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Effective Discovery Strategies in Class-Action Litigation

By David R. Singh and Gaspard Curioni – May 26, 2014

Discovery in class-action litigation is notoriously asymmetric. While a corporate defendant may have hundreds of thousands or millions of potentially relevant documents dispersed geographically and across a range of systems, the putative class representative is likely to have a relatively small number of responsive documents, which can be collected and produced with little burden or expense. Accordingly, corporate defendants in class actions are vulnerable to attempts by plaintiffs to propound extremely broad discovery requests, in the hopes that driving up the expense of the litigation will force the defendant to settle regardless of the merits of the case (or the lack thereof).

Discovery Stays Pending Motions to Dismiss

At the start of a putative class action, defense counsel should consider seeking a stay of discovery while a motion to dismiss is pending. Courts stay discovery at their discretion, *see* Fed. R. Civ. P. 26(c)(1)(A), usually by balancing the relative harms between plaintiffs and defendants. *See, e.g.*, *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120, 1996 WL 101277, at *2–3 (S.D.N.Y. Mar. 7, 1996). The balance of harms should typically tilt in a defendant's favor. On the one hand, the harm to the defendant is likely to be significant. Discovery costs are potentially immense in class actions given, among other things, the costs associated with collecting and reviewing electronic information, the storage of electronic information across a multitude of systems, the dispersal of hard documents in different sites in various geographies (including potentially overseas), the need to retrieve documents from offsite storage, and the need to collect documents related to thousands or millions of transactions. Defendants should not be subjected to these significant expenses if the putative class-action complaint is unlikely to survive a motion to dismiss. On the other hand, the harm to the named plaintiff is often only slight. Discovery is typically unnecessary to decide a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), and the risk of spoliation of potentially relevant documents is usually remote and easily avoidable with an appropriate document-preservation order. Furthermore, where a class action challenges a long-standing business act or practice, rather than newly implemented conduct, a plaintiff generally cannot justify a sudden and urgent need for discovery.

Limits on the Scope of Precertification Discovery

If the court refuses to stay discovery or denies the motion to dismiss, defense counsel should consider attempting to limit the scope of precertification discovery to class-certification issues. Bifurcation between merits and class-certification discovery often creates efficiencies. In the typical class action, merits discovery requires a defendant to produce tens of thousands of pages of documents and make dozens of witnesses available for depositions. This is, of course, costly. A corporate defendant should argue that it should only have to bear this significant expense if the suit is viable as a class action; that is, only once it has been certified. *See Manual for Complex Litigation (Fourth)* § 21.14 (2004). Merits discovery, moreover, could delay the certification

decision, contravening the requirement that a class-certification determination be made at "an early practicable time." Fed. R. Civ. P. 23(c). Aside from efficiency considerations, bifurcation is also fairer to defendants. Onerous merits discovery may pressure defendants to settle even if plaintiffs' allegations lack merit. Cases where the defendant has strong arguments against class certification, therefore, are good candidates for bifurcation. *See Manual* § 21.14; *Gonzales v. PepsiCo, Inc.*, No. 06-2163, 2007 WL 1100204, at *3 (D. Kan. Apr. 11, 2007).

Shifting Precertification Discovery Costs

Defense counsel should also consider seeking to shift precertification discovery costs to the plaintiff. In *Boeynaems v. LA Fitness International, LLC*, a federal district court held that cost shifting was warranted in certain putative class actions. 285 F.R.D. 331, 334–35, 341 (E.D. Pa. 2012). The plaintiffs in that case had signed up to join a health club but allegedly encountered obstacles when they sought to terminate their membership. They filed a putative class action and propounded extremely broad and burdensome discovery requests on the defendant. In the court's assessment, the parties faced "asymmetrical" discovery burdens: The plaintiffs had "very few documents" compared with the defendant's "millions of documents and millions of items of electronically stored information." If the plaintiffs had their way, the defendant would bear the brunt of "[v]irtually all" of precertification discovery at a cost that constituted "a significant factor in the defense of the litigation." As the court observed, although a responding party usually bears the costs of discovery requests, the court can shift the costs to the plaintiffs if the requests are unduly burdensome. Applying this principle to the putative-class-action context, the court held that cost shifting is proper in cases where (1) "class certification is pending," and (2) the discovery requests are "very extensive" and "very expensive," unless there are "compelling equitable circumstances to the contrary." In reaching this conclusion, the court reasoned that "*discovery burdens should not force either party to succumb to a settlement that is based on the costs of litigation rather than the merits of the case*." *Id.* at 342 (emphasis added). The court also discussed the economic pressures faced by class-action defendants. In the instant case, because the defendant had "borne all of the costs of complying with Plaintiffs' discovery to date," the court ruled that the plaintiffs should pay for any "additional discovery." Accordingly, there is persuasive precedent for shifting the cost of precertification discovery to the plaintiff. At the very least, the precedent provides a credible basis for threatening to file a cost-shifting motion if the plaintiff does not withdraw or narrow his or her unreasonable discovery requests. *See also Schweinfurth v. Motorola, Inc.*, No. 1:05CV0024, 2008 WL 4449081, at *2 (N.D. Ohio Sept. 30, 2008) (splitting precertification discovery costs evenly between the parties).

