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

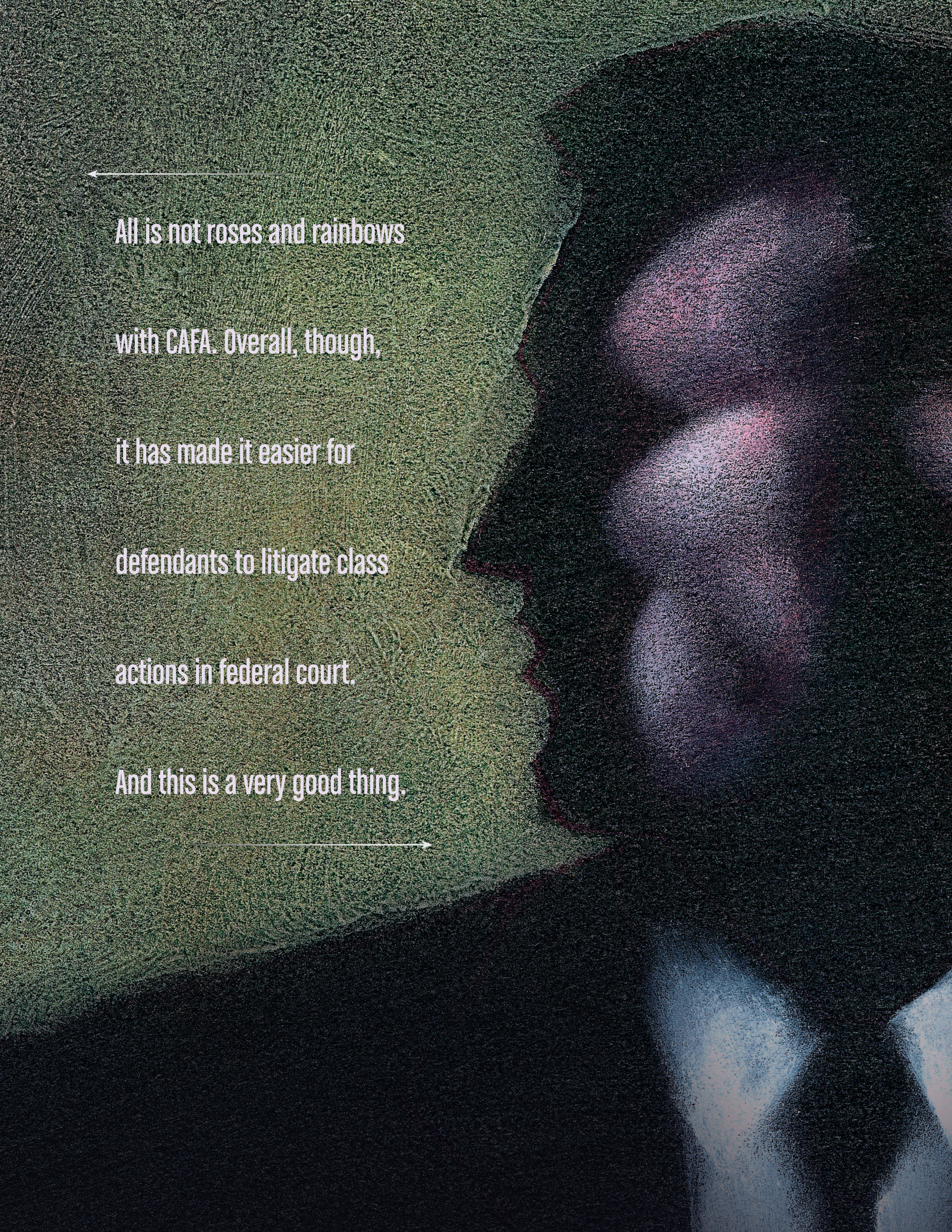
CAFA made three principal changes with respect to federal jurisdiction over "class actions" and sought to remedy some of the above problems.[4] First, it eliminated the complete-diversity requirement. Under CAFA, diversity jurisdiction exists if *any* defendant is diverse from *any* plaintiff. 28 U.S.C. § 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.

continued on page 33



All is not roses and rainbows with CAFA. Overall, though, it has made it easier for defendants to litigate class actions in federal court. And this is a very good thing.

continued from page 16

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 plaintiffs, 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. ■

SEAN P. COSTELLO
1.404.581.8327
scostello@jonesday.com

KATHRYN A. FURFARI
1.404.581.8441
kafurfari@jonesday.com

[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).

LETTER FROM THE PRACTICE CHAIR

continued from page 2

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. ■

Mickey

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).