Chapter 11

Why Aren't Regulation and Litigation Substitutes?

An Examination of the Capture Hypothesis

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In the United States, regulatory agencies and private litigation operate parallel systems of regulation in many substantive areas. At times, these systems can generate mutually inconsistent outcomes, as complying with a regulation sometimes leads to liability exposure. Even when these systems do not directly conflict, a number of critics suggest that these overlapping mechanisms lead to too much regulation. Because of these concerns, some scholars and reformers argue that courts should be more willing to hold that regulations preempt litigation or to allow the use of a regulatory compliance defense, which is currently unavailable in most U.S. jurisdictions but is a standard option in many other countries. With relatively few (and narrow) exceptions, however, policymakers and judges in the United States have been resistant to these suggestions.

The intuitive belief that regulation should shrink the scope of litigation finds support in the more formal work of scholars. In the standard law and economics model, levels of regulation and litigation move in opposite directions. As regulations become more restrictive, there is less harm to be litigated over; more litigation leads to deterrence and a corresponding reduction in the need to regulate inefficiently risky behavior. In the production function for safety, regulation and litigation are substitute inputs on the margin. This intuition has been formalized by Steven Shavell, and it motivates most economic analyses of regulatory design (Shavell 1984a:357; 1984b:271).

Unfortunately, there is a disconnect in this case between economic theory and what actually seems to happen in the world at large. In earlier work on insurance law, we have shown that, if anything, litigation and regulation move together (Helland and Klick 2007, forthcoming). Similar

claims about litigation and regulation moving together have been made with respect to securities law, products liability, consumer protection, and a host of other legal areas.

The original equipment manufacturer (OEM) parts cases (*Avery v. State Farm Mutual Auto Insurance* 1999) that we discussed in our earlier work are illustrative of a "damned if you do, damned if you don't" quality of overlapping regulatory and litigation systems (Helland and Klick, forthcoming). In the OEM class action litigation, insurers found themselves defending against a myriad of consumer protection claims that they had not used OEM parts, even though state regulations had explicitly allowed the use of non-OEM parts and, in a few states, had actually required the use of nonoriginal parts (Government Accountability Office 2001).

Given the standard economic model's implication that efficiency requires regulation and litigation to be substitutes on the margin, and the empirical observations—some anecdotal and some more systematic—that substitution does not occur, concerns about the inefficient, duplicative effects of coterminous regulatory and litigation systems may be justified. However, the standard model assumes away many issues that could reverse conclusions that the current dual system of litigation and regulation is inefficient. Perhaps, once these issues are considered, the lack of substitution is less troubling, and we may have a partial solution to the puzzle of why decision makers are hesitant to hold that regulations preempt liability or to recognize the regulatory compliance defense more broadly.

In this chapter, we investigate one of the primary alternate theories of overlapping regulations and litigation, namely, that litigation is necessary to fill gaps created due to regulatory capture. While the standard model developed by Shavell assumes that a benign social planner will choose the proper level of regulation (and that regulations will be enforced without error), this may not hold true in reality.

Litigation and Regulatory Capture

Although we find little evidence that regulation and litigation are substitutes in deterring harm, there is one possible explanation for the absence of this finding that would still preserve a role for litigation alongside the regulatory process. Specifically litigation, especially class action litigation, may serve as a method for undoing regulatory capture.

There is a large literature in economics and political science about industry co-opting regulators. One of the earliest proponents of this view was George Stigler, who argued that regulation largely worked to the benefit of industry, a state of affairs often characterized as "regulatory

capture" (Stigler 1971). The potential for regulatory capture by industry would appear to recommend litigation as a backstop to regulation, as it gives injured parties a second venue in which to pursue claims necessary to generate efficient levels of deterrence.

Some suggestive evidence on the relationship between regulatory capture and the filing of lawsuits might be found in the differences between elected and unelected utility or insurance commissioners. It has been documented in several studies that states that elect their insurance commissioners also have lower utility and insurance rates (Besley and Coate 2003:1176). This difference is usually attributed to elected officials being more pro-consumer and less subject to capture.

