CAFA Mass Actions: Will Courts Continue to Permit Plaintiffs to Game the System?

Michael Gruver and Glenn Pogust, Kaye Scholer LLP, with Practical Law Litigation

A discussion of the judicial response to plaintiffs' attempts to avoid the jurisdictional reach of the Class Action Fairness Act. Outcomes have differed depending on whether plaintiffs style their case as a class action or mass action under the statute. This Article also discusses the potential for change in this area of the law.

Aimed at reducing forum shopping in class action litigation, the Class Action Fairness Act of 2005 (CAFA) extended federal diversity jurisdiction to class actions meeting minimal diversity requirements and claiming at least an aggregated $5 million in controversy (*28 U.S.C. § 1332(d)(2), (6)*; see also *CAFA Jurisdiction Comparison Chart (http://us.practicallaw.com/8-532-3326)*).

CAFA also addressed forum shopping in litigation involving large numbers of plaintiffs with similar claims, but who do not seek class certification, by creating a new category of mass actions (*28 U.S.C. § 1332(d)(11)*). Federal jurisdiction is similarly enlarged to encompass these actions, defined as lawsuits in which "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact" (*28 U.S.C. § 1332(d)(11)(B)(i)*). Mass actions must also meet certain monetary threshold requirements (*28 U.S.C. § 1332(d)(11)(A), (B)(i)*). For purposes of CAFA, a mass action is deemed to be a class action removable under Sections 1332(d)(2)-(10), provided it meets the requirements of those sections (*28 U.S.C. § 1332(d)(11)(A)*).

In the years since CAFA's enactment, plaintiffs' attorneys wishing to avoid federal jurisdiction under CAFA have experimented with various approaches to keep their cases in potentially friendlier state courts. Plaintiffs have attempted to file separate identical state court cases:

- With smaller damages pled in each case to remain under CAFA's $5 million amount in controversy threshold for class actions.
- With less than 100 plaintiffs in each case to remain under CAFA's 100 plaintiff minimum for mass actions.

This Article explores:

- The intent behind CAFA and recent decisions emphasizing this intent in rejecting attempts to avoid federal jurisdiction.
- Mass action plaintiffs' continued circumvention of the statute and the paradoxically permissive judicial response to this tactic.
- The conceptual limitations of allowing mass action plaintiffs to do what class action plaintiffs cannot and the potential for change in this area of the law.

CAFA WAS INTENDED TO PROMOTE FEDERAL JURISDICTION

The Senate Judiciary Committee's report accompanying CAFA states that the statute's purpose is to "correct[] a flaw in the current diversity jurisdiction statute … that prevents most interstate class actions from being adjudicated in federal court" (*S. Rep. No. 109-14 (2005), 2005 WL 627977, at *5*). CAFA is designed to "make[] it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction, create[] efficiencies in the judicial system by allowing overlapping and 'copycat' cases to be consolidated in a single federal court, and place[] determination of more interstate class action lawsuits in the proper forum - the federal courts" (*S. Rep. No. 109-14 (2005), 2005 WL 627977, at *5* and see *Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1351 (2013)* and *Freeman v. Blue Ridge Paper Prods., Inc., 551 F.3d 405, 408 (6th Cir. 2008)*). To achieve these goals, the legislative history endorses a liberal interpretation of class actions, stating that "lawsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions" (*S. Rep. No. 109-14 (2005), 2005 WL 627977, at *35*).

Falling in the category of lawsuits that resemble class actions are mass actions, which are:

> suits that are brought on behalf of numerous named plaintiffs who claim that their suits present common questions of law or fact that should be tried together even though they do not seek class certification status. Mass action cases function very much like class actions and are subject to many of the same abuses.

(*S. Rep. No. 109-14 (2005), 2005 WL 627977, at *46.*) As stated by the Judiciary Committee, mass actions are "simply class actions in disguise" (*S. Rep. No. 109-14 (2005), 2005 WL 627977, at *47*).

CAFA's statutory language reflects this history, providing that a mass action is deemed to be a class action removable under Sections 1332(d)(2)-(10), provided it meets the requirements of those sections (*28 U.S.C. § 1332(d)(11)(A)*).

