The American Class Action Fairness Act and Forum Shopping American-Style*

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This paper looks at the practice of forum shopping in the United States and focuses on the new Class Action Fairness Act which was passed in 2005 and is one of the most sweeping legislative initiatives relating to class action litigation.

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Introduction: continental reflections on forum shopping

Professor Harald Koch, in his paper entitled “International Forum Shopping and Transnational Lawsuits” (published in this issue), has accurately described the twin rationales for forum shopping by continental lawyers. He makes the dual points that forum shopping embodies both good lawyering as well as averting legal malpractice. In his view, which I believe is correct, an attorney who does not take forum attributes into account in pursuing litigation is acting in a fashion that is tantamount to malpractice. In short, all good lawyers forum shop.

Professor Koch also has accurately articulated a compelling list of why continental lawyers might seek to forum shop by selecting a forum in the United States. He points out the various advantages of litigation in the American legal system: (1) varying advantageous substantive law; (2) the availability of jury trials; (3) contingency fee arrangements permitting recovery of large attorney fee awards; (4) no fee shifting for legal costs and expenses; (5) liberal discovery rules; and (6) the availability of punitive damages.

Professor Koch further points out that the possibility of forum shopping is largely a plaintiff-favouring strategy, because plaintiffs always have the initial choice of forum, and defendants typically must suffer the plaintiff’s choice of forum.

I agree with all of Professor Koch’s arguments and points, and would like to expand on his observations. In the United States, forum shopping also is an attribute of good lawyering, and the failure to take into account forum advantages and disadvantages

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also might be tantamount to malpractice in certain circumstances. Practicing attorneys do forum shop all the time.

Forum shopping in the United States, however, involves far more nuanced and sophisticated gamesmanship than continental lawyers might appreciate. In the United States, forum shopping is the consequence of, and involves the complex interplay of, a dual federal and state court system. In addition, American procedural rules provide for an elaborate system of forum-shopping opportunities for both plaintiffs and defendants.

While a continental lawyer, at first blush, might perceive American forum-shopping opportunities as plaintiff-favouring, the multiple complex of procedural rules actually levels the litigation playing field in interesting ways. As I will discuss below, the recently enacted Class Action Fairness Act (CAFA) embodies both a sophisticated forum-shopping mechanism, and as such, CAFA also embodies a procedural approach to tort reform. Rightly understood, CAFA is a part of the American tort reform movement.

Forum-shopping opportunities in the United States

Initially, forum shopping in the United States is to the plaintiff's advantage. Because of the existence of both a federal and state court system, an attorney's first litigation decision is to choose a federal or state forum. Practicing attorneys in the United States are well-versed in the differences between federal and state courts. Federal and state courts differ in the method of judicial selection, procedural rules, juror pools, and docket congestion, among other differences.

In both the federal and state court systems, American attorneys are very knowledgeable about so-called "plaintiff friendly" jurisdictions. These tend to be state courts (and some federal venues) where jury verdicts favour plaintiffs, juries return high compensatory and punitive damage awards for plaintiffs, the jurisdiction has plaintiff-favouring substantive and procedural law, and where the courts have "plaintiff-friendly" judges on the bench. In the state court system, these often are elected, rather than appointed judges. In addition, plaintiff-friendly jurisdictions may tend to have juries that will engage in "civil jury nullification", which is a practice of disregarding the judicially instructed law.

Correlatively, defendants abhor plaintiff-friendly jurisdictions. In extreme instances, such as class action litigation, the class action defense bar has denominated such venues as "hell-hole" jurisdictions, for obvious reasons. In the United States, then, plaintiffs initially seek to pursue litigation in a plaintiff-friendly forum and defendants will seek to avoid having to defend litigation in such a forum.

Although American rules grant the plaintiff the initial choice of forum, in the federal system, at least, several statutory schemes and doctrines enable defendants to counter the plaintiff's initial choice of forum. Thus, the federal removal statutes¹ permit defendants to "remove" cases from state court into the federal court system. By

¹ 28 U.S.C. § 1441 *et seq.*

utilizing the federal removal statutes, then, American defendants can effectively avoid having to defend a case in an unfavourable state forum.

In addition to the removal procedures, once a case is in the federal court system, a defendant has the ability to transfer a federal case to any other federal forum where the action originally could have been brought by the plaintiff.² Moreover, a defendant may seek to have a case dismissed on the grounds of the *forum non conveniens* doctrine, a doctrine familiar to continental lawyers.

The most exemplary and striking use of these combined procedural opportunities by a defendant corporation is embodied in the famous case of *Piper Aircraft v. Reyno*.³ In *Piper*, a small commercial aircraft crashed in the Scottish Highlands. The pilot and five passengers were all killed; the pilot, passengers, and their heirs were Scottish residents. The aircraft had been manufactured by Piper Aircraft Corp. in Pennsylvania (U.S.). The plaintiffs' attorneys, through a court-appointed administratrix, filed a lawsuit against multiple defendants in California state court.

Using the federal removal statutes, the defendant Piper Aircraft removed the litigation from California state court into the California federal court. Once the case was properly removed to the federal system, the defendant then asked the federal court to transfer the case to a federal district court in Pennsylvania, a forum where the plaintiff originally could have sued. The court granted the transfer motion. In the transfer forum in Pennsylvania, the defendant Piper then asked the federal court to dismiss the case on *forum non conveniens* grounds, which the court granted.⁴ The United States Supreme Court ultimately upheld Piper's invocation of this set of procedural maneuvers, including the *forum non conveniens* dismissal.