Elections may also break the "revolving door" since many elected insurance commissioners are looking for higher office and are hence less likely to have either been drawn from or returning to industry. The basic hypothesis would be that state regulatory commissions in which commissioners must face the voters are less likely to be captured by industry because voting offers a low-cost way to punish commissioners who become too friendly with industry. If this is correct, and if capture helps drive the frequency of litigation, then states that elect their commissioners would be expected to have fewer insurance class action lawsuits. The logic is that class actions and elections would serve similar functions in providing a venue for consumers to reverse pro-industry rulings by the regulator.

To investigate this hypothesis, we use the RAND insurance class action data set that has formed the basis for other academic studies (Helland and Klick 2007, forthcoming; Pace et al. 2007). The data come from a survey of 130 insurance companies, primarily larger property-casualty, life, and health insurers, covering 748 distinct class actions filed during the period 1992 to 2002. Table 11.1 provides the distribution of insurance lines implicated by the cases.

Table 11.1. Cases in Data Set

Lines	*Percentage of all cases*
Automobile	67.5
Homeowners	12.8
Life	7.1
Workers' compensation	6.3
Health	2.4
Multiple lines	1.2
Annuities	1.2
Earthquake	1.2
Mobile home	0.9

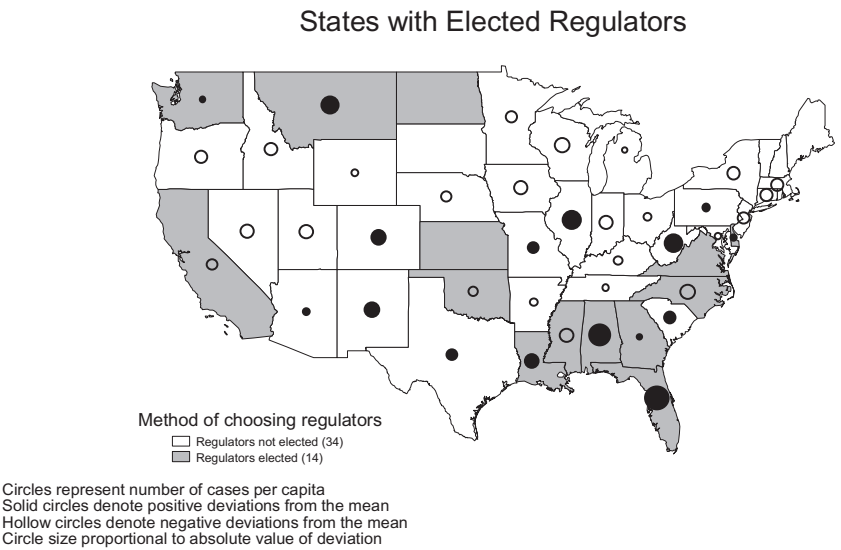

Figure 11.1. States with Elected Regulators and the Number of Class Actions Filed in the State per Capita.

Figure 11.1 provides some evidence relating to the capture hypothesis.[1] The shading of the maps shows which states, during the sample period, elected insurance commissioners and which appointed them. In the thirty-one appointed states and eleven of the fourteen elected states, our survey contained information on the number of class actions filed in the state. The map reveals several states that stand out for the number of class action filings, but these states appear to be similarly divided between states with elected or unelected insurance regulators.[2]

The mean number of cases and filings for both elected and unelected commissioners is presented in Table 11.2. The number of class actions and class actions per one thousand residents of the state are actually higher in states that elect their commissioners, a result inconsistent with the notion that class actions are a method by which consumers can reverse the regulatory mandate of captured regulators. Table 11.2 suggests that, in states where electoral institutions would be expected to tend to push regulators to act more favorably toward consumers, we in fact see more class actions, not fewer.

In summary, at least by one measure—namely, elections—states with regulators that are less susceptible to industry capture are in fact more likely to face more class actions. These data are inconsistent with the hypothesis that class actions are a device for reversing anticonsumer regulatory decisions by a regulatory agency that favors industry.

Table 11.2. Elected Regulators and Class Action Frequency

Selection method	*Number of cases*	*t test*	*Number of cases per 1,000*	*t test*
Unelected commissioners	12.61		2.18	
	(17.51)		(1.72)	
Number of observations	31		31	
Elected commissioners	24.45		3.29	
	(36.69)		(2.75)	
Number of observations	11	–5.996	11	–2.01

This finding, however, might be consistent with an alternative hypothesis about a deeper, if not more pernicious, theory of capture: perhaps elected regulatory commissions are more prone to capture, producing less effective regulation that allows a larger scope for litigation. Given that regulated industries have greater incentives to band together and to contribute to the election of favorable regulators, relatively dispersed consumers may be unable to counter this with their own voting behavior and contributions. Of course, we have no way to test this alternative hypothesis directly.