COURTS GENERALLY RECOGNIZE THE INTENT BEHIND CAFA

In a series of cases interpreting the breadth of CAFA's mandate to promote federal jurisdiction, both the US Supreme Court and the federal appellate courts have found that CAFA's objectives can and should be balanced against plaintiffs' attempts to circumvent federal jurisdiction.

The US Supreme Court: *Standard Fire Ins. Co. v. Knowles*

In *Standard Fire Insurance Company v. Knowles*, the Supreme Court addressed one attempt to avoid CAFA jurisdiction where the named plaintiff tried to manipulate the amount of damages sought in a putative class action (*133 S. Ct. 1345 (2013)*). The named plaintiff filed a putative class action with a stipulation not to seek more than $5 million from the defendant, arguing that this stipulation was sufficient to avoid federal jurisdiction under CAFA. Writing for a unanimous court, Justice Breyer rejected this approach, holding that federal jurisdiction could not be based on contingent future events. Because the class had not yet been certified, the court held, the putative lead plaintiff did not have authority to make a binding stipulation on damages for class members. Therefore, the stipulation not to seek more than $5 million had no effect, as it did not bind any member of the class aside from the lead plaintiff, who may not even survive the certification process in that role.

In reaching this decision, the Court noted:

- "To hold otherwise would … exalt form over substance, and run directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance'."
- A finding in the plaintiffs' favor "would also have the effect of allowing the subdivision of a $100 million action into 21 just-below-$5-million state-court actions simply by including non-binding stipulations."
- An outcome that allowed plaintiffs to avoid CAFA jurisdiction in this manner, "would squarely conflict with the statute's objective."

(*Standard Fire Ins. Co., 133 S. Ct. at 1350* and see *Legal Update, Supreme Court: CAFA Jurisdiction Not Defeated by Named Plaintiff's Stipulation to Seek Less than $5 Million (http://us.practicallaw.com/1-525-2884)*.)

The Federal Appellate Courts

In addition to *Standard Fire*, there have been several recent federal appellate court rulings which seem to look beyond the strict language of CAFA to find a broad right to federal jurisdiction under the statute.

- The US Court of Appeals for the Eighth Circuit ruled that CAFA's amount in controversy provision was satisfied if the fact finder could conclude that damages **could** exceed $5 million. To remove a case to federal court under CAFA, the court held, the defendant need not prove that damages actually will exceed the $5 million threshold (*Raskas v. Johnson & Johnson, 719 F.3d 884, 887 (8th Cir. 2013)*). This follows similar holdings in the Ninth and Seventh Circuits (see *Lewis v. Verizon Commc'ns, Inc., 627 F.3d 395, 400-02 (9th Cir. 2010)* and *Spivey v. Vertrue, Inc., 528 F.3d 982, 985-86 (7th Cir. 2008)*).
- The US Court of Appeals for the Fifth Circuit held that cases filed by state attorneys general could be removed under CAFA's mass action provision because consumers were the real parties in interest, and their number exceeded 100 (and the other requirements for federal jurisdiction were met). In doing so, the court "pierce[d] the pleadings" to "look at the real nature of a state's claims so as to prevent jurisdictional gamesmanship" (*Mississippi ex rel. Hood v. AU Optronics Corp., 701 F.3d 796, 799 (5th Cir 2012)* and see *Legal Update, Fifth Circuit: Mississippi Suit on Behalf of Itself and Consumers is a CAFA Mass Action (http://us.practicallaw.com/4-522-6539)*). Notably, the US Supreme Court recently granted certiorari in this case (*133 S. Ct. 2736 (2013)* and see *Standard Fire Insurance Co. v. Knowles as a Roadmap to the Future*).
- The US Court of Appeals for the Sixth Circuit found CAFA jurisdiction appropriate after taking into account the plaintiffs' motivation for filing five separate class actions, each covering distinct six-month intervals but with identical parties and claims and a limited recovery of $4.9 million per case. In holding that federal jurisdiction was appropriate, the Sixth Circuit:
  - found it crucial that the plaintiffs "put forth no colorable reason for breaking up the lawsuits in this fashion other than to avoid federal jurisdiction"; and
  - also noted, "If such pure structuring permits class plaintiffs to avoid CAFA, then Congress's obvious purpose in passing the statute—to allow defendants to defend large interstate class actions in federal court—can be avoided almost at will, as long as state law permits suits to be broken up on some basis. CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction."