The *Piper Aircraft* case, then, graphically illustrates how American procedural rules effectively can level the playing field regarding choice of forum as between plaintiffs and defendants. Every plaintiff must be aware that the way in which a case is pleaded may result in removal of the case into federal court. If a plaintiff wishes to avoid removal, the plaintiff must plead the litigation in a way to avoid removal, or to make the case "removal-proof". Defendants, on the other hand, need to assess the strengths and weaknesses of attempting to move a case from the plaintiff's choice of forum to another forum perhaps more defendant-friendly.

Illustration: American forum shopping in the class action and mass tort context

American plaintiffs and defendants forum shop for advantage, but the understanding of what constitutes a preferable forum changes over time, often in response to doctrinal shifts or rule changes. This phenomenon is amply demonstrated by class action and mass tort litigation in the American federal courts over the last 35 years.

For a 20-year period, spanning the mid-1970s through the mid-1990s, federal courts were the perceived advantageous forums for class action plaintiffs. During this period, federal courts experimented with ways to aggregate and consolidate mass tort

² See 28 U.S.C. § 1404(a).

³ *Piper Aircraft v. Reyno* (1981) 454 U.S. 235.

⁴ *Ibid.*

litigation, and favoured class action procedures to accomplish resolution of mass tort actions. However, the trend favouring mass tort class litigation decelerated rapidly after 1995–1996, when many federal courts ruled that mass tort class actions were not viable or maintainable in federal court.

The effect of these federal decisions in 1995–1996 prompted the plaintiffs’ mass tort bar to move their cases into state court systems, rather than the hostile federal courts. Among the fifty states, the plaintiffs’ lawyers discovered a number of “plaintiff-friendly” venues, where state court judges were very willing to grant the so-called “drive-by” class certifications without rigorous analysis of class certification standards. Many, if not most of these venues were in the Gulf South states, as well as selected venues in Illinois, California, and New Jersey. The defense bar, in turn, developed a list of the top ten “hell-hole” jurisdictions in the United States. Through the 21st century, state forum shopping for plaintiffs constituted good lawyering; the failure to file in plaintiff-friendly jurisdictions arguably was tantamount to malpractice.

The problem of plaintiff-forum shopping, particularly in mass tort and consumer class actions, spurred a backlash by the corporate and defense bar. In the late 1980s, the prevailing Republican administration responded with a Contract with America platform that included provisions on substantive tort reform and procedural measures to harness class action and frivolous litigation. In 1991, Congress enacted the Civil Justice Reform Act. In 1995, to address securities strike suits, Congress enacted the Private Securities Reform Act of 1995.

The CAFA, which took Congress 8 years to enact, is a part of the civil justice and tort reform movements in the United States. Rather than attempt to mitigate tort litigation through substantive law reform, CAFA instead attempts to regulate class action litigation through defendant-favouring forum shopping procedural mechanisms. As will be explained below, the centerpiece of CAFA is its removal provisions, which now formally and liberally permit defendants to remove class actions out of unfavourable state forums and into defendant-favouring federal courts.

The American class action fairness bill of 2005

On 18 February 2005 President Bush signed the “CAFA of 2005”.⁵ The Act represents one of the most sweeping legislative initiatives relating to class action litigation since amendment of Federal Rule of Civil Procedure 23 in 1966. The Senate had passed the Act by a vote of 72–26, and the House by a vote of 279–149.

Versions of this legislation have been pending in Congress for several years. The House passed similar bills on several occasions, only to see the legislation languish in the Senate. After the November 2004 election, Congress acted quickly to enact the Act when Republicans secured a Senate majority and House Republicans agreed to accept the Senate version.

⁵ Class Action Fairness Act (2005).

Summary of the act

The Act is a complex statute that contains provisions addressing: (1) original federal court jurisdiction over class action lawsuits; (2) removal of state class actions into federal court; (3) class action settlements, including notice provisions; (4) interlocutory appeal of remand decisions; (5) other non-class “mass actions”; (6) reporting requirements; and (7) effective date.

The Act applies to any civil action commenced on or after the date of its enactment. The Act is not retroactive and therefore has no applicability to class action pending or filed before 18 February 2005.

Original jurisdiction

The Act has incorrectly been characterized as a removal statute intended to move all state class actions into federal court. Primarily, the Act essentially is a modification of federal statutes relating to the federal court original diversity jurisdiction.

The Act amends the federal diversity statute.⁶ It provides federal courts with original diversity jurisdiction over any class action when: (1) the aggregate amount in controversy exceeds \$5 million (exclusive of interests and costs); (2) the number of putative class members is at least 100; and (3) any class member is a citizen of a state or foreign country different than any defendant.

This amendment achieves two significant modifications of existing federal court diversity jurisdiction. First, the statute permits aggregation of class damages, effectively overruling the Supreme Court’s non-aggregation decision in *Zahn v. International Paper Co.*⁷ Second, the statute provides for “minimal diversity” among the parties, effectively eliminating the “complete diversity” requirement that exists for all other federal diversity cases. The net effect is to expand federal court jurisdiction for large scale, multistate class actions and to eliminate previous impediments to federal jurisdiction over such class actions.

