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The CAFA Year in (Appellate) Review: A Look Back at the Class Action Fairness Act in the Circuit Courts of Appeals in 2012-2013

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On January 1, 2012, we published "The CAFA Year in (Appellate) Review: A Look Back at the Class Action Fairness Act in the Circuit Courts of Appeals in 2011." In the 18 months between January 1, 2012 and June 30, 2013, ten circuit courts of appeals rendered notable published decisions on various issues under the Class Action Fairness Act ("CAFA"). The United States Supreme Court weighed in as well, resolving a conflict among the circuits on a recurring issue: whether a plaintiff can avoid federal CAFA jurisdiction by a pleading or stipulation as to the amount of damages at issue. In fact, the Supreme Court appears to be focused on class actions. It has issued five class action opinions since January 2013. That trend, of which CAFA jurisprudence is a part, looks likely to continue in the coming year. As described later in this article, The Supreme Court has already granted certiorari on one CAFA case for the October 2013 Term.

1. The SCOTUS says federal CAFA jurisdiction cannot be avoided by plaintiff's stipulation as to damages amount.

In *Campbell v. Vitran Express, Inc.*, 471 Fed. Appx. 646 (9th Cir. 2012), the Ninth Circuit ruled that federal jurisdiction existed where the plaintiff merely pleaded in the complaint that he was seeking less than $5 million but refused to support that pleading with a judicially binding admission. All of the evidence established damages would exceed $5 million if the plaintiff prevailed. The court emphasized that, in assessing the amount in controversy, the court assumes the plaintiff will establish the alleged liability claims in all respects. Thereafter, the Tenth Circuit held, in *Frederick v. Hartford Underwriters Ins. Co.*, that a proposed class representative's "attempt to limit damages in the complaint is not dispositive when determining the amount in controversy" for purposes of determining the correctness of removal under CAFA. 683 F.3d 1242, 1247 (10th Cir. 2012). A mere

allegation by the plaintiff that the amount in controversy was less than $5 million could not preclude the defendant from proving that the damages might exceed that amount. On the other hand, in *Rolwing v. Nestle Holdings, Inc.*, the Eighth Circuit held that a party's affirmative allegation in his complaint that he "and the class" did not seek and would not accept any damages or other relief "in excess of $4,999,999" was a binding stipulation under Missouri law and thus the plaintiff "has shown it is legally impossible for the amount in controversy in this case to meet CAFA's threshold…." 666 F.3d 1069, 1073 (8th Cir. 2012). Because of the "divergent views of the lower courts," the Supreme Court granted a writ of certiorari. See *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348 (2013). Then, agreeing with the Tenth Circuit, the Supreme Court held that a putative class action plaintiff cannot avoid federal court jurisdiction under CAFA by stipulating not to seek more than $5 million in damages. *Id.* at 1348-49. The district court in *Knowles* found that the "resulting sum" of the claims of all persons within the proposed class "would have exceeded $5 million but for the stipulation" that the plaintiffs would "'not at any time during this case . . . seek damages for the class'" in excess of that amount, in the aggregate. *Id.* at 1347 (quoting App. to Pet. for Cert. 75). Nonetheless, adhering to *Rolwing*, the district court granted remand based on the plaintiffs' stipulation. *Knowles v. Standard Fire Ins. Co.*, No. 4:110-cv-04044, 2011 WL 6013024, at **4-6 (W.D. Ark. Dec. 2, 2011). Thereafter, the Eighth Circuit denied review of the remand order. *Knowles v. Standard Fire Ins. Co.*, No. 11-8030, 2012 WL 3828845, at *1 (8th Cir. Mar. 1, 2012). As a result of this procedural posture, the Supreme Court was reviewing the substance of the district court's reasoning, which was, of course, derived from prior Eight Circuit precedent. Writing through Justice Breyer, the Supreme Court unanimously determined the answer was "simple" – the plaintiff's stipulation could not determine the jurisdictional issue. "That is because a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified." *Standard Fire Ins. Co.*, 133 S. Ct. at 1349. The Court rejected the plaintiff's argument that "CAFA . . . permits the federal court to consider only the complaint that the plaintiff has filed," saying: We do not agree that CAFA forbids the federal court to consider, for purposes of determining the amount in controversy, the very real possibility that a nonbinding, amount-limiting, stipulation may not survive the class certification process. This potential outcome does not result in the creation of a new case not now before the federal court. To hold otherwise would, for CAFA jurisdictional purposes, treat a nonbinding stipulation as if it were binding, exalt form over substance, and run directly counter to CAFA's primary objective: ensuring "Federal court consideration of interstate cases of national importance." §2(b)(2), 119 Stat. 5. It would also have the effect of allowing the subdivision of a $100 million action into 21 just-below-$5 million state-court actions simply by including nonbinding stipulations; such an outcome would squarely conflict with the statute's objective. *Id.* at 1350. In conclusion, the Supreme Court reiterated that the stipulation would "tie [the plaintiff's] hands, but it does not resolve the amount-in-controversy question in light of his inability to bind the rest of the class." *Id.* The Court did not consider the plaintiff's alternative argument that "a stipulation is binding to the extent it limits attorney's fees," thereby precluding CAFA jurisdiction, explaining that the "stipulation did not provide for that option." *Id.* **2. Other issues are decided with respect to the $5 million jurisdictional threshold.** In addition to holding in *Frederick* that the plaintiff's allegations of the amount in

