JONES DAY

PRACTICE PERSPECTIVES: PRODUCT LIABILITY & TORT LITIGATION

Success in Court

On the Cutting Edge of How to Defend and Win

letter from the practice chair

This edition of *Practice Perspectives* features a number of articles authored by our lawyers on various issues of current interest principally relating to class actions. We have tried to make these articles useful to our clients and friends by attempting to balance legal scholarship and analysis of new developments with heavy doses of common sense and practical judgment in light of the realities that in-house lawyers face daily. Most of our clients don't need law review articles and treatises when a thorny issue arises; they want practical, cost-effective solutions. We know that. We hope we have struck that balance in our treatment of these topics and the others raised in this issue.

As lawyers primarily involved on the defense side of class-action litigation, we know well that the "big dollar" plaintiffs' firms try to use class actions and other claim-aggregation tactics to create what appear to be huge lawsuits out of otherwise manageable, if not de minimis, individual claims—especially when the owners of the vast majority of those claims do not feel wronged or injured, did not hire and probably do not know the lawyers purporting to be representing them and looking out for their interests, and are not likely to benefit in any meaningful way from any settlement or judgment. At the same time, the lawyers who have thought of the case, invested in it, and often get a settlement from a company that just wants to get it resolved, even when the claims border on the frivolous, walk away with a significant attorneys' fee built into the settlement.

Recent news articles, and an indictment or two, have brought to the forefront the practice of paying individuals to be named plaintiffs and class representatives—a practice that reportedly involves some big-name class-action firms and lawyers. Just as the police chief in the movie *Casablanca* professed to be "shocked, shocked" to learn that there was gambling going on in the back room at Rick's Café, the media seems to be surprised that the plaintiffs' firms were recruiting, financing, and manipulating named plaintiffs and class representatives in this fashion. Many of us at Jones Day who have defended class actions have deposed putative class representatives who often seem to be no more than recruited, revenue-producing pawns for the class-action lawyers. As a result of what we have seen (including a big-name plaintiffs' firm that seems to be able to field relatives of one of its lawyers for various mass tort claims: This cousin was a smoker, this cousin is claimed to have been injured by old lead paint, etc.), we defense lawyers have become cynical,

> Until meaningful reform comes, our charge as defense lawyers is to know how to defend and beat class-action lawsuits.

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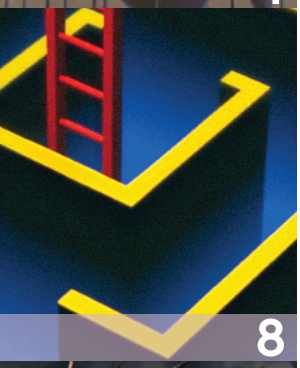

ESCAPE FROM THE PRO-PLAINTIFF COURT

The American Tort Reform Foundation reports annually on "Judicial Hellholes®"—which ATRF defines as "places where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants, in civil lawsuits." The good news, according to ATRF's 2006 report, is that examples of blatant unfairness in such jurisdictions may be decreasing somewhat.

The bad news is that such places still exist.

Moreover, courts that tend to favor plaintiffs over defendants—particularly in product liability cases against major manufacturers—are not limited to the worst offenders. Sometimes the problem is not a lack of fair and capable judges, but rather the substantive law of the jurisdiction or the nature of the jury pool. Whatever the reason, plaintiffs get to pick where they file suit. Especially when the court is not obviously convenient, plaintiffs' counsel probably senses a tactical advantage.

What can a defendant do when sued in an apparently pro-plaintiff forum? Several procedural alternatives should be considered at the outset of any product liability case. Some approaches turn on the discretion of the plaintiff's chosen court whether to keep the case and often present an uphill struggle. Under other approaches, the decision is not made by the original court, or there may be a meaningful opportunity to appeal.

For example, if the case is filed in state court, are there grounds—such as federal-question jurisdiction or diversity of citizenship—for removal to federal court? Under 28 U.S.C. §§ 1446 and 1447, removal is essentially automatic, and it is then the responsibility of the federal court to decide whether removal was proper, and to remand to the state court if it was not. If plaintiffs have tried to avoid diversity jurisdiction by naming in-state defendants, can it be argued that they have been fraudulently

by Paul S. Ryerson

joined? If there is no possibility of a viable cause of action against such defendants, the federal court may disregard them. *See, e.g., Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995).

If the case has been filed in or removed to federal court, should defendants move for a transfer under 28 U.S.C. § 1404? Section 1404(a) provides that "[f]or the convenience of parties and witnesses" and "in the interest of justice," a federal district court may transfer a case to another district or division where it might have been brought. Alternatively, where related cases are pending in different federal district courts, should defendants seek transfer to a single district by the judicial panel on multidistrict litigation, under 28 U.S.C. § 1407, for the more limited purpose of conducting a "coordinated or consolidated pretrial proceeding"? Although MDL cases are supposed to go back to their original districts for trial, in practice the assigned MDL judge often decides motions to dismiss and other important substantive matters, and appeals from such rulings are heard in the federal circuit in which that judge sits. *See, e.g., In re Tobacco/Governmental Health Care Costs Litig.*, 83 F. Supp. 2d 125 (D.D.C. 1999), *aff'd*, 249 F.3d 1068 (D.C. Cir. 2001).

If the case is filed in state court (or filed in federal court, and no other district in the United States is suitable for a Section 1404 transfer), should defendants move for dismissal based on *forum non conveniens*? Even when a court has jurisdiction, it can dismiss if a more appropriate and convenient forum exists elsewhere. As Justice Robert H. Jackson wryly noted in an early case, the *forum non conveniens* doctrine may be a necessary byproduct of liberalizing traditional barriers to personal jurisdiction: "[T]he open door may admit those who seek not simply justice but perhaps justice blended with some harassment." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

The most fundamental question of all should never be overlooked: Is there even personal jurisdiction over the defendant in plaintiff's chosen forum? Minimum contacts sufficient to support specific jurisdiction—that is, jurisdiction to adjudicate a claim that arises from or relates to the defendant's activities in the forum—need not be very extensive. However, general jurisdiction—that is, jurisdiction to adjudicate a claim that does *not* arise from or relate to the defendant's activities in the forum—requires substantially greater contacts. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

Additionally, to satisfy due process, the exercise of *either* specific or general jurisdiction must, in the particular circumstances of the case, be "reasonable." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987). The test is not "simply mechanical or quantitative," looking only at "whether the activity [of defendant within the forum state] is a little more or a little less." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Rather, the analysis must focus more broadly on "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

The most fundamental question of all should never be overlooked: Is there even personal jurisdiction over the defendant in plaintiff's chosen forum?

Four recent cases, in which Jones Day represented the defendants, illustrate the interplay between these doctrines.

In *São Paulo v. American Tobacco Co.*, No. 00-2058 (La. Civ. D. Ct. May 31, 2005), the State of São Paulo, Brazil, sued the major United States tobacco companies in state court in Louisiana. São Paulo sought to recover the costs of providing medical care to its citizens who allegedly were injured by their use of tobacco products. In *Rio de Janeiro v. Philip Morris, Inc.*, 143 S.W.3d 497 (Tex. Ct. App. 2004), the State of Rio de Janeiro, Brazil, sued the same defendants in Texas state court on a virtually identical claim.

São Paulo and *Rio de Janeiro* were each dismissed because the forum (Louisiana and Texas, respectively) was inappropriate. The Louisiana court emphasized that the acts giving rise to the action occurred outside Louisiana, the alleged damages occurred outside Louisiana, and plaintiff (São Paulo)

obviously was not domiciled in Louisiana. The Texas court voiced virtually identical concerns, stating that "Texas does not appear to have an interest in adjudicating this specific dispute, a dispute involving tortious conduct and damages occurring outside the borders of Texas and unrelated to defendants' business in Texas." 143 S.W.3d at 502.

Despite their similarity, however, the cases brought by São Paulo and Rio de Janeiro were dismissed on different grounds. In São Paulo's case, the court invoked *forum non conveniens*. Regardless of whether it could properly exercise personal jurisdiction over the defendants in Louisiana, the court concluded that a more appropriate forum existed outside Louisiana. In Rio de Janeiro's case, on similar facts, the court held that exercising personal jurisdiction over the same defendants in Texas would violate due process. Although it assumed that defendants had minimum contacts, it held that the exercise of jurisdiction would be unreasonable. Thus, the two courts reached the same result under different doctrines—one premised on judicial discretion and one mandated by the Constitution.

In contrast, in *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163 (9th Cir. 2006), an individual smoker sued a North Carolina tobacco company in federal court in the State of Washington. Plaintiff alleged that he had contracted a smoking-related illness in the Philippines as a result of his use of tobacco products in that country for more than 40 years. Plaintiff conceded that his claim for damages—which was filed a few days after his arrival in the United States—arose entirely from defendant's conduct outside the forum state and could not support specific jurisdiction. (Plaintiff also volunteered, in deposition, that the reason he had never sued in the Philippines was that the courts there gave "ridiculously low" damage awards.)

Mr. Tuazon's candor notwithstanding, the United States Court of Appeals for the Ninth Circuit affirmed the district court's denial of defendant's motion to dismiss his case on *both* personal jurisdiction and *forum non conveniens* grounds. The Ninth Circuit upheld the exercise of general jurisdiction on the basis of what it characterized as a "confluence" of the defendant's "physical, economic, and political presence and the company's myriad other activities in the state." 433 F.3d at 1175.

The Ninth Circuit emphasized, however, that "[i]t is abundantly clear that a corporation does not necessarily submit to general jurisdiction in every state in which it merely sells a product." 433 F.3d at 1174. Thus, although decided in plaintiff's favor on the facts, *Tuazon* nonetheless echoed the *International Shoe* warning that "continuous activity of some sort within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." 326 U.S. at 318.

Moreover, although there happened to be international aspects to *São Paulo*, *Rio de Janeiro*, and *Tuazon*, they were not controlling. Other cases make clear that general jurisdiction likewise cannot be exercised in a case brought by a domestic plaintiff concerning products sold and used in the United States when a domestic defendant's contacts with the forum state are insufficient to support the exercise of jurisdiction over a claim that arose in another state. *See, e.g.*, *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1198 (4th Cir. 1993) (annual sales of $9 million–$13 million in the forum, promoted by 17–21 employees working there, and advertising in local newspapers were not sufficient for general jurisdiction); *Glater v. Eli Lilly & Co.*, 744 F.2d 213, 215 (1st Cir. 1984) (eight sales representatives, limited advertising, and substantial sales of pharmaceutical products through wholesale distributors in the forum state were not sufficient for general jurisdiction).

The Supreme Court declined to review *Tuazon*, and it and other cases have left unclear the standards for personal jurisdiction and *forum non conveniens*, especially concerning the extent and nature of forum contacts required for general jurisdiction. When (if ever) will product sales and sales-related activities be sufficient? Assuming more substantial contacts are required, what are they? Notwithstanding the differing results in *São Paulo*, *Rio de Janeiro*, and *Tuazon*, defendants' activities in Louisiana, Texas, and Washington were similar. Like many corporations that market their products in every state, the defendants enjoyed substantial product sales in all three states and engaged in incidental sales-related activities. However, their activities in Louisiana, Texas, and Washington were no greater in kind than their activities in any other state and were small in relation to their overall operations. Unfortunately, the Supreme Court has never "outlined a specific test." *LSI Indus. Inc. v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1375 (Fed. Cir. 2000). Not surprisingly, personal jurisdiction is one of the most frequently litigated issues in state and federal courts.

