No. 99-391

IN THE SUPREME COURT OF THE UNITED STATES

ROBIN FREE AND RENEE FREE,
Petitioners,

v.

ABBOTT LABORATORIES, et al.,
Respondents.

BRIEF OF THE SECURITIES INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Filed February 14, 2000

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INTEREST OF THE *AMICUS CURIAE*

The Securities Industry Association ("SIA") represents the interests of more than 740 securities firms, including investment banks, broker-dealers, and mutual-fund companies, located throughout the United States.[1] Collectively, the SIA's members account for approximately ninety percent, or $270 billion, of securities firms' annual revenues, employ over 600,000 individuals, and directly or indirectly manage the accounts of tens of millions of investors. By virtue of their involvement in all phases of corporate and public finance, the SIA's members and their affiliates are each year subject to hundreds of class-action lawsuits in courts around the country.

The SIA's members thus take a keen interest in the rules governing removal of national class actions from state to federal court. Specifically, the SIA strongly supports the application of federal jurisdiction to large and complex lawsuits of national consequence, particularly class actions (like this one) brought in multiple states, and class actions brought in a single state but encompassing a national class. In these instances, a federal forum offers the welcome prospect of fair, uniform, efficient, and effective administration of justice.

Recognizing these values, Congress passed the Securities Litigation Uniform Standards Act of 1998 (the "Uniform

1. The SIA and its counsel authored this brief in its entirety, and no person or entity, other than the SIA, its members, and its counsel, made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court.

Standards Act"), Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.). This Act, which furthered the objectives of the Private Securities Litigation Reform Act of 1995 (the "Reform Act"), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.), makes certain class actions removable to federal court, and, among other things, enables parties to consolidate and coordinate in federal court duplicative, parallel actions that would otherwise proceed independently in multiple court systems. The Uniform Standards Act substantially brought to a close plaintiffs' attempts to avoid the Reform Act's provisions by filing what are in effect federal securities class actions in state court under analogous state laws.

The SIA believes that its members' experience with the Uniform Standards Act and with class-action securities litigation provides a useful context in which to examine the soundness of applying 28 U.S.C. § 1367 to authorize federal courts to exercise supplemental jurisdiction over the claims of absent class members where there is original jurisdiction over the named plaintiffs' claims. Like the Uniform Standards Act, Section 1367 enables parties to manage the risk of inconsistent adjudications, and enables parties to reduce the costs, burdens, and complications inherent in maintaining multiple, related civil actions in more than one judicial setting. Like the Uniform Standards Act, Section 1367 also stems the tide of national class actions being brought in state, rather than federal, court expressly to avoid the application of the more rigorous federal standards of class certification. In short, like the Uniform Standards Act, Section 1367 measurably promotes state and federal judicial economy and improves the administration of justice. In cases of national consequence, these goals provide particularly

compelling justification for Section's 1367's grant of supplemental jurisdiction.

SUMMARY OF ARGUMENT

Section 1367 unambiguously authorizes federal courts to exercise supplemental jurisdiction over the claims of absent class members where there is original jurisdiction over the named plaintiffs' claims. Dissatisfied with this result, petitioners label it "absurd." They claim that Congress could not have intended such a result, and thus they invite this Court to canvass legislative history for a more favorable interpretation. But this Court need not resort to such measures. As the SIA's experience with the Uniform Standards Act demonstrates, the rule set forth in Section 1367 is not absurd. Rather, like the Uniform Standards Act, Section 1367 is a sensible, reasonable, and appropriate legislative response to the problems and issues presented by large and complex class action lawsuits brought in multiple states, or brought in single states but encompassing a national class. Accordingly, the decision below should be affirmed.

ARGUMENT

As respondents' brief amply demonstrates, Section 1367 unambiguously authorizes federal courts to exercise supplemental jurisdiction over the claims of absent class members where there is original jurisdiction over the named plaintiffs' claims. As respondents' brief also shows, the legislative history of Section 1367 is not out of harmony with its plain language and effect. The SIA will therefore not burden the Court with its own analysis of the statute or its legislative history. Rather, by analogy to the recent example of the Uniform Standards Act, we will show that

Section 1367 constitutes sensible, reasonable, and appropriate legislation and that there is no basis for this Court to conclude, as petitioners argue, that Section 1367 as applied by the court below is somehow "absurd."

I. SECTION 1367, LIKE THE UNIFORM STANDARDS ACT, PROMOTES UNIFORMITY, EFFICIENCY, AND THE EFFECTIVE ADMINISTRATION OF JUSTICE IN CASES OF NATIONAL CONSEQUENCE.