Precertification *Daubert* Challenges

It has become increasingly common for plaintiffs to proffer expert testimony at the class-certification stage to establish that the requirements of Rule 23 have been satisfied. Even where the expert's report overlaps with the merits of the case (such that the expert is likely to submit another report during the merits stage of the case), defense counsel should not wait to challenge the admissibility of the expert's testimony. If the defendant does not act, the plaintiff may argue that the defendant has waived its right to challenge the admissibility of the testimony under Federal Rule of Evidence 702. Keep in mind, however, that the standard for testing expert

reliability at the class-certification stage remains unsettled. Some circuits require a full-blown *Daubert* analysis on the view that expert testimony leading to certification could be outcome-determinative: Once a class is certified, defendants are under intense pressure to settle. *See Sher v. Raytheon Co.*, 419 F. App'x 887, 890–91 (11th Cir. 2011); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815–16 (7th Cir. 2010). Other circuits arguably require a more focused *Daubert* test on the theory that reliability is a function of the available information and that experts have access to limited information at the certification stage. *See Cox v. Zurn Pex, Inc.*, 644 F.3d 604, 612–14 (8th Cir. 2011). The Supreme Court has left this circuit split unresolved, but has suggested in dicta that a full-blown *Daubert* analysis may be required. *See Comcast v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011). Given the unsettled state of the law, and the logic of not certifying a class based on unreliable expert testimony, defense counsel should argue that rigorous analysis of certification issues requires a thorough assessment of experts' reliability akin to a full-blown *Daubert* inquiry. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2009).

Limiting Discovery Concerning Unnamed Class Members

In an attempt to impose a burden on defendants and/or to recruit new or additional plaintiffs, plaintiff's counsel often seek discovery about unnamed class members. Defense counsel should counter such attempts. The rules for discovery of unnamed class members are stricter than the general discovery regime: The named plaintiff must demonstrate that the information is needed for certification. *Manual* § 21.14. Further, discovery may be limited to "a certain number or a sample of proposed class members." Additionally, subject to the First Amendment, courts may limit communications from plaintiff's counsel with potential class members to prevent abuse and ethical violations. *See Hauff v. Petterson*, No. 1:09-cv-00639, 2009 WL 4782732, at *32 (D.N.M. Dec. 11, 2009). Some courts have gone further and restrained plaintiffs from discovering information from defendants *about* potential class members to protect privacy rights. Under the opt-in approach, plaintiffs cannot obtain information relating to unnamed class members from defendants unless the concerned individuals consent. *Best Buy Stores, L.P. v. Superior Court*, 40 Cal. Rptr. 3d 575, 577 (Cal. Ct. App. 2006). Under the opt-out approach, the presumption is reversed: The plaintiff may obtain information about unnamed class members unless the latter object. *Pioneer Elecs. (USA), Inc. v. Superior Court*, 150 P.3d 198, 205–6 (Cal. 2007). Either approach is more protective than the unchecked release of private customer information.

Targeted Precertification Depositions

Depositions of named plaintiffs at the certification stage give defendants an early opportunity to discover facts that undermine the plaintiffs' theories of class-wide harms. In deciding whom to depose first, defense counsel should target the "weakest links" to lock in damaging testimony before plaintiff's counsel have had an opportunity to coach witnesses and adjust their legal theories. Identifying promising targets might require running background checks on the named plaintiffs, retrieving their consumer records, and sweeping social media for damaging comments. Factors to consider include the named plaintiff's criminal record, the existence of class-action waivers (common in credit-card agreements and online terms of use), the named plaintiff's

public comments on the pending litigation, and whether the named plaintiff is a serial litigant or is related personally or professionally to plaintiff's counsel (as is often the case because consumer class actions are often driven by plaintiff's counsel, who conceive of a legal theory and then recruit individuals to serve as class representatives to prosecute them). Priority should be given to taking early depositions in the cases in which the stakes are the highest.

Conclusion

Discovery stays, motions to bifurcate, and cost-shifting motions are powerful tools for reducing discovery costs in putative class actions and forcing a resolution that is reflective of the merits of the case, rather than the cost of litigation. At the same time, it is often well worth the investment to take some focused discovery early, including by taking targeted depositions; to expose the weakness of the plaintiff's case (and thereby influence the settlement dynamic); and to oppose class certification. By incorporating defensive and offensive elements into their discovery strategy, defense counsel can lay the foundation for timely, fair, and cost-efficient resolution of a putative class action.

Keywords: litigation, corporate counsel, class action, discovery stay, cost shifting, *Daubert* challenge

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Strategies for Removal under the Class Action Fairness Act

By Wystan Ackerman – May 26, 2014

Removal to federal court under the Class Action Fairness Act (CAFA) requires swift action upon receipt of a new class-action complaint filed in state court. If corporate counsel does not begin internal research promptly, it may become difficult or even impossible to obtain the information needed for removal in time (except in the Ninth Circuit). Determining whether a case is removable and gathering the information needed to demonstrate the amount in controversy and any other pertinent facts often require substantial effort.

My hope is that this article can serve as a quick guide to removal under CAFA and the key recent decisions, although I can't cover the entire landscape in a few pages.

Is the Case Clearly Not Removable?