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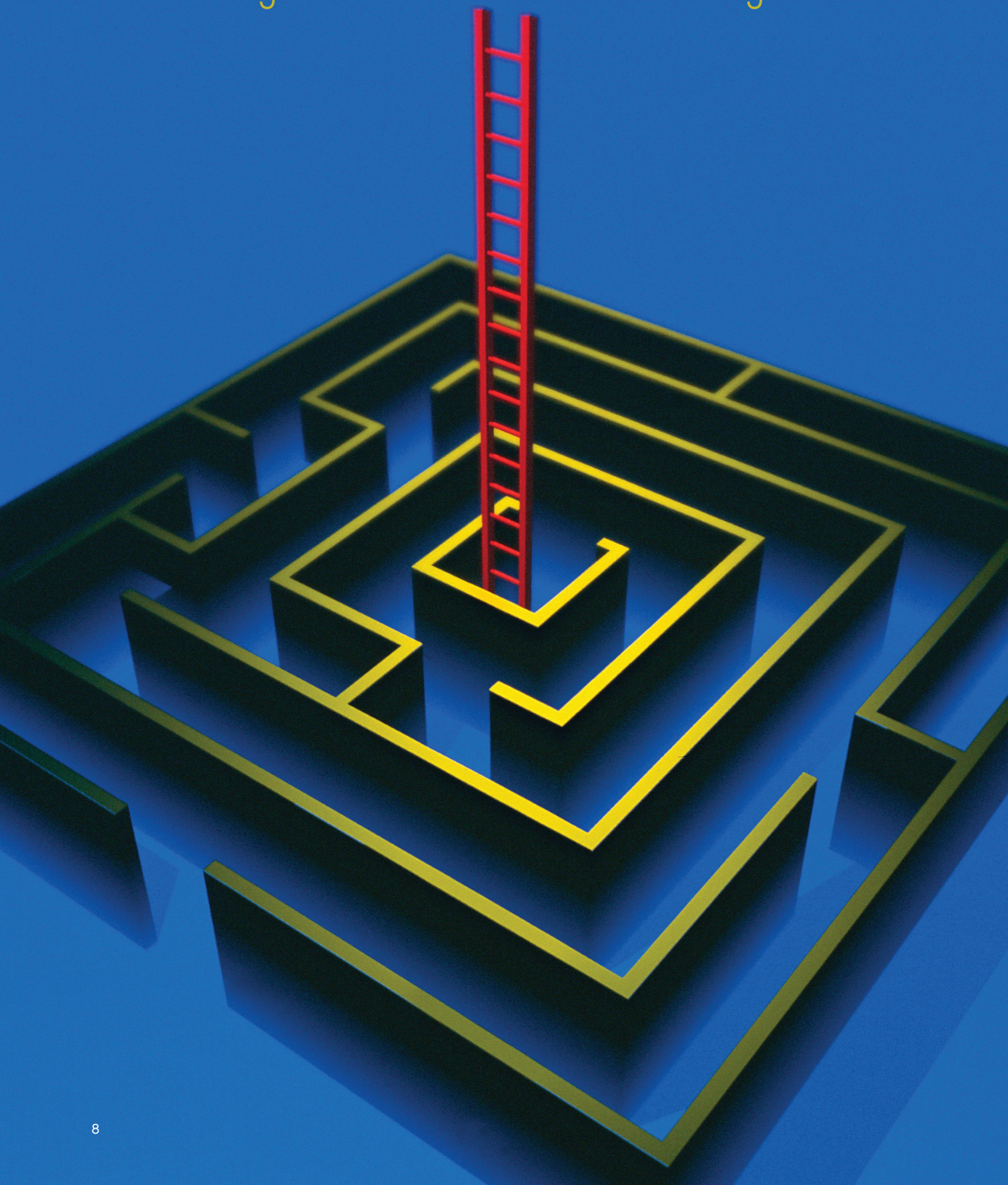
Solving the Problems in Mass Tort Litigation



by Roy T. Atwood, Christopher Groves, and Kelly W. King

The United States judicial system was ill-prepared to handle the flood of litigation spawned by the use of asbestos in America. The deluge of cases involving numerous parties created an environment in which entrepreneurial plaintiffs' attorneys prospered at the expense of businesses and their insurers. The attorneys organized mass screenings to troll for all potential claimants, and they roped clients in by the thousands. With millions of dollars at stake and ample opportunity to scam the system, abuses of the judicial process occurred on a grand scale. Fortunately, courts and commentators are beginning to reveal and rectify those abuses.[1]

Unfortunately, the long history of abuses revealed itself too late for businesses sucked into the asbestos and other mass tort quagmires. For years, mass-toxic-tort plaintiffs' attorneys operated under the same mass tort business model. It required that they sue every entity that might have even the slightest connection to the exposure, no matter how tenuous. And they sued on behalf of anyone and everyone a plaintiff-retained doctor was willing to say might have a condition related to the exposure, based upon crude self-reported work histories and slight shadows on a lung X-ray. Courts accepted bare-bones pleadings spit out by word processors as fast as counsel could substitute the names of new plaintiffs. Plaintiffs named defendants simply because it was conceivable that they *might* have contributed to the plaintiffs' injuries, not because they actually caused them. Plaintiffs then sought to push cases toward trial at the lowest cost possible, using the claims of the most sympathetic to carry the weaker cases. Courts emasculated the rules of procedure and ignored the due-process rights of defendants in an effort to streamline the voluminous litigation burdening their dockets, playing right into the plaintiffs' business model. Ultimately, many defendants either settled for nominal sums or were dismissed outright after the product identification phase[2] ended. Plaintiffs' attorneys then claimed "no harm, no foul" against the settling or dismissed defendants, despite the fact that in many cases, no evidence ever existed that the particular defendant *caused* the plaintiffs' injuries. In fact, rather than "no harm," there is actually enormous harm, considering the number of unsubstantiated claims filed against defendants and the cost of defending each claim.

The solution to this problem is not difficult. The tools exist in the rules of procedure and common law. Courts should require that plaintiffs determine which entities they actually have claims against before filing suit. Courts should also enforce the rules of procedure as written, not as unjustly "amended" because of the number of parties in a case or the number of cases clogging the dockets. Finally, courts should eliminate the ability of plaintiffs' attorneys to procure settlements through blackmail induced by trial setting.

COURTS MUST SCRUTINIZE PLAINTIFFS' PLEADINGS

Courts must require that plaintiffs sue only the defendants against which they have legitimate claims, as universally required by rules of procedure. (Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "statement of the claim showing that the pleader is entitled to relief.") Federal courts and most states have a "notice-pleading" requirement. *See*, *e.g.*, Fed. R. Civ. P. 8(a)(2). "Notice" in this context cannot and does not mean, as is often heard from plaintiffs' counsel, "We sue you all the time in these cases, so we all know what this is about." This requirement means that plaintiffs must put defendants on notice of the relief that they are requesting. And plaintiffs must show that they are entitled to relief. Doing so necessarily requires the plaintiffs to show *some* connection between each defendant and the individual plaintiff's injuries.[3]

In theory, notice-pleading requirements should be sufficient to weed out defendants against which plaintiffs cannot articulate a viable claim at the outset of the lawsuit. Yet courts have not historically required mass tort plaintiffs to plead meritorious allegations of causation. Courts accept pleadings lacking in detail, in which plaintiffs merely recite generally that the defendants caused the plaintiffs' injuries, with no attempt to show how the named defendants are in any way connected to the injuries.

A good example comes from a silicosis case filed in Mississippi, in which 4,200 plaintiffs separately sued 131 defendants. The case was not a class action. The individual allegations of each plaintiff against each defendant, including the statement of the causes of action, consumed only about five pages and were the same for each plaintiff against each defendant. *Prince, et al. v. Pearl River Sand & Gravel Co., et al.*, Cause No. 2002-430, Circuit Court of Noxubee County, Miss. Some defendants are dismissed from more than 90 percent of the cases in which they are sued because the plaintiff fails to identify one of their products as causing the alleged injury. Dismissals of this nature would not occur with such frequency if plaintiffs pled their claims properly.

Postfiling discovery is not the time for plaintiffs to determine which parties they should have sued. Procedures exist for conducting discovery *before* filing suit if a plaintiff needs formal discovery to know which entities to sue. *See* Fed. R. Civ. P. 27(a)(1). Yet when faced with motions to dismiss, plaintiffs readily argue that defendants are seeking to abrogate their due-process rights by moving to dismiss claims before discovery is complete.[4] Courts regularly deny motions to dismiss in mass tort cases on this ground, despite the fact that the plaintiffs' argument establishes their lack of an evidentiary basis for filing suit.

Courts have the tool they need to stop this abuse. Federal Rule of Civil Procedure 11 provides that by filing a pleading, the attorney is certifying that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . ." Fed. R. Civ. P. 11(b)(3). Counsel cannot satisfy this standard based solely on the thought that they may develop evidence that the plaintiff used a product because the product existed. Unfortunately, courts have not used Federal Rule 11 or its state counterparts to address this problem.

In the Advisory Committee Notes to the 1983 Amendments to Rule 11, the committee noted:

> Experience shows that in practice Rule 11 has not been effective in deterring abuses. . . . The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. . . . The standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation.

Fed. R. Civ. P. 11 (1983 Advisory Committee's Note). The Notes to the 1993 Amendments provide:

> Tolerance of factual contentions in initial pleading by plaintiffs or defendants when specifically identified as made on

> information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification.

Fed. R. Civ. P. 11 (1993 Advisory Committee's Note). Defendants that are involved in large-scale mass tort litigation are understandably reluctant to pursue Rule 11 sanctions (or the state-law equivalent) in one venue when the very real chance of retribution exists in another venue. Thus, it is incumbent upon the courts to take charge of the cases pending before them and use the power given to them by Rule 11(c)(1)(B) to initiate sanctions proceedings on their own.[5]

The solution to the problem of mass tort litigation is not difficult. The tools exist in the rules of procedure and common law.

While not using rules relating to pleadings to address the problem, some courts have used their broad case-management powers to address the lack of threshold evidence of causation with the advent of *Lone Pine* orders. *See Lore v. Lone Pine Corp.*, 1986 WL 637507 (N.J. Super. Ct. Law Div., Nov. 18, 1986) (unpublished) (not reported in A.2d), and its progeny. *Lone Pine* orders are "pre-discovery orders designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation by requiring plaintiffs to produce some evidence to support a credible claim." *Steering Comm. v. Exxon Mobil Corp*., 461 F.3d 598, 604 (5th Cir. 2006). *Lone Pine* orders compel plaintiffs to establish minimal causation against defendants upfront, before the parties unnecessarily expend their resources and those of the court. Plaintiffs must present a viable theory of liability, supported by a short expert report. The liability theory must demonstrate that the plaintiff is actually injured and that the named defendants could be liable for the injury. *Lone Pine* orders are particularly useful in previously unexplored tort areas. They give courts a foothold on novel issues and theories of liability. In all cases, *Lone Pine* orders give courts a reasonable preliminary scientific basis for including or excluding appropriate defendants.

In some states, the legislature has stepped in to assist courts in dealing with the abuses in mass tort lawsuits. Recent legislation in these states further details plaintiffs' threshold pleading requirements.[6] The legislation requires that plaintiffs demonstrate a cognizable injury before filing suit. These legislatures have defined "injury" to exist only when a person is physically impaired. By combining legislation requiring proof of impairment with *Lone Pine* orders requiring threshold evidence of causation, courts are attacking the same problems they could cure through the imposition of Rule 11 sanctions against attorneys who file pleadings without adequately investigating their clients' claims. As long as there is no penalty for filing claims with no evidentiary basis and there is a risk of a malpractice claim for not naming a viable defendant, plaintiffs' counsel will always err on the side of suing companies against which they think they might someday be able to establish a claim.

COURTS MUST ENFORCE THE RULES OF PROCEDURE

Courts must preserve justice by enforcing the rules of procedure as written, not as short-circuited in an attempt to accommodate mass tort dockets. The Rules Enabling Act of 1934 gave the United States Supreme Court the power to propose rules as long as the rules do not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Congress retained the right to review rules proposed by the Supreme Court before they become effective. 28 U.S.C. § 2074. As conceived and codified, the rules afford equal justice and freedom from undue cost and burden to plaintiffs, defendants, and nonparties alike. They have been molded by years of judicial precedent. Yet many courts routinely enter standing orders in mass tort cases that selectively enforce the rules of procedure or establish local rules that supplant the promulgated rules, particularly as those rules relate to discovery. The result is the undue burden, expense, and harassment specifically proscribed by the discovery rules. *See, e.g.*, Fed. R. Civ. P. 26(b); *see Scroggins v. Air Cargo, Inc*., 534 F.2d 1124 (5th Cir. 1976); *Baine v. General Motors Corp*., 141 F.R.D. 332, 334 (M.D. Ala. 1991).

