suit); John Sullivan, Note, Staying Diversity Proceedings Pending the Outcome of Parallel Suits in State Court, 48 Mo. L. Rev. 1017, 1019 (1983) (exploring question of whether an order denying stay of federal action is appealable and/or consistent with federal policies regarding appellate review of final judgments).

erning norm is the exclusive forum model, although there are features of federal-federal litigation that bow in the direction of the parallel litigation model.

This messy compromise, perhaps inevitable in a federal, multistate system, is increasingly coming under challenge as it is applied to large-scale class litigation. The background rule of parallel litigation does not cope well with the inherently interstate nature of large-scale class action cases. Conflicts and overlaps among jurisdictions, which are relatively uncommon in traditional litigation, become normal and expected. The large-scale class action pushes the system away from the parallel litigation model and toward the exclusive forum model. Over time, this evolutionary process can be expected to continue, either by way of judicially crafted rules or through federal or state legislation.

In my view, the move toward an exclusive forum model for large-scale cases is necessary and desirable. The inherently interstate nature of many large-scale class actions makes the parallel litigation model impractical, or at least exceedingly expensive and inconvenient, as compared with the exclusive forum approach. The important practical question is the form which the development will take. One promising approach is to auction large-scale cases. Litigation auctions—which Professor Jonathan Macey and I have advocated in other contexts[5]—can help overcome agency costs, increase the prospects of settlement, and enhance the private enforcement of the law. As this Article explains, the auction approach, like other recent reform proposals, entails a significant move away from the parallel litigation model and towards the exclusive forum model of class action litigation.

I
THE INITIAL CHOICE OF FORUM

Before analyzing the problems of overlaps between multiple class actions, it is useful to consider the simple case in which a single plaintiff's attorney is considering where to file a class complaint. Class treatment is available in appropriate cases both in the federal courts

[5] See Macey & Miller, supra note 3, at 105-16 (proposing auction approach to large-scale, small-claim class and derivative suits); see also Jonathan R. Macey & Geoffrey P. Miller, Auctioning Class Action and Derivative Suits: A Rejoinder, 87 Nw. U. L. Rev. 458, 460 (1993) [hereinafter Macey & Miller, Auctioning Class Action and Derivative Suits] (criticizing existing regulatory system as inadequate approach to diverging interests of lawyers and their clients, and offering auctions as potential remedy); Jonathan R. Macey & Geoffrey P. Miller, A Market Approach to Tort Reform Via Rule 23, 80 Cornell L. Rev. 909, 911-15 (1995) [hereinafter Macey & Miller, A Market Approach to Tort Reform] (proposing auction procedures as means to deal with current problems in mass-tort class actions).

and in all states. Thus, an attorney representing a potential named plaintiff has, initially, a choice about where a class action should be filed. That initial choice will be guided by a number of different factors, practical as well as legal.

First, counsel must consider subject-matter jurisdiction. If, for example, some or all of the claims arise under the exclusive jurisdiction of the federal courts, the state-court option will be foreclosed, at least for those exclusively federal claims.[6] If, on the other hand, some or all of the claims arise under state law, the plaintiff's attorney may face difficulty in obtaining a federal forum for the class action. Counsel may seek a federal forum for the claims under diversity-of-citizenship jurisdiction,[7] but federal law requires that the amount in controversy for each class member must exceed $50,000.[8] Class counsel might attempt to circumvent the requirement by pleading damages in excess of the statutory minimum for all class members, but this could prove problematic because the actual damages may fall far below the minimum. Alternatively, class counsel might seek to establish federal jurisdiction over the state-law claims under a doctrine of supplemental jurisdiction.[9]

A second consideration is personal jurisdiction. It will be necessary to obtain a forum in which the defendants can be reached and brought into court consistent with the minimum contacts required under the Due Process Clause.[10] In most large-scale class actions this will not pose a serious problem, because the defendants will typically be manufacturers or other large firms with significant contacts

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[6] This will be the case, for example, for actions claiming violations of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78*ll* (1994). See id. § 78aa (providing that United States district courts "shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder"); see also 15 U.S.C. §§ 15, 26 (1994) (antitrust law); 7 U.S.C. § 25 (1994) (commodities futures trading law); 29 U.S.C. § 1132(e)(1) (1994) (pension law); 28 U.S.C. § 1334(a) (1994) (bankruptcy law); id. § 1338(a) (patent law). However, the parties might be able to extinguish an exclusively federal claim as part of a global settlement of a state-court class action. See infra note 85 and accompanying text.

[7] 28 U.S.C. § 1332(a) (1994).

[8] See Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) (holding that all plaintiffs in class action must satisfy amount-in-controversy requirement in order to satisfy diversity-of-citizenship jurisdictional requirement).

[9] See 28 U.S.C. § 1367 (1994) (conferring supplemental jurisdiction on federal courts); United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (recognizing pendent federal jurisdiction over state-law claims that arise out of same common nucleus of operative facts as federal claim). One circuit court has held that under § 1367 only the named class plaintiffs must meet the amount-in-controversy requirement. In re Abbott Lab., 51 F.3d 524, 529 (5th Cir. 1995).

[10] See World-Wide Volkswagen v. Woodson, 444 U.S. 286, 291 (1980); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

throughout the country. Even in such cases, however, situations could arise in which a defendant is able to assert that the chosen forum lacks personal jurisdiction.

The most important choices facing class counsel in determining where to bring suit are not legal but practical. Counsel will want a personally convenient forum. It is not surprising that many large-scale cases appear to be brought in the jurisdiction where lead counsel has an office. Plaintiff's attorney also may select a jurisdiction in which juries are known to give out large awards. In cases arising under state law, the substantive law of the jurisdiction may play a role: since the forum state is likely to apply its own law, plaintiff's attorney is likely, other things equal, to select a forum with plaintiff-favoring substantive law. The jurisdiction's rules on calculating attorneys' fees may be a factor. In addition, the choice of forum may depend on counsel's relationship with other plaintiffs' attorneys: if counsel is seeking to "go it alone" rather than to join in with a consortium of class counsel, he or she may elect an unusual forum in order to avoid being forced to cooperate with others.

Similar legal and practical considerations about the choice of forum apply outside the class action context. What makes class actions special is the relatively high likelihood that competing litigation will be filed in different jurisdictions. The very nature of the class action implies that there will be many plaintiffs. Because nearly any member of the plaintiff class can act as a class representative, there could be, in theory at least, as many class actions as there are class members. And every representative plaintiff (i.e., every attorney acting in the name of the representative plaintiff) has a choice of jurisdictions in which to bring suit. This is obviously a different situation from standard litigation in which forum choice is constrained by the limited number of plaintiffs. The sheer size of class action cases also facilitates overlap: because the actions complained of typically occur on a nationwide basis, virtually every state and federal court may be available as a potential forum. What is perhaps surprising in class action litigation is not that overlap occurs but that it does not happen in every large-scale case.

II
FEDERAL-FEDERAL CASES

The simplest and least problematic setting for overlapping litigation is one in which all suits are filed in federal court. Because the federal-court system—despite being organized in districts and circuits with their own personnel, local rules, bodies of precedent, and so on—

is at its core a unitary jurisdiction, the problems of conflict and overlap have been handled quite effectively. Conflicts in doctrine can be resolved by higher courts, and competition among judges in overlapping class action cases is constrained by the authority of the Judicial Panel on Multidistrict Litigation to transfer related cases to a single federal district court.[11] Under principles of res judicata, a final judgment in one federal court will defeat subsequent attempts to relitigate the case in another federal court.[12] In short, the general rule in federal-federal cases is the exclusive forum rather than the parallel litigation model.

III
STATE-STATE CASES

Quite different considerations are presented when class actions are brought in the courts of different states. This Part considers the following situations: (a) cases in which the litigation is proceeding simultaneously in courts of different states; and (b) cases in which the litigation in one state court has been reduced to a final judgment.

A. Prior to Final Judgment

Assume that a case is proceeding simultaneously in the courts of two different states—which for ease of reference I will call Sparta and Athens. Different groups of plaintiffs' attorneys file class complaints in the two states and request (and perhaps obtain) class certification. While both cases are pending, the question arises as to the relationship between them. It would seem wasteful for parallel lawsuits to proceed simultaneously in courts of both Athens and Sparta. The defendant would have to answer two sets of discovery requests, the same witnesses would have to appear in both courts, duplicative factual records would have to be created, and so on. As a general rule, however, nothing in federal law prevents the simultaneous conduct of litigation in the courts of two states. The background rule, in short, is the parallel litigation model.

If parallel litigation is to be limited, the limits will have to come from either of two directions: one state will voluntarily recede and

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[11] See 28 U.S.C. § 1407(a) (1994) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."); see also Richard L. Marcus, Conflicts Among Circuits and Transfers Within the Federal Judicial System, 93 Yale L.J. 677 (1984) (analyzing choice-of-law rules when transferring federal cases and considering choices when transferred under multidistrict litigation statute).