The first step in removing a case is to determine whether the case is in fact removable. A case is removable if there is minimal diversity of citizenship, i.e., the putative class is strictly limited to citizens of a state where the defendant is also a citizen. 28 U.S.C. § 1332(d)(2)(A). There is one twist here unique to CAFA—an unincorporated association is a citizen only of the state where it has its principal place of business and under whose laws it is organized. 28 U.S.C. § 1332(d)(10). It's important to read the class definition very carefully. Keep in mind that people who purchased a product or service or own property in one state may be citizens of another state. If you have fewer than 100 class members, there is also no jurisdiction under CAFA. 28 U.S.C. § 1332(5)(B). But unless the case involves a very expensive product or service, a class of fewer than 100 is likely to present a small exposure.

If one of the defendants is sued in its home state (where it is incorporated or has its principal place of business), that might preclude CAFA jurisdiction. A federal court is required to decline jurisdiction where more than two-thirds of the members of the class are citizens of the state where suit was filed, the "primary defendants" are citizens of that state, and the principal injuries alleged occurred in that state. The court is also required to decline jurisdiction in the same circumstances if there is a "significant" defendant who is a citizen of the state where suit is brought, and during the preceding three years there has not been another class action filed asserting the same or similar allegations against any of the defendants. *See* 28 U.S.C. § 1332(d)(4). The court also has discretion to decline jurisdiction where more than one-third but less than two-thirds of the class members and the "primary defendants" are citizens of the forum state. (There is a set of criteria to be considered.) 28 U.S.C. § 1332(d)(3). There is also no jurisdiction under CAFA if the "primary defendants" are states or state officials. 28 U.S.C. § 1332(d)(5)(A). Determining the "primary defendant" or "significant defendants" is fact-intensive. But don't give up on these grounds too easily where plaintiffs are trying to game the system to avoid federal court.

CAFA also does not apply if the case solely involves certain types of securities-law claims, or if it solely relates to the internal affairs or governance of a corporation or other business enterprise,

and arises under the laws of the entity's state of incorporation or organization. 28 U.S.C. § 1332(d)(9).

Is the $5 Million Amount in Controversy Satisfied?

Many disputes over CAFA jurisdiction center on whether the $5 million amount-in-controversy threshold is met. This is measured by the maximum amount that the putative class could potentially recover, in the aggregate, based on the allegations. The allegations should be assumed to be true, and defenses do not matter. A plaintiff's allegation or stipulation that the amount sought is below $5 million is irrelevant, as the Supreme Court held in its first CAFA case (in which I represented the defendant), *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013).

Keep in mind that the plaintiff cannot alter the allegations after removal to attempt to reduce the amount in controversy and thereby avoid federal jurisdiction. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 292 (1938). To avoid the possibility that the plaintiff will voluntarily dismiss the case and refile it in state court with allegations designed to reduce the amount in controversy and avoid federal jurisdiction, you may want to file an answer simultaneously with your notice of removal. *See Thatcher v. Hanover Ins. Group, Inc.*, 659 F.3d 1212 (8th Cir. 2011).

Most circuits have held that the defendant bears the burden of proof, by a preponderance of the evidence, that the amount in controversy is satisfied. Some formulations of this test are quite favorable to defendants, such as the statement by the Seventh and Eighth Circuits that "[o]nce the proponent of federal jurisdiction has explained plausibly how the stakes exceed $5 million . . . then the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much." *Raskas v. Johnson & Johnson*, 719 F.3d 884, 888 (8th Cir. 2013) (quoting *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008)). Although the Third and Ninth Circuits had previously required the defendant to establish the amount in controversy to a legal certainty, last year the Ninth Circuit held that *Knowles* effectively overruled its prior precedent. The Ninth Circuit then adopted a preponderance standard. *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975 (9th Cir. 2013).

Precision in the calculation of the amount in controversy is not required, and a good-faith estimate should be sufficient. When the calculation potentially will be a close call, it is important to examine every cause of action and all categories of damages potentially available thereunder. Even if punitive damages are not requested in the complaint, courts have held that they can be considered in determining the amount in controversy if they are potentially available based on the allegations made. There may not need to be a fraud claim, for example, if there are allegations sounding in fraud. *See, e.g., Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 831 (7th Cir. 2011); *Knowles v. Standard Fire Ins. Co.*, 2013 U.S. Dist. LEXIS 108822, at *27–31 (W.D. Ark. Aug. 2, 2013). Attorney fees typically can be included in the amount in controversy, although in some circuits the attorney fees must be potentially available by statute or contract. Monetary value also usually can be given to claims for declaratory or

injunctive relief, as confirmed by a recent Eleventh Circuit decision. *South Fla. Wellness, Inc. v. Allstate Ins. Co.*, No. 14-10001, 2014 U.S. App. LEXIS 2787 (11th Cir. Feb. 14, 2014).

Also consider whether the plaintiffs have filed multiple class actions for separate time periods or used an unnatural class definition (shorter than the statute of limitations) for purposes of trying to reduce the amount in controversy below $5 million. The Sixth Circuit has held that divvying up class actions to avoid CAFA is improper. *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405 (6th Cir. 2008). At oral argument in *Knowles*, Chief Justice Roberts, Justice Breyer, and Justice Ginsburg appeared to suggest that dividing up class members by last names or using a shortened class period would be improper. In his opinion for the Court, Justice Breyer wrote that subdividing a $100 million class action into 21 just-below-$5 million cases "would squarely conflict with the statute's objective." *Knowles*, 133 S. Ct. at 1350. Keep that in mind if you are faced with a complaint that is carefully and artificially framed to try to keep the amount in controversy below $5 million.

Is the Case a "Mass Action"?