The statute provides for both mandatory and discretionary exercise of federal jurisdiction for class actions that meet the threshold requirements of minimal diversity and \$5 million aggregate damages.

Mandatory Jurisdiction

The statute creates two types of mandatory jurisdiction: circumstances when a court *may not decline* class action jurisdiction, and other circumstances when a court *must decline* jurisdiction. First, a federal court *may not decline* to exercise jurisdiction if 1/3 or fewer of proposed class members are citizens of the state in which the plaintiffs filed the original action.

However, a federal court *must decline* to exercise jurisdiction: (1) if more than 2/3 of class members are citizens of the state in which the action was originally filed; (2) at least

⁶ 28 U.S.C. § 1332.

⁷ *Zahn v. International Paper Co.* (1973) 414 U.S. 291.

one defendant is a citizen of the state in which the action was originally filed, class members are seeking significant relief from this defendant, and the defendant's alleged conduct forms a significant basis for the plaintiffs' claims; (3) the principal injuries were incurred in the state where the action originally was filed; and (4) in three prior years, the same claimants have not asserted the same or similar claims against the defendants.

In addition, a federal court must decline jurisdiction if 2/3 or more of class claimants, and the "primary" defendants, are citizens of the state in which the action originally was filed.

Discretionary jurisdiction

The Act vests discretion to decline federal court jurisdiction even when the proposed class action satisfies the minimal diversity and amount-in-controversy requirements. Thus, if greater than 1/3 but less than 2/3 of class members and the "primary defendants", are citizens of the state in which the case was filed, the court may decline jurisdiction. The court is to consider whether yielding jurisdiction would be "in the interests of justice ... looking at the totality of the circumstances".

Several factors may guide this discretionary evaluation, including whether: (1) the claims involve matters of national or interstate interest; (2) the claims will be governed by state law in which the action originally was filed, or by the laws of other states; (3) the plaintiffs have artfully pleaded the case to avoid federal jurisdiction; (4) the forum has a nexus with class members, the defendants, and the harms alleged; (5) whether the numbers of class members is substantially larger from the state in which the action was originally filed than from any other state, or whether claimants are dispersed among many states; and (6) during 3 years prior to filing the class action, one or more same or similar class actions were filed on behalf of the same or similar claimants.

Removal procedures

The Act works with the federal removal statutes to permit class actions filed in state court to be removed into federal court. The federal removal statutes are set forth generally at 28 U.S.C. §§ 1441 *et seq.* The Act adds a new removal provision, 28 U.S.C. § 1453, that interacts with the existing removal provisions.

The new removal provisions modify removal procedures in several respects. Existing diversity cases must be removed to federal court within 1 year.⁸ Under the Act, class actions are exempt from this deadline. Under existing removal provisions, a case may not be removed if any defendant is a citizen of the state in which the action is brought. The Act modifies this restriction; class actions may be removed regardless of whether any defendant is a citizen of the state in which the class action was brought. Lastly, under existing removal procedures, all defendants must consent to a removal petition. The Act eliminates this restriction; state class actions may be removed without the consent of all the defendants.

⁸ See 28 U.S.C. § 1446(b).

Interlocutory appeal of removal/remand orders

Under the current removal statutes, an order remanding a case to state court is not reviewable.⁹ The Act permits accelerated, discretionary review of a district court's order granting or denying a motion to remand. This appeal must be brought "not less than 7 days after entry of the order". The appellate courts have discretion to entertain the appeal; the statute does not provide standards for exercise of this discretion.

If an appellate court accepts discretionary review, it must complete its review no later than 60 days after the date the appeal was filed. However, if the parties agree, the appellate court may grant a 60-day extension, or a 10-day extension "for good cause shown and in the interests of justice".

Mass actions

The Act contains provisions permitting removal for "mass actions" filed in state court. These are not special provisions for mass tort cases, despite the confusing label. Rather, these provisions are intended to encompass states such as Mississippi, which does not have a state class action rule, but permits massive joinder of claims under its state joinder rule. The Act defines a mass action as "civil actions in which 100 or more plaintiffs bring suit jointly for monetary damages based on claims that involve common questions of law or fact".

These state joinder lawsuits are subject to the Act's removal provisions. However, in "mass action" lawsuits, each plaintiff must individually satisfy the \$75,000 amount-in-controversy requirement for jurisdiction under 28 U.S.C. § 1332(a).

Mass action cases will not include cases where (1) all claims arise in the filing state and any injuries were suffered in that state or a contiguous state; (2) the defendant joined the claims; (3) the claims are asserted on behalf of the public pursuant to a state statute; and (4) the claims have been consolidated solely for coordinated pre-trial proceedings.

If the defendants remove a mass action to federal court, then the mass action may not be transferred to federal MDL proceedings unless a majority of plaintiffs request MDL treatment.

Settlements and notice provisions

The Act's preamble sections recite the benefits of class action litigation as well as the burdens and abuses of class litigation. In order to curb the most egregious excesses of class settlements, the Act provides provisions relating to settlements. For example, the Act provides that settlements may not pay larger awards to some class members because they live in closer proximity to the court where the litigation was filed.

⁹ 28 U.S.C. § 1447(d).

Most prominently, the Act provides that in coupon settlements, the attorneys' fee award is to be based on the value to class members of coupons that class members actually redeemed. If a portion of a coupon settlement recovery is not used to determine fees, then the fee award is to be based on time that class counsel reasonably expended.