Judicial Capture

Left without strong support for our hypothesis regarding regulatory capture and the relationship between regulation and litigation, we seek other candidates. In this section we examine two factors that potentially could determine filing location independent of the underlying harm. We examine a specific measure of how "pro-plaintiff" the state's judiciary is: judicial elections. Several authors have provided evidence that when judges stand for election, the parties to disputes seek to influence the outcome of cases usually by contributing to judicial election funds (Hall and Bonneau 2006:50; 2008:457; Schotland 1985:57; Geyth 2003:64; Wright 1996).[3]

At first glance, the courts seem unlikely candidates for capture. Unlike insurance companies and regulators, plaintiffs and defendants are usually not repeat players in the courts. Moreover, litigants' choice of venue is limited, meaning that capturing a single judge would not be sufficient. Defendants would have to capture all judges who could possibly hear their case.

Yet there are repeat players in litigation, namely, plaintiffs' attorneys (Helland and Tabarrok 2000, 2002; Johnston and Wadfogel 2002). Class action litigation is different from other litigation in that both parties' attorneys are potentially repeat players. Admittedly, if industry is not

initiating the litigation, it may be less likely to be able to capture a court. But the possibility of forum shopping by plaintiffs' attorneys increases the likelihood of judicial capture in a manner favorable to plaintiffs. Although there is relatively little systematic information on the likelihood of repeat class action litigation in the same venue, stories of forum shopping and "litigation hell holes" abound.

This suggests that although we may find no relationship between the electoral institutions used to select regulatory commissioners and class action frequency, plaintiffs' attorneys can still be expected to file cases in states where judges are more sympathetic. Helland and Tabarrok (2000, 2002) found that in states that elect judges in partisan elections, awards against out-of-state defendants in tort cases are $230,092 higher than similar cases tried in states that do not elect judges in partisan elections.

There is some evidence that class action filings are more likely in states that elect their judges. Figure 11.2 shows how states with elected judges compare against the national average in total filings per capita during the sample period.[4] Four of the above-average states have appointed judges while eight have elected judges.[5]

If we consider the ten states that elect judges in partisan elections, a similar pattern holds. As Figure 11.3 shows, states with partisan elections

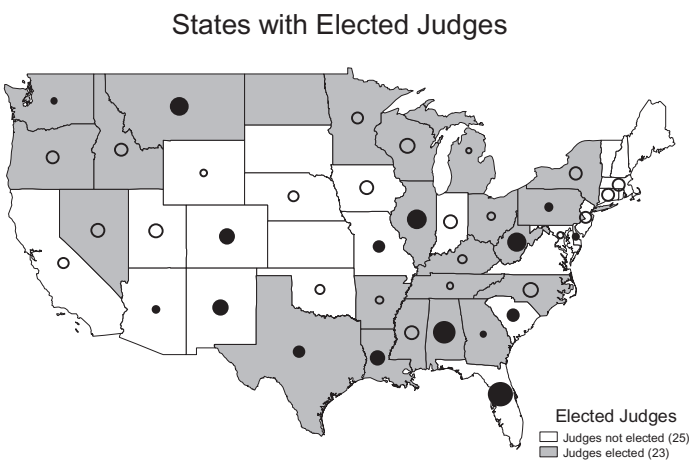

Figure 11.2. States with Elected Judges and per Capita Class Action Filing Frequency.