[12] See Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) (holding that res judicata bars relitigation of claims previously adjudicated in federal court).

stay its processes until the judicial proceedings in the other state are completed, or one state will impose itself as the sole decisionmaker by enjoining or otherwise prohibiting the continuation of the litigation in the other state. If effective, either of these strategies will eliminate the problems of parallel litigation and thus move the controversy in the direction of the exclusive forum model.

1. Abstention

In the first instance, the courts of either Sparta or Athens, when faced with parallel class actions, may decide to stay their own processes in order to allow the courts of the other state to make the first decision.[13] The decision to defer may be based purely on considerations of comity toward the courts of another jurisdiction or on a more generalized inquiry that also considers factors not precisely related to interstate relations, such as fairness and litigation efficiency.[14] In other cases—and more frequently in recent years—dismissals or stays in parallel litigation cases are based on the doctrine of forum non conveniens, which is increasingly utilized by state courts as a means of avoiding interstate jurisdictional disputes.[15] In forum non conveniens cases, the courts consider a variety of discretionary matters, including, in addition to concerns for interstate comity, the availability of witnesses, the ease of access to proof, the possibility of a view of the premises, and the source of applicable law.[16]

Deference by one state to parallel judicial proceedings in another state is never a matter of right for a litigant, but rather is within the discretion of the trial court based on the facts and circumstances.[17] Courts often cite the need to avoid unseemly conflicts between coordinate jurisdictions as one reason for deference to sister-state proceedings.[18] Thus, deference is more likely to occur when the sister-

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[13] Cf. McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 283 (Del. 1970) (deferring to parallel federal lawsuit); FWM Corp. v. VKK Corp., No. 12485, 1992 Del. Ch. LEXIS 88, at *7 (Del. Ch. Apr. 27, 1992) (same).

[14] See, e.g., Jim Walter Corp. v. Allen, No. 10974, 1990 Del. Ch. LEXIS 6, at *7-*8 (Del. Ch. Jan. 12, 1990) (considering fairness and efficiency as well as interstate comity).

[15] For an example of the earlier, restrictive state-court attitude toward forum non conveniens, see Lansverk v. Studebaker-Packard Corp., 338 P.2d 747, 748 (Wash. 1959).

[16] See, e.g., Williams Natural Gas Co. v. BHP Petroleum Co., No. 10711, 1989 Del. Ch. LEXIS 129, at *7 (Del. Ch. Sept. 29, 1989) (identifying relevant factors).

[17] See Thomson v. Continental Ins. Co., 427 P.2d 765, 771 (Cal. 1967).

[18] See, e.g., United Engines, Inc. v. Sperry Rand Corp., 269 A.2d 221, 223 (Del. 1970) ("'Also to be avoided is the possibility of inconsistent and conflicting rulings and judgments and an unseemly race by each party to trial and judgment in the forum of its choice. Public regard for busy courts is not increased by the unbusinesslike and inefficient administration of justice such situation produces.'" (quoting McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 283 (Del. 1970))).

state proceedings exactly parallel those of the forum state,[19] and is less likely to occur when the overlap is only partial because of differences in parties or issues.[20] If the forum state lacks a significant interest in the subject matter of the dispute, it may allow the sister state to proceed first.[21] Deference is likely to be shown when the sister-state courts have considered the jurisdictional overlap and are determined to proceed, since if the forum court does not defer, the two jurisdictions will be set on a collision course.[22] Deference is likely if the sister state has issued preliminary rulings on merit issues or has otherwise demonstrated significant progress in the conduct of the litigation, work that would be wasted if the forum state's proceedings were to take priority.[23] Timing can be important: courts are more likely to defer to sister-state proceedings if the parallel case was filed first[24] or if the sister state is likely to reach a quicker disposition on the merits.[25] Courts may not view temporal priority as conclusive, however, if the cases are filed nearly simultaneously[26] or if the first-filed case is a declaratory judgment action representing an attempt by a party to preempt litigation elsewhere.[27]

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19 See, e.g., *United Engines*, 269 A.2d at 223 (deferring to alternative forum when parties and issues were identical); McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 283 (Del. 1970) (same).

20 See, e.g., Moore Gulf, Inc. v. Ewing, 269 A.2d 51, 52 (Del. 1970) (declining to defer when sister-state proceedings were not precisely overlapping); Macklowe v. Planet Hollywood, Inc., No. 13689, 1994 Del. Ch. LEXIS 176, at *9 (Del. Ch. Oct. 4, 1994) (same).

21 See Diet Center, Inc. v. Brasford, 855 P.2d 481, 484 (Idaho Ct. App. 1983) (deferring to sister-state litigation, in part, because of limited interest by forum state in given controversy).

22 See, e.g., Glacier Park Co. v. Superior Court, 232 Cal. Rptr. 712, 719-20 (App. Dep't Super. Ct. 1986); Williams Natural Gas Co. v. BHP Petroleum Co., No. 10711, 1989 Del. Ch. LEXIS 129, at *7 (Del. Ch. Sept. 29, 1989).

23 See, e.g., Zimmerman v. Home Shopping Network, Inc., Nos. 10911, 10919, 1989 Del. Ch. LEXIS 101, at *16-*20 (Del. Ch. Sept. 11, 1989) (deferring to sister-state litigation in which court had issued preliminary injunction on basic issue in forum-state litigation).

24 See, e.g., United Engines, Inc. v. Sperry Rand Corp., 269 A.2d 221, 223 (Del. 1970) (deferring to earlier-filed sister-state proceeding); *Macklowe*, 1994 Del. Ch. LEXIS 176, at *6-*10 (recognizing importance of first filing but declining to defer for other reasons).

25 See E.I. DuPont de Nemours & Co. v. Cigna Property & Casualty Co., No. 12386, 1992 Del. Ch. LEXIS 149, at *10-*11 (Del. Ch. July 17, 1992) (deferring to sister-state proceeding that would result in early determination of parties' rights).

26 Cf. A.E. Staley Mfg. Co. v. Swift & Co., 419 N.E.2d 23, 26 (Ill. 1980) (declining to defer to prior action in sister state when cases were filed within two hours of one another).

27 See General Foods Corp. v. Cryo-Maid, Inc., 194 A.2d 43, 45 (Del. Ch. 1963) (discussing fact that declaratory judgment actions may be abused in attempt to be first to sue in courthouse of choice), aff'd, 198 A.2d 681 (Del. 1964); Playtex, Inc. v. Columbia Casualty Co., No. 88C-MR-233, 1989 Del. Super. Ct. LEXIS 179, at *10, *16 (Apr. 25, 1989) (applying more stringent standard because defendant's declaratory judgment was anticipatory and did not include all relevant parties).

2. *Antisuit Injunctions*

An alternative mechanism for eliminating overlap between state courts—and thus for achieving some of the values of an exclusive forum model—is for one court to enjoin a party or parties from pursuing litigation in the other court. Such an antisuit injunction, if effective, would eliminate the interstate overlap by causing the case to go forward only in the court issuing the injunction. On the other hand, the consequences of an antisuit injunction can be explosive, since the courts of the state where the litigation is enjoined are unlikely to take kindly to the insult implied by the sister-state court's decision.[28]

The power of a state court to issue an antisuit injunction is initially a matter of state law. Like other equitable remedies, an antisuit injunction is typically available when legal remedies are inadequate, the moving party demonstrates a likelihood of success on the merits, and the moving party would suffer irremediable injury if the relief is not granted. When the antisuit injunction purports to prohibit litigation in a sister state, the issuing courts are generally sensitive to the concerns for interstate comity[29] and require some type of strong showing by the moving party before granting relief.[30] Factors that might be sufficient to convince a court to stay its hand in favor of litigation

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[28] An example is Ex Parte Employers Ins., 590 So. 2d 888, 890-91 (Ala. 1991), an insurance coverage case in which nearly identical lawsuits were brought in California and Alabama. The California court enjoined the parties from proceeding with the Alabama litigation. The trial court in Alabama refused to stay its proceedings and ordered the petitioners to obtain release of the California antisuit injunction on pain of severe sanctions in the Alabama case. The case eventually reached the Alabama Supreme Court on a petition for a writ of mandamus ordering the Alabama trial court to afford comity to the California antisuit injunction; but by the time the Alabama Supreme Court decided the issue, an appeal in California caused the antisuit injunction to be dissolved, and the Alabama Supreme Court never squarely addressed the comity issue. Id. at 891-92. The litigation, however, proceeded far enough to illustrate the potential for interstate confrontation inherent in the issuance by the courts of one state of an antisuit injunction against the conduct of litigation in another.

[29] For a particularly useful discussion, see Chancellor Allen's opinion in Household Int'l, Inc. v. Eljer Indus., Inc., No. 13631, 1994 Del. Ch. LEXIS 135, at *6 (Del. Ch. Aug. 12, 1994) (weighing efficiency against "giving substantial offense to the judicial systems of other states . . . for no reason").