(*Freeman, 551 F.3d at 406-07*.)

Together with Standard Fire's emphasis on the congressional intent behind CAFA, these cases signal that federal courts plainly recognize that jurisdictional gamesmanship to avoid CAFA jurisdiction should not be permitted.

MASS ACTION GAMESMANSHIP: WHERE 50 PLUS 50 DOES NOT EQUAL 100

Yet, CAFA's 100 plaintiff numerosity requirement for mass actions remains an area in which the courts have allowed plaintiffs to manipulate their lawsuits to circumvent CAFA jurisdiction, raising concerns about exalting form over substance and imperiling the purpose behind the statute.

The Judicial Approach to CAFA's Mass Action Provisions

Assuming all other statutory requirements are met, CAFA's mass action provision extends federal jurisdiction to non-class actions that:

- Involve the monetary claims of 100 or more persons that are proposed to be tried jointly.
- Involve common questions of law or fact.
- Meet a certain monetary threshold.

(*28 U.S.C. § 1332(d)(11)(B)(i).*)

Among other things, CAFA excludes from mass actions claims which are "joined upon motion of a defendant" (*28 U.S.C. § 1332(d)(11)(B)(ii)(II)*).

To evade federal jurisdiction, mass action plaintiffs' attorneys commonly file multiple, identical state court actions, each proposing to try the claims of fewer than 100 plaintiffs (even if, in the aggregate, each action represents identical claims by hundreds of plaintiffs or more). By emphasizing the "proposed to be tried jointly" language and the exclusion for claims joined by a defendant, several federal appellate courts have allowed these tactics. The courts effectively take the position that, despite the clear intent to discourage jurisdictional gamesmanship, CAFA has built into it a clause that provides a roadmap for how plaintiffs can in fact avoid federal jurisdiction and that prevents defendants from removing to federal court (see *Scimone v. Carnival Corp., 720 F.3d 876, 885 (11th Cir. 2013)*; *Abrahamson v. ConocoPhillips, Co., 503 Fed. Appx. 157, 160 (3d. Cir. 2012)*, cert. denied, *133 S. Ct. 1820 (2013)*; *Anderson v Bayer Corp., 610 F.3d 390, 393-94 (7th Cir. 2010)* and *Tanoh v. Dow Chem. Co., 561 F.3d 945, 954-55 (9th Cir. 2009)*).

Eleventh Circuit: *Scimone v. Carnival Corp.*

A recent case decided by the US Court of Appeals for the Eleventh Circuit provides a textbook example (*Scimone, 720 F.3d at 876*). Scimone involved the well-publicized sinking of the cruise ship Costa Concordia in January 2012. Six plaintiffs, who had been passengers on the ship, originally filed a joint action against the cruise line in Florida state court. When additional plaintiffs were located, they were added to the state court complaint until the plaintiffs totaled 39. Eventually, 65 more plaintiffs were identified. This would have raised the total number of plaintiffs to 104, and triggered federal jurisdiction under CAFA had those plaintiffs been added to the initial complaint. To avoid this result, the initial 39 plaintiffs dismissed their complaint and then re-filed the action the same day, this time as two separate lawsuits, one on behalf of 56 plaintiffs and the other on behalf of the remaining 48. The separate complaints involved the same facts and made **word-for-word identical claims** against defendants (see *Scimone, 720 F.3d at 879*). The only difference between the two actions was that one was filed on behalf of plaintiffs with last names between A and L, while the other was filed on behalf of plaintiffs with last names L to Z (see *Abeid-Saba v. Carnival Corp., Civil Action No. 12-26072 CA 02 (Fla. Cir. Ct. 2012)* (A-L) and *Scimone v. Carnival Corp., Civil Action No. 12-26076 CA 30 (Fla. Cir. Ct. 2012)* (L-Z)).