Special rules in the form of "standing orders" or "local rules" have long been prevalent in asbestos cases. At one time, the "standing orders" in Dallas County, Texas, consisted of a stack of paper several inches high that was virtually unintelligible to a newcomer. In a group of silicosis cases in Nueces

County, Texas, the courts put in place a scheduling order that required plaintiffs' counsel to designate three groups of 130 plaintiffs for mediation.[7] The courts required plaintiffs' counsel to designate 30 of those 130 plaintiffs for deposition prior to mediation and required defendants' counsel to designate four of them. The court suggested that the parties could easily extrapolate the deposition testimony of 34 plaintiffs to the entire group of 130 plaintiffs at mediation. The court also ordered that it would deem to be timely all master discovery, master expert, and fact witness lists filed *30 days* before trial. On September 6, 2002, in a case in notoriously plaintiff-friendly Jefferson County, Texas, the judge ordered defendants to depose all 300 plaintiffs and begin trial in November 2002 on the first group of 10 plaintiffs, with trials of groups of 10 plaintiffs commencing immediately upon the conclusion of the prior trial until the court tried all 300 plaintiffs' claims. *Aparicio, et al. v. U.S. Silica Co., et al.*, Cause No. A-165,548, 58th Judicial District Court, Jefferson County, Texas. The resulting deposition circus bore no resemblance to the august process appropriate to judicial proceedings, and deprived of any opportunity for a fair trial of even the first 10 plaintiffs, defendants were forced into settlements on the entire 300 that they would not otherwise have made.

COURTS MUST PREVENT PLAINTIFFS FROM INDUCING TRIAL-DATE DURESS THROUGH THEIR INACTION

Mass tort cases clog the dockets of courts around the country. In an effort to dispose of as many cases as quickly as possible, courts are loath to continue trial settings. Courts know from experience that if they set a trial date and stick to it, cases usually settle. Courts despise discovery disputes and tend to favor the little guy in them. Courts are unlikely to grant a defendant's motion to compel in its entirety if they set the motion for hearing in the first place. Knowing all this, in the context of their volume practice, plaintiffs ignore defendants' discovery requests and other efforts to prepare their defenses until the eve of the discovery deadline, when they provide just enough discovery to keep their trial setting. They then pressure defendants to settle rather than defend a case in front of a jury in an undesirable venue without adequate information to prepare thoroughly for trial.

The solution to this problem is an event-based case-management order. Both state and federal courts have implemented day-forward case calendars to ensure that duress induced by trial date and other abuses do not occur. *See, e.g., In re Texas State Silica Products Liability Litigation,* Master Docket No. 2004-70000, in the District Court of Harris County, Texas, Case Management Order No. 8, June 29, 2005. Event-based case-management orders require that plaintiffs fulfill their obligations before defendants' reciprocal obligations accrue. For example, each plaintiff must first file a verified pleading listing the proper defendants to the plaintiff's claims. If the plaintiff does not list a defendant, the defendant is automatically dismissed. Each plaintiff must also file a preliminary medical report establishing a requisite level of injury before that plaintiff's claim may proceed. Formal discovery begins only after the plaintiff makes a threshold showing of injury and identifies the defendants against which he has a claim, complete with identification of the products at issue and the dates and circumstances of product usage. The case then proceeds, with the completion of each event triggering the next appropriate event under the rules of procedure. Depositions of corporate representatives occur only after all plaintiffs have appeared for deposition. Depositions of defendants' experts occur only after plaintiffs' experts have produced reports and been deposed. The parties do not receive a trial setting until all essential discovery is complete, and there is no trial until the court conducts an adequate pretrial hearing. The event-based scheduling order eliminates the plaintiffs' ability to stall the lawsuit and coerce into a settlement defendants that plaintiffs never should have sued in the first place.

DESTROYING THE MASS TORT BUSINESS MODEL

Mass tort litigation has always been a volume play for plaintiffs' counsel. More plaintiffs, plus more defendants, plus low transaction costs, equals more settlements at greater margin and, as a result, more money for the plaintiffs' attorneys. In order to keep transaction costs low and handle the volume that drives the model, plaintiffs need streamlined, less burdensome rules of procedure. Pleadings that are specifically tailored to the facts of the specific case, individualized discovery requests and responses, and the focused attention of experts to each claim are enemies of this model. Anything nonstandardized and plaintiff-specific slows the process and increases the associated per-plaintiff costs.

Applying the procedural rules as contemplated by the drafters destroys plaintiffs' volume-driven business model. First, courts must force plaintiffs' counsel to carry out the presuit

investigation contemplated by the rules so that only legitimately injured plaintiffs will be pursuing claims against defendants whose conduct is directly linked to the injury. Second, courts must enforce the rules of discovery to allow defendants the opportunity to develop the facts of the case fully and in a timely manner. Finally, if courts refrain from setting cases for trial until they are fully developed, defendants can accurately assess the value and strength of each case and, when appropriate, proceed to trial adequately prepared. While counsel who represent plaintiffs may try an occasional case to set values as part of their business model, preparing each case for trial on its individual merits is too time-consuming and expensive when volume is the key.

CONCLUSION

Correcting the abuses that have occurred during the proliferation of mass tort suits is not difficult. The tools to dissuade and remedy these abuses already exist in the rules of procedure and the case-management powers of the courts. Courts simply need to enforce the rules, stop short-circuiting the process, and force counsel on both sides of the docket to do their jobs ethically on behalf of their clients. Crowded dockets are not an excuse to deny defendants the ability to prepare for trial adequately. Instead, crowded dockets require hard work on the part of the litigants and the court, combined with an unflinching dedication to the process that has served our judicial system well for decades. ■

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[1] *See* June 30, 2005, Order in *In Re: Silica Litigation*, MDL No. 1553 (S.D. Texas); David Hechler, "Silica Plaintiffs Suffer Setbacks," *The National Law Journal*, Feb. 28, 2005, at 1–2, 4; Mary Alice Robbins, "Judge's Silica Order Could Affect Future Mass Tort Litigation," *Texas Lawyer*, July 11, 2005, at 1.

[2] The "product identification phase" is the process through which defendants attempt to determine the products the plaintiff actually used or to which the plaintiff was exposed. It often begins with a plaintiff intake sheet designed and produced by the plaintiff in lieu of proper discovery responses and may end with the deposition of the plaintiff or plaintiff's coworkers. Sometimes it continues while the plaintiff attempts to discover whether defendants ever sold any products over the preceding 50 years to any place of business ever visited by the plaintiff and to which the plaintiff may have ever conceivably been exposed.

[3] For example, in *United States. v. Baxter Intern., Inc*., 345 F.3d 866, 881 (11th Cir. 2003), the court determined that the Federal Rules of Civil Procedure require plaintiffs to provide "a statement in their pleadings calculated to give each defendant fair notice of what the plaintiffs' claims are and the grounds upon which they rest." Similarly, in *Northern States Power Co. v. Fed. Transit Admin*., 358 F.3d 1050, 1056–57 (8th Cir. 2004), the court found that "[t]he essential function of notice pleading is to give the opposing party fair notice of the nature and basis or grounds for a claim."

[4] For example, in a case pending in the 17th Judicial Circuit Court in Broward County, Florida, a plaintiff responded to an action to dismiss his case by claiming a violation of his due-process rights because "there ha[d] been no opportunity for the Plaintiff to discover, gather, review or present other supporting evidence of Plaintiff's exposure to Defendant's product. . . . Plaintiff may well uncover . . . evidence that would establish that the Plaintiff was exposed to a product manufactured or otherwise distributed or supplied by various defendants herein." From Plaintiff's Response to Certain Defendants' Notice of Intent to File a Proposed Order of Dismissal with Prejudice in *Bilanich v. Air Liquide America, L.P.*, Case No. 05-06358 (04) in the Circuit Court of the 17th Judicial Circuit, in and for Broward County, Florida.

[5] "On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto." Fed R. Civ. P. 11(c)(1)(B). Mass tort evils are equally visited on the courts in terms of clogged dockets and wasted judicial resources. Efficiency requires court action, with or without litigant initiative.

[6] The Texas Legislature, for example, codified Senate Bill 15 into Chapter 90 of the Texas Civil Practice and Remedies Code, effective September 1, 2005, establishing minimum requirements to bring and maintain a claim involving asbestosis or silicosis. Ohio and Florida have similar statutes.

[7] *Acosta, et al. v. Pulmosan Safety Equip. Corp., et al.*, Cause No. 01-6501-E, 148th Judicial District Court, Nueces County, Texas. While the order was styled as an "Agreed Scheduling Order," it was not the product of open negotiation and not all parties agreed to the order.

The Class-Action Fairness Act Two Years Later: LOOKING BACK AND *LOOKING AHEAD*

by Sean P. Costello and Kathryn A. Furfari

STRIKE UP THE BAND: CAFA BECOMES LAW

You could almost hear the corks popping in the boardrooms of corporate America when President Bush signed into law the Class-Action Fairness Act, now known affectionately as "CAFA," on February 18, 2005.[1] Finally, relief was on its way for product manufacturers and other companies weary of class actions. CAFA was their ticket out of the class-action morass of places like Madison County, Illinois, and other "magnet"[2] state courts around the country.

In enacting CAFA, Congress expressly found that state and local courts had acted "in ways that demonstrate bias against out-of-state defendants," Pub. L. 109-2, § 2, and any manufacturer who ever faced a class action in a place like Madison County, Illinois, could attest to feeling that bias. Whether the case was litigated in federal or state court often was a case-dispositive issue. The odds of defeating class certification in many state courts usually were slim, and the odds of winning a dispositive motion were slimmer still. As a practical reality, the choice was between settling or going to trial. Either one was an expensive proposition. It was a prototypical Hobson's choice. While CAFA did nothing to change substantive class-action law, it at least cleared a path for class-action defendants to federal court, and that was reason enough for optimism.

More than two years have passed since CAFA became law. That's not a long time, but it's long enough to take stock, evaluate how things are shaping up, and identify trends that class-action defendants ought to be aware of, particularly with respect to CAFA's impact on the "product liability" class action.[3] This article examines what CAFA changed, what savvy plaintiffs' lawyers might do to avoid those changes and keep their cases in their favorite jurisdictions (and what courts have been doing that might help them), and what manufacturers should anticipate from the class-action plaintiffs' bar in the future. As shown below, all is not roses and rainbows with CAFA. It has introduced some elements that pose tactical and strategic threats to manufacturers contemplating removal. Overall, though, it has made it easier for defendants to litigate class actions in federal court. And this is a very good thing.

THE DARK AGES: REMOVAL OF PRODUCT LIABILITY CLASS ACTIONS BEFORE CAFA

First, a brief history. Before CAFA, product manufacturers facing putative class actions often were stuck in unfriendly state courts without any realistic hope of escaping to federal court. This predicament stemmed from three legal principles, or rules, that plaintiffs' lawyers had manipulated effectively to their advantage: (1) the requirement of "complete" diversity; (2) the prohibition against aggregating damages of class members to reach the jurisdictional minimum amount in controversy; and (3) the burden of proof.

The "complete diversity" requirement derives from 28 U.S.C. § 1332(a) and requires that all defendants be completely diverse from all plaintiffs. If a plaintiffs' lawyer files his or her case in Missouri on behalf of a Missouri plaintiff and a class limited to Missouri citizens, and he or she sues a manufacturer that is headquartered and has a principal place of business in Georgia, there is complete diversity. But if that same lawyer adds as a defendant a retailer, distributor, or other party in the chain of distribution that happens to be a citizen of Missouri, complete diversity is destroyed. If a plaintiffs' lawyer did this, the manufacturer generally sought to show that the in-state retailer or distributor had been "fraudulently joined" or "misjoined," which generally required showing that the plaintiff had no chance of succeeding on a claim against the nondiverse party. This was a notoriously difficult exercise, particularly in product liability cases, class action or not. In the years before CAFA, case law had made establishing fraudulent joinder harder still. *See, e.g., Smallwood v. Ill. Cent. R.R. Co.*, 352 F.3d 220 (5th Cir. 2003). Thus, because it was an effective strategy, class-action lawyers named nondiverse defendants in the complaint as a matter of routine.

The nonaggregation rule likewise was difficult to overcome. Under this rule, the damages claims of individual putative class members could not be added up to reach the jurisdictional minimum. Thus, if a class consisted of 1,000 members and the plaintiffs' lawyer claimed to seek only $74,000 on behalf of each, the jurisdictional threshold of $75,000 would not be met, even though the aggregate amount in controversy was $74 million—a huge sum. While the pedigree of the rule was questionable, all of the circuits followed it. A class

action seeking monetary damages was virtually impossible to remove to federal court unless, depending on the jurisdiction, the defendant could show that either the named plaintiff or all of the class members had damages in excess of $75,000.