controversy were not dispositive of federal CAFA jurisdiction, the Tenth Circuit further held that such jurisdiction did not exist simply because "punitive damages in some unspecified amount may be possible." 683 F.3d at 1248. The defendant may, however, "point to facts alleged in the complaint, the nature of the claims, or evidence in the record to demonstrate that an award of punitive damages is possible." *Id.* Otherwise, punitive damages cannot be considered in determining whether to remand. The amount in controversy requirement of CAFA was at the bottom of the issue whether the defendant timely removed a proposed class action seeking rescission for over 200 customers of a vehicle financing contract. *Kuxhausen v. BMW Financial Services NA LLC*, 707 F.3d 1136 (9th Cir. 2013). The original complaint simply said that the amount in controversy exceeded $50,000.00. After an amended complaint was filed to add a new class, the defendant removed the case, claiming its business records showed the amount in controversy of the whole case was more than $10 million, but the district court remanded. The Ninth Circuit reversed, declining to hold that "materials outside the complaint start the thirty-day clock" for removal. *Id.* at 1141. "By leaving the window for removal open, it forces plaintiffs to assume the costs associated with their own indeterminate pleadings." *Id.* Because nothing on the face of the complaint showed that the amount in controversy satisfied the requirements of CAFA, the removal clock was not triggered. The court further held that the removal clock did not begin to run when the plaintiff was granted leave to file an amended complaint with a new class along the lines she ultimately did; no such amended complaint had been filed at that time and it might never have been filed. The defendant was not required to take a "blind leap" and file a potentially "baseless notice of removal" before the amended complaint was actually filed. *Id.* at 1142 (citations omitted). More recently, the Eleventh Circuit determined that CAFA's amount in controversy requirements were satisfied and affirmed the denial of a remand. *McGee v. Sentinel Offender Service, LLC*, 2013 WL 2436658 (11th Cir. June 6, 2013). Because the complaint did not plead a specific amount of damages, the court accepted the defendant's declaration of the actual fees it had collected from persons who were convicted of certain violations and under the defendant's supervision. The plaintiff "failed to show or even suggest that these amounts are uncertain, erroneous, or otherwise based on guesswork." The court also refused to consider whether claims to some of the fees might be barred by the statute of limitations, saying that "courts cannot look past the complaint to the merits of a defense that has not yet been established." Finally, at the very end of our period of coverage, the Eighth Circuit waded back into the amount-in-controversy issue again. In *Raskas v. Johnson & Johnson*, the court confronted a remand order arising from three separate putative class-action suits originally filed in Missouri state court. 2013 WL 3198177 (8th Cir. June 26, 2013). The plaintiffs alleged that defendants "violated the Missouri Merchandising Practices Act . . . and conspired with unknown third parties to deceive customers into throwing away medications after their expiration dates, knowing that the medications were safe and effective beyond the expiration date." 2013 WL 3198177, at *1. After defendants removed the class actions, the district court consolidated the plaintiffs' remand motions for purposes of the hearing. After the hearing, the district court remanded the actions, ruling that defendants had not established that the amount in controversy was met. On review, the Eighth Circuit vacated the district court's order. Although plaintiffs argued that defendants' affidavits, which relied upon their sales figures in