Defendants argued that federal jurisdiction under CAFA was proper because:

- The plaintiffs had implicitly proposed a joint trial by initially filing a single complaint (*Scimone, 720 F.3d at 883*).
- Allowing plaintiffs to evade federal jurisdiction through this type of artful pleading ran directly counter to CAFA's purpose (*Scimone, 720 F.3d at 885*).

The Eleventh Circuit rejected these arguments. The court reasoned that while there were 104 plaintiffs altogether, at no point had plaintiffs explicitly proposed to try one case with that number of plaintiffs. The court similarly rejected the argument that it had "ignored the purpose of the statute, which was to expand federal jurisdiction over class and mass actions and to facilitate their removal" (*Scimone, 720 F.3d at 885*). The court emphasized:

- The length to which the plaintiffs went to avoid federal jurisdiction evidenced that they did not intend to try the cases jointly (*Scimone, 720 F.3d at 883-84*).
- There was "no indication that Congress's purpose in enacting CAFA was to strip plaintiffs of their ordinary role as masters of their complaint and allow defendants to treat separately filed actions as one action regardless of plaintiffs' choice," and that "what plaintiffs have done in this case does not defeat Congress's intent to remove … impediments to federal adjudication of class actions" (*Scimone, 720 F.3d at 885*).
- The plaintiffs retained the ability to avoid federal jurisdiction "simply by not proposing joint trial of 100 or more persons' claims," regardless, it would seem, of their reasons for doing so or the total number of identical suits they file (see *Scimone, 720 F.3d at 886*).

Similar Reasoning in Other Circuits

The *Scimone* decision corresponds with other federal appellate cases similarly interpreting the mass action numerosity requirement (see *Abrahamson, 503 Fed. Appx. at 160; Anderson, 610 F.3d 393-94* and *Tanoh, 561 F.3d at 954-55*). These cases did not take issue with the plaintiffs' tactic of filing separate identical actions for the undisguised purpose of circumventing CAFA's jurisdictional requirements. For example:

- The US Court of Appeals for the Seventh Circuit held that CAFA jurisdiction could be avoided in a case involving hundreds of plaintiffs who filed four "mostly identical complaints in state court," because the statute was consistent with the general rule that "plaintiffs as masters of the complaint may include (or omit claims) or parties in order to determine the forum" (*Anderson, 610 F.3d at 392-93* (quoting *Garbie v. DaimlerChrysler Corp., 211 F.3d 407, 410 (7th Cir. 2000)*).

- The US Court of Appeals for the Ninth Circuit similarly found no removal jurisdiction in a case in which 664 West African foreign nationals filed seven suits, each with fewer than 100 plaintiffs. The court held that CAFA's "proposed to be tried jointly" provision demonstrates Congress's endorsement of the practices that plaintiffs' attorneys use to avoid federal jurisdiction. It further held Congress anticipated that defendants "might attempt to consolidate several smaller state court actions into one 'mass action,' and specifically directed that such a consolidated action was not a mass action eligible for removal under CAFA" (*Tanoh, 561 F.3d at 953-54*).

The Seventh, Ninth, and Eleventh Circuit decisions can only be distinguished from the US Supreme Court's decision in *Standard Fire* and the Sixth Circuit's *Freeman* decision, both of which admonished plaintiffs' attempts to artificially avoid CAFA jurisdiction, on the grounds that those cases involved class actions rather than mass actions. Invoking the "proposed to be tried jointly" language, as well as the exclusion for claims joined by a defendant, both of which are not included in CAFA's class action provisions, the circuit courts reasoned that CAFA's class action and mass action provisions are distinct and precedent for one is not applicable to the other (*28 U.S.C. 1332(d)(11)(B)(i), (ii)(II); Scimone, 720 F.3d at 881, 885-86; Anderson, 610 F.3d at 393* and *Tanoh, 561 F.3d at 955-56*).