On top of the nonaggregation rule itself was the fact that the defendant had the burden of establishing jurisdiction, including proving the amount in controversy. A defendant could not simply say that damages for the named plaintiff (or each class member) exceeded $75,000; the defendant had to prove that fact. Generally, the burden was "a preponderance of the evidence." But when a plaintiff alleged damages *below* the jurisdictional minimum in the complaint, the burden ratcheted up and a defendant removing to federal court had to prove that the amount in controversy was satisfied "to a legal certainty" in many jurisdictions. *See, e.g., Burns v. Windsor Ins. Co.*, 31 F.3d 1092 (11th Cir. 1994).

Obviously, the higher burden was better for plaintiffs, so they naturally engineered strategies and tactics to ensure that it, rather than the lesser burden, governed. To that end, one of the chief tactics of the class-action plaintiffs' bar was to affirmatively disclaim damages in excess of $75,000 for the plaintiff and each class member, or to file a "stipulation" agreeing not to seek damages in excess of that amount after remand. Though defendants labored hard against these tactics—arguing, for instance, that they rendered the plaintiff and the plaintiff's lawyer inadequate under Rule 23 or that the value of a stipulation once the case returned to state court was dubious—by and large, the plaintiffs won the argument.

Disclaimers not only served to preclude defendants from establishing jurisdiction; they also had a happy side effect from the plaintiffs' perspective—they put defendants seeking to establish federal jurisdiction in the awkward position of showing that the plaintiff classes would obtain *more than they were asking for*, essentially proving up the plaintiffs' damages case. It should come as no surprise, then, that disclaimers became a ubiquitous feature of class-action complaints.

Finally, 28 U.S.C. § 1447(d)—providing that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise"—made it nearly impossible for class-action defendants to obtain appellate review of remand orders and skewed the incentives in favor of remand. After all, a district court could be reversed for denying remand, but faced no such risk by granting remand. Even if the federal district court got things completely wrong, if it purported to remand on a basis permitted under the diversity statute, its decision could not be second-guessed by a higher court. Whether the federal judges admitted it or not, remand had become a docket-clearing tool.

THE ENLIGHTENMENT: CAFA MAKES NEEDED CHANGES IN THREE PRINCIPAL AREAS

CAFA made three principal changes with respect to federal jurisdiction over "class actions" and sought to remedy some of the above problems.[4] First, it eliminated the complete-diversity requirement. Under CAFA, diversity jurisdiction exists if *any* defendant is diverse from *any* plaintiff. 28 U.S.C. § 1332(d)(2). Consequently, naming one or more nondiverse defendants in the chain of distribution does not destroy diversity. Second, it expressly permitted aggregating damages in class actions. Under CAFA, the amount in controversy is satisfied if the aggregate sum or value of what is being sought exceeds $5 million. 28 U.S.C. § 1332(d)(2). Third, it provided for appellate review of rulings on remand motions in class actions. 28 U.S.C. § 1453(c).[5] No longer would remand orders be immune from review.

Simple enough, right? Maybe not. The devil is in the details. Savvy plaintiffs' lawyers already are worming their way around those details to circumvent CAFA's jurisdictional provisions. The plaintiffs' bar—and the class-action bar in particular—is a clever bunch, and its members will likely continue to devise ways to circumvent CAFA. A sophisticated class-action defense strategy must take into account the efforts of plaintiffs' lawyers over the last two years, as well as outcomes in the courts in which these efforts have taken place.

SWEAT THE DETAILS: TAKING CARE TO GET REMOVAL RIGHT UNDER CAFA

The first detail a manufacturer should sweat—don't laugh—is whether it really wants to be in federal court. Sometimes state court might be the better choice for a particular case or in a particular jurisdiction. The defendant facing a putative class action must take this first step, rather than reflexively assuming that being in federal court is the answer.

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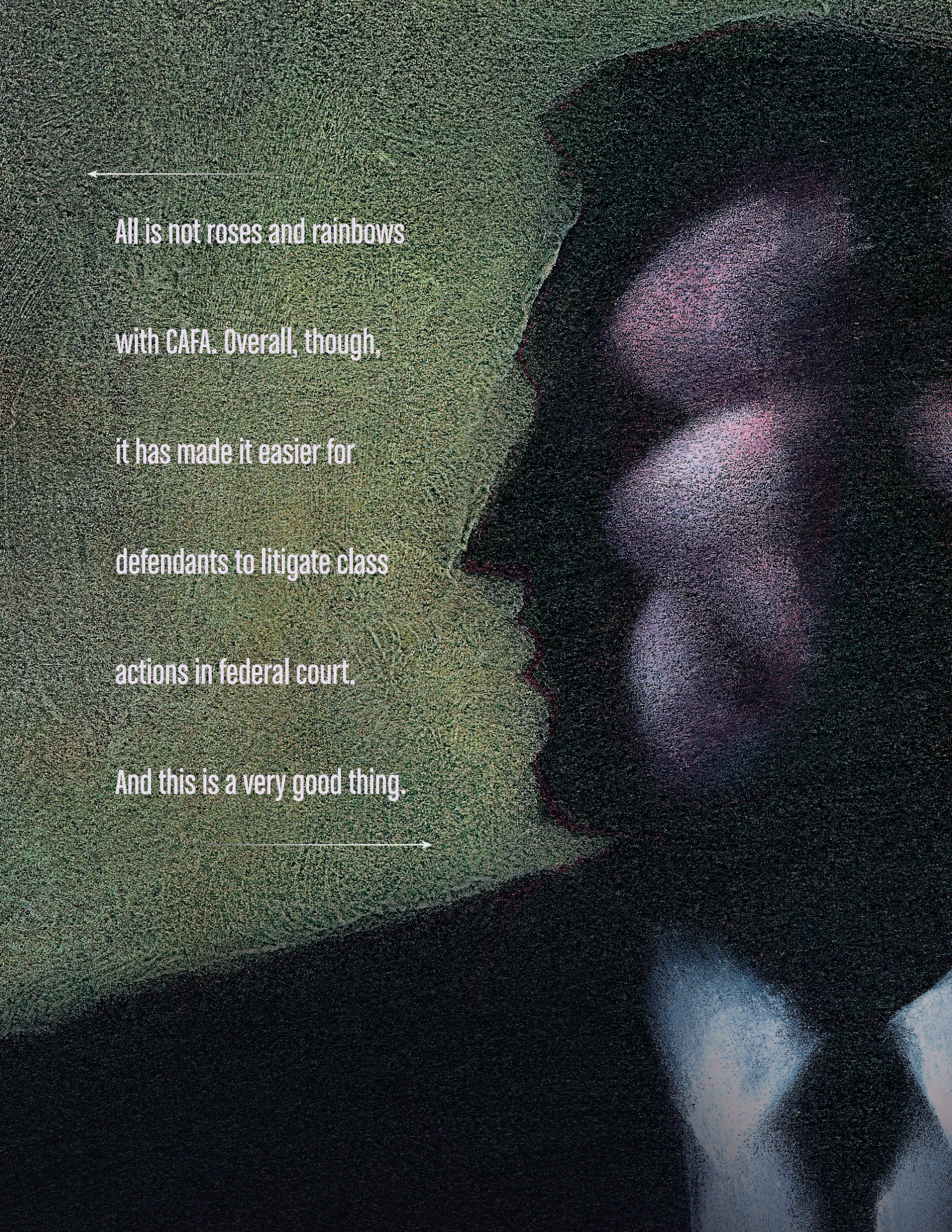
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"No Injury" Class Actions for "Economic Loss" Due to Produc

t Defects Under State Consumer-Protection Statutes

by Peter J. Biersteker and David T. Miller

Recent years have witnessed a proliferation of putative "no injury" class actions brought by uninjured purchasers of allegedly defective products under state consumer-protection statutes. Plaintiffs in these cases seek recovery of "economic loss" due to the alleged product defect: The defective product, as sold, was worth less than the defect-free product allegedly promised.

Every product manufacturer is vulnerable to these "no injury" actions,[1] and they can pose significant financial risks. The trial court in *Price v. Philip Morris USA, Inc.*, for example, entered a verdict after a bench trial of $10 billion over the allegedly false and misleading marketing of "light" cigarettes in Illinois. *Price v. Philip Morris USA, Inc.*, 2003 WL 22597608 (3d Jud. Cir., Madison Cty., Ill. 2005).

The *Price* verdict subsequently was overturned on appeal to the Illinois Supreme Court, *Price v. Philip Morris USA, Inc.*, 848 N.E.2d 1 (2005), and an overwhelming majority of courts have dismissed these "no injury" actions short of trial. But, as this article suggests, the rationales expressed by the courts, while sufficient to dispose of the cases before them, generally do not develop the larger policy and legal issues that should serve to defeat *all* of these "no injury" class actions.

THE NARROW BASES OF THE COURTS' DECISIONS

Two principal rationales have been articulated by the courts to defeat "no injury" class actions short of trial.

No "Actual Damages." Most state consumer-protection statutes permit purchasers of products to recover "actual damages." A significant number of cases have reasoned that plaintiffs in "no injury" class actions concerning alleged product defects have yet to sustain "actual damages." After all, the product has not yet malfunctioned—it has, so far, performed exactly as the plaintiffs allegedly expected—and plaintiffs accordingly have received the "benefit of their bargain." *See, e.g., Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 320 (5th Cir. 2002) ("[Plaintiff] paid for an effective pain killer, and she received just that—the benefit of her bargain."); *Briehl v. General Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) ("Where, as in this case, a product performs satisfactorily and never exhibits an alleged defect, no cause of action lies."); *In re Canon Cameras*, 237 F.R.D. 357, 360 (S.D.N.Y. 2006) ("A plaintiff who purchases a digital camera that never malfunctions over its ordinary period of use cannot be said to have received less than what he bargained for when he made the purchase."); *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 128 (N.Y.A.D. 1st Dept. 2002) ("In sum, plaintiffs have not been involved in any accidents and have not suffered any personal injuries or property damage. Moreover, plaintiffs do not allege that any seat has failed, been retrofitted or repaired, nor have plaintiffs attempted to sell, or sold an automobile at a financial loss because of the alleged defect."); *Wilson v. Style Crest Prods., Inc.*, 627 S.E.2d 733, 736 (S.C. 2006) ("There is no evidence that the [mobile home] anchor systems have not, to date, been exactly what the Homeowners bargained for."); *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 240 (Wis. 2004) ("[A]n allegation that a product is diminished in value because of an event or circumstance that might—or might not—occur in the future is inherently conjectural and does not allege actual benefit-of-the-bargain damages. . . ."). *Compare, e.g., Collins v. DaimlerChrysler Corp.*, 894 So. 2d 988, 990–91 (Fla. Dist. Ct. App. 2005) ("We see no requirement in [the Florida Deceptive Trade Practices Act] that a defect manifest itself by failing to operate in an emergency or by causing injury. . . . [Plaintiff] has alleged more than a possible injury. She claims an actual injury in the form of insufficient product value. In other words, she contends that she did not get what she bargained for.").[2]

No Misrepresentation. An essential element under most state consumer-protection statutes is that the defendant has engaged in an "unfair" practice. In most class actions brought over alleged product defects, the alleged unfair practice was an implicit misrepresentation. Courts have dismissed cases where the alleged implied misrepresentation constituted mere "puffing." *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 245–46 (Wis. 2004) (advertising a motorcycle engine as "a masterpiece" of "premium quality" that is "filled to the brim with torque and ready to take you thundering down the road" was mere puffery, not an actionable representation that the engine was defect-free); *see also* 63 Am. Jur. 2d Products Liability § 685 (1997) (collecting cases regarding "puffing" in the context of warranty claims).

Wholly apart from precedent under state consumer-protection statutes, defense counsel also might consider arguing that the courts should be reluctant to adopt an expansive definition of what constitutes an implicit "misrepresentation" for two reasons.

First, adopting an expansive definition of what constitutes an implicit "misrepresentation" impermissibly would transform manufacturers into insurers against "economic loss" for most product defects.

