"When Congress gives you lemons . . ."

Plaintiffs' attorneys are forced by the Class Action Fairness Act to devise innovative new ways to prosecute interstate class actions

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The Class Action Fairness Act, which creates federal jurisdiction over multi-state class actions, caused many plaintiffs' attorneys to predict multi-state, class-action lawsuits' demise. But this isn't true. Rather, if properly pleaded, creative plaintiffs' attorneys can resolve class actions in federal court on the same multi-state basis as in the past.

The Class Action Fairness Act of 2005[1] transformed class-action practice and procedure as we know it. CAFA's major changes involve: (1) expanding federal-diversity jurisdiction to include virtually all interstate class actions; (2) allowing defendants to remove state-court, class-action lawsuits, restricting federal courts' ability to remand them, and providing expedited appellate review; (3) adding noteworthy steps to the procedure for settling class actions; and (4) providing a structure for evaluating coupon settlements and attorneys' fees in coupon settlements.

Since CAFA's enactment, some plaintiffs' attorneys have conceded the ability to pursue multi-state, class-action lawsuits alleging violation of one or multiple states' substantive laws. Perhaps this is because scant commentary exists describing and examining the new ways that creative plaintiffs' attorneys can actually plead their previously state-court, class-action lawsuits to appreciate CAFA's effects.[2] After explaining CAFA's requirements, this article will describe some innovative, new methods for pleading successful multi-state, class-action cases after CAFA.

CAFA's subject-matter-jurisdictional effect

CAFA changed federal subject-matter-jurisdictional doctrine with regard to class-action claims based on diversity jurisdiction. Before CAFA amended the federal diversity-jurisdiction statute (28 U.S.C., §1332), to create federal jurisdiction for claims involving minimal diversity[3] and amounts in controversy that, individually, total less than $ 75,000,[4] federal courts were not allowed to aggregate class members' claims to establish the jurisdictional minimum.[5] Rather, for federal subject-matter jurisdiction to exist, "each plaintiff in a Rule 23(b)(3) class action [had to] satisfy the jurisdictional amount, and any plaintiff who [did] not [had to] be dismissed from the case. . . ."[6]

But believing that, due to the non-aggregation rule, "class-actions [were long being] manipulated for personal gain,"[7] and that "lawyers who represent plaintiffs from multiple states [were] shopping around for the state court where they expected to win the most money,"[8] on February 10, 2005, Congress passed CAFA, and on February 18, 2005, President Bush signed it into law. CAFA amended the federal-diversity statute and abrogated the non-aggregation rule, thus creating original federal-court, subject-matter jurisdiction for class-action claims exceeding $5 million in potential aggregate damages. As a result, plaintiffs can no longer realistically sue multi-state, class-action lawsuits alleging application of a single state's substantive law in state court – assuming their claims involve any worthwhile damages (i.e., over $5 million) – but must rather file their class-action lawsuits in federal court.

A new world view

Although some plaintiffs' attorneys continue to test federal judges, due to class actions' new forum the notion of multi-state class actions alleging violation of a single state's substantive law has all but vanished after CAFA. While plaintiffs occasionally succeeded in certifying and settling multi-state cases in state courts pre-CAFA, plaintiffs' class-action attorneys generally agree that federal courts are reluctant to certify multi-state class-actions applying a single state's substantive law, even though the U.S. Supreme Court's *Phillips Petroleum Co. v. Shutts*[9] decision suggests this approach's propriety under

certain circumstances.[10] Since plaintiffs can now no longer necessarily expect courts to certify multi-state classes alleging violation of a single state's substantive law, some plaintiffs' attorneys have begun to devise new and innovative ways to achieve a hopefully similar result while accepting CAFA's restrictions and realities.