The Act provides for new notice provisions. The Act requires that when a proposed settlement is filed in court, each defendant must notify the appropriate state and federal officials of each state in which class members reside of the proposed settlement. The notice must include information about the complaint, proposed settlement, class notice, proposed judgment, and names of class members (if feasible).

A federal court may not finally approve a class settlement earlier than 90 days after state and federal officials are notified. If notice to government officials is not provided, then a class member may choose not to be bound by any settlement agreement or consent decree.

Implications of the CAFA

At least some implications of the CAFA are reasonably foreseeable. First, we are about to embark on at least a decade of collateral litigation arising from appellate review of remand orders. Because the statute does not provide standards for discretionary review, appellate courts will now embark on delineating such standards. This exercise probably will replicate the federal court experience in articulating standards for discretionary interlocutory review of class certification orders under the Federal Rules of Civil Procedure 23(f)(amended in 1998).¹⁰

Second, federal courts that do accept discretionary review of remand orders will now have to construe the often problematic language of the statutory provisions to determine whether federal jurisdiction was mandatory or discretionary. Appellate courts will now be enmeshed in thorny statutory construction problems, such as determining how many members comprise a proposed class (applying the difficult 1/3 and 2/3 formulas), as well as location of class members. Courts will have to parse new terms such as "primary defendants". This exercise will probably replicate the federal court experience with parsing Congress's supplement jurisdiction statute.¹¹

Many class actions will probably not be removed into federal court, because of the local carve-out exceptions. A recent study conducted by *Mealey's Litigation Reporter* validated this hypothesis. Studying state class actions in several states (both large and small) between 1997 and 2003, the study concluded that under the Act's provisions, approximately 60 per cent of class actions will remain in state courts, while 40 per cent will be removable. Because of various securities litigation exceptions, the Delaware Chancery court will retain approximately 90 per cent of its docket.

The Act most likely will result in large-scale multistate and national class actions being removed into the federal system. Alternatively, the plaintiffs' bar may regroup

¹⁰ Fed. R. Civ. P. 23(f) (amended in 1998).

¹¹ 28 U.S.C. § 1367 (enacted in 1990, and still unsettled law).

and decide to file more class actions initially in federal courts, in plaintiff-friendly jurisdictions such as the Second and Ninth Circuits. Small-scale, localized class actions will remain in state court.

Finally, it is worthwhile noting the law of unintended consequences. When Congress enacted the Private Securities Reform Litigation Act in 1995, Congress intended to severely curb abusive shareholder and other securities litigation. Then, commentators predicted the death-knell of securities litigation. The experience of the PSLRA has been dramatically otherwise. Rather than curbing such litigation, federal courts have experienced a proliferation of its PSLRA docket.

The CAFA's effect on mass tort litigation

Three parts of the Act deal with tort litigation. The first provides a means to remove a true class action from a state court to a federal court, under spelled-out requirements and limits. The second brings mass tort actions within the ambit of class actions for removal purposes, but also with numerous limitations. Third, if one considers a suit for economic loss (coupon suits) as torts, these too are regulated.

Class actions

As to the class action provisions, class actions started in state court, including those for tort, are removable under the minimal diversity requirement if the amount in controversy in the aggregate is \$5 million or more. Such a provision will mean little to the parties in New York class actions, however, since the courts have refused to apply CPLR Article 9 to allow tort-based class actions.

A number of states, however, have been amenable to certifying class actions for tort cases, sometimes for citizens of that state and sometimes creating a nationwide class action. Some of these classes have been for personal injuries arising out of the use of or exposure to a common product, such as asbestos, tobacco, and pharmaceuticals (such as Baycol or OxyContin). Supporters of the new law saw as an abuse the practice of plaintiffs filing nationwide class actions in state courts after being denied such classes by federal courts. Under the new law, removal of these actions to the federal court will presumably lead to their dismissal again. (This result has already been achieved, in any case, by federal courts enjoining state court class actions under the All Writs Act.)

A cause of action for medical monitoring (the creation of a fund to pay for periodic testing of persons exposed to a toxic substance) is a hybrid, involving aspects both of personal injury and of the creation of an equitable fund. Many states recognize a cause of action for medical monitoring, provided its requirements are met of course. These actions are usually only for citizens of that state, but some have been nationwide in scope, as for example the diet drug Fen Phen settlement. A limit under the act on removal might well apply to medical monitoring suits where both the defendant and the plaintiffs are citizens of the state. Therefore, an action brought based upon the conduct of a local polluter would not be removable, whereas one against a prescription drug manufacturer located in another state would be.

Mass actions

The new definition of civil actions for which federal courts have original jurisdiction – and therefore removal jurisdiction exists – includes a “mass action”, which is defined as one 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”.

Concentrating on the phrase “proposed to be tried jointly”, the questions are who has proposed it and how has it been proposed to be done. Class actions by their inherent representative nature are one way to try the cases of all claimants together, but that is already covered in another section of the new law as discussed. Other procedural mechanisms by which 100 or more cases may be tried together are consolidation (as for example under state laws which track Federal Rules of Civil Procedure 42); joinder (as for example under state laws which track the Federal Rules 20); or special state rules, or just by court order.