It is no answer for plaintiffs' counsel to assert that state consumer-protection statutes were intended to make it easier for consumers to recover for false and misleading business practices. They have. At least some states dispense with the necessity of proving objectively reasonable reliance, *scienter*, privity of contract, and certain other common-law requirements. *Davis v. Powertel, Inc.*, 776 So. 2d 971, 973–74 (Fla. Dist. Ct. App. 2000); *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 164 (Ill. 2002); *Gennari v. Weichert*, 691 A.2d 350, 366 (N.J. 1997); *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635

(Mo. Ct. App. 1988); *Forbes v. Par Ten Group, Inc.*, 394 S.E.2d 643, 651 (N.C. Ct. App. 1990); *Stutman v. Chemical Bank*, 731 N.E.2d 608, 611–12 (N.Y. 2000).

Expanding the definition of what constitutes an actionable "misrepresentation," however, effectively would make most manufacturers insurers against "economic loss" due to product defects, which state legislatures could not have intended. Indeed, support for the principle that a manufacturer is not an insurer against all risks of injury or loss associated with its product abounds in the decisional law in most states, even after enactment of state consumer-protection laws. 63 Am. Jur. 2d Products Liability § 4 (2006 Supp.).[3]

Second, an expansive interpretation of what constitutes an actionable, implicit "misrepresentation" may run afoul of the First Amendment. These "no injury" product-defect cases generally challenge commercial speech that is only "potentially misleading," not "inherently" or "inevitably misleading." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 372 (1977). Under *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980), and its progeny, potentially misleading commercial speech is entitled to First Amendment protection. *See, e.g., Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1180 (D. Colo. 2001). Such speech may be regulated only if the plaintiffs show that restricting the speech would (1) further a "substantial" government interest; (2) advance that substantial interest "directly"; and (3) do so in a way that "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566; *Mason v. Fla. Bar*, 208 F.3d 952, 957 (11th Cir. 2000); *Pearson v. Shalala*, 164 F.3d 650, 655 (D.C. Cir. 1999); *Parker v. Ky. Bd. of Dentistry*, 818 F.2d 504, 509 (6th Cir. 1987).

Every product manufacturer is vulnerable to "no injury" actions, and they can pose significant financial risks.

Conclusion. Both of these arguments drawn from the case law are perfectly sensible, textual rationales for denying recovery.

But plaintiffs may argue that they do not apply universally. For example:

The "no actual damages" rationale arguably would not apply where a product has already malfunctioned without causing any physical injury or property damage. And even for products that have yet to malfunction, there arguably can be "actual damages" at least for those plaintiffs who, for instance, alleged that they sold their used defective product for less money than they would have obtained for the promised defect-free product.

The "no misrepresentation" rationale would not apply where an actionable misrepresentation was made or where it is a violation of the state statute not to disclose the existence of the alleged defect. *Graham v. RRR, LLC*, 202 F. Supp. 2d 483, 491 (E.D. Va. 2002) (the Virginia Consumer Protection Act requires only that the act or practice constitute a false representation of an existing fact); Tex. Bus. & Com. Code Ann. § 17.46(b)(24) ("failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed").

TOWARD A BROADER VIEW

There are sound reasons for denying recovery in *all* "no injury" class actions brought over alleged product defects that pose a risk of future personal injury or property damage which, so far, do not appear to have been developed adequately in the decided cases.

The purported "economic losses" claimed by plaintiffs must be identical or substantially identical to the present value of their expected future personal injuries or property damage from the alleged product defect. In *Rivera*, *supra*, for example, a drug manufacturer failed to disclose adequately a drug's risk of causing future cardiovascular disease. What is the alleged diminution in the product's value? It must be the economic value now of the increased risk of future cardiovascular disease. One is hard-pressed to conjure up examples of "no injury" cases involving product defects in which this is not true.

The true identity of the damages sought ought to preclude their recovery by a prospective class whose members have not yet suffered any actual physical injury or property damage, for at least three reasons:

First, virtually all states preclude recovery of future personal injury or property damage, except in limited circumstances that are not present in these cases. 22 Am. Jur. 2d Damages § 214 (2006 Supp.). In any event, claims for future personal injury or property damage are unsuitable for class-action treatment.

Second, allowing class recovery in "no injury" lawsuits over alleged product defects would permit recovery of essentially the same damages twice—once in the guise of "economic loss" and then again for plaintiffs who actually suffer the personal injury or property damage in the future. Consequently, the level of compensation is greater than that which is socially optimal. As Judge Easterbrook observed in *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002), since "tort law fully compensates those who are physically injured," any recoveries for "economic loss" under state consumer-protection statutes for allegedly defective products by plaintiffs who have suffered no physical injury or property damage "mean excess compensation." *See also Heindel v. Pfizer Inc.*, 381 F. Supp. 2d 364 (D.N.J. 2004) (dismissing claim for "economic loss" under state consumer-protection act because prescription drug posed allegedly undisclosed risk of cardiovascular disease, noting that imposing liability would mean "excess compensation"); Michael S. Greve, "Consumer Law, Class Actions, and the Common Law," 7 *Chap. L. Rev.* 155, 171 (2004) ("The plain fact is this: so long as the parties actually injured can sue, any additional deterrence is over the top.").[4]

Third, the class is either impermissibly splitting its causes of action or, to the extent that future personal injury or damage claims by plaintiffs are foreclosed, either legally or practically,[5] the class representatives have opted for a division of damages that compensates everybody now for increased risk of future injuries but provides no further compensation to plaintiffs who are actually injured later. Such intraclass conflict (between a group who will never be injured by the alleged defect and a small and unidentified minority who will be injured) can prevent class certification. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997) ("Most saliently, for the currently injured, the critical goal is generous

immediate payments. That goal tugs against the interest of exposure-only [and currently uninjured] plaintiffs in ensuring an ample, inflation-protected fund for the future.").

These doctrinal and underlying policy considerations should effectively preclude recovery in *all* "no injury" class actions over product defects that allegedly pose a risk of future personal injury or property damage.[6] ■

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[1] "No injury" class actions have targeted manufacturers of a wide array of products, including automobiles, motorcycles, electrical receptacles, medical devices, prescription drugs, computers, cigarettes, gasoline, cameras, and mobile homes.

[2] Other rationales have been advanced, some less generally applicable because they are case- or fact-specific.

Some courts, for instance, have held that there is no injury-in-fact and hence no justiciable case or controversy. *See, e.g., Rivera v. Wyeth-Ayerst Labs*., 283 F.3d 315, 319–21 (5th Cir. 2002) (Prospective class of purchasers of prescription drug who did not experience the side effect that the manufacturer allegedly failed to disclose lacked standing. Plaintiffs additionally failed to allege causation—that, had the allegedly nondisclosed side effect been disclosed, plaintiffs would not have purchased the drug.); *Harrison v. Leviton Mfg. Co., Inc.*, 2006 WL 2990524, *4 (N.D. Okla. 2006) (Putative class of homeowners with allegedly defective back-wire push-in electrical terminals that were fundamentally unsafe and increased risk of electrical fires, but who had not actually sustained personal injuries or property damage from the electrical terminals, had no Article III standing to sue under, *inter alia*, the Oklahoma Consumer Protection Act for "economic injuries," including the cost of replacing the electrical terminals, because they had suffered no "actual or threatened distinct injury."). Although dismissal for failure to state a claim was an appropriate result in these cases, the decisions fail to distinguish adequately between (1) traditional consumer fraud cases, such as where a merchant represents that a watch is a Rolex when, in fact, it is a cheap imitation, where few would dispute that standing exists; and (2) claims for "economic loss" based on the presence of a product defect that the defendant allegedly represented was not present or failed to disclose. As developed below, different results in these two circumstances are appropriate.

Other cases deem the alleged "economic loss" due to product defects too speculative to survive. *See, e.g., Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 297–98 (4th Cir. 1989); *Lee v. Gen. Motors Corp.*, 950 F. Supp. 170, 175 (S.D. Miss. 1996); *Yost v. Gen. Motors Corp.*, 651 F. Supp. 656, 658 (D.N.J. 1986); *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 99 (S.D.N.Y. 1997); *Tietsworth v. Harley-Davidson, Inc*., 677 N.W.2d 233, 240 (Wis. 2004).

Finally, in *In re Canon Cameras*, 237 F.R.D. 357, 360 (S.D.N.Y. 2006), the court initially held that, under New York's Consumer Protection Act, plaintiffs had to prove an actual malfunction. While some members of the proposed class allegedly had experienced actual malfunctions, the cause of the malfunction would have to be shown individually. Thus, common issues did not predominate, and the court denied class certification. *See also Houston County Health Care Auth. v. Williams*, 2007 WL 80797, *12 (Ala. 2007) (no "legal injury" for breast-implantation patients who did not experience a fungal infection or undergo removal of the implants; as to class members who did, common issues did not predominate).

[3] This argument is not to be confused with an attempt to apply tort-based limitations on recovery, such as the "economic loss" rule, to actions brought under state consumer-protection statutes. Most courts have rejected that approach. *See, e.g., Tietsworth*, 677 N.W.2d at 241–44 (collecting authority).

[4] Indeed, there is an argument to be made that, to the extent manufacturers foresaw the recovery of pure economic loss, without any accompanying personal injury or property damage, the manufacturers would have "spread the loss" by charging higher prices. Consequently, consumers have already received the "benefit of the bargain" in the form of lower prices. *See* Moin A. Yahya, "Can I Sue Without Being Injured? Why the Benefit of the Bargain Theory for Product Liability Is Bad Law and Bad Economics," 3 *Geo. J.L. & Pub. Pol'y* 83, 113–22 (2005) (At 113–14: "Paradoxically, for the no-injury suit to work, the manufacturer should have charged more in the first place—effectively negating the 'benefit of the bargain' claim." At 131: "Both the case law and economic analysis suggests [sic] that plaintiffs should recover nothing in no-injury suits. Either the economic loss rule bars recovery . . . or the 'benefit of the bargain' is equal to zero.").

[5] Damages for the risk of future personal injuries in the guise of "economic loss," such as the $10 billion judgment in *Price* against Philip Morris USA, Inc., in Illinois alone, may be so great as to threaten the viability of the defendant and any recovery by those plaintiffs who actually sustain personal injuries in the future.

[6] These same doctrinal and policy considerations pose no obstacle to recovery by plaintiffs in traditional consumer fraud cases. They are not implicated where the claimed "economic loss" bears no relationship to expected future personal injury or property damages.


PRODUCT LIABILITY
IMPLICATIONS OF
NANOTECHNOLOGY

by Robin L. Juni

Nanotechnology is currently being utilized in hundreds of products, with more coming on the market every day. However, few companies have comprehensively evaluated the risks that nanomaterials may present, and even fewer have addressed the potential for litigation surrounding alleged harms from products containing nanomaterials. Significant litigation risk exists for companies not prepared to challenge the underlying science and law of alleged harms stemming from nanomaterials. This article describes recent developments and discusses potential strategies to defeat or minimize claims.

THE SCIENCE IS LEADING THE REGULATIONS

Nanomaterials are particles of less than 100 nanometers in diameter specifically engineered to take advantage of size-related characteristics, compared with larger particles of the same material. A nanometer is one-billionth of a meter; in comparison, a human hair is approximately 80,000 nanometers wide, while a red blood cell is 7,000 nanometers in diameter. Nanomaterials are currently used in hundreds of products, including paints, varnishes, insulation, electronic diodes, clothing, cosmetics, and sunscreens. New products are constantly being evaluated. For example, researchers are developing "bio-reactive plastics"—infection-fighting plastics embedded with nanoscale antibodies and enzymes that begin decontamination as soon as pathogens or toxins touch the surface. Pursuant to its authority under the Federal Insecticide, Fungicide, and Rodenticide Act, the United States Environmental Protection Agency ("EPA") recently regulated as an antimicrobial device a washing machine using silver nanoparticles.

Although limited research has been done to date, nanomaterials are alleged to have discrete human health risks. These risks include:

Increased mobility. Due to size, nanomaterials may be more easily taken up by the body and transported across biological membranes.

Increased reactivity. Because of the increased surface area, more biological tissues may interact with nanomaterials.

Increased persistence. Again, because of size, some fate and transport mechanisms that might otherwise remove toxins may operate less effectively against nanomaterials.[1]

Government agencies have just begun to grapple with these issues. In particular, in February 2007, EPA issued a long-awaited Nanotechnology White Paper ("White Paper"). This White Paper provides some useful guidance on potential nanotechnology regulation but, not surprisingly, does little to clarify any litigation issues.