[30] See, e.g., Sinclair Can. Oil Co. v. Great N. Oil Co., 233 A.2d 746, 750-52 (Del. Ch. 1967); Pauley Petroleum, Inc. v. Continental Oil Co., 231 A.2d 450, 454-57 (Del. Ch. 1967), aff'd, 239 A.2d 629, 634 (Del. 1968); Pennzoil Co. v. Getty Oil Co., No. 7425, slip op. at 3-4 (Del. Ch. Dec. 18, 1984), available in LEXIS, States library, Del file; Pfaff v. Chrysler Corp., 610 N.E.2d 51, 65 (Ill. 1992); State ex rel. General Dynamics Corp. v. Luten, 566 S.W.2d 452, 458-62 (Mo. 1978); Applestein v. United Bd. & Carton Corp., 173 A.2d 225, 232 (N.J. 1961); Trustees of Princeton Univ. v. Trust Co., 127 A.2d 19, 25-26 (N.J. 1956); Christian v. Integrity Ins. Co., 719 S.W.2d 161, 163 (Tex. 1986); Gannon v. Payne, 706 S.W.2d 304, 307 (Tex. 1986); University of Tex. v. Morris, 344 S.W.2d 426, 429 (Tex.), cert. denied, 366 U.S. 973 (1961).

pending elsewhere, such as priority of filing, may not be weighty enough to justify an antisuit injunction against the conduct of litigation in a sister state.[31] On the other hand, the identity of the parties enjoined may be important: other things equal, an antisuit injunction is more likely to issue against a citizen of the forum state than against a noncitizen.[32]

When the court of one state issues an antisuit injunction against the conduct of litigation in another state, the second state confronts the question of what force to give the writ. An initial issue, still unresolved, is whether respect for the antisuit injunction is required under the Full Faith and Credit Clause of the United States Constitution[33] or the federal full faith and credit statute.[34] A permanent injunction issued by Sparta against the conduct of suit in Athens is, at least in form, the sort of "judicial proceeding" that would ordinarily be entitled to full faith and credit in Athens under these federal authorities. The majority rule, however, appears to be that full faith and credit is not owed by one state to an antisuit injunction issued by another;[35] the rationale appears to be that to require respect for antisuit injunctions issued by other states would infringe the right of each state to control its own courts.[36]

Even if respect for an antisuit injunction issued in another state is not required under federal principles of full faith and credit, a state court might still determine to recognize the writ out of concern for interstate comity. Comity considerations will not always carry the day, however. In the insurance context, for example, state courts with jurisdiction over financially troubled insurers sometimes issue sweeping injunctions prohibiting the company from paying claims during the

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31 See *Pfaff*, 610 N.E.2d at 68 (priority of filing in forum state did not establish need for antisuit injunction).

32 See Poole v. Mississippi Publishers Corp., 44 So. 2d 467, 470-77 (Miss. 1950) (emphasizing distinction between residents and nonresidents of forum state in determining whether to grant antisuit injunction against sister-state litigation).

33 U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

34 28 U.S.C. § 1738 (1994) (requiring state courts to give judicial proceedings of other states "the same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken").

35 See, e.g., Cook v. Delmarva Power & Light Co., 505 A.2d 447, 449 (Del. Super. Ct. 1985) (noting full faith and credit not owed and citing authorities explicating comity principles to be applied in evaluating antisuit injunctions).

36 See Willis L.M. Reese & Vincent A. Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum. L. Rev. 153, 177 (1949) (noting that while Supreme Court has not decided issue, injunctions based on forum non conveniens have not usually been subject to full faith and credit).

resolution proceedings. A number of courts have held that comity is not owed to such injunctions, at least when the policyholder is suing on a claim outside the first state's jurisdiction.[37]

Another limitation on the availability of an antisuit injunction is the possibility of a counterinjunction from the other jurisdiction. If Athens can enjoin the parties from proceeding in Sparta, Sparta is free to do likewise with respect to litigation in Athens.[38] The result is two courts of competent jurisdiction, each with outstanding injunctions against prosecution of the action in the other—in short, a direct confrontation between sister-state courts.[39]

The leading case of *James v. Grand Trunk Western Railroad Co.* effectively illustrates the application of colliding antisuit injunctions.[40] The plaintiff, a resident of Michigan, filed a wrongful death action in Illinois. The defendant railroad company obtained an antisuit injunction in Michigan against the plaintiff's prosecution of the Illinois action. The plaintiff sought an anti-antisuit injunction in Illinois against the Michigan injunction, but before an order was issued, the plaintiff was arrested in Michigan for flouting the Michigan antisuit injunction. The Illinois courts responded by enjoining the defendant from further litigation in Michigan.[41] At that point, each party had been enjoined by one court from proceeding in the other—clearly an undesirable outcome, but one which is always possible when antisuit injunctions begin to fly in overlapping jurisdiction situations.[42]

B. After Final Judgment

After final judgment in a class action in one state, whether by verdict or settlement, straightforward application of the rule of res judicata generally bars a member of the plaintiff class from relitigating

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[37] See *Cook*, 505 A.2d at 449 (finding it beyond jurisdiction of New York court to enjoin parties not within New York's jurisdiction from bringing claim); Fuhrman v. United Am. Insurors, 269 N.W.2d 842, 847 (Minn. 1978) (holding that broad injunction issued by Iowa court was improper in attempting to reach parties outside its jurisdiction).

[38] Even if Sparta does not want to engage in direct confrontation with Athens, it can at least issue an anti-antisuit injunction: an order prohibiting the parties from seeking to obtain an antisuit injunction in Athens (or elsewhere). If the anti-antisuit injunction is effective, the parties will be free to engage in parallel litigation without any injunctive effect from either side. Michael D. Schimek, Antisuit and Anti-Antisuit Injunctions: A Proposed Texas Approach, 45 Baylor L. Rev. 499, 526 (1993). These are commonly found in the international area. See id. at 501, 525-31 (discussing when Texas courts should issue such injunctions).

[39] For examples of dueling injunctions, see, e.g., James v. Grand Trunk W. R.R. Co., 152 N.E.2d 858, 860-61 (Ill.), cert. denied, 358 U.S. 915 (1958); Lowe v. Norfolk & W. Ry. Co., 421 N.E.2d 971, 973-74 (Ill. App. Ct. 1981).

[40] 152 N.E.2d 858 (Ill.), cert. denied, 358 U.S. 915 (1958).

[41] Id. at 860.

[42] The reporters fail to indicate how the controversy was resolved.

the case in the state where the action was initially brought. This claim preclusion, however, is subject to two exceptions. First, under *Phillips Petroleum Co. v. Shutts*,[43] it appears that absent class members will not be bound by the judgment unless they were afforded constitutionally adequate notice and the right to opt out of the action.[44] If they are given notice and opt-out rights, however, they can be barred from attacking the judgment even though they may not have the sort of minimal contacts with the forum state that would sustain personal jurisdiction under standard due process analysis.[45] What is less clear is whether a judgment in a shareholders' derivative suit or a state equivalent to a Federal Rule of Civil Procedure 23(b)(1) or 23(b)(2) class action—in which opt-out rights are unavailable—should enjoy preclusive effect against class members or shareholders who did not have the requisite minimum contacts with the forum state—a question left open in *Shutts*.[46] Second, absent class members may be able to collaterally attack a judgment in a class action case if they can show that they were not adequately represented by class counsel in the initial proceeding.[47]

If the first judgment is issued by courts of Athens, the courts of Sparta would be under additional compulsion to respect the Athens judgment under the Full Faith and Credit Clause, the federal full faith and credit statute, and (if applicable) the Uniform Enforcement of Foreign Judgments Act.[48] Thus, once a judgment is final in a class action in the first state, the courts of all other states are generally required to give it full faith and credit. Assuming substantive overlap

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[43] 472 U.S. 797 (1985).

[44] Id. at 812.

[45] See id. at 811.

[46] See id. at 811 n.3. A recent decision by the Delaware Chancery Court held that the lack of opt-out rights was not fatal to the preclusive effect of its judgment because the purchase or holding of shares in a corporation chartered in Delaware created a sufficient relationship to permit the jurisdiction conclusively to adjudicate rights attaching to the stock. Hynson v. Drummond Coal Co., 601 A.2d 570, 575 (Del. Ch. 1991). But cf. Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992) (finding lack of notice and opt-out rights in Federal Rule 23(b)(1) and (b)(2) class action opened settlement to collateral attack by class members who did not have minimum contacts with forum or consent to jurisdiction), cert. dismissed, 114 S. Ct. 1359, 1360 (1994); In re Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 769 (3d Cir.) (same), cert. denied, 493 U.S. 821 (1989).

[47] See Hansberry v. Lee, 311 U.S. 32, 44 (1940). Proving inadequate representation may be difficult, however. See *Brown*, 982 F.2d at 390-91 (rejecting inadequate representation claim because of failure to establish that prior counsel did not defend action with "due diligence and reasonable prudence," and that opposing party had notice of facts making failure apparent).