In addition to providing jurisdiction over class actions, CAFA also extends jurisdiction over a "mass action," defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact. . . ." 28 U.S.C. § 1332(d)(11)(B)(i). But jurisdiction does not exist where (1) the claims are joined on a defendant's motion, (2) all of the claims arise from an event in the state where the action was filed, (3) the claims are asserted on behalf of the general public pursuant to a state statute authorizing such an action, or (4) the claims are consolidated or coordinated solely for pretrial proceedings. *Id.* § 1332(d)(11)(B)(ii).

Importantly, "mass action" jurisdiction exists only over those plaintiffs who have claims with an amount in controversy exceeding $75,000. *Id.* § 1332(d)(11)(B)(i); *see also Hood ex rel. Miss. v. JP Morgan Chase & Co.*, 737 F.3d 78, 86 (5th Cir. 2013) (requiring for removal a showing that at least one plaintiff have a claim over $75,000). So for cases involving small claims, this provision of CAFA won't be of help.

One issue that was hotly contested and recently resolved was whether a state attorney general's *parens patriae* suit could be removed as a "mass action." In *Mississippi ex. rel Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), the Supreme Court held that a suit filed by the Mississippi attorney general, in the name of the state, was not a "mass action" under CAFA, even though it included a claim for restitution based on injuries suffered by numerous Mississippi citizens who were not parties to the case. The court held essentially that the "mass action" provision applies only to suits involving 100 or more *named* plaintiffs (as opposed to unnamed parties with an interest). The Court rejected the Fifth Circuit's view that "mass action" jurisdiction should depend on who the real parties in interest are. This decision is likely to largely shift the jurisdictional playing field in state-attorney-general litigation to disputes over whether the suit qualifies as a "class action" because it is brought under a state statute (or rule) that is sufficiently similar to Federal Rule 23 to qualify as a "class action" under CAFA. *See*

Brown v. Mortg. Elec. Registration Sys., Inc., 738 F.3d 926, 931 (8th Cir. 2013) (construing action as a "class action" under CAFA because state-court procedure was similar to a class action).

Another question that has been hotly litigated is under what circumstance cases are "proposed to be tried jointly" within the meaning of CAFA's "mass action" provision. A recent Tenth Circuit decision held that plaintiffs can avoid "mass action" jurisdiction by filing separate suits in the same state court, each of which had fewer than 100 plaintiffs, and expressly stating that they were not requesting a joint trial. *Parson v. Johnson & Johnson*, 2014 U.S. App. LEXIS 6762, *9–15 (10th Cir. Apr. 11, 2014); *see also Scimone v. Carnival Corp.*, 720 F.3d 876, 881–84 (11th Cir. 2013). However, where plaintiffs' counsel has implicitly requested a joint trial by requesting assignment to a single judge and suggesting a bellwether or joint trial, courts have found removal appropriate. *Atwell v. Boston Sci. Corp.*, 740 F.3d 1160, 1165–66 (8th Cir. 2013); *In re Abbott Labs., Inc.*, 698 F.3d 568, 573 (7th Cir. 2012). If the state court itself orders a joint trial or bellwether trial, you may be able to remove the case at that point. CAFA does not have a one-year limitation on removal. *See* 28 U.S.C. § 1453(b).

What Evidentiary Support Is Necessary for Removal?

The Supreme Court recently granted certiorari to decide whether a defendant must include evidence supporting federal jurisdiction in its notice of removal. *See Dart Cherokee Basin Operating Co., LLC v. Owens*, No. 13-719 (cert. granted Apr. 7, 2014). In that case, the district court refused to consider evidence presented by the defendant concerning the amount in controversy, when the evidence was presented in an opposition to a motion to remand, because the evidence had not been attached to the defendant's notice of removal. A panel of the Tenth Circuit denied permission to appeal under CAFA (*see* 28 U.S.C. § 1453(c), which allows discretionary appeals of remand orders). An equally divided panel of the Tenth Circuit denied rehearing en banc. Judge Hartz wrote a persuasive dissent from the denial of rehearing en banc, explaining that, under 28 U.S.C. § 1446(a), a notice of removal must contain "a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." The removal statute does not require that evidence be attached to or accompany a notice of removal. Judge Hartz also cited Federal Rule of Civil Procedure 8(a)(1), which provides that a pleading contain "a short and plain statement of the grounds for the court's jurisdiction. . . ." *See Dart Cherokee Basin Operating Co., LLC v. Owens*, 730 F.3d 1234, 1234–39 (10th Cir. 2013) (Hartz, J., dissenting). I could be wrong, but I expect that the Supreme Court will agree with Judge Hartz. This will lighten the burden on defendants in preparing their notices of removal under CAFA. Substantial work will still need to be done, however, to develop the factual basis for the allegations that need to be made in the notice of removal.

How Much Time Is There to File a Notice of Removal?

The removal statute requires that a notice of removal be filed "within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. . . ." 28 U.S.C. § 1446(b)(1). The

Supreme Court has held that this deadline is not triggered by receipt of a "courtesy copy" of a complaint, but only by formal service of process. *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347–48 (1999). The removal statute further provides that "if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3).