Pursuing 50-state class actions

• *Suing one or only a few cases for victims in all 50 or multiple states*

As suggested, plaintiffs' counsel can still file 50-state, class-action lawsuits even after CAFA. Although, before CAFA, plaintiffs' lawyers often sued multi-state claims on behalf of an individual class representative, this practice invoked inevitable standing, subject-matter jurisdiction, and – if plaintiff even reached class certification – class-membership issues. Plaintiffs' counsel sued in this manner (and sometimes still do) because they sought to capture the most expansive class possible while spending the least effort necessary.

But a properly alleged multi-state, class-action lawsuit usually requires multiple class representatives – ethically retained and with genuine damages. And while plaintiffs' counsel can certainly sue these multiple clients' lawsuits in these clients' home-state federal courts, counsel might instead prefer to sue these clients' claims together in a single federal forum under a single state's (forum's or otherwise) substantive law.

After all, since counsel must now file these lawsuits in federal rather than state court, these cases are subject to multi-district consolidation,[11] meaning the Multi-District Litigation (MDL) Panel will most likely consolidate and transfer them to a single district court anyway. So, to avoid multiple filing fees and hiring multiple local counsel, plaintiffs' counsel may prefer to file in a single federal court having proper venue. When doing so, plaintiffs' counsel should strongly consider the defendant's (or main defendant's, where multiple defendants exist) home state (assuming its law is good there), since doing so permits plaintiffs' counsel to encourage classwide application of that state law's substantive under *Shutts*,[12] even if class representatives may not exist from all states for whose citizens counsel has filed suit.

• *Suing in 50 states under 50 states' respective substantive laws*

Suing 50 individual class-action lawsuits or alleging state-law claims on behalf of 50 states' class members in a single, colossal class-action lawsuit involves immense labor and organization. As such, plaintiffs' counsel should consider whether this exercise is worth it, meaning they should balance the benefit of complete, multi-state coverage versus the risk of leaving some states unsued. Although suing on claims for victims nationwide (whether via 50 initially separate lawsuits or one master complaint) deters uninvited plaintiffs' attorneys from joining in plaintiffs' counsel's cause, suing in this ambitious manner may present significant manageability issues to the transferee (or original, as the case may be) judge, which the judge may consider insurmountable even well before considering superiority at class certification.[13] Therefore, plaintiffs' counsel needs to balance the risk of additional, unwanted plaintiffs' counsel against the risk of upsetting and alienating their trial judge right from the start when deciding whether to sue multiple cases that end up consolidated or one super-case alleging multiple states' claims.

The effectiveness of suing "exemplar-state," class-action lawsuits

Suing on behalf of class members in a limited number of states – "exemplar states" – is an innovative alternative to suing multiple cases or one mega-case and can potentially solve the likely management issues involved with over-ambitious pleading at potentially minimal, if any, eventual cost.[14] Exemplar states simply means a handful of states, whether sued separately or together, for whose alleged victims plaintiffs' counsel, by way of appropriate class representatives, file a single class-action complaint.

If plaintiffs' counsel pursue the exemplar route, they must include class representatives from enough states (however their judgment determines that is) to effectively litigate their case, while, of course, focusing on states with good substantive state law and significant populations. Doing so allows plaintiffs' counsel's exemplar case to remain small enough to avoid manageability issues yet big enough to hopefully coax a global settlement should the opportunity arise.

But since other plaintiffs' attorneys can immediately access all federal class-action case filings through the electronic databases PACER, Courtlink, and Casestream, suing only exemplar states leaves plaintiffs' counsel vulnerable to other attorneys suing overlapping or competing class actions. This means other counsel may sue for consumers in states not yet in suit or may even sue on top of pending cases. Plaintiffs' counsel suing exemplar-state, class-action lawsuits must therefore organize and consolidate their leadership structure and positions early (perhaps by requesting a pre-trial order, or orders depending on the status of consolidation, appointing them interim lead or co-lead counsel), thus helping defeat any likely future leadership attacks. Because if plaintiffs' counsel does not take the time and care to organize their claim's politics, they had better be prepared to argue and win inevitable lead-counsel motions by demonstrating their extensive (if true) pre-filing investigation, their class-action lawsuit's proprietary nature, and their entitlement to a lead or co-lead counsel position.