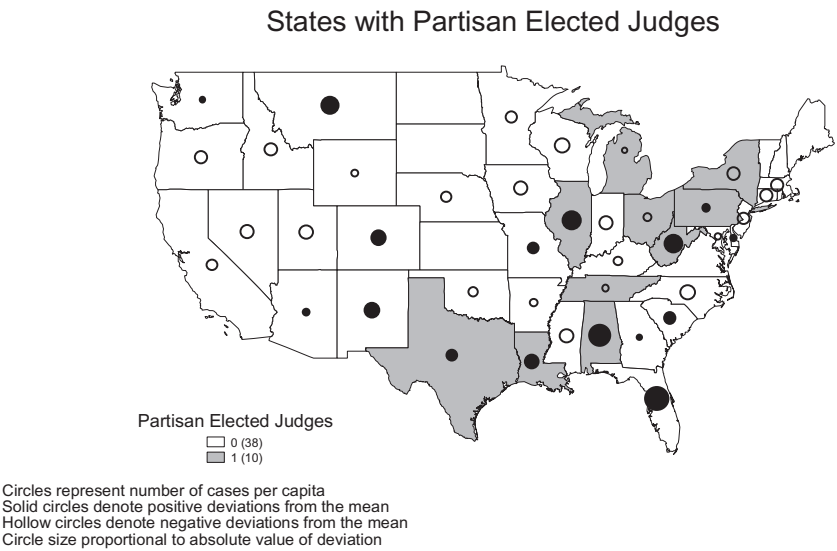

Figure 11.3. States with Judges Elected in Partisan Elections and per Capita Number of Class Action Filings.

have a disproportionate share of above-average filing rates compared with the rest of the country. The pattern is even more pronounced if total filings (not adjusted for population) are examined: seven states with partisan-elected judges have above-average levels of filings, compared with only five of the other states having above-average levels.

Tables 11.3 and 11.4 test whether the difference in means between class action frequencies in elected and partisan elected states is statistically significant. The total number of filings is higher in states with elected judges, although the difference is not statistically significant.

For the states that use partisan elections to select their judges, the results are similar. States with judges elected in partisan elections have a higher number of filings during the sample period, and the difference is statistically significant for both the total number of cases and for per-capita cases.

The question remains of how much to make of the fact that class action filings are similar in states that use elections to select their regulators—but class action filings are more frequent in states using elections, and particularly partisan elections, to select their judges. The results do not appear consistent with class actions acting as a check on captured insurance regulators, at least to the extent that Besley and Coate (2003) and others are correct that elected regulators are less likely

Table 11.3. Elected Judges and Class Action Frequency

Selection method	*Number of cases*	*t test*	*Number of cases per 1,000*	*t test*
Unelected judges	14.45		2.48	
	(28.25)		(2.08)	
Number of observations	20		20	
Elected judges	16.86		2.47	
	(20.21)		(2.088)	
Number of observations	22	−1.042	22	−0.05

Table 11.4. Partisan Elected Judges and Class Action Frequency

Selection method	*Number of cases*	*t test*	*Number of cases per 1,000*	*t test*
Unelected judges	10.97		2.104	
	(22.85)		(1.93)	
Number of observations	32		32	
Elected judges	30.9		3.66	
	(22.59)		(2.09)	
Number of observations	10	−6.68	10	−5.9

to be captured by industry. The results are instead more consistent with a broader political economy story in which interest groups compete for influence with the regulator. In this case, however, the "regulator" appears to be elected judges. One explanation is the plaintiffs' attorneys are filing cases in venues they think will be more sympathetic to their cases.

Further research is clearly needed on the connections between the electoral institutions used to select judges and class actions. For the purposes of this chapter, it is sufficient to say that the evidence is not consistent with class actions being a method for consumers to undo regulatory capture by industry. Whatever else may be driving the filing decisions of plaintiffs' attorneys, it does not appear to be related to how pro- or anti-consumer the local regulators are.

Putting It All Together

The previous sections, and some of our previous work, have examined the correlations between class action litigation and regulation, as well as the related hypothesis that regulatory inattention due to capture by industry is driving class actions. We find little evidence that litigation

and regulations are substitutes. It is possible, of course, that our analysis misses important interactions between the various measures of regulatory stringency.

In this section, we present the results of a regression of each of the factors mentioned in this chapter. The dependent variable, $cases_{ijt}$, is the number of cases filed in the state i, of a specific allegation j, in year t. We divide the factors into three categories. The first category includes factors related to the substitution hypothesis, which we include in x_{ijt}. The factors include those used in our earlier work: the log of the number of market conduct investigations in the state regulatory office per insurance company, the log of the number of market conduct examiners per regulated firm, the log of the regulatory budget per regulated firm, and the log of the number of fines per regulated firm. These variables are designed to capture regulatory intensity. For example, a higher enforcement budget and fines would, according to the substitution hypothesis, reduce the number of insurance-related harms and hence reduce the number of class actions.