Cautious defendants have removed cases under CAFA within 30 days of service of process, assuming that they were obligated to do whatever internal work was necessary to ascertain the amount in controversy within the 30-day period. But the Ninth Circuit recently held that a defendant can remove a case outside the 30-day period, based on its own investigation of the amount in controversy, where the complaint and other documents received from the plaintiffs do not demonstrate on their face that the case is removable. In the Ninth Circuit's view, the defendant's investigation is not required to be performed (at least preliminarily) within the first 30 days after service of the complaint. *Roth v. CHA Hollywood Med. Ctr., L.P.*, 720 F.3d 1121 (9th Cir. 2013); *see also Rea v. Michaels Stores Inc.*, 742 F.3d 1234 (9th Cir. 2014). Notwithstanding the Ninth Circuit's decision, I expect that defendants are likely to continue to remove cases within the initial 30-day period to achieve a federal forum quickly, and because other circuits (or the Supreme Court) might disagree with the Ninth Circuit's view.

Keywords: litigation, corporate counsel, CAFA, Class Action Fairness Act, removal, *Knowles*

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Navigating CAFA Removal and Remand Strategies

By Jennifer L. Gray – May 26, 2014

In the wake of the U.S. Supreme Court's decision last year in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), federal-circuit and district-court decisions concerning removal and remand under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d), have exhibited an interesting dichotomy. Some courts have adhered to the legislative-intent-focused underpinning of *Knowles*, while othershave embraced a strict, textual approach. Generally, decisions involving how the amount in controversy is calculated for class-action removal have expanded the scope of CAFA jurisdiction, while decisions involving the requirements for mass-action removal have narrowed the scope of CAFA jurisdiction. In the mass-action cases, courts have exhibited a reluctance to permit removal where doing so appears inconsistent with a strict textual reading of CAFA provisions, even when the result is inconsistent with CAFA's goals of ensuring federal-court consideration of nationwide litigation.

Knowles held that a class-action plaintiff could not avoid CAFA removal by stipulating that the amount in controversy was below the CAFA threshold of $5 million. Prior to *Knowles*, courts were split as to whether such stipulations were effective to defeat CAFA removal. The Supreme Court held that because a putative class member has no power to bind absent class members prior to the certification of a class, a stipulation is not effective in establishing the amount in controversy and therefore could not provide a basis to avoid CAFA jurisdiction. The Court explained that its decision was grounded in the legislative intent behind CAFA—to expand federal jurisdiction over class actions. The Court cautioned against "treat [ing] a nonbinding stipulation as if it were binding, exalt[ing] form over substance, and run[ning] directly counter to CAFA's primary objective: ensuring federal court consideration of interstate cases of national importance." *Knowles*, 133 S. Ct. at 1350 (internal quotation marks omitted).

In the wake of *Knowles*, courts have generally moved away from strict requirements regarding proof of the amount in controversy, favoring more lenient standards consistent with *Knowles*'s focus on CAFA's legislative intent. For example, the several courts that have had the occasion to consider the burden-of-proof standard for establishing the amount in controversy have acknowledged that a rigid requirement of proving damages to "a legal certainty" is inconsistent with *Knowles*.

In *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975 (9th Cir. 2013), for example, the Ninth Circuit reviewed a remand order entered prior to *Knowles*, that had been based on a stipulation that damages sought were below the CAFA threshold. In light of *Knowles*, the Ninth Circuit reversed and remanded as the stipulation plainly ran afoul of the holding in *Knowles*. The Ninth Circuit used that opportunity to address the burden-of-proof standard in light of *Knowles*, an issue the Supreme Court had left open. Existing Ninth Circuit precedent required that a defendant opposing remand establish the amount in controversy to a legal certainty. The Ninth Circuit viewed that standard as inconsistent with *Knowles*, and held that a defendant need only prove the amount in controversy by a preponderance of the evidence. *See also Rea v. Michael's*

Stores, 742 F.3d 1234 (9th Cir. 2014) (reversing remand in light of *Rodriguez v. AT&T Mobility* where district court had improperly applied the burden of proof for establishing amount in controversy); *Cutrone v. MERS*, No. 14–455, 2014 WL 1492715 (2d Cir. Apr. 17, 2014) ("[R]removal clocks" under CAFA not triggered until the plaintiff serves the defendant with an initial pleading or other document that explicitly specifies the amount of monetary damages sought or sets forth facts from which an amount in controversy in excess of $5 million can be ascertained). *Cf. Perritt v. Westlake Vinyls Co.*, No. 14–30145, 2014 WL 1410256 (5th Cir. Apr. 15, 2014) (defendant failed to meet preponderance-of-evidence standard where the defendants failed to provide a "reliable metric" for determining the nature and extent of the plaintiffs' damages).

In another favorable decision for defendants, the Eleventh Circuit recently held that the amount-in-controversy requirement could be established where a demand for relief is framed in terms of declaratory judgment rather than monetary damages. In *South Florida Wellness v. Allstate Insurance Co.*, No. 14-10001, 2014 WL 576111 (11th Cir. Feb. 14, 2014), the plaintiff, a medical center, asserted that the defendants had underpaid claims by approximately $68 million—the difference between the formula for reimbursement that the defendant insurance company had used and the formula the plaintiffs asserted should have been used. The defendants removed the case. In response, the plaintiffs argued that because it wasn't directly seeking money damages, it would be "too speculative" to value the declaratory relief at issue as exceeding CAFA's $5 million threshold because not every class member would necessarily file the claims required to collect on the declaratory judgment. The Eleventh Circuit rejected the plaintiffs' contention that because additional action would need to be taken after the suit to convert the judgment into dollars, the amount in controversy was too speculative to support removal. The court also held that the relevant inquiry in determining the amount in controversy is "how much will be put at issue." The Eleventh Circuit also reaffirmed that "the value of injunctive or declaratory relief is the value of the object of the litigation measured from the plaintiff's perspective." *Id.* (internal citations omitted).