Embracing or avoiding CAFA's federal subject-matter jurisdiction

Of course, suing in the above-described manner will most certainly subject a plaintiff's lawsuit to CAFA's newly created federal subject-matter jurisdiction, which exists so long as plaintiffs' alleged claims exceed $5 million

and minimal diversity exists, which occurs when at least one plaintiff resides in a different state from at least one defendant. But even where minimal diversity exists, state-court jurisdiction may remain if plaintiff alleges less than $5 million in damages or pleads one of CAFA's "local case" exceptions.

• *Alleging damages less than $5 million in damages*

Although long ago the U.S. Supreme Court ruled that district courts could not aggregate class members' damages to satisfy minimum jurisdictional requirements,[15] CAFA now requires aggregation to determine whether a plaintiff's amount in controversy satisfies CAFA's new jurisdictional minimum by exceeding $5 million. So, if class plaintiffs want to remain in state court, they may want to consider alleging under $5 million in damages.

With respect to injunctive relief, before CAFA, district courts measured injunctive relief's value by determining whether the injunctive relief sought exceeded the federal-diversity statute's $75,000 threshold. And while relief to individual class members would not typically exceed $75,000, the injunctive relief's total cost to defendants typically did. But CAFA's mandatory aggregation provision now appears to require that courts measure injunctive and other nonmonetary relief according to the total classwide benefit sought or the total cost to defendant. As a result, plaintiffs who desire to remain in state court might want to consider avoiding requests for injunctive relief while at the same time pleading damages less than $5 million.[16]

• *CAFA's "home-state" and "local-controversy" exceptions*

According to CAFA's home-state exception,[17] if two-thirds or more of the proposed class members and the primary defendants are citizens of the state where plaintiff filed suit, federal subject-matter jurisdiction under CAFA does not exist. And under CAFA's local-controversy exception,[18] if two-thirds of the plaintiffs and at least one defendant against whom significant relief is sought are citizens of the state where plaintiff filed suit; the principal injuries occurred in that state, and no other class actions against any of the defendants on behalf of the same class have been filed in the past three years, federal subject-matter jurisdiction under CAFA does not exist either.

• *Facing or forgetting the remand fight*

If less than one-third of all class members are citizens of the original forum state, CAFA requires federal subject-matter jurisdiction and remand cannot occur. But district courts have discretion to decline subject-matter jurisdiction if between one-third and two-thirds of the class members and the primary defendants are citizens of the state where plaintiff filed suit. And when exercising their discretion to decline jurisdiction, CAFA requires district courts to consider the following additional factors:

- Whether the claims involve matters of national or interstate interest;
- Whether the claims will be governed by the laws of the State in which the action was originally filed or by the laws of other States;
- Whether the class action has been pled in a manner that seeks to avoid federal jurisdiction;
- Whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
- Whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
- Whether, during the three-year period preceding the filing of that class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.[19]

Finally, district courts must remand class actions if they satisfy CAFA's home-state or local-controversy exceptions.

As shown, CAFA's remand considerations involve the number of plaintiffs and where they reside, but from a plaintiff's perspective, counting class members and identifying their geographical locations can be virtually impossible at a lawsuit's inception. After all, defendants – not plaintiffs – are in a better position to know class members' identities and addresses. Further exacerbating this problem is the reality that many class members will likely have moved or purchased the product involved in the lawsuit through third parties, like distributors or retailers. These problems all create the very real risk of remand-related mini-trials over class size and class members' geographic locations, which mini-trials will likely require information that defendants will be uncomfortable disclosing. And even more uncomfortable is the possibility that if plaintiffs allege under $5 million in damages and forego a request for injunctive relief, defendants will be forced to argue that class members' damages actually exceed $5 million, which no defendant would relish doing.