[48] Unif. Enforcement of Foreign Judgments Act § 2, 13 U.L.A. 152 (1986) (providing that state treat foreign judgments in same manner as it would judgments of its own state courts).

between the two state-court class actions, this would seem to require dismissal of any later proceeding on the ground that the first judgment is res judicata. The effect, therefore, can be a race in which the first judgment prevails against all subsequent ones. This would appear to hold regardless of filing priority: even if the case were filed first in Athens, a prior Sparta judgment would trump the Athens litigation under the full faith and credit principle.

The courts of the second state, however, need only respect judgments issued by the first state if they are valid.[49] If the initial judgment were invalid—for example, if it were rendered without subject-matter jurisdiction or in violation of federal due process requirements—the courts of the second state need not recognize it.[50] The second jurisdiction may also deny enforcement of an otherwise valid judgment if equitable relief could be obtained from the judgment in the forum in which it was rendered.[51]

IV
FEDERAL-STATE CASES

Having outlined the basic rules applicable in state-state cases, we can obtain a clearer picture of the background in federal-state cases, which is complicated by the presence of coordinate, and in many respects, overlapping state and federal sovereignties. As will be seen, the pattern is similar to the pattern observed in state-state cases: the general rule is parallel jurisdiction, but it is subject to various exceptions and limitations that bow in the direction of the exclusive forum model. The trend in class action cases appears to be in the direction of the latter model.

A. Prior to Final Judgment

While otherwise valid state and federal proceedings are pending, the basic pattern of parallel jurisdiction is similar to that already observed in state-state cases. However, the pattern is modified by a complex set of rules that affect the conduct of litigation in one juris-

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[49] See Restatement (Second) of Judgments § 81 (1980); Restatement (Second) of Conflict of Laws §§ 92, 93, 98 (1971).

[50] Compare, e.g., Hansen v. Pingenot, 739 P.2d 911, 913 (Colo. Ct. App. 1987) (refusing to recognize sister-state judgment where there was no evidence court issuing judgment had personal jurisdiction over litigant) with Packer Plastics, Inc. v. Laundon, 570 A.2d 687, 690 (Conn. 1990) (enforcing sister-state judgment and observing that burden of proving lack of jurisdiction rested on party attacking judgment).

[51] Restatement (Second) of Judgments § 82 (1980); Restatement (Second) of Conflict of Laws § 115 (1971).

diction in response to the pendency of overlapping litigation in the other.

1. *Action by Federal Court*

a. Abstention. We have seen that state courts often will defer to parallel sister-state litigation under principles of comity or forum non conveniens.[52] Analogous rules apply when federal courts are asked to defer to ongoing state-court litigation. These abstention doctrines have received enormous attention from scholarly commentators and are often seen as unusual features of the litigation landscape. In the broadest context, however, they are quite familiar strategies used by one jurisdiction to avoid conflict or duplication with another.

The equitable restraint doctrine of *Younger v. Harris*[53] directs federal courts, otherwise properly vested with jurisdiction, to allow the state courts to make the initial determination in certain overlapping jurisdiction cases. *Younger* held that federal courts ordinarily should not enjoin state-court criminal proceedings absent a showing of bad faith, harassment, or other unusual circumstances.[54] Although *Younger* itself was a criminal case, it has been extended to some civil contexts.[55] The rationale appears to be a combination of traditional principles of equity jurisprudence, relatively amorphous notions of federal-state comity, and concern for the inefficiencies inherent in parallel litigation.[56]

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[52] See supra Part III.A.1.

[53] 401 U.S. 37 (1971).

[54] Id. at 54.

[55] See, e.g., Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 10-14 (1987) (holding federal district court's injunction against state collection procedures due to alleged constitutional deprivations improper when Texaco had not raised federal constitutional issues and dispute might have been resolved under Texas law); Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 432-37 (1982) (finding New Jersey's interest in regulating attorneys sufficiently vital to warrant federal abstention when adequate opportunity for constitutional challenges were afforded by state proceedings); Trainor v. Hernandez, 431 U.S. 434, 444 n.8, 445-46 (1977) (holding abstention proper in challenge to attachment proceeding brought by Illinois under state law to recover public assistance wrongfully received); Juidice v. Vail, 430 U.S. 327, 335-37 (1977) (applying *Younger* abstention doctrine to 42 U.S.C. § 1983 federal challenge to state contempt procedures); Huffman v. Pursue, Ltd., 420 U.S. 592, 604-05 (1975) (stating federal-court intervention into Ohio nuisance law litigation was improper when state was party to proceeding and had interests similar to those underlying its criminal laws).

[56] For a sampling of the vast literature on *Younger* abstention, see generally Martin H. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 Yale L.J. 71 (1984) (arguing that federalism interests are adequately protected by substantive federal rights and that a judge-made abstention doctrine is unnecessary); Martin H. Redish, The Doctrine of Younger v. Harris: Deference in Search of a Rationale, 63 Cornell L. Rev. 463, 486 (1978) (offering alternative rationales for abstention); see also Doug-

A federal court might also elect to stay its hand under the *Pullman* doctrine, which instructs federal courts to allow state courts the first shot at resolving unsettled questions of state law, at least when doing so would potentially resolve a federal constitutional challenge.[57] *Pullman* abstention would appear to apply only where the parallel state proceeding will determine an unsettled question of state law, a fact pattern that is unlikely to be presented in large-scale class action contexts. Unusual circumstances could arise, however, when such abstention would be warranted.

In addition to abstention under *Younger* and *Pullman*, there is authority for a more generalized power in federal courts to stay their hands in deference to ongoing state-court actions. This power is inherent in a court's authority "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."[58] In *Meredith v. Winter Haven*,[59] the Court indicated in dicta that this generalized power to stay proceedings applies in full measure when parallel proceedings are underway in state courts, observing that a federal court may have a duty to defer when "a suit is pending in the state courts, where the state questions can be conveniently and authoritatively answered, at least where the parties to the federal-court action are not strangers to the state action."[60] Less clear is whether the federal courts enjoy a broader power to stay their proceedings in deference to state-court litigation when no unresolved questions of state law are presented, or when the question for determination in the state action arises under, or is closely interwoven with, federal law.

b. Removal and Antisuit Injunctions. We already have seen that in state-state cases, it may be possible to achieve some of the benefits of the exclusive forum model by means of antisuit injunctions but that such injunctions risk confrontation between sister-state courts.[61] In the federal-state setting, federal courts have two principal mechanisms at their disposal to preempt parallel state proceedings: removal and antisuit injunctions.

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las Laycock, Injunctions and the Irreparable Injury Rule, 57 Tex. L. Rev. 1065 (1979) (reviewing Owen M. Fiss, The Civil Rights Injunction (1978)).

[57] See Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500-01 (1941).

[58] Landis v. North Am. Co., 299 U.S. 248, 254 (1936).

[59] 320 U.S. 228 (1943).

[60] Id. at 236. For an application, see Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594 (1968) (per curiam).

[61] See supra Part III.A.2.

i. Removal

One obvious way to prevent overlaps is for the federal court to grant a petition to remove the state-court proceedings.[62] If granted, the removal results in two federal-court actions that can then be consolidated by the clerk of the court, or, if the cases are pending in different federal courts, by the Judicial Panel on Multidistrict Litigation.[63] The applicable statute provides that "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."[64]

Ordinarily, removal would not be permitted in situations where the only cause of action pleaded in the complaint arises under state law and federal jurisdiction is not invoked.[65] The plaintiff is not required to plead federal law even if a federal remedy is available; he or she can ignore the federal question and rely solely on state law. The plaintiff is master of the complaint.

However, if it turns out that the plaintiff has attempted to foreclose the defendant's right to a federal forum by artful pleading, which recasts essentially federal claims as state causes of action, a federal court may grant removal, regardless of how the plaintiff has characterized the case.[66] The clearest application of this artful pleading rule is where federal law has preempted the field and displaced state authority; removal may be warranted in such cases in order to prevent fruitless litigation.[67] Whether the artful pleading rule allows removal in other circumstances is less clear. One Supreme Court decision, *Federated Department Stores, Inc. v. Moitie*,[68] suggests that removal might

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62 See generally Michael G. Collins, The Unhappy History of Federal Question Removal, 71 Iowa L. Rev. 717 (1986) (discussing development and proposed legislative overhaul of federal question removal).

63 See supra note 11 and accompanying text.

64 28 U.S.C. § 1441(b) (1994).

65 See, e.g., Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-12 (1983); Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 151-52 (1908).

66 See Robert A. Ragazzo, Reconsidering the Artful Pleading Doctrine, 44 Hastings L.J. 273, 276-78 (1993) (discussing development of doctrine).

67 See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987) (stating that "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character"); Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560 (1968) (upholding removal of labor dispute to federal court based on Labor Management Relations Act). While it could be said that the artful pleading rule is grounded in concerns for judicial economy and convenience, implicit in the rule is more than a little distrust of state-court decisions. Otherwise, the federal courts could simply leave it up to the state courts to dismiss claims brought under state law when federal law has occupied the field to the exclusion of state authority.