As this action epitomizes and commentators confirm, in recent years there has been a significant increase in the filing of multiple, duplicative actions in several states to obtain settlement leverage over class-action defendants, to burden them with increased litigation expenses, and to minimize the consequences of an adverse ruling. *See* Deborah R. Hensler *et al.*, RAND Institute for Civil Justice, *Class Action Dilemmas: Pursuing Public Goals for Private Gain (Executive Summary)* 9-10 (1999). Commentators likewise have observed an increase in the filing of nationwide class actions in state rather than federal court to pursue claims, often against out-of-state defendants, under more forgiving procedural requirements and before jurists who may lack the experience, the administrative apparatus, and the life tenure necessary to handle large and complex cases fairly, efficiently, and effectively. *See Statement of Stephen G. Morrison Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary*, S. 353: The Class Action Fairness Act of 1999, at 2 (May 4, 1999) (available at <http://www.senate.gov/~judiciary/5499sgm.htm>) [hereinafter *Morrison Statement*].

Justice unmistakably suffers as a result: with less predictable jurists, looser procedural safeguards, and higher

stakes, the pressure on defendants to settle is intense and can be entirely out of proportion to the merits of the underlying claim. *See Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (relating the pressures on class-action defendants to settle); *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (same); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (same), *cert. denied*, 516 U.S. 867 (1995). Even where claims lack any merit, many defendants are forced to conclude that their only acceptable litigation option, as a business matter, is simply to give in and pay up.

Section 1367 addresses such concerns. In federal court, both the parties and the judiciary may more easily manage large and complex cases. *See, e.g.*, Richard B. Schmitt, *Justice RFD: Big Suits Land in Rural Courts*, Wall St. J., Oct. 10, 1996, at B1, B9 (noting that large, complex cases can overwhelm small, rural courts). Moreover, where it is appropriate, similar and related class actions brought in different states can be consolidated and coordinated, thereby reducing the burdens on all involved, including not only defendants but also unnamed class members, and minimizing or avoiding inconsistent rulings among actions. *See* 28 U.S.C. § 1407 (1994) (permitting interdistrict transfers for coordinated or consolidated proceedings to promote convenience, justice, and efficiencies). And where claims arise under the state law of multiple jurisdictions, federal judges are more experienced in the application of the laws of different states, and federal courts are better equipped to handle the complex management and administrative burdens associated with such actions. *See Morrison Statement*, *supra*, at 5.

The Uniform Standards Act addressed similar concerns. Following the passage of the Reform Act, the number of securities class actions filed in state court increased dramatically. These filings, which were essentially federal securities class actions brought under state law, were made in state rather than federal court to avoid the application of the procedural and substantive safeguards contained in the Reform Act. *See* Uniform Standards Act § 2, 15 U.S.C. § 78a (Supp. 1998) ("[S]ince the enactment of [the Reform Act], . . . a number of securities class action lawsuits have shifted from Federal to State Courts . . . prevent[ing] that Act from fully achieving its objectives."); Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 Stan. L. Rev. 273, 338 n.157 (1998) (calculating that state-court securities class-action filings jumped by over 250% following the Reform Act's enactment).

And a further problem arose: many state securities class actions were brought *in addition to* functionally identical federal class actions. The purpose of many of these duplicative filings was to avoid the Reform Act's discovery stay during the pendency of a motion to dismiss and to obtain discovery in state court to aid their federal-court causes. *See* Office of the General Counsel, U.S. Securities and Exchange Commission, *Report to the President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995*, at 4 (1997) ("[M]any of the state [securities-fraud] cases are filed parallel to a federal court case in an apparent attempt to avoid provisions of the Reform Act."). [2] As a result, before the Uniform Standards

2. Similarly, as plaintiffs' law firms vied with each other for the opportunity to collect an award of attorneys' fees, multiple, (Cont'd)

Act, parties ran a significant risk of inconsistent rulings in different courts, and not coincidentally, duplicative, less predictable litigation increased the risks and costs to class-action defendants.

By the Uniform Standards Act, Congress responded and closed the state-court loophole that permitted such tactics. Under the Act, defendants may now remove most securities class actions to federal court, and state securities-fraud class-action claims are now largely preempted. *See* Uniform Securities Act § 101(b)(1)(B)(1)-(2), 15 U.S.C. § 78bb(f)(1)-(2) (Supp. 1998). In a federal forum, cases may be more effectively managed and, where appropriate, consolidated and coordinated with similar federal actions pending before other federal district courts. *See* 28 U.S.C. § 1407 (1994).