Missouri during the relevant time period, were overinclusive (because the plaintiffs were "only attempting to recover damages for the medications wrongfully discarded and replaced," not all sales), the Eighth Circuit disagreed. It ruled that, "'[o]nce the proponent of federal jurisdiction has explained plausibly how the stakes exceed $5 million,'" as Defendants have in this case, "'then the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much.'" 2013 WL 3198177, at *3 (quoting *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir.2008)). 528 F.3d at 986 (internal citation omitted). "Even if it is highly improbable that the Plaintiffs will recover the amounts Defendants have put into controversy, this does not meet the legally impossible standard." 2013 WL 3198177, at *3 **3. More courts consider whether a *parens patriae* suit is a class action, an issue the Supreme Court has agreed to address.** Four circuit courts concluded in 2012 that *parens patriae* suits by a state attorney general were not removable under CAFA. One circuit court held otherwise. The Supreme Court recently agreed to resolve the conflict. Adhering to its prior precedent, the Ninth Circuit once again held that such suits "'lack the defining attributes of true class actions'" and instead simply "'resemble' class actions in the sense that they are representative suits." *State of Nevada v. Bank of America Corp.*, 672 F.3d 661, 667 (9th Cir. 2012) (quoting *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 850 (9th Cir. 2011)). The court further concluded the suit was not removable as a "mass action" because, reading the complaint "as a whole," the State was "the real party in interest in this action." *Id.* at 672. The State had a "sovereign interest in protecting its citizens and economy from deceptive mortgage practices," and the claim for restitution does not alter its "strong and distinct interest" in the lawsuit. *Id.* at 671. Because the State is the real party in interest, the suit did not qualify as a "mass action" removable under CAFA. Thereafter, the Fourth Circuit similarly held that a State's *parens patriae* suit was not removable under CAFA as a class action. *AU Optronics Corp. v. State of South Carolina*, 699 F.3d 385 (4th Cir. 2012). The court adopted the "whole-case approach" and rejected a "claim-by-claim" approach. *Id.* at 391. "That the statutes authorizing these actions in the name of the State also permits a court to award restitution to injured citizens is incidental to the State's overriding interests and to the substance of these proceedings." *Id.* at 394. The court accordingly refused to consider the citizens who might receive restitution and held that CAFA's minimal diversity requirement was not satisfied. Shortly thereafter, in another *parens patriae* case involving AU Optronics, the Fifth Circuit adhered to its prior precedent and held that, although the case was not a class action for purposes of CAFA, it did qualify as a "mass action" under CAFA. See *State of Mississippi v. AU Optronics Corp.*, 701 F.3d 796, 802 (5th Cir. 2012), cert. granted 81 U.S.L.W. 3658 (U.S. May 28, 2013) (No. 12-1036). Explaining that it was required "to pierce the pleadings and look at the real nature of a state's claims so as to prevent jurisdictional gamesmanship," the court concluded that the individuals who purchased the defendants' products had "rights sought to be enforced" in the case. *Id.* at 799-800. Thus, they were real parties in interest along with the State and there accordingly were more than 100 claims at issue in the case, thereby satisfying the CAFA definition of a "mass action." The court then addressed the exceptions to the term "mass action," concluding that only the "general public" exception was relevant. That exception did not apply, however, since "all of the claims" were not asserted on behalf of the public. The court noted its concern that "finding the general public exception inapplicable here may render such

