

**PREPARED STATEMENT OF SHERMAN JOYCE,
THE AMERICAN TORT REFORM ASSOCIATION,
BEFORE THE AMERICAN BAR ASSOCIATION**

**IN SUPPORT OF H.R. 2341
“THE CLASS ACTION FAIRNESS ACT OF 2001”
APRIL 3, 2002**

Thank you for the opportunity to offer the views of the American Tort Reform Association (ATRA) in support of H.R.2341, “The Class Action Fairness Act of 2001.” As this testimony outlines, ATRA supports H.R.2341 because it proposes a fair and simple solution to the alarming and increasingly common practices of predatory federalism and regulation by litigation in the state courts.

I. Regulation by Litigation

Former Clinton Administration Secretary of Labor Robert Reich coined the phrase “regulation by litigation” to describe the practice of personal injury lawyers and judges regulating entire industries, generally in state court, through class action litigation.¹ This practice interferes with the lawmaking functions of Congress and state legislatures.

Many state class actions involve class members from across the country and claims that reach billions of dollars. Such class actions empower state judges to dictate national public policy from local courthouse steps.

Some state courts have declared that the laws of their forum apply in interstate class actions to all class members in an action, even when that state law is inconsistent with the laws of the jurisdictions where other claims arise. In short, some state courts are federalizing state law claims, declaring the laws of one state to apply in all jurisdictions.

A state court that regulates “national” commerce does what its own legislature may not. The Supreme Court of the United States has repeatedly rejected states' attempts to “control conduct beyond the boundaries of the State” and regulate “commercial activity occurring wholly outside” their borders.² This is more than a matter of respect for a sister sovereign's judgments. The Full Faith and Credit and Due Process Clauses of the United States Constitution forbid a state from applying its law absent “significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.”³ The mere fact that foreign commerce “has effects within” a state does not authorize regulation of that commerce.⁴ A state therefore cannot “infring[e] on the policy choices of other States,” and must “respect the interests of other States” in regulating local transactions.⁵

¹ Robert B. Reich, *Regulation is Out, Litigation is In*, USA TODAY, Feb. 11, 1999, at 15A.

² *Healy v. Beer Inst.*, 491 U.S. 324, 336-37 (1989).

³ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality opinion).

⁴ *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion).

⁵ *BMW of N. Am. v. Gore*, 517 U.S. 559, 571-72 (1996).

It is particularly egregious for a state to reach beyond its borders and punish activity that is lawful in another state. This is especially true given that the courts make laws retroactively, based on a discreet set of facts. State legislatures and regulatory agencies are better equipped than the courts to make changes in public policy – be them sweeping changes or incremental reforms – because they can gather facts from a wide range of interests, including professional consumer advocates and industry leaders. This process puts the public on notice that the law may change and gives businesses and others the opportunity to prospectively comply with the new law, once the policy change has been made. Allowing a state court to nullify the law-making processes of another state raises serious constitutional questions. As the Supreme Court found in *BMW of North America v. Gore*, “[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.”⁶ Nonetheless, this practice continues.

The clearest example of a state court reaching beyond its borders to punish activity that is lawful in another state is the case of *Avery v. State Farm Mut. Auto Ins. Cos.*⁷ In *Avery*, the nationwide class, covering 4.7 million State Farm policyholders in forty-eight states and the District of Columbia, alleged that an automobile insurance company had breached its contracts with all of its policyholders by requiring the use of less expensive non-original equipment manufacturer parts – a standard industry practice.⁸ The Illinois state court judge in *Avery* granted certification to a nationwide class and allowed a \$1.18 billion jury verdict to stand, including \$600 million in punitive damages, even though several insurance commissioners testified that a ruling in favor of the nationwide class would actually contravene the laws and policies of other states, which have enacted laws or regulations encouraging (or even requiring) the very conduct for which the Illinois court had sanctioned.⁹ As the *New York Times* reported, the import of the Illinois decision was to “overturn insurance regulations or state laws in New York, Massachusetts, and Hawaii, among other places” and “to make what amounts to a national rule on insurance.”¹⁰

6 The United States Supreme Court in *BMW of North America v. Gore* made clear that principles of state sovereignty deeply rooted in our constitutional structure dictate that “a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States.” In *BMW*, the Court struck down a two million dollar punitive award punishing BMW’s nationwide policy of not disclosing pre-sale repairs to vehicles if the repair cost fell below a specified threshold. Because *BMW’s* threshold complied with statutory disclosure thresholds in many states, the Court held that Alabama could not set punitive damages based on the number of vehicles sold nationwide, but instead must (at a minimum) apportion the award to Alabama sales.