Section 1367 achieves these same worthwhile goals for class actions outside the securities arena, enabling many more class actions to be adjudicated and administrated more fairly and effectively. By permitting such class actions to be removed to federal court, Section 1367 simply allows defendants in such class actions to opt for a federal forum, and the ability to have an action of potentially national scope and scale heard in a federal forum, with the attendant advantages of a judiciary that is familiar with the administration of large and complex multiparty matters, that is experienced with applying the law of multiple jurisdictions,

(Cont'd)
duplicative state class action lawsuits appeared in various states, forcing duplicative litigation on several fronts. *See* Richard A. Rosen, *The Statutory Safe Harbor for Forward-Looking Statements After Two and a Half Years: Has It Changed the Law? Has It Achieved What Congress Intended?*, 76 Wash. U.L.Q. 645, 672 (1998).

and that will apply federal standards of procedure and due process. And Section 1367 does so without preempting or otherwise affecting the availability of any class-action remedies. Surely there is nothing "absurd" about such a result.

II. Section 1367, Like the Uniform Standards Act, Stems the Tide of National Class Actions Being Filed in State Courts To Avoid the Application of Federal Standards.

Class-action plaintiffs have also turned to state courts specifically to avoid the application of the more stringent class certification standards of the Federal Rules of Civil Procedure. *See* Hensler *et al.*, *supra*, at 15; *Morrison Statement*, *supra*, at 2.[3] As a result, class actions that would not have been certified in federal court — or for that matter, in many state courts — are often certified, sometimes on an *ex parte* basis. *See Testimony of E. Donald Elliott Before the Subcomm. on Administrative Oversight and the Courts*

3. As the *Wall Street Journal* reported, some members of the plaintiffs' bar purposefully seek out the most permissive courts and judges:

> [P]laintiffs' lawyers, who were awarded millions of dollars in fees, have nothing but praise for the judge [before whom they just succeeded.] "I think he is probably now the leading class-action judge in the South," says Gordon Ball, a Knoxville, Tenn. lawyer and former classmate [of the judge] who recommended bringing the case in his court. "We probably will file another class action down there at some point. It was a very positive experience."

See Schmitt, *supra*, at B9.

of the Senate Comm. on the Judiciary, S. 353: The Class Action Fairness Act of 1999, at 6 (May 4, 1999) (available at <http://www.senate.gov/~judiciary/5499ede.htm>); *Morrison Statement*, *supra*, at 3 (describing "drive-by class certification" whereby a class is certified without giving notice to defendants and, in some instances, before defendants are served with the complaint). In fact, as many such class actions encompass nationwide classes, these state courts, often in small, rural jurisdictions far from the centers of commercial activity that they will affect, usurp and exercise a sort of nationwide jurisdiction, applying the law of any or all of the fifty states and adjudicating claims thereunder. *See Morrison Statement*, *supra*, at 5.

Section 1367 eliminates much of this end run around the Federal Rules of Civil Procedure and the federal judiciary. The Uniform Standards Act effectively addressed a similar situation and cured the problem of end runs around the procedural safeguards and substantive requirements of the Reform Act. Under the Uniform Standards Act, securities class-action plaintiffs may no longer avoid, and thereby undermine, the reforms enacted specifically to curb their abuses. *See* Uniform Standards Act § 2(1), 15 U.S.C. § 78a (Supp. 1998). As interpreted by the Fifth and Seventh Circuits, Section 1367 likewise eliminates abuses by class-action plaintiffs. Once removed to federal court, class-action plaintiffs must comply with the procedures and safeguards afforded by Federal Rules of Civil Procedure and adhere to constitutional requirements of due process. Here again, the lesson of the Uniform Standards Act is clear: blocking this end run is not an "absurd" result.

III. Limiting Section 1367 as Petitioners Urge Would Adversely Impact Cases of National Consequence.

Limiting Section 1367 as petitioners urge would only encourage class-action plaintiffs to file, as they have here, multiple, duplicative actions in several state courts, or to file nationwide class actions in state courts to avoid federal law. Either result would severely impede the fair and efficient administration of justice and, as other *amici curiae* have extensively catalogued, disadvantage all — particularly defendants in such class actions — to the sole benefit of the plaintiffs' bar. *See Morrison Statement*, *supra*, at 2-5; Schmitt, *supra*, at B9. This Court should not disregard the plain terms of Section 1367 in order to countenance such practices. This Court should thus affirm the Fifth Circuit's interpretation of Section 1367 to permit supplemental jurisdiction over absent class members where there is original jurisdiction over named class-action plaintiffs.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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