statutory exception a dead letter (because finding a suit to be a mass action negates the possibility of the exception applying), and we welcome congressional clarification of this issue." Id. at 802. The court nevertheless found that this result "must yield to our responsibility to apply the unambiguous, express language of a statute as written." *Id.* One member of the panel concurred in the light of the Fifth Circuit's binding precedent, but wrote to say the Circuit should "reconsider" that precedent and "correct our course in this area of the law." *Id.* at 803. By order dated May 28, 2013, the Supreme Court granted certiorari in *Mississippi v. AU Optronics*, 81 USLW 3494 (U.S. 2013). No action was taken with regard to the petition for certiorari in *AU Optronics v. South Carolina*, presumably because it petition will await the decision in the Mississippi case. Finally, joining the majority of circuits on this issue, the Second Circuit held earlier this year that a state's *parens patriae* suit is not a "disguised" class action removable under CAFA. *Purdue Pharma L.P. v. State of Kentucky*, 704 F.3d 208, 217 (2d Cir. 2013). It concluded that such actions "implicate few if any" of the procedures of a class action, and it declined to "adopt the claim-by-claim approach to unmask the 'class action' lurking underneath." *Id.* at 218. Saying it did not need to "'pierce the pleadings'" any further than it had done, the court noted the Supreme Court's warning that "federal courts should be 'reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it.'" *Id.* at 220 (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 n. 22 (1983)). **4. Exceptions to CAFA.** CAFA has an exception for any class action that "solely involves . . . obligations related to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 . . . and the regulations issued thereunder)." 28 U.S.C. § 1332(d)(9)(C). After complaining that "the wording of the exception (like much of CAFA) does not easily give up its meaning," the Second Circuit went on to say that its precedents establish that this exception precludes CAFA jurisdiction over "claims based either on the terms of the instruments that create and define securities or on the duties imposed on persons who administer securities, while leaving unaffected federal jurisdiction over claims based on rights arising from independent sources of state law." *Blackrock Financial Management Inc. v. Segregated Account of Ambac Assur. Corp.*, 673 F.3d 169, 176 (2d Cir. 2012) (citations and internal quotation marks omitted). The court concluded that the bank's suit to confirm it had authority, as the trustee of trusts holding residential mortgage-backed securities, to settle claims of breach of obligations owed to the trusts by the originator and servicer fell within that exception. Duties could "relate to" securities even though "'they are not rooted in a corporate document but are instead superimposed by a state's corporation law or common law or the relationship underlying that document.'" *Id.* at 179 (quoting *Estate of Pew v. Cardarelli*, 527 F.3d 25, 31 (2d Cir. 2012)). The court made short shift of the defendant's argument that, if the exception applied, the appellate court then lacked jurisdiction to direct the district court to remand the case. It explained that even "where the federal courts no longer have jurisdiction over a case, courts of appeal retain the authority to properly dispose of it." *Id.* at 179. The court accordingly had authority to vacate the order of the district court and require it to remand the case to state court. The "securities" exception also was addressed in *Appel v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609 (7th Cir. 2012). The Seventh Circuit first determined that the Securities Litigation Uniform Standards Act did not bar the suit and did not provide the defendant with a basis for removal. Moreover, the