Furthermore, while CAFA refers to "primary" defendants and defendants from whom "significant" relief is sought or who caused plaintiff's alleged "principal injuries," CAFA does not define either of these terms. Nevertheless, plaintiffs' counsel can try to influence remand by naming (or not naming) certain defendants; describing them as primary defendants or as defendants from whom they seek significant relief; or by describing injuries so as to make the injuries principal injuries.

Given the above-described likelihood of uncertainty and confusion, where minimal diversity exists trying to massage CAFA's contours into a formula that requires remand, is an all-but-impossible undertaking, whether concentrating on a class-action lawsuit's amount

in controversy; class members' number and/or locations; which defendant is primary or significant; or which defendant caused plaintiff's alleged principal injuries. Given this difficulty, plaintiff's counsel should not try too hard to retain state-court, subject-matter jurisdiction for fear that attempting to do so may result in a remand-related sideshow, which plaintiff may lose after spending substantial time and money. Instead and most fundamentally, even given CAFA's enactment if plaintiffs' attorneys continue to sue responsible and worthwhile cases and believe in their cases with the ardor, zeal and fervor required by all states' ethical rules, it should make no real difference where plaintiffs' counsel try their cases, and justice should prevail whether sought in state or federal court.

Crafting broad settlements under CAFA

Come hopeful settlement time, drafting a suitably broad settlement agreement in a 50-state, class-action lawsuit (where class representatives from all 50 states are involved) is rather straightforward, as the settlement agreement will necessarily affect claims in all 50 states. But crafting a satisfactory settlement agreement in an exemplar-state, class-action lawsuit requires additional thought.

During litigation, defendants understandably strive for the narrowest class possible, but during settlement defendants endorse the broadest class possible. Since a typical exemplar-state, class-action complaint only alleges claims on behalf of people under comparable substantive laws in a handful of states, at settlement time the parties must figure out how to provide defendants expansive relief (without which defendants likely will not agree to settle) while recognizing and respecting due process and perhaps comity concerns. Because if the parties' settlement involves only the exemplar states, this leaves multiple states available for later lawsuits by other attorneys, which situation will surely discourage defendants from settling under any approach. And with the exemplar-state case possibly (but likely not) tolling any unsued state claims' statutes of limitations, even if an exemplar-state case lingered for years, huge exposure to defendants may still exist by way of other plaintiffs' lawyers bringing claims for citizens residing in any unsued states.

So, to be safe at settlement time, plaintiffs' counsel should consider amending their complaint to allege claims on behalf of class members in all 50 states. If plaintiffs sued their complaint in the defendant's (or the main defendant's, when multiple defendants exist) home state, amending their complaint in this manner does not necessarily create the standing, subject-matter jurisdiction, and class-membership issues described earlier since *Shutts* permits the forum state substantive law's extraterritorial application if doing so does not violate due process, such as when plaintiffs sue in the defendant's home state.[20] On the other hand, if plaintiffs sued (or the MDL Panel consolidated and transferred) their complaint in some other state, *Shutts* similarly allows the extraterritorial application of the pleaded states' substantive laws so long as no conflicts exist among these laws and the newly added states' substantive laws.[21] Finally, certain state's substantive laws, independent of *Shutts*, allow their extraterritorial application, which means that a federal court may approve multi-state settlements pursuant to these certain substantive laws without even the need to conduct a *Shutts* analysis.[22]

So even after CAFA, multi-state resolutions are possible, indeed desirable. If the parties take care while crafting their multi-state, class-action settlement agreements (keeping the aforementioned due process, jurisdictional and standing concerns that CAFA created in mind), the parties can likely resolve their litigation with the relief and peace of mind that everyone desires.

Conclusion

CAFA unquestionably made pleading, litigating, and settling multi-state, class-action cases more difficult, but it hardly made this procedure impossible. Although substantial class-action cases are now in federal court to stay, their new venue need not unduly agitate plaintiffs' counsel. If plaintiffs' attorneys pursue sensible and worthwhile multi-state, class-action lawsuits with the foregoing pleading themes in mind, plaintiffs' attorneys should be able to successfully resolve these claims even after CAFA.