Past experience in mass torts aggregations indicates that it is only rarely that a large number of cases have been brought together for trial purposes by either joinder or consolidation. These devices are not expansive enough to round up hundreds of cases. However, it has been asserted that one of the abuses aimed at under the new law was the practice in Mississippi which allowed the joinder of claims for injuries from the same product under almost any condition. Plaintiffs living in various venues in that state could sue an out of state defendant in the county of their choice even if their claims had little in common. But to the extent this situation was abuse, it had been largely terminated before the act went into effect. The Supreme Court of Mississippi had changed its official comments for the joinder procedure to require a “distinct litigable vent linking the parties” and on that basis had ordered the severance of cases of such recent mass torts as Propulsid and Fen Phen diet pills.¹²

Mississippi practice aside, very few state court mass tort actions have been tried jointly. More often they are prepared jointly and then tried one by one or in small groups. The new law makes it clear that the mere coordination of cases for preparation purposes, which is common in states which see much mass tort litigation such as California, New York, New Jersey or Pennsylvania, does not make the cases removable.

As to who may propose the joint trial, the new law has a clause which prohibits the defendant(s) from making such a motion. And, assuming that the plaintiffs would not so move (after all they filed their cases in state court to begin with), this leaves the court *sua sponte* to so move, although nowhere is that stated explicitly in the law. Thus one can hypothesize a situation where a state court judge finds herself overwhelmed by a hundred or more cases involving the same product filed in her court. Could she divest herself of this load by proposing that the cases be tried jointly (to track the words of the new law)?

A further issue arises if a state judge *sua sponte* declares that he will try all of the cases jointly. If the judge professes to take this step under a procedural rule which is

¹² See for example, *Wyeth-Ayerst v. Caldwell*, Miss (2005) 2003-IA-01390-SCT 1/27/05.

misapplied, or if he merely enters such an order without premising it on any recognized procedural device, what remedy would the plaintiffs have? Normally they might take an appeal from such an order, but the defendant would be expected to move quickly to attempt to remove the case to federal court under the new law. If removed, the plaintiffs might seek to remand on the basis that no procedure exists to support the order of joint trial.

There are other limits on the removal of mass actions. The law does not apply to individual cases which do not seek the current federal jurisdictional minimum of \$75,000. Nor would it apply to civil actions commenced before the law went into effect on 18 February 2005. Hence, using as an example the Vioxx cases pending in state court in New Jersey, even assuming they were removable, one would need 100 new cases, seeking damages of \$75,000 or greater. Another major limitation on the new law is that it does not apply to claims arising out of an event in the state which results in injuries in that state or ones contiguous to it. Thus, a local pollution disaster case would not be removable.

If a mass tort action is removed from a statewide coordination to the district court, it is not clear to which district within a state it will be removed where there are multiple districts. And there is a strange provision in the law which says that even if all of the cases in the federal system have been assigned to one judge under multi-district litigation provisions,¹³ which is a common development, the ones involving the same product which are removed under the new law are not to be transferred from the district court where they were taken to the multi-district litigation proceeding, unless a majority of the plaintiffs so demand. If they did not, there would be two federal proceedings going over the same ground.

There is no provision in the act for the situation of a new personal injury case being filed after an initial batch has been removed. It appears that one could still file in the state court, if there was a tactical advantage (such as to get the law of that state to apply), but that the defendant could remove it without another 100 accumulating.

There is also no provision in the new law as to what the federal judge is to do after the batch of mass tort cases have been removed to its court, and the same is true for a removed class action or one of permissive joinder as had been the situation in Mississippi. It would seem that the court would be free to handle the litigation as it chose. It could decide, for example, to try the cases individually, in waves or however it wanted. There might even be a potential for remand, since the law has a strange provision in it that for the time when the cases are removed, the statute of limitations is tolled.

Coupon settlements

Suits for economic damages, such as return of the price paid for a product, might under a broad sense be considered tort based, especially if they are premised on a misrepresentation cause of action. An oft perceived abuse in this type of litigation is

¹³ 28 USC sec.1407.

that of attorneys; fees for the class work involved are computed on the theoretical full value of the settlement, as measured by the potential maximum cost to the defendant.

In practical experience, however, many class members do not step forward and claim their benefit, especially if the settlement involves a coupon allowing money off the purchase price of a product. The new law seeks to control fees under these circumstances by limiting the fees to the actual value of the redeemed coupons or by using an hourly rate for the time counsel has spent.

In conclusion, how much use will be made of the new act in the field of tort litigation? Where a state court class action has been filed, especially after a federal one involving the same product has been denied, predictably it will be almost inevitably used. That is what the new act was primarily aimed at.

Realizing that, plaintiffs may be inhibited from even trying – producing the same result as far as defendants go. As to the use in “mass torts” as defined separately from class actions, time will tell about how often it will be used, but it would seem that the new law will not have a great amount of use. Indeed, knowing the inventiveness of the plaintiffs’ bar, another law may come into play: the law of unintended consequences.

Retroactivity under the CAFA

Eight months after President signed the CAFA into law,¹⁴ federal courts have been grappling with the retroactive application of the statute to class action pending at the time the President signed the bill. Appellate and district courts have generated no fewer than two dozen decisions analyzing retroactivity issues. Already, federal courts have issued conflicting opinions resolving an array of interesting retroactivity problems.