7 746 N.E.2d 1242 (Ill. Ct. App. 2001).

8 *Id.*

9 In upholding the *Avery* jury’s award last year, an Illinois court of appeals discounted testimony from “[f]ormer and current representatives of state insurance commissioners [who] testified that the laws in many of our sister states permit and in some cases . . . [even] encourage competitive price control.” *Avery v. State Farm Mut. Auto Ins. Cos.*, 746 N.E.2d 1254 (Ill. Ct. App. 2001).

10 Matthew J. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers*, N.Y. TIMES, Sept. 27, 1998, § 1, at 29.

The impact of the *Avery* decision is already apparent in the growing number of class actions that have been filed in Illinois state courts challenging standard insurance industry practices. A recent Manhattan Institute study identified 26 nationwide class action law suits filed in Madison County, Illinois, (population 250,000) targeting the insurance industry, including cases challenging the way the insurance industry determines when to reimburse medical expenses resulting from car accidents and how the industry calculates the value of wrecked vehicles.¹¹ This swelling in insurance class actions has resulted from the willingness of certain Illinois state court judges to serve as free-roving insurance commissioners by issuing edicts affecting the way insurance companies can do business in 49 other states.

The danger posed by these efforts to federalize state law extend far beyond insurance. The dockets of three surveyed counties in the Manhattan Institute study included numerous cases in which plaintiffs' counsel sought to have trial judges in county courts set national policies in areas as diverse as warranties, land use rights, plumbing licenses, environmental protection, advertising campaigns, bank billing practices, employee investment plans, and numerous other broad-ranging issues for 49 other states – and 3,065 counties – in addition to their own. While some of the class actions pending in these jurisdictions may seem trivial (e.g., movie rental late fees, the price of Barbie dolls), even these cases (particularly if they are decided incorrectly) could have a dramatic impact on commerce by limiting how companies can market and charge for their products.

The resulting question is a simple one: Who should decide if national policy and regulatory issues should be adjudicated as class actions – federal judges who are selected by the President and confirmed by the U.S. Senate or state court judges who are elected by a few thousand voters in a rural county? As the Senate Judiciary Committee has noted, “[c]learly, a system that allows State court judges to dictate national policy from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism.”¹²

If a company's interstate business practices have adverse effects on the American public, Congress or federal regulatory agencies can end them in every state. But only federal lawmakers have that sweeping legislative and regulatory power. Ironically, while state courts have granted themselves national reach, state legislatures can only regulate activity within state borders, no matter what one's view of a policy might be.¹³

II. Predatory Federalism

The problem of class action abuse is compounded by the practice of “predatory federalism,” whereby plaintiffs’ attorneys engage in a “race to the bottom” to seek out state judges that support their effort to use nationwide class action and mass action lawsuits to set what they believe to be sound regulatory and social policy.

¹¹ John H. Beisner and Jessica Davidson Miller, *They're Making A Federal Case Out Of It...In State Court*, CIVIL JUSTICE REPORT NO. 3, Sept. 2001 (“Manhattan Institute Study”).

¹² *The Class Action Fairness Act of 2000*, S. REP. NO. 106-420, 106th Cong. (2000) at 20.

¹³ *BMW*, 517 U.S. at 571 (“while we do not doubt that Congress has ample authority to enact such a policy for the entire Nation, it is clear that no single State could do so”) (citations omitted).

Even though only a minority of state courts routinely fail to exercise sound judicial judgment on class action issues, those courts have become magnets for a wildly disproportionate share of the interstate class actions that are filed. In short, personal injury lawyers file their class actions in the minority of courts that are most likely to have a *laissez-faire* attitude toward class certification. By establishing themselves as the lowest common denominator, a distinct minority of state courts essentially set the national norm; they are effectively dictating national class action policy.