defendant had "provided a good-faith estimate that plausibly explains how the stakes exceed $5 million." *Id.* at 617. Then, to assure that its jurisdiction was "secure," the court "sua sponte" addressed the "securities" exception to CAFA, even though the plaintiff had not sought remand or asserted this exception. Id. at 619. The court easily found that the exception in subsection (d)(9)(C), which applies to "any security," did not apply, saying the breach of contract alleged with respect to certain fully disclosed charges for the processing and sending of securities transaction receipts was "not material to any security transaction" and, agreeing with Second Circuit precedent, further held that "it is not sufficient that the plaintiff's claim merely relates to a security." *Id.* at 621. The court then addressed "the broader exception in subsection (d)(9)(A), which applies to a class action that 'solely' involves a claim 'concerning a covered security,'" and concluded it did not apply either. *Id.* at 621. The court acknowledged that the word "concerning" has an "expansive meaning and broadly construed could encompass any claim that relates to a covered security or security transaction." *Id.* at 621. That, however, would be contrary to Congress's intent to confer "broad federal court jurisdiction with only narrow exceptions." *Id.* at 621. Quoting the Supreme Court's admonition that "'[a] word in a statute may or may not extend to the outer limits of its definitional possibilities,'" the Second Circuit found it unnecessary to "delineate the outer limits of 'concerning' to find that [plaintiff's] claim doesn't fall within its ambit." *Id.* at 621. That overcharge claim "applies generally to handling, postage and insurance charges that are found in many agreements unrelated to securities transactions" and the "few dollars" at issue "was not important enough to reasonable participants in an investment decision to alter their behavior." *Id.* at 621-22. The Third Circuit, in *Abraham v. St. Croix Renaissance Group*, interpreted the exclusion in CAFA's definition of "mass action" as any action in which, among other things, all of the claims "arise from an event or occurrence in the State in which the action was filed…." 2013 WL 2128539, at *2 (3rd Cir. (Virgin Islands) May 17, 2013) (quoting 28 U.S.C. 1332(d)(11)(B)(ii)(I)). The court concluded that claims by residents against a neighboring landowner for the continuous release of hazardous substances from a single facility over a fixed period of time arose from "an event or occurrence" as used in that definition. The court explained that this phrase does not refer solely to a specific incident that can be definitely limited to an ascertainable period of time. Noting the district court's observation that "'one can speak of the Civil War as a defining event in American history, even though it took place over a four-year period and involved many battles,'" the court declared that "treating a continuing set of circumstances as an 'event or occurrence' for purposes of the mass-action exclusion is consistent with the ordinary usage of those words, which do not necessarily have a temporal limitation." 2013 WL 2128539, at **3, 6. Hence, the court held the suit was not removable. The court also held it had discretionary appellate jurisdiction over the case since, under CAFA's plain "deemer" language, any "mass action" is deemed to be a "class action" for purposes of CAFA's removal provisions. The Seventh Circuit, writing through Chief Justice Easterbrook, addressed the exception in 28 U.S.C. § 1453(d)(2) that says CAFA does not apply to "'any class action that solely involves . . . a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the state in which such corporation or business enterprise is incorporated or organized.'" *LaPlant v. Northwestern*, 701 F.3d 1137, 1138 (7th Cir. 2012). A Wisconsin-only class

action had resulted in a "sweeping decision" by the state court judge declaring that the defendant violated its annuity contracts and its fiduciary duties when it changed the method it used to determine the annual contractual dividends. The state court further declared that the defendant should pay substantial compensatory and punitive damages. The plaintiff then amended his complaint to seek damages for all annuitants in every state. Such a class had previously been denied for a number of reasons, including choice of law provisions in some policies making the law of the annuitants' home state controlling, rather than Wisconsin where the defendant was incorporated and had its headquarters. Upon the amendment enlarging the class, the defendant removed the case under CAFA. The federal district court remanded, ruling the choice-of-law provision were invalid and Wisconsin law controlled the policies in every state. *Id.* at 1139. The district court further ruled that all disputes concerning policies issued by a mutual insurer related to that insurer's internal affairs and thus remand was required. The Seventh Circuit granted the defendant's petition for permission to appeal and vacated the remand order. The Seventh Circuit concluded that the "internal affairs" exception did not apply. The annuitants "are entitled to the full measure of their rights no matter the issuer's financial structure," including under contract and insurance law. *Id.* at 1140. The court further rejected the district court's "startling" conclusion that choice-of-law provisions are invalid in Wisconsin. In pointed final paragraphs, the Seventh Circuit stated that the federal district judges "must determine whether to certify a nationwide class for damages and, having resolved that and any other procedural issue, must decide the case on the merits." *Id.* at 1142. Like the state trial judge, the federal district court was free to consider whether the state court's declaratory judgment was "substantively correct," but also whether the declaratory judgment statute "permits the maneuver by which the class" had sought to avoid the prior determination that a class-wide suit for damages could not be pursued. *Id.* The court ended with the sharp reminder that it would be free on final appeal to review a judgment based on the state court's earlier declaratory judgment. **5. Other issues.** In a case of first impression, the Ninth Circuit addressed CAFA's requirements for attorney's fees awards in "coupon" cases. Those requirements had been imposed "to put an end to the 'inequities' that arise when class counsel receive attorneys' fees that are grossly disproportionate to the actual value of the coupon relief obtained for the class." *In re HP Inkjet Printer Litigation*, 2013 WL 1986396, at *4 (9th Cir. May 15, 2013). The one thing the majority of the panel and their "dissenting colleague" agreed on was that this attorney fees provision was, like various other provisions of CAFA, "poorly drafted…." 2013 WL 1986396, at *5. Then, however, the majority concluded, based on the provision's plain language, that, in cases where the only relief to the class is coupons, the attorney's fees for class counsel cannot be calculated under the lodestar method and must instead be based on the redemption value of the coupons awarded to the class. As the court put it, "[p]laintiffs attorneys don't get paid simply for working; they get paid for obtaining results." 2013 WL 1986396, at *6. In an appeal challenging the approval of a class action settlement for "Soggy Plaintiffs," whose plumbing systems had already leaked, and "Cloggy Plaintiffs," whose systems had not yet leaked, the Eighth Circuit held that the settlement notice to state attorneys general "meaningfully complied with CAFA, and that the 'merely technical or formal' error does not warrant reversal here." *In re Uponor, Inc., F1807 Plumbing Fittings Products Liability Litigation*, 2013