Generally, retroactivity problems have centered on two distinct issues. First, courts have addressed whether CAFA applies to state class actions that were pending when CAFA was signed, but that the defendants subsequently remove to federal court after 18 February 2005. Second, courts have grappled with the questions whether plaintiffs’ various post-CAFA amendment of pleadings commences a new lawsuit so as to bring that “new” class action subject to CAFA. Courts have differed in their approaches to these questions.

Commencement of the action

CAFA applies to and became effective for all class actions “commenced on or after” 18 February 2005.¹⁵ In a number of cases, defendants have attempted to remove state class actions into federal court under CAFA’s new removal provisions, after 18th February.¹⁶ In the instances where defendants have removed after February 18, 2005,

¹⁴ Class Action Fairness Act (2005) Pub. L. 109-112, 119 Stat. 4.

¹⁵ *Ibid.* § 9.

¹⁶ See 28 U.S.C. § 1453.

the defendants have argued that removal triggers the commencement of a new lawsuit that makes the removed case subject to CAFA's federal jurisdiction provisions.¹⁷

Four federal Courts of Appeal have now decided this issue, and all substantially agree that an action "commences" when the action originally was filed in state court, and is not recommenced – or newly commenced – when defendants remove the case to federal court.¹⁸

The Ninth Circuit's *Cheaptickets* decision illustrates a common problem federal courts now encounter with post-CAFA class actions. The plaintiffs in *Cheaptickets* filed their state class action in California superior court on 17 February 2005, or 1 day before the President signed CAFA into law. In anticipation of CAFA's enactment, a large slew of class actions were filed in state court on the day before the legislation's signing.

Cheaptickets removed the case to federal court in March 2005, arguing that the action was subject to CAFA because the lawsuit commenced on removal. The district court disagreed and remanded the action to state court; on appeal, the Ninth Circuit agreed that CAFA's "commenced" language "surely refers to when the action was originally commenced in state court".¹⁹

Furthermore, the Ninth Circuit ruled that federal courts must determine the "commencement" issue by application of the state's own laws and rules of procedure to determine when a dispute may be cognizable in state court. In California courts an action is commenced when the plaintiffs file the action in court.²⁰ This commencement rule comports with the Federal Rules of Civil Procedure 3 which indicates that a civil action is "commenced by the filing of a complaint with the court".²¹ In other states, such as New York and Connecticut, an action is commenced when the plaintiff serves the complaint or summons on the defendant.²²

The Ninth Circuit, along with other Circuits, has concluded that this interpretation of CAFA best comports with the plan language of the statute, the CAFA statutory scheme, and CAFA's legislative history.²³ The First, Seventh, and Tenth Circuits have resolved the "commencement" issue in the same way.²⁴

Additionally, numerous lower federal district courts have applied CAFA's "commencement" language to mean when an action was originally filed in state court, not at the time of removal.²⁵

¹⁷ See 28 U.S.C. § 1332(d).

¹⁸ See *Bush v. Cheaptickets Inc.*, 2005 WL 2456926 * 3 (9th Cir. October 6, 2005); see also *Natale v. Pfizer Inc.*, 379 F. Supp. 2d 161 (D. Mass. 2005), collecting all decisions discussing this issue.

¹⁹ *Cheaptickets* (2005).

²⁰ Cal. Civ. Proc. Code § 350.

²¹ Fed. R. Civ. P. 3.

²² See for example, Conn. Gen. Stat. § 52-45a (2003).

²³ See *Cheaptickets* (2005) at *3-4.

²⁴ See *Knudsen v. Liberty Mutual Insurance Co.* (2005); *Pfizer, Inc. v. Lott* (2005); *Pritchett v. Office Depot, Inc.* (2005).

²⁵ See for example, *In re Expedia Hotel Taxes and Fees Litig.* (2005) 377 F. Supp. 2d 904; *Lander and Berkowitz, P.C. v. Trans first Health Servs. Inc.* (2005) 374 F. Supp. 2d 776; *Natale v. Pfizer* (2005) 379 F. Supp. 2d.

Relation-back doctrine

A second cluster of CAFA cases have grappled with the question whether a plaintiff's post-CAFA amendment of the class action, to change the class definition, add new defendants, or add new claims, commences a new action for the purposes of subjecting the action to CAFA. Federal courts have taken different approaches to resolving these issues.²⁶

The Seventh Circuit opened the possibility that a post-CAFA amendment to a class action pleading might subject a pre-CAFA state class action to CAFA, through application of the so-called "relation-back" doctrine in Federal Rules of Civil Procedure 15(c).²⁷

In *Knudsen*, the Seventh Circuit rejected the argument that a plaintiff's change in the class definition "commenced" a new action for CAFA purposes. However, the court further speculated that if a plaintiff added new defendants, then this action could commence a new piece of litigation through application of Rule 15(c)'s relation-back doctrine.