68 452 U.S. 394 (1981).

be appropriate even when the federal claim has not preempted parallel state causes of action, but, as discussed below,[69] the decision may be premised on the fact that a prior federal claim by the plaintiff based on identical facts had already proceeded to final judgment.[70] Accordingly, while the scope of the artful pleading doctrine is unclear, the rule does undoubtedly afford some opportunity for a defendant facing overlapping class actions to eliminate the overlap by removing the state action to federal court, even when no federal claim is presented on the face of the state-court complaint.

ii. Antisuit Injunctions

The federal court could attempt to obtain primacy for a federal class action by issuing an injunction against the state proceeding. If effective, a federal antisuit injunction would eliminate the jurisdictional overlap and move the controversy away from a parallel litigation model and toward an exclusive forum model.

A federal injunction against ongoing state proceedings is the equivalent in the federal system of an antisuit injunction in state-state cases. There are, however, significant differences between the contexts. First, the widespread availability of removal to federal court takes a great deal of pressure off of the antisuit injunction; if the case arises in whole or in substantial part under federal law, it can ordinarily be taken away by the federal court without the need for an injunction. Second, once issued, the effect of a federal antisuit injunction is more severe than a state antisuit injunction. A state court is not helpless to protect itself in the state-state context: confronted with an antisuit injunction issued by the courts of another state, a sister state is perfectly free to ignore the order or even to respond with a counterinjunction against litigation in the first forum.[71] In the federal-state context, however, a state court has little ability to defend against an antisuit injunction issued by a federal court; the litigants will be bound by the order if validly issued, and the state court has no authority to respond by enjoining the federal process.[72]

It is against this background that we should understand the operation of the federal Anti-Injunction Act, which provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or

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[69] See infra text accompanying notes 96-101.

[70] For a discussion of the conflicting interpretations of *Federated Department Stores*, see Ragazzo, supra note 66, at 307-16.

[71] See supra notes 38-42 and accompanying text.

[72] See infra note 82 and accompanying text.

effectuate its judgments."[73] The Anti-Injunction Act appears to be, and in fact is, a fairly strict limitation on federal power; it restricts a federal court's ability to control state-court proceedings even when the state court acts contrary to federal law.[74] Exceptions to the statute are narrowly construed.[75] Although the Anti-Injunction Act does constrain antisuit injunctions issued by federal courts, both the widespread availability of removal and the extraordinary force of a federal antisuit injunction once granted demonstrate that federal power over the overlapping state-court litigation is broader than the analogous state-court power over sister-state proceedings.

In the class action context, the Anti-Injunction Act would ordinarily bar the federal court from enjoining an overlapping state proceeding. The exception to the Anti-Injunction Act for injunctions necessary in aid of the federal court's jurisdiction would typically be unavailing. As long as the action is in personam and seeks monetary relief only, the rule is one of parallel jurisdiction: the state-court action can proceed concurrently with the federal action, and the first judgment to become final can be pleaded as res judicata in the court where the action is still pending.[76] However, not all federal injunctions against state class actions would be barred; for example, the federal court could likely enjoin a pending state-court class action if it could be shown that the state proceeding involved bad faith, harassment, or other extraordinary circumstances.[77]

2. *Action by State Courts*

a. Abstention. A state court confronting a case in which parallel litigation is underway in a federal forum may determine to stay its hand in order to allow the federal court to make the prior decision.[78] As in state-state cases, a determination by a state court to defer to a

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[73] 28 U.S.C. § 2283 (1994).

[74] See Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 294-95 (1968) (stating that interference with federal right is not among those situations excepted from rule by Congress).

[75] See Michael G. Collins, The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Court Proceedings, 66 N.C. L. Rev. 49, 72-76 (1987) (describing exceptions to Anti-Injunction Act).

[76] See Kline v. Burke Constr. Co., 260 U.S. 226, 230 (1922).

[77] See Mitchum v. Foster, 407 U.S. 225, 230 (1972) (criminal case discussing various exceptions to federal Anti-Injunction Act); Carlough v. Amchem Prods., Inc., 10 F.3d 189, 204 (3d Cir. 1993) (upholding federal power to issue antisuit injunction against overlapping state-court proceeding when prospect of settlement in federal court was imminent and plaintiffs in state court were seeking to challenge propriety of federal class action).

[78] See, e.g., McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 283 (Del. 1970) (holding stays should be granted freely where there is prior action pending in another competent court).

federal proceeding is discretionary, not mandatory.[79] State-court deference to federal litigation can be based either on generalized notions of state-federal comity or on forum non conveniens. States, however, have been quite jealous of their jurisdictions in some cases where parallel litigation is underway in a federal court, especially when one or both of the parties is a domiciliary.[80] In general the state courts apply the same general methodology to class action cases as to other types of litigation.[81]

b. Antisuit Injunctions. Where litigation is pending in both state and federal courts, it is not only the federal court that might seek to enjoin the state-court action. The state court might take it in mind to enjoin the federal proceeding. Such an action by the state court is extremely unlikely to succeed, however. The general rule is that state courts are completely without power to restrain federal-court proceedings in personam.[82] While federal-court power to issue antisuit injunctions against ongoing state proceedings is limited by the Anti-Injunction Act, state-court power to issue antisuit injunctions against parallel federal proceedings is completely foreclosed.

B. After Final Judgment

1. Final Judgment in State Court

Under the full faith and credit statute, a federal court must generally accept the final judgment of a state court, and in doing so must give that judgment the same preclusive effect as would be given by another court of the state.[83] Thus, with respect to recognition of state-court judgments, the state in which the judgment is issued determines the applicable federal rule of res judicata.[84] Grounded in the

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[79] See People ex rel. Department of Pub. Aid v. Santos, 440 N.E.2d 876, 878 (Ill. 1982) (declining to defer to earlier-filed federal class action because of discretionary factors).

[80] See, e.g., Thomson v. Continental Ins. Co., 427 P.2d 765, 768 (Cal. 1967) (refusing to defer to earlier-filed parallel federal lawsuit under doctrine of forum non conveniens when one party was domiciliary).

[81] See Schnell v. Porta Sys. Corp., No. 12,948, 1994 WL 148276, at *3-*5 (Del. Ch. Apr. 12, 1994) (staying state-court putative class action in deference to earlier-filed federal securities-law class actions because of substantial similarity of cases and forum non conveniens grounds); In re Chambers Dev. Co., Inc. Shareholders Litig., [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,637, at 96,934-39 (Del. Ch. May 20, 1993) (staying state-court shareholders' derivative action in favor of consolidated shareholders' derivative and federal securities-law class actions in federal court on grounds of forum non conveniens).

[82] General Atomic Co. v. Felter, 434 U.S. 12, 12 (1977) (per curiam); Donovan v. City of Dallas, 377 U.S. 408, 412-13 (1964).

[83] Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985); Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984).

[84] Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481-82 (1982).

policies of the exclusive forum model, federal-court recognition of state judgments is obviously necessary in order to avoid chaotic multiple litigation.

In the class action context, the rules have evolved further toward the exclusive forum model. Although class action plaintiffs cannot obtain a judicial determination in state court for claims arising under the exclusive jurisdiction of the federal courts, they can enter into a global settlement in state court that releases defendants from all liability—state or federal—that arises out of the transactions or occurrences that form the basis of the state action.[85] Such a release will be effective as long as there is a sufficiently close factual relationship between the state and federal claims, and the settlement otherwise complies with the requirements for a valid final judgment.[86] Because nearly all large-scale class actions are disposed of by settlement rather than by final judgment, the state court effectively has the power to foreclose federal litigation by approving a global settlement.

The recent Supreme Court case, *Matsushita Electric Industrial Co. v. Epstein*,[87] illustrates the power of this res judicata rule. The case arose out of a tender offer in which Matsushita acquired MCI, Inc., a Delaware corporation. Plaintiffs' attorneys filed a class action in Delaware state court, alleging purely state-law claims.[88] Later, a second class action was filed in federal court in California, alleging violations of certain Securities and Exchange Commission rules promulgated under the Securities Exchange Act of 1934—claims which fell within the exclusive jurisdiction of the federal courts.[89] The defendant won a summary judgment in the federal case. While that judgment was under appeal to the Ninth Circuit, the parties to the Delaware litigation reached a settlement, which provided that class members who did not opt out waived all claims in connection with the tender offer, including the claims at issue in the federal litigation. The Delaware Chancery Court upheld the settlement as fair and adequate, and the Delaware Supreme Court affirmed.[90] Back in the Ninth Circuit, Matsushita invoked the Delaware judgment as a bar to further

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[85] See Matsushita Elec. Indus. Co. v. Epstein, 64 U.S.L.W. 4101, 4104 (U.S. Feb. 27, 1996) (recognizing power of state court to approve settlement that effectively releases claims arising under exclusive jurisdiction of federal court); Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1563-64 (3d Cir. 1994) (upholding state court's power to approve settlement in which federal claims are released even though court had no jurisdiction in first instance to adjudicate such claims), cert. denied, 115 S. Ct. 480 (1994).