First, the White Paper explains that EPA believes current environmental statutes provide authority for the agency to regulate nanomaterials. While this statement is not surprising, left unanswered is the more difficult question of how statutes that delineate specific triggers for EPA action—a Maximum Contaminant Level under the Clean Water Act, for example—will apply to nanomaterials that are present in much smaller amounts than traditional toxicants.[2]

Second, the White Paper addresses—but does little to resolve—the critical issue of risk assessment. EPA specifically identifies "research needs for risk assessment" in the areas of chemical identification and characterization, environmental fate and transport, environmental detection and analysis, human exposures, human health effects, and ecological effects. White Paper at 72–80. Each of these areas is tremendously complex; years of study will likely be needed even to make a real start on many of these issues.

Industry groups have recognized the need for similar actions, including the need to: (1) assess the human health and environmental risks posed by nanomaterials; (2) determine exposure potentials; and (3) establish handling guidelines for operations involving nanomaterials.[3] And some initial steps have been taken. On June 21, 2007, for example, DuPont and the environmental advocacy group Environmental Defense—in conjunction with the Woodrow Wilson International Center for Scholars—announced the launch of their jointly developed Nano Risk Framework, "a tool for evaluating and addressing the potential risks of nanoscale materials." *See* http://www.wilsoncenter.org/nano (last visited on October 8, 2007).

Academic groups have likewise called for further research. In particular, the National Research Council released *A Matter of Size*: *Triennial Review of the National Nanotechnology Initiative*, which describes federal research and development efforts regarding nanotechnology. That document explains that the National Nanotechnology Initiative ("NNI") was created in 2000 to coordinate research activities in order "to accelerate responsible development and deployment of nanotechnology for economic benefit and national security." *See A Matter of Size*: *Triennial Review of the National Nanotechnology Initiative (Report in Brief)* at 1. With respect to risk assessment, the report states:

> Although some evidence exists that engineered nanomaterials have adverse effects on laboratory animals, NNI environmental, health, and safety (EHS) research to date has been inconclusive. Research on environmental, health, and safety effects of nanotechnology needs to be expanded.

A Matter of Size: *Triennial Review of the National Nanotechnology Initiative (Report in Brief)* at 3. But government statements regarding the potential for risk and the need for further research do little to help a company seeking to evaluate its risk today.

DEFENDING PRODUCT LIABILITY CLAIMS IN A CLIMATE OF UNKNOWNS

Product liability lawsuits focused on alleged harms from nanomaterials are likely to pose difficulties for unprepared companies because of the substantial unknowns in the science, the huge number of potential claimants, and the long latency periods between exposure to a nanomaterial and the onset of disease alleged to be related to that exposure.

Although defective-design and defective-manufacture cases will undoubtedly be brought, perhaps the most difficult class of cases for companies to defend will be allegations regarding failure to warn (and related claims for failure to test). This is so because "state of the art" and "no alternative design" are likely to be colorable defensive arguments in many defective-design and defective-manufacture cases, and those defenses have strong applicability to products containing nanomaterials. However, nanotechnology has so many unknowns that even beginning to draft adequate warnings is fraught with uncertainty.

Generally speaking, a product may be found defective on the basis of inadequate instructions or warnings when foresee-

able risks of harm posed by the product could have been reduced or avoided if reasonable instructions or warnings had been provided by the manufacturer, seller, or other entity in the chain of distribution, and when omission of the instructions or warnings rendered the product not reasonably safe.

A manufacturer or seller generally need not warn about small or inconsequential risks that a reasonable person would not deem material to his or her decision to use the product, or about obvious and generally known risks. Rather, the law expects warnings to be provided for all inherent risks that anticipated product users would reasonably deem material or significant in deciding whether to use the product. But this is where nanomaterials become difficult; there are many unknowns, and more research is constantly being done.[4]

Moreover, manufacturers may face additional risks because of a duty to research all "reasonably foreseeable or scientifically discoverable" risks before putting a product on the market. A decision in Texas reinforces this view:

> Dangers that a seller "should know" include those that are reasonably foreseeable or scientifically discoverable at the time the product is sold. . . . A manufacturer also has a duty to instruct users on the safe use of its product. . . . In this regard, a manufacturer is held to the knowledge and skill of an expert. . . . This means that it must not only keep abreast of scientific knowledge, discoveries, and advances, but, more importantly, test and inspect its product. . . . This duty to research and experiment is commensurate with the dangers involved. . . . A manufacturer may not rely unquestioningly on others to raise concerns about its product, but must instead show that its own conduct was proportionate to the scope of its duty.

Wood v. Phillips Petroleum Co., 119 S.W.3d 870, 873 (Tex. App. 2003) (citations omitted).

REDUCING LITIGATION RISK

Faced with this level of uncertainty from the scientific community, as well as from regulators, companies with nanotechnology-based products in development have several potential courses of action to protect themselves from litigation risk and should ask themselves the following questions:

Comprehensive Evaluation of Product Risks. Is an alternative design—one with better risk-assessment knowledge—available? Is our manufacturing process well controlled? Have we crafted warnings as skillfully as possible? Have we fully researched the risks of the materials used, including nanomaterials?

Use of Outside Scientific Experts. Can outside experts provide insight into potential product risks and help to define appropriate warnings? Can outside experts help to show that our research was unbiased and comprehensive? Are we confident that we are in touch with the most recent developments?

Control of Documents. Are memoranda carefully worded? Are e-mails, especially those transmitted by BlackBerry®, utilized properly? Are risks fairly described and studies appropriately documented? Have speculation and hyperbole been avoided? Are document retention policies consistently implemented?[5]

Utilization of these strategies, along with early analysis of relevant issues, can help to ensure that nanotechnology-related claims do not provide a basis for unwarranted discovery and potential relief. ■

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[1] *See* Günter Oberdörster, Eva Oberdörster, and Jan Oberdörster, "Nanotoxicology: An Emerging Discipline Evolving from Studies of Ultrafine Particles," 113 *Envtl. Health Perspectives* 823 (July 2005).

[2] *See also* Linda K. Breggin and Leslie Carothers, "Governing Uncertainty: The Nanotechnology Environmental, Health, and Safety Challenge," 31 *Col. J. Envtl. L.* 285, 292–98 (2006) (summarizing the federal government's regulatory initiatives on nanotechnology).

[3] Katherine A. Dunphy Guzmán, Margaret R. Taylor, and Jillian F. Banfield, "Environmental Risks of Nanotechnology: National Nanotechnology Initiative Funding 2000–2004," 40 *Envtl. Science & Technology* 1401, 1402 (Mar. 1, 2006) (citing views of Chemical Industry Vision2020 Technology Partnership).

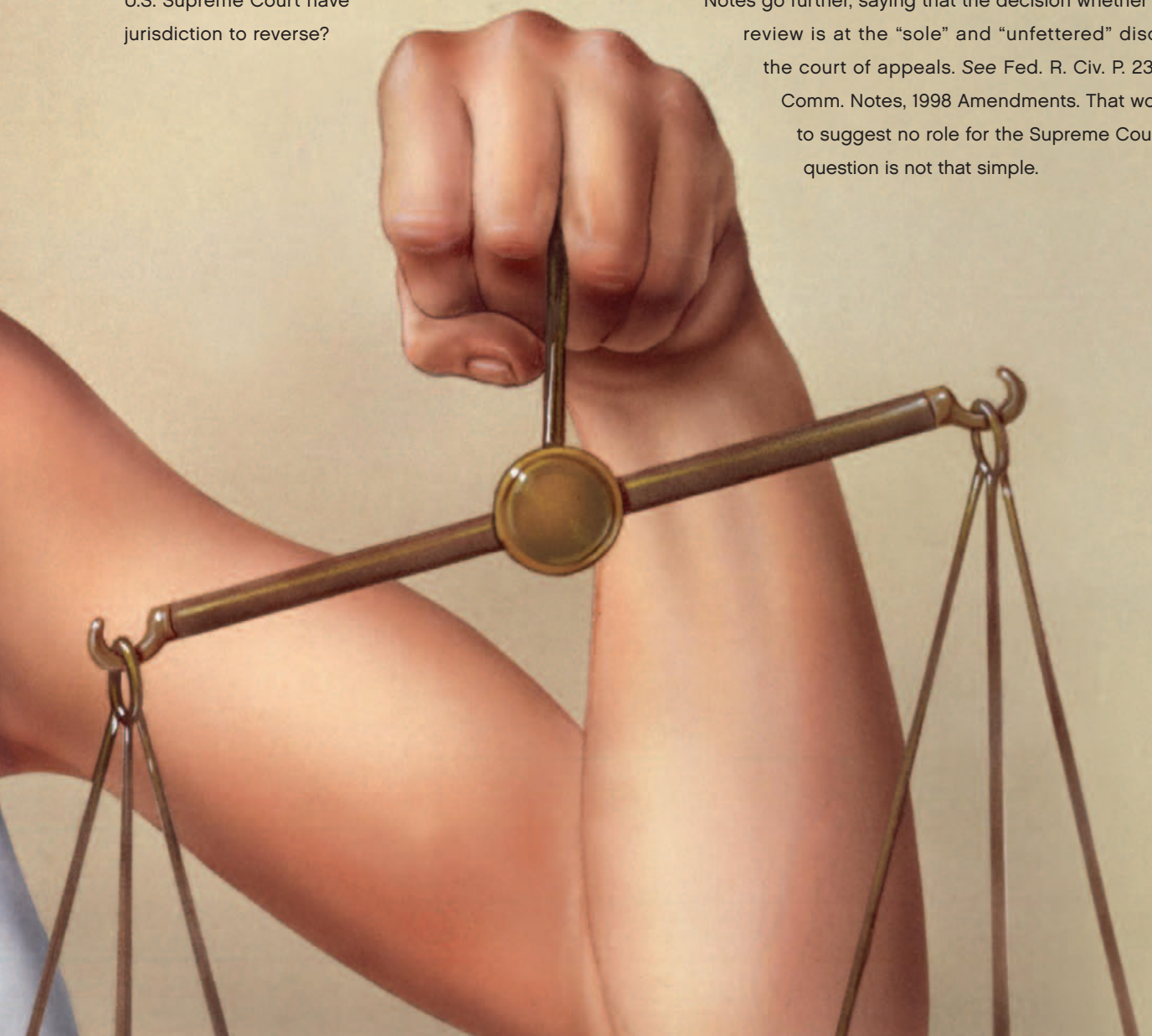
[4] The learned-intermediary rule should provide additional protection for manufacturers of pharmaceutical drugs and medical devices using nanomaterials.

[5] *See* Robin L. Juni, J.C. McElveen, and Nathan C. Doty, "Document Retention Issues in Environmental Law," in *Environmental Law Practice Guide: State and Federal Law* (Matthew Bender & Co. 2005).

That's Why They're "Supreme": If the Justices Want to Hear an Appeal, They Can Always Find a Way

by Theodore M. Grossman and Todd R. Geremia

At oral argument on a motion for class certification in a RICO case alleging that cigarette companies had defrauded 50 million purchasers of "light" cigarettes (*Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006), now on appeal as *McLaughlin v. American Tobacco Co.*, No. 06-4666-cv (2d Cir.)), Judge Jack Weinstein of the U.S. District Court for the Eastern District of New York asked the following question: If the district court certified a class, and the court of appeals declined discretionary review under Federal Rule of Civil Procedure 23(f), would the U.S. Supreme Court have jurisdiction to reverse?



The answer is now moot in *McLaughlin*, as the U.S. Court of Appeals for the Second Circuit granted a motion for permission to appeal under Rule 23(f) after the district court certified a class. The question, however, is bound to arise again in other large class actions, and it's worth closer evaluation.

Rule 23(f), on its face, says nothing about Supreme Court jurisdiction. It provides only that the court of appeals "may in its discretion permit" an interlocutory appeal of a class certification order. Fed. R. Civ. P. 23(f). The Advisory Committee Notes go further, saying that the decision whether to accept review is at the "sole" and "unfettered" discretion of the court of appeals. *See* Fed. R. Civ. P. 23 Advisory Comm. Notes, 1998 Amendments. That would seem to suggest no role for the Supreme Court, but the question is not that simple.