LIMITATIONS ON THE JUDICIAL APPROACH TO MASS ACTIONS

The strict construction approach to the "proposed to be tried jointly" language and the exclusion for claims joined by a defendant has raised issues, including:

- There must be limits on plaintiffs as masters of the complaint (see *Plaintiffs as Masters of the Complaint Must Have Limits*).
- There is not necessarily a special meaning to the "proposed to be tried jointly" language (see *The "Proposed to be Tried Jointly" Language Is Not Entitled to Special Meaning*).
- Proposing to jointly try claims may not be binding (see *Proposing to Jointly Try Claims is Not Binding*).

Plaintiffs as Masters of the Complaint Must Have Limits

The federal appellate courts have determined that Congress intended for mass action plaintiffs to have free rein in constructing their complaints, an intention which outweighs concerns over jurisdictional gamesmanship (see *Scimone, 720 F.3d at 885; Anderson, 610 F.3d at 393* and *Tanoh, 561 F.3d at 954*). To be sure, plaintiffs are the masters of the complaint and defendants should not be permitted to lump together completely unrelated cases to reach CAFA's mass action 100 plaintiff threshold. This is different, however, from the situations in which plaintiffs artificially divide concededly related cases "for no colorable reason" other than to defeat CAFA jurisdiction (see *Freeman, 551 F.3d at 407*).

There should be a check on how far plaintiffs (mass action or class action) can engineer lawsuits to avoid the federal jurisdiction statute. A plaintiff may indeed **limit** the amount in controversy or the number of plaintiffs seeking relief to remain in state court (*Freeman, 551 F.3d at 409* ("Generally, if a plaintiff 'does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove'.") (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 290-92 (1938)*).

Where, however, plaintiffs effectively wish to **expand** their case to receive a greater award, either by increasing the amount sought or the number of plaintiffs in the aggregate suing on identical claims, they must accept the corresponding obligation that they may have to pursue these claims in federal court.

While *Freeman* was decided in the context of a class action, similar reasoning was applied in the mass action context at the district court level. *Hamilton v. Burlington Northern Santa Fe Railroad Company*, involved six identical actions with an aggregate of more than 600 plaintiffs (*No. 08-cv-0132, 2008 WL 8148619, at *2 (W.D. Tex. Aug. 8, 2008)*). While recognizing that plaintiffs are the masters of the complaint, the court still found that "there are limits to a Plaintiff's ability to evade removal jurisdiction through artful pleading" (*Hamilton, 2008 WL 8148619, at *5*). The court extended reasoning applied in the context of fraudulent joinder and bad faith pleading generally and in cases where plaintiffs deliberately obscure the amount in controversy to avoid federal jurisdiction. By examining the record as a whole, the court noted that the claims in the various lawsuits were identical, differing "only in that the plaintiffs have been divided alphabetically into groups of fewer than 100 per action filed" (*Hamilton, 2008 WL 8148619, at *5*). As a result, the "Plaintiffs are actually seeking to try the claims of 100 or more persons at the same time, and therefore the related complaints should be subject to CAFA's mass action provisions" (*Hamilton, 2008 WL 8148619, at *6).* "In other words, if it looks like a duck, walks like a duck, and quacks like a duck, it surely is not six separate and distinct lawsuits" (*Hamilton, 2008 WL 8148619, at *5 n.1*).

The "Proposed to be Tried Jointly" Language Is Not Entitled to Special Meaning

It is further questionable whether Congress truly intended the statutory language "proposed to be tried jointly" to be a meaningful distinction between CAFA's mass action and class action numerosity requirements. "Proposed to be tried jointly" has been found to be a term of exclusion, setting out a threshold requirement for federal jurisdiction that must be met for mass actions but not class actions.

However, it is unclear whether it is appropriate to treat this language as a true jurisdictional requirement at all. Read in light of congressional intent to have CAFA cover both class actions and large actions without a certified class, "proposed to be tried jointly" may be viewed as a term of inclusion, meant to describe those actions without a certified class that should still be given the same treatment as class actions for jurisdictional purposes under CAFA. Perhaps the reason why no similar provision was included in the

language regarding class actions was merely that Congress did not believe the extra language necessary, as class actions by their very nature are proposed to be tried jointly.