South Florida Wellness should be helpful to defendants in removing not only cases that expressly seek declaratory relief but also those in which the plaintiff argues that the defendant's amount-in-controversy calculation is erroneous or too speculative. The Eleventh Circuit reaffirmed that CAFA's amount-in-controversy requirement turns on the *maximum potential* value of the claims as of the date of removal.

Notwithstanding the recent rulings that appear to expand CAFA jurisdiction, many courts have adopted a strict textual approach when the dispute turns on other CAFA removal requirements. Adhering to the axiom that plaintiffs are the masters of their complaints, courts have allowed plaintiffs, in some cases, to avoid CAFA removal even where cases have been structured in illogical and inefficient ways for the obvious purpose of avoiding removal. One example of these types of cases is actions brought by state attorneys general or private citizens pursuant to state laws that allow *parens patriae* suits. In a number of such cases, defendants had argued that these actions were filed on behalf of classes of citizens to recover damages on their behalf, and in

every way functioned as class actions. Circuit courts were split as to whether such suits should be considered class or mass actions for CAFA removal purposes. The U.S. Supreme Court recently weighed in. In *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), the Court held that such *parens patriae* actions do *not* qualify as mass actions under CAFA. CAFA generally permits removal of mass actions where the claims of "100 or more persons are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)). In *Mississippi ex rel. Hood v. AU Optronics Corp.*, the Supreme Court held that this language refers to named plaintiffs only and does not encompass unnamed persons who are real parties in interest. 134 S. Ct. at 737. Construing "plaintiffs" to include unnamed real parties in interest would stretch the meaning of "plaintiff" beyond its common understanding as a party who brings a civil suit. *Id. See also Bauman v. Chase*, 2014 WL 983587 (9th Cir. Mar. 6, 2014) (extending this analysis to cases filed by nongovernment plaintiffs suing in a *parens patriae* capacity.). *Cf. Addison Automatics, Inc. v. Hartford Cas. Ins. Co.*, 731 F.3d 740 (7th Cir. Oct. 2013) (upholding CAFA removal where plaintiff sued in individual capacity but only had standing as a class representative and thus was effectively suing on behalf of a class).

Relying on courts' strict adherence to CAFA terms regarding the number of plaintiffs bringing a mass action, a common tactic by the plaintiffs' bar to avoid CAFA removal is to subdivide a large group of plaintiffs into multiple subgroups—each with fewer than the minimum 100 required for mass-action removal—and to file identical complaints for each subgroup. The plaintiffs also avoid or deny any admission that the cases will be tried together—another key element for mass-action removal. Courts have generally permitted these tactics to preclude removal.

Scimone v. Carnival Corp., 720 F.3d 876 (11th Cir. 2013), illustrates this tactic. This case involved the cruise ship *Costa Concordia*, which sank off the coast of Italy. Passengers sued the cruise line and new plaintiffs were added to the complaint as they were identified. Eventually, 104 plaintiffs were identified. Rather than amend the complaint to add the final group—which would have put the number of plaintiffs over the CAFA removal threshold—the initial plaintiffs dismissed their complaint and filed two new suits. The new complaints were identical except that one was filed by plaintiffs whose names started with the letters A–L and the second by plaintiffs with names starting with M–Z. In some cases, spouses or family members were split apart into different actions. The defendants attempted to remove on the grounds that, taken together, the two complaints satisfied CAFA. The Eleventh Circuit disagreed, reasoning that the plaintiffs did not claim that they intended to try to cases jointly. In fact, they had asserted the opposite—that they intended to try the two batches of related claims in two separate trials. Nor had the court consolidated the two actions. CAFA does not allow the defendant to create jurisdiction by proposing a single joint trial. Thus, because there was no express request for a single trial, no CAFA jurisdiction existed.

The Ninth Circuit reached a similar conclusion in *Romo v. Teva Pharmaceuticals*, 731 F.3d 918, 921 (9th Cir. 2013). There, the plaintiff's counsel divided the products-liability claims of more than 1,500 individuals into 41 separate lawsuits, with no case exceeding 100 plaintiffs. The

plaintiffs had filed a motion to "coordinate the lawsuits for all purposes," pursuant to a California procedural rule that allowed for such coordination. The defendants attempted to remove on the grounds that the plaintiffs' petition to coordinate the cases effectively increased the number of plaintiffs above 100. On appeal to the Ninth Circuit, the key issue was whether the plaintiffs had proposed that their claims be "tried jointly." The defendants argued that the petition to coordinate was tantamount to a request for a joint trial because the California rule relied on expressly contemplated that coordinated cases would continue through trial before a single judge. The Ninth Circuit disagreed, finding that because there had been no express request for a joint trial, CAFA jurisdiction did not exist. One judge dissented on the grounds that the plaintiffs had clearly demonstrated an intent to try the cases jointly by seeking coordination of the cases and justifying their request by asserting a need to avoid inconsistent judgments. The dissenting judge warned that the panel's decision effectively amounts to a rule that plaintiffs must expressly request a single joint trial to trigger removal under CAFA and provides a very clear and simple road map for plaintiffs to avoid CAFA removal. The Ninth Circuit subsequently granted en banc review of this decision.