One concern is that regulators simply may not be interested in the same types of harms that generate class actions. In the case of securities litigation, the federal Securities and Exchange Commission explicitly prosecutes cases against small firms because the recovery in these cases will be small and it leaves the litigation against larger firms to private attorneys. Something similar could result in insurance class actions. To determine the relationship between regulator interest and class actions, the RAND Institute for Civil Justice conducted a survey in 2005 of staff members of state departments of insurance. Seventeen states completed the survey. The survey asked the regulators to rank the 260 key allegations made by the plaintiffs according to their relationship to the traditional activities of the regulator. Each allegation was ranked on a five-point scale. A rating of 1 implied little or no relationship between the particular allegation and the regulators traditional activities. A rating of 5 implied a significant overlap with the regulators' activities. A more complete discussion of the results is contained in Pace et al. (2007).

The across-state average rankings ranged from 2.0 for claims alleging that the defendants "failed to have settlements reached with minors reviewed and approved by a judge," to an average of 5.0 for claims that "the defendants sold coverages in insolvent plans or with unlicensed carriers." The mean- and median-adjusted responses were about 3.6. Pace et al. (2007) classified regulatory issues with an adjusted response above the 80th percentile (i.e., those greater than 4.07) as having the "strongest" potential relationship to a state's regulatory regime. They further labeled issues in the bottom 20th percentile of all adjusted responses (3.15 and below) as having the "weakest" relationship. Those

issues between the 20th and 80th percentile were ranked as having a "modest" relationship. We include the proportion of cases making a similar allegation that regulators ranked as having a strong relationship in the ICJ survey to control for regulator interest in the specific allegation.

The second category of factor, z_{ijt}, includes whether the state insurance regulators are elected, whether the state chooses its judge via elections, and whether the state chooses it judges in partisan elections.

The final set of factors, w_{ijt}, relate to the existence of previous class actions concerning a given allegation in a state. It includes the proportions of cases in the four years prior to the observation year that are remanded to federal courts (e.g., 1991–94 for a 1995 observation year), the proportions of cases in which the class was certified, the proportion of cases certified for a multistate class, the proportion of cases certified for nationwide classes, and the proportion of cases in which regulators filed a brief on behalf of the defendants. The factors are measured both by allegation, thus measuring the outcomes of cases in any state or the federal system making a similar allegation, and by state, thus measuring the impact on future filings of the outcome of other class actions in the state in the last four years. The specification,

$$cases_{ijt} = \beta_1 x_{ijt} + \beta_2\, z_{ijt} + \beta_3 w_{ijt} + \beta_4\, controls + \varepsilon_{ijt},$$

includes an error term clustered on the state-allegation cell.[6] We also estimate the model by using several different controls. In all specifications, we include the number of firms in our sample that offer insurance in the state in order to control for the impact of any differences in filings caused by market differences by state. We also include year fixed effects to control for the national trend (allowing for nonlinearities) and tort reforms.[7] In other specifications, we include fixed effects for state and allegation and then an interaction of the state-allegation fixed effects. The descriptive statistics are provided in Table 11.5.

The results are presented in Table 11.6. We estimate three basic models. Model 1 estimates the number of class actions of a particular allegation filed in a state in a given year, including all of the factors and several subsets of the factors but only controls for years. Model 2 includes controls for year, allegation, and state, while Model 3 adds a control for each state-allegation cell. The inclusion of state fixed effects necessitates the removal of state-level variables that do not vary though time. Thus Models 2 and 3 do not include the election variables. The difference between Models 2 and 3 is that in Model 2 we utilize the variation between states to estimate the allegation-specific variables and the variation between allegations to estimate the state-specific variables. In our Model 3 estimation, we use only the within-state allegation variation. This means