WL 2450138, *6 (8th Cir. June 7, 2013). The court noted that each state attorney general received timely notice of the settlement, including a number of relevant documents, and that none of them objected to the settlement. Other CAFA issues were addressed by the appellate courts as well. The Sixth Circuit joined a majority of courts holding that a third-party defendant cannot remove a case under the plain language of CAFA. *In re Mortgage Electronic Registration Systems, Inc.*, 680 F.3d 849, 854 (6th Cir. 2012). In an unpublished decision in *Ellison v. Autozone Inc.*, the Ninth Circuit vacated the district court's remand of a case for the lack of jurisdiction after the class action claims in the case were either severed and transferred or voluntarily severed dismissed. 486 Fed. Appx 674 (9th Cir. 2012). The court cited its prior precedent holding that where "jurisdiction was proper at the time of removal, subsequent dismissal or transfer of class claims does not defeat the court's CAFA jurisdiction over remaining individual claims." *Id.* at 675. CAFA jurisdiction was avoided in *Abrahamsen v. Concocophillips, Co.*, by the single device of dividing up the plaintiffs who sued for injuries while working in the North Sea for Conoco, so that each group of plaintiffs had less than 100 persons. 503 Fed. Appx. 157 (3d Cir. 2012). "Despite the similarities of their claims, Plaintiffs did not propose to try their claims jointly." *Id.* at 160. And, CAFA expressly excludes suits in which "the claims are joined upon motion of a defendant." 28 U.S.C. § 1332(d)(11)(B)(ii)(II). On the other hand, in *In re Abbott Laboratories, Inc.*, the Seventh Circuit resolved conflicting district court decisions and held that a motion to consolidate state court cases before one judge through trial constituted "a proposal to try the cases jointly, thus triggering the 'mass action' provision" of CAFA. 698 F.3d 568, 570 (7th Cir. 2012). Although the motion did not explicitly request a joint trial, "a proposal for a joint trial can be implicit, particularly where the assumption would be that a single trial was intended.'" 698 F.3d at 573. The court further noted that "a joint trial can take different forms as long as the plaintiffs' claims are being determined jointly." 698 F.3d at 573. **Conclusion** It is an active time for class action jurisprudence generally and CAFA jurisprudence specifically. Although CAFA jurisprudence seems to be shaking out among the circuit courts of appeals, there are still pockets of disagreement and hard issues with which to grapple. And it appears that the Supreme Court is keeping a close eye on class action developments nationwide. It should be interesting to watch the coming year in CAFA jurisprudence unfold.

Authored By

Joseph H. Lang Jr.

Sylvia H. Walbolt

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