Recently, in *Parson v. Johnson & Johnson*, Nos. 13–6287, 2014 WL 1399750 (10th Cir. Apr. 11, 2014), the Tenth Circuit was faced with a similar fact pattern and reached the same conclusion. The court affirmed the remand of 11 identical cases involving 702 plaintiffs asserting claims against a medical-device manufacturer. The complaints each contained language stating that the claims within the complaint would be consolidated for pretrial and discovery purposes, but the complaints also contained express disclaimers of any request that the claims be jointly tried. Citing *Scimone* and *Romo*, among other cases, the court observed that in none of these cases had other courts found that a proposal for a joint trial was present solely because the plaintiffs had filed multiple cases each containing fewer than 100 plaintiffs. In accord with these cases, the Eleventh Circuit held that because there was no request for a joint trial, remand was proper. *Accord Abrahamsen v. ConocoPhillips*, Co., 503 F. App'x 157, 160 (3d Cir. 2012); *Anderson v. Bayer Corp.*, 610 F.3d 390, 392 (7th Cir. 2010); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 950–51 (9th Cir. 2009).

Not all courts have taken such a literal approach to mass-action removal. In *Atwell v. Boston Scientific*, 740 F.3d 1160 (8th Cir. 2013), the Eighth Circuit confronted a fact pattern similar to those in cases discussed above. The plaintiffs had subdivided a mass action into three separate cases and moved to consolidate the cases before one judge. The plaintiffs indicated that they intended to select a bellwether case to try and argued that assignment to a single judge was necessary to avoid "conflicting pretrial rulings," but the plaintiffs had not specifically requested a joint trial. The Eighth Circuit reversed the district court's remand, finding that the plaintiff's conduct demonstrated an intent to have a joint trial on the merits, and thus CAFA mass action jurisdiction was present.

Cases such as *Scimone*, *Romo*, and *Parson* have effectively provided plaintiffs with a road map for avoiding CAFA removal, at least where the plaintiffs are known and the case can be pled as a mass action. Given that these mass-action rulings turn on factors that are completely in the

plaintiffs' control, defendants face a difficult task in opposing remand in these cases. The only avenue for opposing these efforts appears to be demonstrating that the plaintiffs' conduct evidences intent to try separate cases together. While most courts have appeared unwilling to infer such intent absent an express request for a joint trial, at least some courts have recognized that this approach undermines the Supreme Court's admonition in *Knowles* not to exalt form over substance and contravenes CAFA's goal of ensuring "federal court consideration of interstate cases of national importance."

Keywords: litigation, corporate counsel, *Standard Fire Insurance Co. v. Knowles*, Class Action Fairness Act, CAFA, *Schimone*, *Romo*, *Parson*

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A Brief Guide to Removal

By Matthew M.K. Stein – May 26, 2014

Removing a case to federal court is a technical and detail-oriented process. It can sometimes be difficult to determine the proper approach, given various interconnected and interrelated statutes governing federal jurisdiction and removal. This is intended as a brief guide to those statutes and related interpretative case law. Note that for simplicity's sake, this guide does not discuss courts' jurisdiction over "mass actions," which is found in 28 U.S.C. § 1332(d)(11).

Every practitioner has anecdotes about the difficulty of removing cases from state to federal court—from the little errors that can result in outright dismissal or remand, to judges who will sua sponte identify issues that the parties must brief on subject-matter jurisdiction. An example of this is *Heinen v. Northrop Grumman Corp.*, where at oral argument, the Seventh Circuit apparently surprised counsel with questions about subject-matter jurisdiction, corrected counsel's mistaken understanding of the citizenship rules, and directed the removing party to file an amended notice of removal properly alleging the individual party's domicile. 671 F.3d 669, 670 (7th Cir. 2012). The court wrote:

> Jurisdiction should be ascertained before filing suit in federal court (or, as here, removing a suit to federal court). Counsel have wasted the court's time, and their clients' money, by postponing essential inquiries until after the case reached the court of appeals. That strategy often leads to a jurisdictional dismissal and the need to start over in state court. Why take that risk? Lawyers have a professional obligation to analyze subject-matter jurisdiction before judges need to question the allegations.

Id. (Earlier in my career, I received a remand order similarly sua sponte raising issues about an individual's citizenship. While that order was not the genesis for this article, it was an important learning experience about the need for extreme care in this area.)

Consequently, you should bear in mind that courts take these issues very seriously, and so should you as well. If there is a requirement to demonstrate something for which you would have the burden of proof, caution suggests that you should do so, and—if Dart Cherokee's experience is any guide—you should not wait for a subsequent opportunity to submit your evidence with it, even if you do not think it's required at the time. (This is a reference to *Dart Cherokee Operating Co., LLC v. Owens*, a case where the defendant removed and did not submit, with its notice of removal, evidence supporting its removal. The district court remanded, the Tenth Circuit denied appeal, and the U.S. Supreme Court granted certiorari on April 7, 2014. Whether or not Dart Cherokee was required to submit the evidence with its notice of removal—and there is nothing in the statutory framework that would appear to require it—Dart Cherokee would have avoided a significant amount of costs in appellate briefing if it had.) And similarly, if you are required to confer with codefendants before acting, you should do so—not relying on the belief that they

won’t object, as occurred in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 431 F. Supp. 2d 109 (D. Mass. 2006).