[86] *Grimes*, 17 F.3d at 1563-64.

[87] 64 U.S.L.W. 4101 (U.S. Feb. 27, 1996).

[88] Id. at 4102.

[89] Id.

[90] Id.

prosecution of the federal action under the Full Faith and Credit Act. The Ninth Circuit, however, refused to recognize the state-court judgment as preclusive, on the ground that the federal claims could not have been extinguished by the issue preclusive effect of an adjudication of the state-law claims by the Delaware court.[91] The United States Supreme Court reversed, holding that the state-court settlement was effective to preclude the federal litigation under the Full Faith and Credit Act, even though the federal claims being barred could not have been adjudicated by the state court.[92] *Matsushita* represents a significant move in the direction of the exclusive forum model, because if the Court had ruled the other way the result would have been potentially intractable problems of jurisdictional overlap in securities class action cases.

Although federal courts are obliged to give broad res judicata effect to prior judgments of state courts, this does not authorize state courts to preempt the federal litigation by injunction. Even if the state action has been reduced to final judgment, the state court has no authority to bar a subsequent federal lawsuit based on the same facts. In the leading case, *Donovan v. Dallas*,[93] a plaintiff class lost in state court. Subsequently, after the state-court decision was final, class members filed suit in federal court raising substantially identical issues and claims. The City of Dallas obtained an injunction from the Texas courts barring all members of the plaintiff class from further prosecuting the federal action. The Supreme Court held that the state-court injunction was invalid; the fact that the federal action may have been precluded by the earlier state judgment was irrelevant.[94]

2. *Final Judgment in Federal Court*

In some cases, a class action might proceed in federal court and result in a final judgment or settlement on the merits. In such situations, a party disaffected with the judgment (often, but not always, a plaintiff's attorney) might attempt to continue the litigation in state court, either by pressing forward with a case already on file or by filing another suit in state court. The defendant would argue that the

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91 Id. at 4103.

92 Id. at 4104.

93 377 U.S. 408 (1964).

94 Id. at 412-13. In a converse situation, however, the federal courts do have some authority to enjoin the enforcement of state-court judgments, notwithstanding the Anti-Injunction Act, when the party resisting enforcement demonstrates that the judgments were obtained by fraud or in violation of due process. See Wells Fargo & Co. v. Taylor, 254 U.S. 175, 183 (1920) (listing various exceptions to Anti-Injunction Act).

case should be dismissed as res judicata. The state court, however, might take a different view.

The usual rule is that the federal judgment would preclude all state-law claims arising out of the factual matters in dispute that could have been raised in the federal litigation, even if the state-law claim was not in fact raised in the federal court. The state court is required to respect the federal judgment, both under its own rules of res judicata (if applicable), and under the federal Full Faith and Credit Act. Thus, related state-law claims will ordinarily be included in the res judicata effect of any federal judgment. In the class action context, the scope of federal preclusion of state-law claims may be particularly broad, since the plaintiff in a federal class action has the power to release the defendant from all liability arising from the circumstances of the case, even from claims that may not have been cognizable in federal court in the first instance.[95]

The defendant, accordingly, will want to enlist the aid of the federal court to prevent the relitigation of the claims in state court, at least if the defendant believes that the state court will not dismiss the lawsuit as barred by res judicata. The defendant could attempt to stymie the new litigation through several strategies.

a. Removal to Federal Court. First, the defendant might attempt to remove the pending state-court case to federal court, and then seek dismissal of the removed case by a federal judge who in the defendant's view would be receptive to the res judicata argument. A number of distinct grounds for removal may be identified in this context.

i. The Artful Pleading Doctrine

Where the facts complained of in a state-court action replicate a federal-court case previously brought to final judgment adverse to the plaintiffs, the artful pleading doctrine may be liberally interpreted to allow removal. In *Federated Department Stores, Inc. v. Moitie*,[96] a federal district court judge dismissed antitrust class actions on the ground that the complaints failed to allege injury to business or property as required by the Clayton Act.[97] Instead of joining others in appealing, one plaintiff's attorney refiled in state court, alleging identical facts

[95] See, e.g., Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1287 (9th Cir.) (holding court-approved settlement could extinguish all claims from common nucleus of fact despite court's lack of subject-matter jurisdiction for some claims), cert. denied, 506 U.S. 953 (1992).

[96] 452 U.S. 394, 396 (1981).

[97] Id.

but couching the complaint solely under state law.[98] The federal district court allowed the defendants to remove these new cases and then dismissed the complaints as barred by res judicata.[99] The Supreme Court upheld the removal and found that the prior federal-court decision was foreclosed by res judicata as to the federal law claims.[100] The decision went well beyond prior law, since the federal law at issue in the case had not preempted the state causes of action pleaded in the later-filed case. The Court may have been willing to allow generous removal because it saw this as a means for protecting the res judicata effect of a prior federal judgment; if so, the scope of the *Federated Department Stores* case may be limited to situations in which a prior federal judgment is implicated.

Judge Weinstein's decision in *Ryan v. Dow Chemical*[101] is a leading case in which a federal court used removal as a means to protect a prior judgment in a federal class action. Members of the plaintiff class in the federal Agent Orange litigation, who were parties to the settlement of that case, brought suit in a Texas state court against firms which had also been defendants in the federal action.[102] These subsequent suits were couched entirely in terms of state law and no diversity of citizenship existed between the parties. Nevertheless, Judge Weinstein held that the action was properly removed under *Federated Department Stores*, since the claims at issue in the state proceeding were virtually identical to those involved in the prior federal case, and the plaintiffs had previously chosen a federal forum.[103]

ii. Continuing Federal Jurisdiction

A more problematic rationale for removal is the idea that federal courts retain continuing jurisdiction over class actions, even after final judgment, because they must supervise an ongoing remedial scheme. This theory also finds voice in *Ryan*. Judge Weinstein concluded that removal was proper because he had continuing jurisdiction over the settlement agreement, observing that "a state suit will reduce the funds available to the class, providing a special need for exercise of federal jurisdiction."[104] This argument, however, has little doctrinal support. The fact that a federal district court judge maintains ongoing

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98 Id.

99 Id. at 396-97.

100 Id. at 402. The Court declined to decide whether the prior federal judgment precluded litigation of the state-law claims. Id.

101 781 F. Supp. 902 (E.D.N.Y. 1991), aff'd, 996 F.2d 1425 (2d Cir. 1993).

102 Id. at 912-13.

103 Id. at 916-18.

104 Id. at 915.

jurisdiction over a class action settlement hardly gives the judge a roving commission to police against actions by parties which threaten to reduce the amount of that settlement; such a license would empower the judge to cut off all sorts of claims by third-party creditors, including judgment creditors whose claims are unrelated to the facts at issue in the prior federal case. The idea that continuing jurisdiction over the settlement gives a broader removal power than would otherwise exist under the artful pleading doctrine is theoretically questionable. Nevertheless, Judge Weinstein's decision, however dubious doctrinally, is precedent for this free-floating removal authority, and defendants in future cases will no doubt attempt to make use of it where it serves their interests.

iii. All Writs Act

A third possible ground for removal is the All Writs Act, which authorizes federal courts to issue "all writs necessary or appropriate in aid of their . . . jurisdictions."[105] Thus, even if removal is not permissible under the federal removal statute, it might nonetheless be available under this Act. One reasonable interpretation of this statute would limit it to writs supplemental to existing remedies, such that where Congress provides a writ and circumscribes its application, the Act would not permit federal courts to issue writs of the same type which are outside the scope of congressional authorization. In *Yonkers Racing Corp. v. City of Yonkers*,[106] however, the Second Circuit went beyond this interpretation by holding that removal was available under the All Writs Act in "exceptional circumstances" even when removal was not authorized under the federal removal statute and even when the plaintiff in the state case had not been a party to the original federal litigation.[107] *Yonkers Racing Corp.* involved a different situation than the typical mass-tort or securities-law class action: at issue was a consent decree in a constitutional housing discrimination case, and the state-court litigation had the potential for placing city officials under inconsistent obligations from state and federal courts.[108] In the mass-tort and securities-law settings, the worst that can be expected to happen as a result of subsequent state-court litigation is that the defendants might have to pay extra damages and thus become unable fully to satisfy their obligations under the earlier decree. Despite these differences in context, a broad reading of *Yonkers*

[105] 28 U.S.C. § 1651(a) (1994).
[106] 858 F.2d 855 (2d Cir. 1988).
[107] Id. at 864-65.
[108] Id. at 858, 864-65.