The Advisory Committee Notes notwithstanding, the Supreme Court's jurisdiction is established by Title 28, which, when read with Rule 23(f), creates "fetters." Indeed, Title 28 appears to establish two bases for review in the Supreme Court, one allowing substantive review of the class certification order itself, and the other allowing review of a court of appeals' decision to decline an interlocutory appeal. Mandamus jurisdiction, which existed before Rule 23(f) and was undisturbed by it, would also provide an avenue for review, although presumably a more difficult one.

Title 28 is quite clear. It expressly allows the Supreme Court to review "[c]ases in the court of appeals" by writ of certiorari granted "before or after rendition of judgment or decree." 28 U.S.C. § 1254(1). That creates two separate potential bases for jurisdiction. First, the filing of a Rule 23(f) petition appears to put a case "in the court of appeals" regardless of whether the court of appeals grants it, thereby creating Supreme Court jurisdiction; second, there is jurisdiction if an order denying a Rule 23(f) petition is a "decree" within the meaning of Title 28. Both bases appear to be solid.

The power of the Supreme Court to entertain substantive review of the class certification order is demonstrated by the analogous case of *Hohn v. United States*, 524 U.S. 236 (1998). There, a petitioner moved to vacate his conviction for use of a firearm under the Antiterrorism and Effective Death Penalty Act. *See id.* at 239. Under that act, an appeal could not be heard unless the petitioner obtained a "certificate of appealability" upon a showing of probable cause of denial of constitutional rights. *Id.* at 240. The petitioner sought such a certificate, but a panel of the court of appeals denied the request, and the petitioner sought certiorari in the Supreme Court. *See id.* Certiorari was granted, the Court holding that the request for a "certificate of appealability" put the case "in the court of appeals" and therefore created a predicate for Supreme Court review. *Id.* at 241, 248. *See also Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (granting writ of certiorari in a case where the court of appeals summarily dismissed appeal on the ground that the order was not appealable; "case was 'in' the Court of Appeals under § 1254 and properly within our certiorari jurisdiction").

Indeed, the "in the court of appeals" basis for jurisdiction not only allows substantive Supreme Court review of the class certification order, but by its terms allows review "before" the appellate court has rendered a decision, although for obvious institutional and policy reasons, obtaining such a review by the Supreme Court wouldn't be easy. *Cf. Hohn*, 524 U.S. at 248 (canvassing case law and concluding that "these decisions foreclose the proposition that the failure to satisfy a threshold prerequisite for court of appeals jurisdiction, such as the issuance of a certificate of appealability, prevents a case from being in the court of appeals for purposes of § 1254(1)"); *see also* 28 U.S.C. § 2101(e) (providing for "an application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals"). Convincing the Court to review the class certification order itself where the court of appeals had not considered it first would require a showing that "the case is of such imperative public importance as to justify a deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11. But where the class is big and coercive enough—say, on the order of *McLaughlin* (with $800 billion at stake); *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007) (seeking back pay for all women employed by Wal-Mart); or *In re Simon II Litigation*, 407 F.3d 125 (2d Cir. 2005) (seeking punitive damages for anyone with heart disease, cancer, or other diseases who ever smoked even a single cigarette)—the chances for review are greater.

A party could also persuade the Court to review a class certification order before the appellate court had ruled on it "when a similar or identical question of constitutional or other importance is currently before the Court in another case," but that would depend on serendipity. Robert L. Stern, Eugene Gressman et al., *Supreme Court Practice* § 4.20, at 262 & n.65 (8th ed. 2002) (collecting cases, including *Bolling v. Sharpe*, 344 U.S. 873 (1952), where the Court invited a petition for certiorari before judgment in light of *Brown v. Board of Education*, 344 U.S. 1 (1952)).

Apart from having power to undertake substantive review of the class certification order, the Court would also have jurisdiction to review the court of appeals' procedural decision not to accept a Rule 23(f) petition, and this avenue for review would present fewer institutional obstacles. Under *Hohn*'s analogous ruling, the court of appeals' rejection of the Rule 23(f) petition would be a "decree," from which a party could properly seek review by certiorari under § 1254(1). *See Hohn*, 524 U.S. at 253 (Court has jurisdiction to review propriety of order denying application for certificate of appeal-

ability). Further, as the Supreme Court has not yet ruled on the standard the courts of appeals should use in determining whether to grant a Rule 23(f) petition, the likelihood of a split in the circuits on the identification of such standards and their application increases the chance that the Court could consider an important-enough case.

Two additional factors increase the likelihood that the Supreme Court will review a court of appeals' denial of a Rule 23(f) petition in the right case. First is the developing understanding that class certification orders are often dispositive and that an interlocutory appeal is effectively the only potential for appellate review. The Advisory Committee Notes to Rule 23(f) themselves make this clear, noting that an order granting certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *See* Fed. R. Civ. P. 23 Advisory Comm. Notes, 1998 Amendments. Noting the same factors before the promulgation of Rule 23(f), the Seventh Circuit granted mandamus from a class certification in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995), ruling that the coercive effect of class certification would render the certification effectively unreviewable at the end of the case. After promulgation of Rule 23(f), the Seventh Circuit noted that an appeal may be "in order" to counter the blackmail effect of a certification order in a high-stakes case: "[W]hen the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial, an appeal under Rule 23(f) is in order." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). "This interaction of procedure with the merits justifies an earlier appellate look." *Id.* at 835.

The second factor increasing the likelihood of Supreme Court review is the increasing extent to which the lower courts' discretion in certifying classes has been circumscribed. Indeed, in considering the court of appeals' discretion whether to consider an interlocutory appeal, one must also consider that a district court's decision whether to certify a class is reviewed under an "abuse of discretion" standard. By a succession of appellate decisions and changes in the rules, however, the nominal "discretion" to certify a class has been largely replaced with clear rules, and if those rules are ignored or misapplied, the Supreme Court may have good reason to accept jurisdiction before a final judgment has been entered.

The lower courts' "discretion" to certify a class was, for example, greatly circumscribed in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), where the Supreme Court held that "limited fund" class actions could be certified only when a clearly defined and precisely calculated fund predated the litigation. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), among other things, circumscribed the lower courts' discretion to certify settlement classes. The 2003 amendments to Rule 23 eliminated the discretion for lower courts to enter "conditional" certifications of classes, requiring that all the elements of Rule 23 be met before any class could be certified. *See* Fed. R. Civ. P. 23(c)(1)(C); *see also* Fed. R. Civ. P. 23 Advisory Comm. Notes, 2003 Amendments ("The provision that a class certification 'may be conditional' is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification. . . ."). The appellate courts have further limited discretion of the district courts in this regard as well. For example, in *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (2d Cir. 2006), the Second Circuit reversed its own prior holdings and required the district court to apply stricter scrutiny of expert opinions necessary to sustain plaintiffs' burden on class certification.

To note that Rule 23(f) gives the courts of appeals "discretion" to review class certification orders, therefore, does not end the analysis. The answer to Judge Weinstein's question appears to be yes—the Supreme Court has the power to review a court of appeals' decision not to entertain a Rule 23(f) appeal, and in the right case, it may do so. ■

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What *is* now clear, however, thanks to the Supreme Court's decision in a fourth recent case—*Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184 (2007)—is that a trial court need not necessarily decide that it has jurisdiction before dismissing a case on *forum non conveniens* grounds. In *Sinochem*, the Supreme Court unanimously held that "a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case." 127 S. Ct. at 1186.

Consequently, defendants may consider seeking *forum non conveniens* dismissal at the very beginning of a case, hoping to avoid costly discovery concerning forum contacts. Conversely, an advantage of obtaining dismissal on jurisdictional grounds is that defendants need not consent to jurisdiction or waive statute-of-limitations defenses in one or more alternative jurisdictions—conditions that courts frequently impose on *forum non conveniens* dismissals. *See, e.g., Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1450 (9th Cir. 1990). (*Sinochem* did not address the enforceability of such conditions when a court dismisses on *forum non conveniens* grounds without first deciding personal jurisdiction.) Another factor to be considered is that appellate courts generally reverse *forum non conveniens* decisions only for abuse of discretion, while decisions as to whether due process permits the exercise of personal jurisdiction are subject to *de novo* review. *Compare Ceramic Corp. of America v. Inka Maritime Corp.*, 1 F.3d 947, 948–49 (9th Cir. 1993) *with Sher v. Johnson*, 911 F.2d 1357, 1360 (9th Cir. 1990).

Otherwise, in practice the doctrines differ less than one might think. Due process does not require litigation of a dispute in the "best" possible forum, but only in a reasonable one. Because *forum non conveniens* is a doctrine of judicial discretion and not a constitutional requirement, it may appear to give courts greater freedom to dismiss cases in favor of other, more appropriate jurisdictions. However, the *forum non conveniens* doctrine embodies a well-established rule to the effect that plaintiff's selection of a forum is entitled to considerable weight and should be disturbed only when there are good reasons for doing so. *See, e.g., Gulf Oil*, 330 U.S. at 508. In other words, if plaintiff's forum choice is "reasonable," it may survive challenges on grounds of both jurisdiction and *forum non conveniens*.

When courts address personal jurisdiction, in effect they ask whether the case is such a bad fit with the forum that it would violate the defendant's due-process rights to allow it to proceed. When courts address *forum non conveniens*, in effect they ask whether the case is such a bad fit with the forum that the presumption favoring the plaintiff's initial selection should be overcome. Under either rationale, the criteria by which courts decide whether the case is a bad fit are similar. In addition to the defendant's forum contacts, courts consider such things as (1) the residence of the parties and the witnesses; (2) the forum's convenience for the litigants; (3) ease of access to proof; (4) the availability of compulsory process for attendance of unwilling witnesses; (5) the cost of obtaining attendance of willing witnesses; (6) the enforceability of any judgment; (7) the costs involved in resolving a dispute that is not related to the forum; (8) the court's familiarity with the governing law; (9) the burden on the court and local juries; and (10) "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Compare Gulf Oil*, 330 U.S. at 508–09, *with Asahi*, 480 U.S. at 113–16.

Defendants that face product liability litigation in pro-plaintiff courts can try a number of approaches to shift the proceedings to a more favorable forum. These include removal to federal court; interdistrict or multidistrict transfer; and dismissal on the basis of insufficient forum contacts, unreasonableness, or *forum non conveniens*. Although the unique circumstances of each case must be carefully weighed, in many instances—and especially where the lawsuit has few connections with the forum—it may be possible to move the litigation to a place where the odds are less likely to be stacked in the plaintiff's favor. ■

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But assuming that the manufacturer has taken a hard look at the pros and cons of federal and state court and has decided it wants to be in federal court, the hard work of crafting a proper removal strategy must commence. And it is here that developments in the law under CAFA must be carefully understood and considered. A simple mistake or wrong assumption can cost the product manufacturer a federal forum and, potentially, the case.

The first and possibly most important consideration involves the burden of establishing whether federal jurisdiction exists. Who has the burden? How is that burden met? What is necessary to "prove" it? What are the consequences of offering proof, tactical and otherwise? Has CAFA put the burden on plaintiffs or kept it on defendants?

Things get a little tricky here. As discussed already, pre-CAFA (and for non-class-action cases being removed to federal court, post-CAFA), the burden was always and squarely on the defendant to establish federal jurisdiction. The uninitiated might assume that, because CAFA clearly was intended to make removal to federal court easier for class-action defendants, the burden is now on the plaintiff to show that federal jurisdiction is *not* proper.

That assumption would be wrong. This is a case of "the more things change, the more they stay the same." While the notion that CAFA reverses the historical burden finds support in the legislative history of CAFA,[6] the federal appeals courts have uniformly held that the defendant retains the initial burden of establishing federal jurisdiction, legislative history be damned. In their view, if Congress had wanted to change that burden, it would have done so in the statute, instead of burying the idea in legislative history.[7] Thus, the defendant must establish both that the parties are minimally diverse *and* that the aggregate amount in controversy exceeds $5 million.[8]

Aside from failing to show that a class action "commenced" after the effective date of CAFA,[9] the chief reason post-CAFA class-action defendants find themselves getting remanded to state court is that they fail to prove the amount in controversy. This is yet another instance of "the more things change, the more they stay the same." Class-action plaintiffs have resorted to one of their old tricks. Just as they did before CAFA, class-action plaintiffs are now affirmatively disclaiming damages over the jurisdictional minimum in their complaints, only now they are disclaiming aggregate damages of more than $5 million. Because CAFA changed the amount in controversy but is silent on the question of who has the burden of proving it, it remains the defendant's job to show that damages are, in fact, more than $5 million. That job is extraordinarily difficult when the showing must be "to a legal certainty," the standard that applies when a plaintiff has disclaimed damages less than the amount in controversy.