The Senate Judiciary Committee's report accompanying CAFA did not specifically differentiate between mass actions and class actions and, to the contrary, the report noted that mass actions are "class actions in disguise" which "function very much like class actions and are subject to many of the same abuses" (*S. Rep. No. 109-14 (2005), 2005 WL 627977, at *46-47*).

Proposing to Jointly Try Claims is Not Binding

Like the non-binding stipulation rejected as a valid means of avoiding CAFA jurisdiction in *Standard Fire*, an allegation that the claims of numerous plaintiffs assembled in a single complaint are proposed to be tried jointly is not binding on the plaintiffs, the court or any other party and should not serve as a basis to reject federal jurisdiction where the proposal is only made to artificially defeat that jurisdiction. Indeed, the plaintiffs' initial proposal in a complaint, that the cases of multiple individual plaintiffs are intended to be tried jointly, is in reality a fiction that rarely, if ever, will come to fruition given the way in which mass actions are actually litigated and tried.

Imagine, for example, a hypothetical mass action filed on behalf of 990 plaintiffs, styled as ten identical state court complaints, each on behalf of 99 plaintiffs. Based on their past rulings, it appears federal appellate courts would deny attempts to remove and consolidate these cases at the federal level because they were not proposed to be tried jointly. However, it is unlikely that any state court or plaintiffs' attorneys themselves would proceed with ten separate trials, each requiring individualized proof regarding causation and damages for 99 plaintiffs, not to mention the choice of law complications created by the fact that arbitrarily-grouped plaintiffs will likely reside in several different states.

In addition, no matter how many plaintiffs' claims are proposed in a mass action, it is unlikely that all the claims will actually be **tried** together. Instead, what usually happens in mass actions is that individual "bellwether" plaintiffs are selected for the first trials, often permitting plaintiffs' attorneys to move their best cases forward no matter where those plaintiffs appeared in the various complaints. As a result, an initial pleading, even if it identifies numerous claims to be tried jointly, has little bearing on how the cases actually move forward (see *Bullard v. Burlington N. Santa Fe Ry. Co., 535 F.3d 759, 761 (7th Cir. 2008)* ("No one supposes that all 144 plaintiffs will be active; a few of them will take the lead, just as in a class action, and as a practical matter counsel will dominate, just as in a class action.")).

The Seventh Circuit recently limited its prior holding in *Anderson*, based on similar reasoning. In In re *Abbott Laboratories*, several hundred plaintiffs filed ten separate state court cases against the defendant in several different counties. Plaintiffs later made a motion to consolidate and transfer the related state court cases to one circuit court, through trial of the cases (as opposed to merely for pre-trial proceedings). While the plaintiffs were careful not to propose that the cases actually be tried jointly, triggering CAFA jurisdiction, the court determined that this conduct constituted such a proposal where "the assumption would be that a single trial was intended" (*In re Abbott Labs., Inc., 698 F.3d 568, 573 (7th Cir. 2012)* (quoting *Koral v. Boeing, Co., 628 F.3d 945, 947 (7th Cir. 2011)*). As a result, the court held that a proposal to jointly try multiple cases can be "implicit," even where plaintiffs may not have explicitly asked that their claims be tried jointly, and held that removal under CAFA was proper.