Endnotes:

[1] 28 U.S.C., §1332(d).

[2] Since this article examines federal class-action lawsuits, it will not discuss methods for avoiding CAFA's federal-subject-matter-jurisdictional requirements, such as pleading multiple city, county, or even smaller classes, each alleging under $5 million in potential damages.

[3] 28 U.S.C., §1332(d)(2)(A).

[4] *Id.* at §1332(d)(2)(C).

[5] *See Snyder v. Harris* (1969) 394 U.S. 332, 336 (The Court explained that "when two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount."). *See also Zahn v. Int'l Paper Co.* (1973) 414 U.S. 291, 299 (The Court explained that "class actions involving plaintiffs with separate and distinct claims were subject to the usual rule that a federal district court can assume jurisdiction over only those plaintiffs presenting claims exceeding the $10,000 minimum specified in 1332 [, and that a]ggregation of claims was impermissible.").

[6] *Zahn*, 414 U.S. at 301.

[7] Press release, The White House, President Signs Class-Action Fairness Act of 2005, http://www.whitehouse.gov/news/releases/2005/02/20050218-11.html (last visited June 18, 2006).

[8] *Ibid.*

[9] 472 U.S. 797 (1985).

[10] *See id.* at 821 (Allowing extraterritorial application of single state's substantive law so long as "the choice of [one state's] laws is not arbitrary or unfair."). *See also In re St. Jude Med., Inc.* Silzone Heart Valves Prods. Liab. Litig., MDL No. 01-1396, 2006 U.S. Dist. LEXIS 74797 (D. Minn. Oct. 13, 2006), *11-12 ("Given defendant's significant contacts with Minnesota, no one would doubt that an individual class member could sue defendant in Minnesota and apply Minnesota law. Similarly, the Court concludes that it is constitutionally permissible to apply Minnesota law in the class action context.").

[11] *See* 28 U.S.C., §1407(a) (2006) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.").

[12] Of course, if the MDL Panel transfers the consolidated case to a "neutral" forum, plaintiffs may still argue that defendant's (or the main defendant's, if any) home state's law applies classwide under *Shutts*.

[13] *See* Fed. Rules Crim. Proc. 23(b)(3)(D) (When deciding whether a class action is the superior to other ways to resolve a controversy, the court may consider "the difficulties likely to be encountered in the management of a class action.").

[14] *See. e.g., In re New Motor Vehicles Canadian Export Antitrust Litig.* (D. Maine 2006) 235 F.R.D. 127, 148 (certifying exemplar-state classes of indirect automobile buyers and lessees); *D.R. Ward v. Rohm & Haas Co.* (E.D. Pa. 2006) 470 F. Supp. 2d 485, 494 (denying defendants' motion to dismiss plaintiffs' exemplar-state complaint in consumer price-fixing case).

[15] *Zahn v. Int'l Paper Co.* (1973) 414 U.S. 291.

[16] Although avoiding a request for injunctive relief for the sole purpose of remaining in state court, when injunctive relief should be sought as an integral part of the class's damages, may subject class counsel to an adequacy-of-representation challenge at the lawsuit's class-certification stage.

[17] 28 U.S.C., §1332(d)(4)(B).

[18] *Id.* at §1332(d)(4)(A).

[19] *Id.* at §1332(d)(3)(A)-(F).

[20] *See supra* note 9.

[21] *See Shutts*, 472 U.S. at 816 (A court may apply a single state's substantive law extraterritorially so long as the law sought to be applied "is not in conflict with that of any other jurisdiction connected to the suit.").

[22] *See, e.g., Freeman Indus., LLC v. Eastman Chem. Co.* (Tenn. 2005) 172 S.W.3d 512, 523 (Non-Tennessee residents may invoke Tennessee's antitrust statute so long as the defendants' "alleged anticompetitive conduct affects Tennessee trade or commerce to a substantial degree.").

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