Racing Corp. suggests that the All Writs Act sometimes may permit federal district courts to remove state-law proceedings in order to protect consent decrees or final judgments previously issued in federal class action litigation.[109]

b. Antisuit Injunctions in Federal Court. As an alternative to removal, a federal court may issue an antisuit injunction under the All Writs Act against litigation in state court for claims or issues already determined in federal court. In approving a settlement or judgment in a class action, for example, the court might enjoin the members of a plaintiff class from initiating or prosecuting any further litigation against the defendants arising out of the same or related facts.[110] Such an order would probably pass muster under the Anti-Injunction Act as "necessary . . . to protect or effectuate" the judgment.[111] However, an antisuit injunction against a subsequent state-court proceeding will not lie if the federal judgment which is claimed as res judicata is subject to collateral attack.[112]

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Taken together, these various means available to federal courts to protect their judgments in class action cases go quite far toward replacing the parallel litigation model with an exclusive forum model. The apogee of exclusive forum jurisprudence is Judge Weinstein's opinion in *Ryan*, which, despite its possible merit from the standpoint of public policy, might be considered a judicial mugging of parallel state-court proceedings. However, the decision in *Ryan* should not be seen as an anomaly. While Judge Weinstein may have been bolder and gone farther than other federal judges to date, the impetus behind his decision is the reality of modern, large-scale class action litigation which inevitably involves the possibility of overlapping jurisdictions and conflicting classes and which impels courts to stretch existing doctrine in the direction of the exclusive forum model.

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109 Judge Weinstein also relied on the All Writs Act in granting removal in Ryan v. Dow Chem. Co., 781 F. Supp. 902, 918 (E.D.N.Y. 1991), aff'd, 996 F.2d 1425 (2d Cir. 1993).

110 See id. at 916-17 (claiming continuing power to enforce antisuit injunction issued as part of prior order).

111 28 U.S.C. § 2283 (1994).

112 Compare In re Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 771 (3d Cir.) (rejecting injunction), cert. denied, 493 U.S. 821 (1989) with Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1284 (9th Cir.) (upholding injunction), cert. denied, 506 U.S. 953 (1992).

V
THE MOVE TOWARD AN EXCLUSIVE FORUM MODEL

As we have seen, the large-scale class action fits uneasily within the parallel litigation model that is standard in state-state and federal-state cases. The very large size of class action cases, coupled with the fact that plaintiffs' attorneys often act as self-selected champions of class rights, make duplication and overlaps among jurisdictions nearly inevitable. The courts have, accordingly, begun to experiment with doctrinal innovations that increasingly emulate the exclusive forum model—for example, by issuing antisuit injunctions to protect class action settlements, by generously granting removal from parallel state-court proceedings, or by recognizing global settlements that release claims not otherwise cognizable in the court approving the settlement.

Beyond these judicial innovations, a number of legislative reforms have been adopted, and others proposed, all of which share the feature that they tend to replace the parallel litigation model with the exclusive forum model. For instance, one option for achieving many of the benefits of the exclusive forum model is for the states to establish common rules for allocating jurisdiction and cutting off parallel litigation. Such rules could be adopted by means of uniform state laws or interstate compacts.

The uniform law model already exists in at least one context: child custody cases. The Interstate Child Placement Compact promotes cooperation between states in the interstate placement of children.[113] Another state initiative, the Uniform Child Custody Jurisdiction Act, addresses jurisdictional problems arising in interstate child custody proceedings and promotes cooperation between sister-state courts.[114]

Other, more innovative solutions have been proposed, all adopting elements of the exclusive forum model. The American Law Institute's Complex Litigation Project has recommended federal legislation to establish a Complex Litigation Panel of federal judges

[113] See, e.g., Ariz. Rev. Stat. Ann. § 8-548 (1989) (enacting Interstate Child Placement Compact into state law); Fla. Stat. ch. 409.401 (1993) (same). The compact requires that specific administrative conditions be met before a child may be transported interstate for foster care or adoptive placement. Each state adopting the compact has appointed an administrator to coordinate its activities with officers of other states. See, e.g., Ariz. Rev. Stat. Ann. § 8-548; Fla. Stat. ch. 409.401.

[114] Designed to overcome problems with comity doctrines, the uniform act limits custody jurisdiction to a state where the child has his or her home or where there are other strong contacts with the child and his or her family. See, e.g., Ariz. Rev. Stat. Ann. §§ 8-401 to 8-424 (1989) (providing for adoption and implementation of Uniform Child Custody Jurisdiction Act); Fla. Stat. chs. 61.1302 to 61.1348 (1993) (same).

that would have the power to transfer some complex litigation to state courts, either for pretrial proceedings or for full-scale merit determinations[115]—a form of reverse removal from federal court.[116] At the state level, the National Conference of Commissioners on Uniform State Laws has approved a Transfer of Litigation Act which would authorize transfers of litigation among state courts in state-state cases. State uniformity by means of an interstate compact has also been recommended.[117]

The analysis presented in this paper supports the general movement of reform in the direction of the exclusive forum model. Among the possible reforms, the most desirable appear to be those which would centralize litigation in federal courts. The reasons for federal-court centralization are straightforward. The courts in the several states do not have sufficient centralizing power to ensure the orderly and efficient disposition of large-scale class action cases. Even if states attempt to establish common jurisdictional rules by means of uniform laws, or interstate compacts, some states may elect not to join the club; and even if a state does enact a uniform law, the enforcement of that law is vested in the judges of the enacting state, which may elect to favor interpretations that retain jurisdiction in their own courts. Conflict may be reduced by the harmonization of state law, but it cannot be eliminated.

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115 The American Law Institute recommends in part that, subject to certain exceptions, the Complex Litigation Panel may designate a state court as the transferee court if it determines

> (1) that the events giving rise to the controversy are centered in a single state and a significant portion of the existing litigation is lodged in the courts of that state; (2) that fairness to the parties and the interests of justice will be materially advanced by transfer and consolidation of the federal actions with other suits pending in the state court; and (3) that the state court is more appropriate than other possible transferee courts.

American Law Inst., Complex Litigation: Statutory Recommendations and Analysis § 4.01(a) (1993).

One academic commentator has advocated a somewhat different form of reverse removal. See Conway, supra note 4, at 1107 (arguing for consolidated state-court adjudication of multistate cases by allowing Judicial Panel on Multidistrict Litigation to transfer cases both to and from state courts).

116 See generally Richard A. Epstein, The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal, 10 J.L. & Com. 1 (1990) (discussing American Law Institute proposal); Linda S. Mullenix, Problems in Complex Litigation, 10 Rev. Litig. 213 (1991) (discussing philosophical, economic, procedural, and practical problems created by contemporary mass-tort complex litigation).

117 See generally Leonard J. Feldman, The Interstate Compact: A Cooperative Solution to Complex Litigation in State Courts, 12 Rev. Litig. 137, 140 (1992) (proposing Multistate Complex Litigation Interstate Compact to establish procedure for "consolidating related cases pending in state courts into a single case before a Multistate Complex Litigation Court").

Federal consolidation of cases in state courts by means of reverse removal offers some benefits, but would not deal well with cases initially in the courts of a state. Transfer of litigation from federal to state court would not eliminate state-state overlaps. Moreover, reverse removal might in any event not be a sensible approach for class actions that present significant issues of federal law. The goals of the exclusive forum model might not be worth achieving if the cost is the transfer of litigation to a single court which is an inappropriate forum for the merits of the controversy.

The best solution to the problem of overlapping jurisdiction, in my view, would be to vest centralizing authority in federal courts for cases of state-state or state-federal overlap. The doctrinal apparatus for such authority is already largely in place; the federal courts can, for the most part, achieve the benefits of the exclusive forum model through suitable interpretations of their existing powers. These should include the following:

(1) The removal power should be broadly construed to authorize federal courts to take over overlapping state class action cases when the federal-court litigation offers the opportunity for the complete and adequate resolution of the claims asserted in state court.

In this respect, the artful pleading rule should be applied in overlapping class action cases so as to allow removal even when there is no preemption of the state causes of action, and even when the federal litigation has not reached a final disposition on the merits by judgment or settlement, so long as the federal litigation offers class members the opportunity for full and adequate relief on all claims, state and federal. It should be noted that the federal litigation would often provide class members the opportunity for full and adequate relief on the state-court claims because those claims would usually be cognizable in federal courts under rules of supplemental jurisdiction. Even if the state-law claims could not be directly adjudicated by the federal court, the court might still be said to possess the capacity to afford full and adequate relief on the state-law claims if there appeared to be a good prospect for a global settlement in federal court in which class members who did not opt out agreed to release all claims arising out of the transaction or occurrence, including all state-law claims.

A broad application of the artful pleading doctrine is particularly appropriate in class action cases in light of the fact that such cases tend to be dominated by the plaintiffs' attorneys, subject to virtually no monitoring by their ostensible "clients." In many cases a federal court could reasonably conclude that a principal reason why a case has been filed in state rather than federal court is not that the state forum offers any particular advantage for the members of the class, but

rather that the attorney who is prosecuting the state case wants to obtain a strategic advantage for himself or herself vis-a-vis competing class counsel in federal court. There is no good reason of public policy to limit the removal power if the principal effect is to encourage strategic competition among competing groups of plaintiffs' attorneys.