Table 11.5. Descriptive Statistics

Variable	*Mean*	*SD*	*Min*	*Max*
Number of cases	−0.040389	0.32458	0	17
Log market conduct exams	−4.36489	1.212156	−6.90776	−1.24321
Log market conduct examiners per firm	−5.84973	1.03248	−6.90776	−2.46308
Log budget per firm	15.94643	1.012368	13.0002	18.97122
Log fines per firm	−5.5933	0.930081	−6.90776	−2.30523
% of allegation with strong rank	0.274213	0.270612	0	1
% of allegation with modest rank	0.551745	0.300221	0	1
Agency officials elected	0.235294	0.424194	0	1
Judges chosen in election	0.470588	0.499148	0	1
Judges chosen in partisan election	0.235294	0.424194	0	1
Number of out-of-state companies in risk set	0.972525	0.063475	0	1
Proportion of cases moved to federal court by allegation, last 4 years	0.10179	0.165627	0	1
Proportion of cases moved to federal court by state, last 4 years	0.102579	0.223705	0	1
Proportion of cases with approved certification by allegation, last 4 years	0.090668	0.176659	0	1
Proportion of cases with approved certification by state, last 4 years	0.071095	0.169218	0	1
Proportion of multistate class actions by allegation, last 4 years	0.024949	0.09396	0	1
Proportion of multistate class actions by state, last 4 years	0.009881	0.058711	0	1
Proportion of nationwide class actions by allegation, last 4 years	0.022713	0.09262	0	1
Proportion of nationwide class actions by state, last 4 years	0.007485	0.056938	0	1
Regulators have filed briefs on behalf of the defendant in this line	0.028524	0.11737	0	1
Regulators have filed briefs on behalf of the defendant in this state	0.017489	0.088563	0	1

Table 11.6. Regression Results for the Number of Class Action Cases Filed by State, Allegation, and Year

	Model		
Variable	*1*	*2*	*3*
Log state population	0.02478***	0.03385	0.15069**
	(0.00680)	(0.04760)	(0.06563)
Log market conduct exams	−0.00224	−0.00305	−0.00180
	(0.00267)	(0.00371)	(0.00336)
Log market conduct examiners per firm	0.00142	0.01591**	0.00934*
	(0.00362)	(0.00625)	(0.00533)
Log budget per firm	0.01155*	−0.00721	−0.00391
	(0.00676)	(0.00735)	(0.00764)
Log fines per firm	0.01543*	0.01684**	0.01925**
	(0.00800)	(0.00805)	(0.00903)
% of allegation with strong rank	−0.02961**		
	(0.01476)		
% of allegation with modest rank	−0.00596		
	(0.01688)		
Agency officials elected	0.02226		
	(0.01717)		
Judges chosen in election	−0.04595**		
	(0.02032)		
Judges chosen in partisan election	0.05605***		
	(0.01307)		
Number of out-of-state companies in risk set	−0.07018	−0.06066	0.32209**
	(0.04935)	(0.04333)	(0.14169)
Proportion of cases moved to federal court by allegation, last 4 years	0.07224***	0.03426**	0.03264*
	(0.01798)	(0.01603)	(0.01686)
Proportion of cases moved to federal court by state, last 4 years	−0.02610	−0.01952	−0.02055
	(0.01627)	(0.01230)	(0.01298)
Proportion of cases with approved certification by allegation, last 4 years	0.06460***	−0.02167	−0.02230
	(0.01525)	(0.02571)	(0.02800)
Proportion of cases with approved certification by state, last 4 years	0.00761	−0.01291	−0.01574
	(0.01780)	(0.01741)	(0.01750)
Proportion of multistate class actions by allegation, last 4 years	1.22834***	1.05796***	1.06204**
	(0.38047)	(0.39874)	(0.42065)
Proportion of multistate class actions by state, last 4 years	0.38746	0.05967	0.11727
	(0.27014)	(0.26828)	(0.24382)
Proportion of nationwide class actions by allegation, last 4 years	−1.36169***	−1.12647***	−1.12694**
	(0.38250)	(0.41455)	(0.43747)

	Model		
Variable	*1*	*2*	*3*
Proportion of nationwide class actions by state, last 4 years	−0.35764 (0.27234)	−0.03382 (0.27296)	−0.08870 (0.24735)
Regulators have filed briefs on behalf of the defendant in this line	0.02565 (0.01866)	0.01404 (0.02163)	0.01026 (0.02286)
Regulators have filed briefs on behalf of the defendant in this state	−0.03251 (0.02332)	0.01184 (0.02121)	0.01921 (0.02024)
Year controls	Yes	Yes	Yes
Tort reforms	Yes	Yes	Yes
Allegation controls	No	Yes	No
State controls	No	Yes	No
Allegation * state controls	No	No	Yes
Observations	14,145	16,605	16,605
R^2	0.03	0.08	0.28

Note: Robust standard errors are in parentheses.
*$p < .10$; **$p < .05$; $p < .01$.

that the state-specific variables such as state population, budget, market conduct examiners and exams, and fines will be the same in Models 2 and 3, while the variables capturing the state's or allegation's experience with class actions in the last four years will be different in the two corresponding columns.

