

Q u i c k - Which states make up the 11th Federal Judicial Circuit?

If you have no idea, you're not alone: many people we talk to know something of the Federal Judicial Circuit system, but few have a good understanding of its composition or history.

Because of the important role each circuit court plays in the interpretation of securities law, and the consequential impact on D&O insurance, we thought we'd devote this issue of CUG.COMments to a brief discussion of the circuit courts.

How many "Circuits" are there, and where are they?

The enclosed map of the USA, shows the geographic distribution of the circuits. On the east coast they get a little hard to see, so here is the full list.

<u>Circuit</u>	<u>Jurisdiction</u>
First	MA, ME, NH, Puerto Rico, RI
Second	NY, CT, VT
Third	DE, NJ, PA, Virgin Islands
Fourth	MD, NC, SC, VA, WV
Fifth	LA, MS, TX
Sixth	KY, OH, MI, TN
Seventh	IL, IN, WI
Eighth	AR, IA, MO, MN, NE, ND, SD
Ninth	AK, AZ, CA, HI, ID, MT, NV, OR, WA
Tenth	CO, KS, NM, OK, UT, WY
Eleventh	AL, FL, GA
Twelfth	District of Columbia.

In addition to the twelve numbered circuits there is the **Federal** Circuit.

Origin of the Federal Circuits

The Judiciary Act of 1789 set up 13 judicial districts with a court in each district. These were

divided into three "circuits": Eastern, Middle and Southern. Justices of the U.S. Supreme Court were then required to "ride circuit" around these large areas, hearing cases and dispensing justice at the circuit courts. This was inconvenient, exhausting and so unpopular that it served as a deterrent to qualified candidates serving on the Supreme Court. The practice was eventually abolished although the itinerant characteristic was immortalized in the continued use of the word "circuit."

Originally, the circuit courts heard regular cases as well as appeals, but the Judiciary Acts of 1891 and 1911 limited the circuit courts to an appeal function only, creating the basis of the modern federal circuit system.

The number of circuits expanded throughout the nineteenth and twentieth centuries, culminating with the creation of the Federal Circuit court in 1982. The main function of this court is to hear patent cases from every jurisdiction.

Federal versus State

Because of the historic unwieldiness of the federal court system, the state legal system became the system of choice for most legal requirements. The main role of the federal court system is to hear cases involving federal statutes, which is why most securities class actions are heard in these forums: they usually allege violation of the Securities Act of 1933 and the Securities Exchange Act of 1934. Immediately after passage of the 1995 Private Securities Litigation Reform Act (the "Reform Act"),

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many D&O cases were taken to state court, hoping for a forum more friendly to the plaintiffs. In order to drive securities class actions back to federal court, Congress in 1998 passed the Securities Litigation Uniform Standards Act which bars securities class actions from being brought in state court.

Circuit versus Circuit

The ultimate court of appeal (for both the federal and state systems) is the United States Supreme Court. For a circuit court of appeals, therefore, decisions of the U.S. Supreme Court are *mandatory* precedents. Prior decisions from the same circuit are *authoritative*, but decisions from other circuits are merely *persuasive*.

This means that it is quite possible for different circuits to issue differing or even conflicting rulings, and nowhere is this more evident than in their response to securities class actions, with particular regard to pleading standards.

Since the passage of the "Reform Act," the 6th, 9th and 11th Circuits have promulgated a pleading

standard that has "raised the bar" for plaintiffs. In other words, plaintiffs now have to prove a much higher degree of "recklessness" by the defendants than before. At the same time, the 2nd and 3rd Circuits have adopted a position that gives plaintiffs a much better chance of surviving a motion to dismiss their case. The irony is that before the "Reform Act," the 2nd Circuit was relatively pro-defendant and the 9th was pro-plaintiff.

Next Stop: the U.S. Supreme Court?

As one of the central aims of the "Reform Act" was to create a uniform pleading standard, there is now the possibility that such a standard will have to be imposed by a decision from the U.S. Supreme Court. But what priority the Supreme Court places on this issue is anyone's guess: each year out of nearly 30,000,000 cases handled in the state and federal systems, only about 5,000 are submitted to the Supreme Court, and of those, only some 150 are accepted for hearing. It may be a while before the inconsistencies in the circuits are addressed. ❖

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