(2) Federal courts with jurisdiction over a class action should interpret the Anti-Injunction Act to authorize anti-suit injunctions against overlapping state class actions, in situations where the state-court proceeding threatens to obviate the federal-court litigation by means of a comprehensive settlement that extinguishes the federal law claims, at least when the federal court concludes that there is a substantial probability that the federal litigation will result in a fair and adequate settlement or judgment that affords relief to the members of the plaintiff class. In the special context of overlapping class actions, the federal courts should interpret the phrase "where necessary in aid of its jurisdiction" to confer authority, in appropriate cases, to enjoin the conduct of the parallel state litigation until the conclusion of settlement discussions or other activity in the federal court that offers the chance for a prompt and adequate disposition of the merits of the class action claims.

(3) Federal courts should continue to experiment with the auction approach to class action litigation, and in furtherance of this end, should view the possibility of a litigation auction as an additional consideration favoring the centralization of overlapping class action cases in a single federal forum.

Jonathan Macey and I suggested the use of litigation auctions, either as an adjunct to or a substitute for other approaches, in a law review article published in 1991.[118] Focusing on securities-law class actions and shareholders' derivative cases, we noted that such litigation tends to be dominated by entrepreneurial plaintiff's attorneys who are largely free of effective monitoring by their ostensible "clients."[119] We observed that this problem creates a risk that plaintiffs' attorneys in class action cases will not fairly and adequately represent the interests of the class.[120]

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[118] See Macey & Miller, supra note 3, at 105-16 (describing auction approach and detailing its pros and cons). For debate on the auction idea, see Macey & Miller, Auctioning Class Action and Derivative Suits, supra note 5, at 469-70; Randall S. Thomas & Robert G. Hansen, Auctioning Class Action and Derivative Lawsuits: A Critical Analysis, 87 Nw. U. L. Rev. 423, 456 (1993).

[119] See Macey & Miller, supra note 3, at 7-8. Others, notably Professor Jack Coffee, have also investigated the implications of the fact that plaintiffs' attorneys in large-scale class actions act essentially as entrepreneurs. See the articles by Professor Coffee cited supra note 3.

[120] See Macey & Miller, supra note 3, at 3.

We argued that an auction approach to large-scale class action litigation would address these problems.[121] Upon the filing of a class action complaint, the judge would conduct an initial investigation to determine whether the case would be appropriate for auction.[122] If the judge decided to go forward, he or she would conduct an auction of the claim.[123] Anyone, including the defendant, could bid for the litigation; if the defendant made the high bid, the case would settle. The judge would award the claim to the highest bidder, deduct expenses, and distribute the remaining funds to the class members upon filing of proper proofs of claim. Meanwhile, the winning bidder would prosecute the case (unless the defendant submits the high bid) much like a standard class action case.[124]

As Professor Macey and I observed in a subsequent article, the auction procedure offers several distinct advantages:

> The danger of "sell-out" settlements or other actions harmful to the interests of the plaintiff class would be eliminated, since the owner of the claim would be the only one who would lose if the case settled for too little.
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> . . . .
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> . . . Under such circumstances, cases would likely settle for more than they would settle in the hands of an entrepreneurial attorney representing absent class members. The owner of the claim would have a strong incentive to litigate his or her case vigorously. Private enforcement of the law would potentially improve, since defendants would know that they could not expect to separate a plaintiffs' attorney from his or her client by offering a cheap settlement in exchange for a generous fee. The higher expected damages would

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121 Id. at 105-18.

122 Features that indicate the potential utility of litigation auctions include the following: whether a large number of plaintiffs is included in the proposed class; whether more than one lawsuit has been filed to redress the same injury; whether the claims are sufficiently well-defined to warrant auction treatment; and whether there are any other factors that bear on auction treatment (such as individualized issues that might require extensive participation by class members). Id. at 106.

123 If for any reason it is not feasible to auction off the entire claim, a court could conduct a sale of lead counsel rights. The sale of lead counsel rights retains some of the advantageous features of the auction but does not wholly eliminate agency costs.

124 Two innovative federal district court judges have achieved positive results in their experimentation with lead counsel auctions. See, e.g., the following decisions by Judge Vaughn Walker: In re California Micro Devices Sec. Litig., No. C-94-2817-VRW, 1995 WL 476675 (N.D. Cal. Aug. 4, 1995); In re Oracle Sec. Litig., 136 F.R.D. 639, 640-41 (N.D. Cal. 1991); In re Oracle Sec. Litig., 132 F.R.D. 538, 547-48 (N.D. Cal. 1990); In re Oracle Sec. Litig., 131 F.R.D. 688, 697 (N.D. Cal. 1990) and the following decisions by another distinguished federal judge, Milton Shadur: In re Amino Acid Lysine Antitrust Litig., MDL-No. 1083, 1996 WL 23190 (N.D. Ill. Jan. 18, 1996) (describing conduct of auction for lead counsel rights); In re Telesphere Int'l Sec. Litig., 753 F. Supp. 716, 721 n.12 (N.D. Ill. 1990) (announcing that judge would use auction approach in suitable case).

> in turn induce better *ex ante* compliance by defendants with the applicable legal regime, since defendants would expect to pay a higher amount of damages if they violated the law. Some of the higher damages would find their way into the pockets of the members of the plaintiff class, since the bidders at the auction would increase their bids knowing that they would prosecute the case vigorously, and that other bidders would do the same.[125]

Although we recommended the use of litigation auctions in securities-law class actions, a similar procedure might be enlisted to solve some of the problems of mass-tort litigation. These cases share with securities class actions the fact that they are typically large in scale and that the plaintiffs' attorney dominates the litigation (although perhaps to a somewhat lesser extent than in the securities-law context given the size of individual claims). To be sure, the mass-tort setting poses problems for the auction approach not found in the securities-law context, including issues of proof and conflict of laws as well as federal-state jurisdictional problems. Nevertheless, the auction approach may be a useful way to protect the interests of absent class members while enhancing the substantive enforcement of the law.[126]

It should be noted that the auction approach, like other reforms of large-scale class action litigation, represents a move in the direction of the exclusive forum model of class action procedure. The auction would unify all of the litigation in one forum and place the conduct of the case in the hands of a single manager. Such a departure from the

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125 Macey & Miller, A Market Approach to Tort Reform, supra note 5, at 913-14.

126 As Professor Peter Schuck observes, auctions do not in fact represent a radical departure from existing practice since a portion of the claim is already "sold" to plaintiffs' attorneys who take a share of the proceeds as contingent fee compensation for their legal services. Peter H. Schuck, Mass Torts: An Institutional Evolutionist Perspective, 80 Cornell L. Rev. 941, 984 (1995). Professor Schuck writes that

> each claim (or, more precisely, one-third or more of each claim) is already "sold" in the current mass-tort system. The purchaser, of course, is the claimant's contingent-fee lawyer. Depending on how this lawyer finances her litigation costs, she may use part of her share to secure further financing (which may be tantamount to selling that part). Despite legitimate ethical concerns about such arrangements, invalidating them would probably deny legal representation to all but the most affluent claimants—a proposition that raises equally profound ethical problems . . . .
>
> Although the current contingent fee and class action financing arrangements already effectively employ a market in tort claims, adopting the proposed market approach would not be superfluous. As we have just seen, existing rules now permit the sale (without calling it that) of only a fraction of the claim. More important, a variety of procedural and ethical barriers inhibit evolutionary reform toward a thick, fully functional market. . . . If enabled by legislative fiat, mass-tort claims and class representation markets could, if well-regulated, readily accommodate more complete, well-informed, and efficient trading of claims.

Id. (citations omitted).

norm of parallel litigation appears warranted in light of the unique features of large-scale class action litigation.

CONCLUSION

Large-scale class actions present unique problems that challenge the traditional norm of parallel litigation in state-state and federal-state cases. The courts in such cases have begun to experiment with innovative procedures that achieve some of the benefits of the exclusive forum model. Nevertheless, the existing system remains a series of compromises between the need for the efficient and orderly disposition of disputes, on the one hand, and a residual concern for the principle of separate sovereignty, on the other. In the large-scale litigation setting, the efficiency concern becomes paramount because of the massive difficulties in disposing of such litigation in an expeditious and accurate manner, while the interest in respecting separate sovereignty is of diminished importance because of the inherently interstate nature of this category of litigation. In recognition of this different balance of public policies in the large-scale litigation setting, a number of innovations have been proposed which move in the direction of the exclusive forum model. Among the desirable reforms are (1) enhanced use of the federal removal power to centralize litigation in federal court in federal-state cases; (2) appropriate use of anti-suit injunctions in aid of the federal court's jurisdiction, again with a view toward achieving the benefits of the exclusive forum model; and (3) generous use of the first two powers in cases which the federal-court judge believes may be suitable for auction either of lead counsel rights or of the cause of action as a whole.