This point can be seen in a recent case from the Ninth Circuit, *Lowdermilk v. United States Bank National Assoc.*, 479 F.3d 994 (9th Cir. 2007). In that putative class action, the plaintiffs' lawyer pleaded in the state-court complaint that she sought damages "in total, less than five million dollars." *Id.* at 997. The defendant removed, and the district court ordered remand. On appeal, the Ninth Circuit affirmed, holding that because the plaintiff had disclaimed damages above a fixed amount, the defendant was required to establish that the amount in controversy exceeded $5 million to a "legal certainty," which meant that the "defendant must not only contradict the plaintiff's own assessment of damages, but must overcome the presumption against federal jurisdiction." *Id.* at 999. The defendant failed to meet this burden despite the fact that it had "examined company records" of thousands of employees, engaged in sophisticated calculations, and submitted a declaration setting forth both the calculation and the assumptions that were behind it. *Id.* at 1000–1001 (describing calculations and assumptions). Ultimately, the Ninth Circuit thought the defendant had made too many unjustified assumptions and had failed completely to establish the number of class members.

Other courts have adopted similar burden rules.[10] A defendant confronted with a disclaimer like the one in *Lowdermilk* must do some hard work, both in terms of persuasively establishing the class size and proving the amount of each class member's claim. While reasonable assumptions may get the job done where the burden is "a preponderance of the evidence," they will not get the job done in the face of an express disclaimer like the one in *Lowdermilk*.[11]

Moreover, even where a complaint does not contain a disclaimer but is instead ambiguous, a defendant may not simply remove the case, assert that the aggregate amount in controversy exceeds $5 million, and then ask for discovery when confronted with a remand order in federal court. That does not satisfy the "preponderance of the evidence" standard. The Eleventh Circuit recently confronted this issue in *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007), and concluded that "[s]ound policy and notions of judicial economy and fairness" preclude a remove-first-and-find-evidence-later approach. *Id.* at 1216.

Cases like *Lowdermilk* and *Lowery* offer some lessons, both express and implicit. First, CAFA does not make removing a class action a slam-dunk. Even post-CAFA, a defendant facing a putative class action must work hard to support a removal.

Second, seeking removal under CAFA could lead to tactical or strategic trade-offs. For instance, because damages are now aggregated, to establish jurisdiction to the satisfaction of the court, the defendant may have to provide detailed information regarding the size of the class and customer identities. The number of people in a class has a direct impact on the amount of aggregate damages. In *Lowdermilk*, the defendant failed because it could not convince the court of the size of the class, despite having detailed records about each potential class member. The end result was that the defendant gave the plaintiffs' lawyer a lot of useful information about the class without gaining anything in the exchange. Any plaintiffs' lawyer would love to lay hands on that type of information early in the lawsuit. The defendant must be willing to potentially give up that information in order to make a case for federal jurisdiction.

Third, and relatedly, expert analysis and computations may be necessary at the removal stage itself. Given the short time frame to remove (30 days) and the practical difficulties of assembling data, putting together the type of analysis necessary to establish the jurisdictional minimum may be difficult.

All of this merely points to the need to get started very early on evaluating removal and getting the necessary information in hand. Ironically, drafting a paper called "Notice of Removal" is even less likely to satisfy a defendant's burden in the post-CAFA world, given the complications presented by aggregating damages to reach the amount in controversy.

Of course, in many cases involving thousands of putative class members and widely purchased products, the above considerations may be only minor. Often, simple arithmetic will do the trick. In many cases, the plaintiffs' lawyer may not even be aware—or care—that he or she is paving the way for removal under CAFA. But the most savvy and competent lawyers among the class-action plaintiffs' bar are sure to do all they can, within the limitations of good faith and the ethical rules, to make the road to federal court as bumpy as possible. Which leads to the final subject of this article: the ways in which class-action plaintiffs may plead their complaints or engineer litigation to frustrate the removal of product liability class actions.

LITIGATING AROUND CAFA: CURRENT AND FUTURE TRICKS AND TACTICS OF THE PLAINTIFFS' BAR

First, taking their cue from the fraudulent joinder tactics that served them so well in the past, some plaintiffs' lawyers are going a step further and filing class actions that do not name out-of-state manufacturers *at all*, but instead name *only* non-diverse distributors or retailers. By limiting the case to state citizens, plaintiffs' lawyers obviously are seeking to remove the required diverse party from the mix and preclude removal under CAFA. This tactic seems ill-conceived and short-sighted, however, because those in the chain of distribution can bring the manufacturer in as a third-party defendant. The manufacturer might even seek to intervene in the case. One way or the other, the manufacturer will become part of the case and will undoubtedly seek to remove it.

Second, some plaintiffs' attorneys have begun to file, or have threatened to file, class actions in the manufacturer's home state on behalf of a class of that state's citizens. While this historically has not been a preferred practice of the plaintiffs' bar, because of concerns that a state court might be disinclined to hammer a home-state employer, it could be a more common strategy in the post-CAFA world. In high-profile actions where there is vast media coverage, along with a perception—real or imagined—of widespread harm, this could be a wise tactic. With two "home teams" to cheer for, the judge may not clobber the corporate defendant but may not be so skeptical of class certification, either.

Third, some plaintiffs' lawyers are eschewing the class-action device in favor of smaller actions joining together a few plain-

tiffs, or even several dozen. While this might seem to be of marginal concern to manufacturers—since smaller actions do not threaten to result in the total devastation of a single, statewide class action—a closer look suggests that this may be a real concern. In class actions, after all, plaintiffs' lawyers often band together and pool resources. They could band together to pool resources yet represent separate "blocks" of plaintiffs as well, and the aggregate effect potentially could be just as disruptive as if a single class action had been filed. Indeed, dealing with such actions will present significant logistical and coordination challenges. Retaining experienced national coordinating counsel will be a must for manufacturers facing such actions.

Fourth, instead of suing on behalf of a statewide class, plaintiffs may start filing more micro-class actions, in which they sue on behalf of residents of a single county or group of counties or file multiple such class actions, essentially "gerrymandering smaller groups of class actions that fall beyond the purview of CAFA." *Shappell v. PPL Corp.*, No. 06-2078, 2007 U.S. Dist. LEXIS 20041, at *5 (D. N.J. Mar. 21, 2007). This could provide a means of limiting aggregated damages for each class, even though the manufacturer will face the same total exposure. In quasi-product liability suits in particular—*e.g.,* consumer fraud actions—where monetary damages for each class member are relatively small, this has real potential as a means of keeping class-action cases out of federal court. There is precedent for this tactic. In the wake of such cases as *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), and *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), which rejected nationwide product liability class actions, plaintiffs' lawyers started filing statewide class actions instead. In addition, though he ultimately was reversed, an Ohio trial judge attempted to craft a class consisting of residents of several counties in a particular region of Ohio.[12] In both instances, the efforts were directed at making the class more amenable to certification, but it is no stretch to predict that the plaintiffs' class-action bar will employ similar tactics to make their cases "CAFA-proof." Like a cockroach, the plaintiffs' class-action bar has demonstrated a remarkable ability to survive in even the bleakest of conditions.

CONCLUSION

The past two post-CAFA years have demonstrated yet again that the class-action plaintiffs' bar is a quick study, increasingly devising ways to succeed in avoiding federal jurisdiction under CAFA. Any manufacturer that routinely faces class-action litigation or that may face class-action litigation in the future—in other words, *every* manufacturer—must understand the pitfalls and loopholes in CAFA and anticipate how plaintiffs' lawyers will seek to use them to their advantage. Forewarned is forearmed. ■

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[1] Pub. L. 109-2, § 9, 119 Stat. at 14, codified at 28 §§ 1332(d) and 1453.

[2] *See* John H. Beisner and Jessica Davidson Miller, "Class Action Magnet Courts: The Allure Intensifies" (July 2002). Others have described such jurisdictions less charitably, characterizing them as "Judicial Hellholes®." *Judicial Hellholes 2006*, available at http://www.atra.org/reports/hellholes/report.pdf (ATRA has trademarked the term).

[3] We use the term "product liability class action" to encompass not only the traditional case in which the plaintiff and class allege physical injuries from the use of a product but also "consumer fraud class action," in which a product is alleged to be a "fraud" because it poses a risk of harming users even though it has not yet manifested any defect (the "no-injury class action"), as well as "medical monitoring class action," which, like the "no-injury class action," is premised not on a claim for existing physical injury but on the potential for such injury.

[4] "Class action" is defined liberally to "mean[ ] any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B).

[5] For more discussion and analysis of the changes effected by CAFA, *see, e.g.,* Richard G. Stuhan and Sean P. Costello, "The Class Action Fairness Act: Enough Rope to Pull Class-Action Defendants Out of 'Judicial Hellholes' or Just Enough to Hang Them?" 25 *Andrews Toxic Torts Litig. Rep.* 17 (2005).

[6] *See* S. Rep. 109-14, at 42, *as reprinted in* 2005 U.S.C.C.A.N. 3, 40 ("the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied)").

[7] *See, e.g., Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 685 (9th Cir. 2006) (*per curiam*); *Morgan v. Gay*, 471 F.3d 469, 472–73 (3d Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328–29 (11th Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005).

[8] Once the defendant establishes the minimal diversity requirements of CAFA, it then becomes the plaintiff's burden to show that one of the exceptions to CAFA warrants remand. Thus, it is the plaintiffs' burden to show that either the "home state" or the "local controversy" exception applies. Those exceptions are set forth in 28 U.S.C. § 1332(d)(4).

if not sickened, by these apparently accepted and sanctioned abuses of the system. Perhaps class actions may have net societal value when injunctive relief is sought and granted to prevent an ongoing unlawful act, like a clear consumer fraud, but for those of us who are in the trenches daily seeing the damage cases, make no mistake: The vast majority of these cases are by and for the lawyers.

It has become a fact of life in America, sadly tolerated, that the mail brings almost weekly a notice from some settlement administrator telling us that a judge in a state we have never visited—or from a federal district court in some faraway district—is going to approve a settlement that is going to extinguish a cause of action that we are said to own by giving us some voucher or coupon or future discount (if we still have the records of buying something during a long-past period). Even if we read the facts as set out in the notice, I daresay that most of us do not feel genuinely harmed or threatened if the actual fuel capacity of the gas tank was a few ounces less than what was stated in the owner's manual, or if some of the quarter-pound hamburgers didn't weigh four ounces after they were cooked, or if our cell phone company had a computer system that treated a one-minute-and-56-second call as a two-minute call. The only thing one can be sure of with such a notice is that the lawyers who invested in the claim, recruited someone to be the named plaintiff, and negotiated a settlement where each class member gets essentially nothing (since each was not really injured)—those lawyers are going to walk away with a hefty fee.

Some steps toward reform have crept forward. But until meaningful reform comes, it is our charge as defense lawyers to know how to defend and beat these cases. The articles in this issue should provide readers with some of the ways we are staying on the cutting edge of how to defend and win. If your company has the misfortune of coming under attack in a case of this kind, give us a chance to be your defenders. ■

Paul M. Pohl

[9] Much has been written on this. CAFA provides that it applies to all cases "commenced" on or after its effective date, February 18, 2005. Defendants have tried a variety of arguments to show that their cases "commenced" on or after CAFA's effective date even though the cases were filed before that date, but with little success. For a discussion of this issue, *see* Stuhan and Costello, *supra* note 5 at 5–6.

[10] *See, e.g., Morgan*, 471 F.3d at 474.

[11] Of course, such a disavowal, assuming it is enforced at the state level, should prove helpful to the defendant in settlement negotiations and evaluating the risks of proceeding to trial.

[12] The certification was described in *Marrone v. Philip Morris USA, Inc.*, 2004 Ohio App. LEXIS 4419 (Ohio Ct. App. Sept. 15, 2004), *reversed by Marrone v. Philip Morris USA, Inc.*, 850 N.E.2d 31 (Ohio 2006).