Model 1 is the full model with all the factors. One common feature of all the models is that the log of population is significant and positive in all specifications. This suggests that potential class size is an important consideration in filing decisions. We also find that an increase in the log budget causes a statistically significant increase in the number of class actions filed in the state. The impact is relatively modest, as a one standard deviation increase in budget increases the number of alleged class actions filed in a state by 1.2 percent. The log of the number of fines per firm also has a positive and statistically significant impact on filings. We find that as a greater proportion of a specific allegation is ranked as being of strong interest to regulatory authorities in our survey, the number of alleged class actions filed in the state decreases. The effect is quite small, with a one standard deviation increase in the proportion of regulators ranking an allegation as having a strong connection to their regulatory mandate coincides with a decrease in the number of class actions by 0.2 percent.

Choosing judges in elections has an overall negative impact on the number of filings. However, choosing judges in a partisan election has a

statistically significant and negative impact on filings. Electing a judge in a partisan election increases the number of class action filings in a state by 2 percent while overall states that use elections have about 1 percent fewer filings.

In Models 2 and 3, we include a more extensive set of controls. The addition of state controls does not alter the positive relationship between the log of fines per firm and the number of class actions. Although several of the state-level variables are no longer statistically significant, allegations that have more cases certified for multistate class status have more filings, while those with a nationwide certification have fewer filings.

One remaining issue is the impact of the outcome of previous cases on the decision as to where to file a case. In Table 11.7, we report the impact of the results of past cases on the likelihood of filing. We examine two dimensions of the filing decision: whether to file a case with a specific allegation and, if so, which state to file the case in.

Table 11.7. Marginal Effects

Factor	*% change in the number of class actions resulting from a one standard deviation increase*
Proportion of cases with a similar allegation moved to federal court	39
Proportion of cases filed in the state moved to federal court	–12.4
Proportion of cases with a similar allegation approved certification	34
Proportion of cases in the state in which the class was certified	12
Proportion of cases certified with multistate classes with a similar allegation	319
Proportion of cases certified with multistate classes in the state	58
Proportion of cases with a similar allegation certified for nationwide classes	–347
Proportion of cases in the state certified for nationwide classes	–54
Proportion of cases with similar allegation in which state regulators have filed briefs on behalf of the defendant	11
Proportion of cases in the state in which state regulators have filed briefs on behalf of the defendant	–13

Note: All factors are for the period covering the last four years.

There are a few surprises in the results. The proportion of cases making a similar allegation that were removed to federal court in the past four years actually increases the likelihood of future cases making similar allegations in state court. One explanation for this finding is that cases that are more important, either in terms of settlement value or the issues involved, are more likely to be removed to federal court.[8] By contrast, a one standard deviation increase in the proportion of cases from a particular state that are removed to federal court decreases the likelihood of future filings in that state by 12.8 percent.

Certification of cases making a similar allegation increases the likelihood that future cases making the same allegation will be filed, and the more cases of any allegation that are certified in a state, the more likely future cases are to be filed in state. The effect is most dramatic with cases certified for multistate litigation. A one standard deviation in the proportion of cases certified for a multistate class increases the likelihood of a future case making the same allegation by 35 percent. A one standard deviation in the proportion of the cases that a state's courts certify for multistate class actions increases the likelihood of future filings by 13.2 percent.