STANDARD FIRE INSURANCE COMPANY V. KNOWLES AS A ROADMAP TO THE FUTURE

Despite the narrow approach taken by the federal appellate courts regarding the mass action numerosity requirement, the *Standard Fire* ruling certainly signals the high court's interest in looking at the purpose behind CAFA in determining whether certain cases fall within its scope. Even more recently, the Court granted *certiorari* in *Mississippi v. AU Optronics Corporation*, in which the US Court of Appeals for the Fifth Circuit held that cases filed by state attorneys general could be removed under CAFA's mass action provision because the real parties in interest, the consumers, exceeded 100 (and the other requirements for federal jurisdiction were met) (*701 F.3d 796 (5th Cir. 2012), cert. granted, 133 S. Ct. 2736 (2013)*). The Fifth Circuit disallowed the plaintiffs and their attorneys from "seek[ing] to avoid the rigors associated with class actions (and avoid removal to federal court)," and, by piercing the pleadings, held that " [b]ecause this suit is a mass action under the terms of the CAFA, removal is proper" (*AU Optronics Corp., 701 F.3d at 799, 803*). In this context, the Supreme Court may examine when it is appropriate to look beyond the form of claims removed under CAFA to the underlying facts in order to uphold CAFA's purpose of encouraging federal jurisdiction and preventing plaintiffs from "'game[ing] the system' by trying to defeat diversity jurisdiction" (*S. Rep. No. 109-14 (2005), 2005 WL 627977, at *5*).

PRACTICAL IMPLICATIONS

In the context of class actions, it appears courts have embraced the intent behind CAFA to disallow blatant attempts to circumvent the statutory mandate without strict adherence to the concept that plaintiffs are the master of the complaint. However, there has been judicial resistance to extending this reasoning to mass actions, despite the fact that the Senate Judiciary Committee's report accompanying CAFA deemed class and mass actions to be essentially the same for jurisdictional purposes.

As a result, for the time being at least, plaintiffs' counsel seem to have the option to keep mass action claims in state court by dividing up identical claims to circumvent CAFA's mass action provisions. Defendants' counsel, on the other hand, who want to remove related but separate mass actions to federal court under CAFA, should be aware that until the courts apply the same standards to mass actions that have been applied to class actions, they face an uphill battle.

MICHAEL GRUVER

Kaye Scholer LLP

T + 212 836 7420
F + 212 836 6645
E michael.gruver@kayescholer.com
W www.kayescholer.com

Professional qualifications. New York, US
Areas of practice. Intellectual Property
Litigation
Patent Litigation
Product Liability

Education. Duke University School of Law, J.D., 2006
Johns Hopkins University, M.A., 2001
Johns Hopkins University, B.A., 2000

GLENN POGUST

Kaye Scholer LLP

T + 212 836 7801
E glenn.pogust@kayescholer.com
W www.kayescholer.com

Professional qualifications. New York, US
Areas of practice. Mr. Pogust's experience is in the defense of manufacturers of a wide variety of products in personal injury and property damage cases. He is actively involved in national litigation involving an atypical antipsychotic medication, including responsibility for all state cases. Previously, he has been involved in the national coordination of litigation involving over-the-counter decongestants and a diabetes medication for major pharmaceutical manufacturers. He was actively involved in the national coordination of toxic shock syndrome litigation for a leading tampon manufacturer, and served as regional counsel and trial counsel in defense of a major corporation in the silicone gel breast implant litigation.

For more information, search for the following resources on our website.

Topics

- Commencement and Pleadings (http://us.practicallaw.com/topic9-520-1640)
- Federal Litigation (http://us.practicallaw.com/topic0-500-0085)
- Removal (http://us.practicallaw.com/topic5-520-1642)

Practice Notes

- Removal: How to Remove a Case to Federal Court (http://us.practicallaw.com/1-506-8452)
- Removal: Post-removal Procedure (http://us.practicallaw.com/0-508-0911)
- Removal: Remanding the Case to State Court (http://us.practicallaw.com/1-518-8628)
- Removal: Why Remove? (http://us.practicallaw.com/2-533-3069)

Standard Documents

- Notice of Filing of Notice of Removal (http://us.practicallaw.com/1-507-0898)
- Notice of Removal (http://us.practicallaw.com/9-507-0210)

Checklists

- CAFA Jurisdiction Comparison Chart (http://us.practicallaw.com/8-532-3326)
- Removal Checklist (http://us.practicallaw.com/7-504-3821)

Legal Update: archive

- CAFA Mass Actions: How Do You Count to 100? (http://us.practicallaw.com/9-535-1205)

For the links to the documents referenced in this note, please visit our online version at http://us.practicallaw.com/8-537-7705