In *Knudsen*, Judge Easterbook indicated that: "[A] a new claim for relief (a "new cause of action" in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes. Removal practice recognizes this point: an amendment to pleadings that adds a claim under federal law (where only state claims had been framed), or adds a new defendant, opens a new window of removal. We imagine, though we need not hold, that a similar approach will apply under the (CAFA) Act, perhaps modeled on Fed. R. 15(c), which specifies when a claim relates back to the original complaint (and hence is treated as part of the original suit) and when it is sufficiently independent of the original contentions that it must be treated as fresh litigation".²⁸

Other courts have followed the Seventh Circuit's suggestion, and held that an amended complaint that added new defendants did commence a new civil action for the purposes of the new defendants, and permitted the defendants to remove pursuant to CAFA.²⁹ However, a plaintiff that has amended to add new defendants may avoid application of CAFA if the plaintiff voluntarily dismisses the added defendants and the dismissal does not result in prejudice to the defendants.³⁰

If a plaintiff amends a complaint to add new claims, then some courts have applied the four factor test in Rule 15(c) to determine whether these newly added claims relate back to the original complaint, or commence a new action. In *Plummer v. Farmers Group, Inc.*, for example, an Oklahoma district court concluded that the plaintiff's addition of new claims under Rule 15(c) was the equivalent of filing a new action. The

²⁶ See for example *Adams v. Federal Materials Co., Inc.* (2005), recognizing and discussing the competing lines of jurisprudence.

²⁷ See *Knudsen* (2005) 411 F.3d 805; *Schorsch v. Hewlett Packard Co.* (2005) 417 F.3d 748.

²⁸ *Knudsen* (2005) 411 F.3d at 807.

²⁹ See for example, *Adams, supra*.

³⁰ See *Robb v. Stericycle, Inc.* (2005) WL 2304475.

amended class action petition, then, was a *de facto* commencement of a new suit, which made that suit removable pursuant to CAFA.³¹

Changes to the class definition may be more problematic with regard to the “new action” issue. A number of federal courts have found that amended class petitions that change the class definition give rise to a new action within the meaning of § 9 of CAFA.³² Other courts, however, have disputed whether CAFA permits application of the relation-back doctrine, because Congress did not say so in CAFA.³³

Implications of retroactivity issues

Problems relating to retroactivity commonly arise after Congress enacts a new statute or procedural rule. One may expect a stream of CAFA cases within the next year dealing with the commencement issue. The simple retroactivity problems concerning pre-CAFA filing most likely will be resolved in accord with the emerging consensus of the federal Circuits. However, post-CAFA cases involving amended petitions, adding new claims, parties, or class definition, may continue to challenge the federal courts well into the future.

Burdens of proof under the CAFA

Since enactment of the CAFA,³⁴ federal courts have been grappling with two major interpretative problems. As previously discussed, federal courts have issued a significant universe of conflicting decisions relating to the retroactive application of the statute to class action pending at the time President Bush signed the bill.

The second major issue that has emerged relating to CAFA concerns which party carries the burden of proof of jurisdictional facts in support of removal jurisdiction. Similar to the retroactivity problem, courts have divergent views concerning which party carries the burden of jurisdictional proof on removal of a state class action to federal court under CAFA.

As is well known, CAFA applies to and became effective for all class actions “commenced on or after” 18 February 2005.³⁵ CAFA creates new original diversity jurisdiction for class actions that plaintiffs chose to initiate directly in federal court.³⁶ In addition, CAFA also created a new removal statute that permits defendants who are sued in state court to remove state class actions into federal court.³⁷

³¹ See Plummer (2005) WL 2292174 *5, citing Knudsen, 411 F.3d at 807.

³² See Senterfitt v. Sun Trust Mortgage, Inc. (2005) WL 2100594; *Heaphy v. State Farm Mut. Auto Ins. Co.* (2005) WL 1950244.

³³ See *Weekley v. Guidant Corp.* (2005) WL 2348476.

³⁴ CAFA (2005) Pub. L. 109-2, 119 Stat. 4.

³⁵ *Ibid.*, § 9.

³⁶ See 28 U.S.C. § 1332(d).

³⁷ See *ibid.*, C. § 1453.

Prior to the enactment of CAFA, a defendant who removed a case from state court into federal court carried the burden of establishing proper federal court jurisdiction for the removal, either under federal question jurisdiction, or federal diversity jurisdiction.³⁸ This allocation of the burden of proof on removal jurisdiction was consistent with the longstanding hornbook rule that the party who invokes the jurisdiction of the court carries the burden to prove appropriate federal jurisdiction.³⁹

Since the enactment of CAFA, federal district courts have split concerning which party carries the burden of proving jurisdiction upon a CAFA removal. Several federal district courts have concluded that contrary to the hornbook removal rule, CAFA shifts the jurisdictional burden to the state court plaintiffs, rather than the removing defendant. Recently, the United States Court of Appeals has decided to the contrary, holding that the CAFA removal provisions do not shift the burden of jurisdictional proof.⁴⁰

CAFA shifts the jurisdictional burden

Perhaps the leading case that concludes that CAFA shifts the jurisdictional burden of proof to the remanding plaintiff is a decision authored by Judge Alicemarie H. Stotler in the Central District of California.⁴¹ In *Berry*, Judge Stotler relied on CAFA's legislative history, in the Senate Committee Report, to conclude that CAFA shifted the burden of proof to the party seeking remand.

CAFA provides a number of exceptions to federal jurisdiction for various state class actions, depending on the facts underlying the proposed action, such as the locality of the parties, the small number of claimants, or other discretionary factors. The Senate Committee Report states: "It is the Committee's intention that with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the application of an exemption. Thus, if a plaintiff seeks to have a class action remanded ... that plaintiff shall have the burden of demonstrating that those criteria are met by the lawsuit".⁴²

The CAFA removal provisions make no textual mention of which party carries the burden of proving jurisdictional facts. In this absence, Judge Stotler held that it was legitimate for the court to make recourse to the clear legislative intent that the burden is shifted to the remanding plaintiff. Stated Judge Stotler: "the Committee Report expresses a clear intention to place the burden of removal on the party opposing removal to demonstrate that an interstate class action should be remanded to state court".⁴³

³⁸ See *ibid.*, §§ 1331, 1332.