Chart: A Brief Guide to Removal

Keywords: litigation, corporate counsel, removal, federal court

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NEWS & DEVELOPMENTS

May 13, 2014

Potential Conflicts of Interest for Class-Action Counsel

A recent decision by the Florida Supreme Court reminds class-action counsel to be cognizant of potential conflicts of interest that may arise upon proposal of a class-action settlement where objections to the settlement are lodged, or when members' interests and positions change.

At issue in *Young v. Achenbauch*, No. SC12-988, 2014 (Fla. Mar. 27, 2014), was a class-action lawsuit by flight attendants against various tobacco companies, asserting injuries related to second-hand-smoke exposure. The parties' settlement agreement awarded $300 million to be used for scientific research on early detection and cure of diseases related to cigarette smoking. The agreement also provided for the creation of the Flight Attendant Medical Research Institute (FAMRI) to oversee the research, which board membership was made up of several class members. Finally, the agreement allowed the plaintiffs to pursue individual claims for compensatory damages.

As part of the individual suits, some plaintiffs were dissatisfied with FAMRI's activities, and therefore filed complaints directly against FAMRI for an accounting of funds, injunctive relief prohibiting further activity, and modification of the original settlement agreement. The FAMRI and two of its board members moved to disqualify the attorneys filing suit against FAMRI, asserting a conflict of interest. The trial court determined that disqualification was required, as counsel had violated Florida's Rules of Professional Conduct governing conflicts with current clients and conflicts with former clients.

On appeal, the Florida appellate court did not apply Florida's Rules of Professional Conduct, but instead looked to federal courts' balancing tests used in class-action proceedings. The balancing test considers a party's right to select counsel versus a client's right to undivided loyalty of his or her counsel. The appellate court relied on the Third Circuit's holding that even if some class representatives object to a proposed settlement, class counsel may continue to represent the remaining class representatives and the class, as long as the best interests of the class are maintained by continued representation of that counsel, and are not outweighed by actual prejudice to the objecting members who will now be opposite to their former counsel.

The appellate court also looked to the Second Circuit, which has stated that conflicts between multiple clients in a federal class action need not require counsel's withdrawal, because class counsel is typically allowed to challenge contentions of class members who have opposed a proposed settlement agreement of the class action. Finally, the appellate court noted that class counsel's responsibility is to ensure the best interest of the class, as a whole, not any individual client. Accordingly, the appellate court reversed the trial court's disqualification order.

The Florida Supreme Court ultimately affirmed the trial court's disqualification of counsel and criticized the appellate court for applying federal law instead of the Florida Rules of Professional Conduct. The supreme court agreed that the rules were violated because the action against FAMRI was directly adverse to interests of the board members, thus creating conflicts of interest with current clients. And conflicts of interest related to former clients also existed because the complaint against FAMRI, the individual suits, and the original class action were all substantially related. Importantly, the Florida Supreme Court's opinion did not address whether a more standard objection to a class-action settlement from some members would automatically create a conflict requiring withdrawal of counsel.

In navigating potential conflicts of interest, class-action counsel should be aware of potential issues and evolving interests that may arise after a settlement agreement is reached; and additionally understand how each state applies its rules of professional conduct and related federal laws to conflicts of interest considerations for class-action counsel.

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May 9, 2014

SCOTUS Relaxes Attorney Fee Standard in Patent Infringement Cases

The U.S. Supreme Court, in two unanimous decisions issued on April 29, 2014, held that the Federal Circuit's test for awarding attorney fees in patent-infringement cases was too rigid, making it unnecessarily difficult for courts to award fees to the prevailing party.

The Patent Act allows courts to award attorney fees to a prevailing party in "exceptional cases." The Federal Circuit has defined "exceptional" as "objectively baseless" and "brought in subjective bad faith." However, in *Octane Fitness LLC v. Icon Health & Fitness Inc.*, the Supreme Court disagreed with this definition, and found that "exceptional" only means "uncommon" or "not ordinary." The Court found that the Federal Circuit's requirement was too inflexible and encumbers a court's statutorily granted discretion. The Court held instead that fees can be awarded if the losing party's case "stands out from others" or is litigated in an "unreasonable manner." The Court noted that a judge should be able to independently determine whether a case is indeed "exceptional." Additionally, the Court held that a party seeking fees need not prove their case by clear and convincing evidence, because the governing statute does not impose any specific evidentiary burden.

In the second opinion, *Highmark Inc. v. Allcare Health Management System Inc.*, the Court focused on the standard for review of an attorney-fee award. Here, the Court rejected the Federal Circuit's de novo review standard, and held that these awards should be reviewed for abuse of discretion.

For litigants, the impact of these opinions is significant. First, with the risk of a substantial attorney-fee award, sanction motions will likely become more common in an effort to dismiss baseless litigation early on. This is important as, prior to these decisions, there was little disincentive to file unsubstantiated patent claims. Second, the prevailing party now has a higher chance of success on its attorney-fees motion, which is always positive, and also an important factor in litigation strategy.

While commentary on these opinions has been primarily focused on the deterrent effect for patent trolls, the rulings are no less important to patent owners and accused infringers. The risk and benefits associated with potential sanction motions and attorney-fees awards apply equally to both plaintiffs and defendants in patent cases, and will likely change the landscape of this litigation.

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