As Dr. John B. Hendricks testified at a hearing before the U.S. House of Representatives in March 1998, a docket study of state court class actions in one Alabama jurisdiction showed: (a) that class actions had become disproportionately large elements of the dockets of some county courts; (b) that many of the class actions were against major out-of-state corporations lacking any connection with the forum county; and (c) that the proposed classes in those cases typically were not limited to in-state residents and often encompassed residents of all 50 states.¹⁴ Dr. Hendricks identified one state court judge who had granted class certification in 35 cases over the preceding two years. As Dr. Hendricks stated, “[t]hat’s a huge number of cases when one considers that during 1997, all 900 federal district court judges in the United States combined certified a total of only 38 cases for class treatment.” The study failed to uncover any instance in which that judge had ever denied class certification. Clearly, that court alone was playing a radically disproportionate role in setting national class action policy.¹⁵

Among the jurisdictions that have earned reputations for setting national class action policy are Madison County, Illinois; Jefferson County, Mississippi; and Palm Beach County, Florida. These counties attract a clearly disproportionate number of class actions for their populations. In Madison County, for example, the rate of per capita state court class actions in 1999 was nearly nine times higher than the federal court average, with about 61 class actions filed per million people.¹⁶ In addition, the majority of the class actions that these counties attract are brought on behalf of nationwide classes.¹⁷ In Madison County, for example, 81 percent of the cases filed during the survey period sought to certify nationwide classes. In Jefferson County, 57 percent of the class actions were brought on behalf of nationwide classes.

¹⁴ Testimony by Dr. John B. Hendricks, U.S. House of Representatives Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property, Oversight hearing regarding mass torts and class action lawsuits, March 5, 1998.

¹⁵ The Alabama Supreme Court finally issued several rulings in 1999 that have dampened this behavior, and the Alabama legislature has established restrictions as well. But when such action is taken in one state, counsel simply move the class action show to another jurisdiction where the courts have shown a lax attitude toward regulating the class device; many believe that is why so many class actions are sprouting in Jefferson County, Texas and Madison County, Illinois. Testimony by John H. Beisner, Esq., U.S. House of Representatives Committee on the Judiciary, Legislative hearing on H.R. 2341, “The Class Action Fairness Act of 2001,” February 6, 2002.

¹⁶ Manhattan Institute Study at 9, *supra* note 11.

¹⁷ *Id.* at 12-19.

These national class actions challenge a broad array of industry practices that touch on most Americans' everyday lives.¹⁸

In Madison County, for example, lawyers have sought to certify classes over the last three years that included: (1) all Sprint customers nationwide who have ever been disconnected on a cell phone call; (2) all RotoRooter customers nationwide whose drains were repaired by allegedly unlicensed plumbers; (3) all consumers who purchased "limited edition" Barbie dolls that were later allegedly offered for a lower price elsewhere; and (4) private owners of wells in 16 states where a gasoline additive may have seeped into the groundwater.

In Jefferson County, proposed classes included: (1) all individuals nationwide who have paid late fees for video rentals from Blockbuster; (2) all individuals nationwide who have purchased a computer from the Best Buy retail chain with an extended warranty; and (3) all individuals who sought reimbursement for medical expenses or wrecked vehicles from a number of insurance companies that use a common method of assessing such claims (there were a number of similar, overlapping class actions involving these insurance practices in Madison County as well).

In Palm Beach County, proposed classes included: (1) all individuals nationwide who purchased a dietary supplement that the company claimed would eliminate cellulite; (2) all healthcare providers and consumers nationwide who participate in United HealthCare health plans based on the company's interpretation of "medically necessary" treatment; and (3) all holders of seasons tickets to the Florida Marlins who were allegedly defrauded when the team owner reneged on his promise to field a "World Class Baseball Team."

Thus, these three county courts have been asked to adjudicate cases that could affect the daily of lives of millions of Americans throughout the country – from what water they drink to how much they pay for their next insurance policy or telephone bill.

III. Conclusion

The class action device was designed to help adjudicate a large number of similar claims in an efficient manner. It was intended to be a tool of judicial economy. The device was never intended to allow a handful of state court judges to usurp the regulatory power of the states and set national standards advancing what these judges believe to be sound regulatory and social policy.

H.R.2341 is consistent with principles of federalism and Supreme Court precedent. It in no way limits the right of an individual to seek redress through the courts.

¹⁸

Id. at 13-25.