³⁹ See for example, *Doe v. Allied Signal, Inc.* (1993) 985 F.2d 908, 911; *Ethridge v. Harbor House Rest.* (1988) 861 F.2d 1389, 1393.

⁴⁰ See *Brill v. Countrywide Home Loans, Inc.* (2005) 427 F.3d 446.

⁴¹ See *Berry v. Am. Express Publ'g Corp.* (2005) U.S. Dist. LEXIS 15514, No. 05-0302.

⁴² See Judiciary Committee Report on Class Action Fairness Act, S. (2005) at 42–44.

⁴³ *Berry*, *id.* at 7–8.

Other federal district courts in Washington state and New Jersey have reached similar conclusions that CAFA intended and enacted a burden-shifting of jurisdictional proof.⁴⁴ Through October 2005, approximately a dozen district courts had reached similar conclusions that CAFA shifted the burden of proof to the remanding plaintiff.⁴⁵

In the *Blockbuster* case, the court simply noted: “But it appears that the party opposing removal under Section 1332 (d) bears the initial burden of demonstrating that an action should be remanded”, citing both the Senate Report and statements by Representatives Sensenbrenner and Goodlatte in the Congressional Record.⁴⁶ In the *Merck* litigation, the New Jersey court sided with the defendant, holding that it is the plaintiff’s responsibility to demonstrate that removal from state court was improvident. The court declared: “... notwithstanding the absence of explicit statutory provisions, it is not difficult to divine Congressional intent from CAFA’s legislative history”.⁴⁷

CAFA does not shift burden

Other federal courts have taken vehement exception to the conclusion that CAFA shifts the burden of proving jurisdiction on removal to the remanding plaintiff. In a lengthy opinion discussing the appropriate usage of legislative history to aid in statutory construction, Judge J. O’Neill Jr. of the Eastern District of Pennsylvania took Judge Stotler to task for her recourse to the CAFA Senate Report to decide the question relating to burden-shifting.⁴⁸

In Judge O’Neill’s view, recourse to legislative history as an aid to statutory construction is appropriate and justified only where the face of a legislative act is ambiguous. Declared Judge O’Neill: “I do not find Section 1332(d) to be ambiguous and or to produce an absurd result because it is consistent with the Courts’ long standing application of the burden of proof for establishing diversity jurisdiction”.⁴⁹

Judge O’Neill also invoked the principle that the Supreme Court has frequently held that Congress is presumed to be aware of existing law when it passes legislation. Congress, therefore, could not have been unaware that courts uniformly place the burden of jurisdictional proof on the removing defendant.⁵⁰ Finally, the court noted that if Congress had intended to change the law with respect to the burden of proof, it would have done so expressly in the statute.⁵¹

In October 2005, the Seventh Circuit Court of Appeals became the first circuit court to weigh in on the debate over allocation of the burden of proof upon removal,

⁴⁴ See *Harvey v. Blockbuster, Inc.* (2005) U.S. Dist. LEXIS 16446, *6; *Waitt v. Merck & Co., Inc.* (2005) WL 1799740.

⁴⁵ See *Brill* (2005) 427 F.3d446, U.S. App. LEXIS 222514, *5.

⁴⁶ See 151 Congressional Record (2005) H72723-01, at H727 and H732.

⁴⁷ *Waitt* (2004) WL 1799740, *2.

⁴⁸ *Schwartz v. Comcast Corp.*, 2005 U.S. Dist. LEXIS 15396, *20 (E.D. Pa. July 29, 2005).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, at *22.

⁵¹ *Ibid.* at 24–25.

declaring that CAFA did not change the longstanding rule.⁵² In an opinion authored by Judge Easterbrook, the court opined that mere “naked legislative history has no legal effect”.⁵³ Citing *Pierce v. Underwood*, Judge Easterbrook noted that in that case, “A Committee of Congress attempted to alter an established legal rule by a forceful declaration in a report; the Justices concluded, however, that because the declaration did not correspond to any new statutory language that would change the rule, it was ineffectual. Just so here. The rule that the proponent of federal jurisdiction bears the risk of non-persuasion has been around a long time. To change the rule, Congress must enact a statute with the President’s signature... A declaration by 13 Senators will not serve”.⁵⁴

Implications of burden-shifting

Simply put, the implications of a change in the burden-shifting rule does have an impact on forum access. A shifted burden rule generally will favour defendants’ opportunity to remove state class actions into federal court, and will place an often onerous burden on state court plaintiffs to demonstrate that the case doesn’t belong there.

The burden-shifting issue ultimately will distill into a debate over the appropriate use of legislative history as an aid to statutory construction. Because the Seventh Circuit is the only federal Circuit to have opined on this issue, the burden-shifting problem is certain to continue to percolate in the lower federal courts.

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⁵² *Brill v. Countryside Home Loans, Inc.* (2005) 427 F.2d 446.

⁵³ *Brill, ibid.*, U.S. App. LE22514, *5.

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