Certification of a nationwide class has the opposite effect. The impact is most dramatic for the proportion of cases making a similar allegation certified for nationwide class action status. This is likely a preemption effect. As more cases are certified for nationwide classes, the plaintiffs for future cases have already been included in ongoing cases. In fact, nationwide class actions are likely to be settlement classes, which suggest that this may well be the intent of the case (Cramton 1995: 811). Finally, removal of a case to federal court publicizes the line of action further, increasing the likelihood that other cases making similar allegations on behalf of plaintiffs in other states or against other defendants will be filed.[9] The negative impact on the proportion of a state's cases receiving nationwide class action status is contrary to our intuition. We would have expected a state allowing more nationwide classes to be certified to be a more attractive venue to file cases, but this appears not to be the case.[10]

Finally, the impact of regulatory intervention in other class actions in the state is consistent with our expectations. Because almost all briefs filed by regulators support the defense, we would expect more active regulators to discourage future filings.[11] Consistent with this theory, an increase in the proportion of class actions in the state in which the regulator filed a brief reduces the number of filings in the state.

The results suggest that plaintiffs' attorneys are determining where to file cases based on the outcome of previous cases rather than the other factors we have examined. Filings are generally more likely where states

have been more willing to certify classes and particularly multistate classes. Future cases are less likely when regulators intervene on behalf of defendants and when nationwide classes preempt future filings of a particular allegation.

Conclusion

The evidence presented in this chapter suggests that class actions and regulation are parallel systems, at least in the context of insurance, and that this overlap does not appear to be generated by a desire to curb the effects of regulatory capture. Plaintiffs' filing decisions appear to be influenced by the success of previous plaintiffs both in the state and with a particular allegation. This success itself may be affected by a form of judicial capture whereby states with elected judges are more class-action friendly.

These results suggest that the standard economic models of the interplay between regulation and litigation do not usefully describe reality. Given that, the normative prescriptions of how to structure the dual system of regulation and litigation may well also be incorrect. More fruitful models will likely have to include a richer model of what drives litigation decisions. A deeper understanding of the regulation-liability dynamic may allow for sensible remedies to the problems identified by critics of the U.S. regulatory system, including the potential for overregulation and the creation of regulatory Catch-22s.

Notes

1. One complicating factor is that insurance agencies often differ in scope. The National Association of Insurance Commissioners notes that several agencies have multiple tasks. It is possible that regulators with a broader mission are more or less likely to be captured. We attempted to disaggregate insurance regulators by mission scope but found no differences in class action filings.

2. Nothing hinges on controlling for population, as similar results obtain using just the absolute number of filings.

3. For a discussion of the impact of judicial elections on tort awards, see Helland and Tabarrok (2000, 2002) and Tabarrok and Helland (1999:157).

4. Exactly which states "elect" judges is open to interpretation. We label a state as electing its judges if the state supreme court and appellate court judges are choose by election. We label states as having partisan elections if judges are chosen in partisan elections or if the parties choose which candidate to run in an election. For example, Ohio is a partisan state because although party affiliation is not listed on the ballot in the general election, the candidates are chosen in partisan primaries. We also list California as an unelected state although trial court judges are elected in California. For more detailed information, see the American Judicature Society's Judicial Selection Methods in the States website at www.judicialselection.us, as well as table 4 (Selection of Appellate Court Judges) and table 6 (Selection and Terms of Trial Court Judges) in Rottman et al. (2006).

5. Larger states elect their judges, which is why we show the results for filings per capita. Without adjusting for population, some of the solid-dot states in Figure 11.2 are hollow, and vice versa; however, more of above-average levels of filings are still in elected states (nine) rather than appointed states (three).

6. This allows for arbitrary nonindependence across observations for a given state.

7. These controls draw on the database produced by Avraham (2011), but we have also examined the relevant statutes in each state to ensure that the reforms are coded correctly as they apply to auto, bad faith, and product liability cases.

8. In general, all of our allegation measures, that is, proportion removed to federal court, proportion certified, and proportion certified for multistate classes, are likely to measure case importance.

9. These findings are consistent with previous research on forum choice. For example Hensler et al. (2000) found that plaintiffs' attorneys choose state courts because of a perception that state courts are more likely to certify a class. Willging and Wheatman (2005) found from a survey of attorneys that perceptions of how state versus federal judges would rule in the case, the source of law, and the residence of the preponderance of the class all influenced forum choice.

10. One possible explanation is that this variable is measuring the substantive law of class certification. States vary in how closely they follow federal Rule 23. Some states, such as Mississippi and Virginia, do not have a general class action rule (Rowe 2008).

11. Pace et al. (2007) found that only 7 percent of state class actions have a regulatory intervention in the case.

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