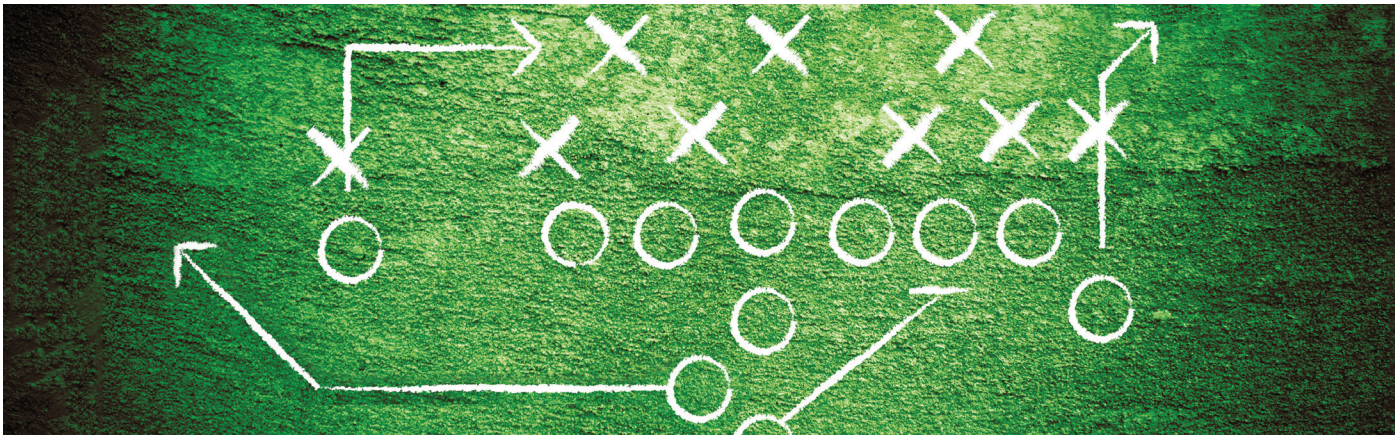

CAFA Mass Actions: Can Plaintiffs Continue to Game the System?

Plaintiffs' attempts to avoid the jurisdictional reach of the Class Action Fairness Act of 2005 (CAFA) have resulted in different outcomes depending on whether the plaintiffs style their case as a class action or a mass action under the statute.

GLENN J. POGUST
PARTNER
KAYE SCHOLER LLP

Glenn's practice focuses on defending manufacturers of a wide variety of products in personal injury and property damage cases. He has been actively involved in the national coordination of several product liability cases, and is engaged in cases pending in the federal and state courts in New York, as well as in other jurisdictions.

MICHAEL L. GRUVER
ASSOCIATE
KAYE SCHOLER LLP

Michael is an associate in the firm's Commercial Litigation Department. His practice focuses on product liability and intellectual property-related litigation.

Aimed at reducing forum shopping in class action litigation, CAFA changed the traditional rules governing federal diversity jurisdiction over certain actions involving numerous plaintiffs. 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)*).

Additionally, CAFA created a new category of mass actions for litigation involving large numbers of plaintiffs with similar claims, but who do not seek class certification (*28 U.S.C. § 1332(d)(11)*). Federal jurisdiction is similarly extended to reach 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)*). 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)*). Mass actions must also meet certain monetary threshold requirements (*28 U.S.C. §§ 1332(d)(11)(A), (B)(i)*).

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 fewer 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 rejecting attempts by class action plaintiffs to avoid federal jurisdiction.
- The continued circumvention of CAFA by mass action plaintiffs seeking to avoid federal jurisdiction and the paradoxically permissive judicial response to this tactic.
- The conceptual limitations on the judicial approach to mass actions and the potential for change in this area of the law.

Search Class Action Fairness Act of 2005 (CAFA): Overview for more on CAFA's requirements for federal diversity jurisdiction over class actions and mass actions.

Search CAFA Jurisdiction Comparison Chart for a chart outlining the changes effected by CAFA.

CAFA'S INTENT TO PROMOTE FEDERAL JURISDICTION

The Senate Judiciary Committee's report accompanying CAFA provides that the statute's purpose was to correct a flaw in the diversity jurisdiction statute that prevented most interstate class actions from being adjudicated in federal courts (*S. Rep. No. 109-14, at 5 (2005), 2005 WL 627977*). 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.
- Place the determination of more interstate class action lawsuits in the proper forum.

(*S. Rep. No. 109-14, at 5 (2005), 2005 WL 627977*; see also *Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1350 (2013)*; *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, emphasizing 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, at 35 (2005), 2005 WL 627977*). Falling under this category of lawsuits are mass actions. As stated by the Senate Judiciary Committee, "mass action cases function very much like class actions and are subject to many of the same abuses ... mass actions are simply class actions in disguise" (*S. Rep. No. 109-14, at 46, 47 (2005), 2005 WL 627977*).

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)*).

JUDICIAL RECOGNITION OF CAFA'S INTENT

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 avoid federal jurisdiction. In the context of class actions, it appears these courts have embraced the intent behind CAFA, disallowing blatant attempts to circumvent the statutory mandate.

Search Removal: Overview and Removal: Why Remove? for information on the removal process and key differences between state and federal litigation practice that may influence a defendant's decision to remove.

US SUPREME COURT: *STANDARD FIRE INS. CO. v. KNOWLES*

In *Standard Fire Insurance Co. v. Knowles*, the US Supreme Court rejected the named plaintiff's attempt to avoid federal jurisdiction under CAFA by trying to manipulate the amount of damages sought in a putative class action (*133 S. Ct. at 1350*). The named plaintiff filed the putative class action with a stipulation not to seek more than $5 million from the defendant, arguing that this stipulation was sufficient to avoid CAFA jurisdiction.

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 Supreme Court found that 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 class member aside from the lead plaintiff, who may not even survive the certification process in that role.

In reaching its decision, the Supreme Court noted that:

- To hold otherwise would "exalt form over substance" and run directly counter to CAFA's primary objective of ensuring federal court consideration of interstate cases of national importance.
- A finding in the plaintiffs' favor would effectively allow 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 the 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*.)

Search Supreme Court: CAFA Jurisdiction Not Defeated by Named Plaintiff's Stipulation to Seek Less than $5 Million for more on the *Standard Fire* decision.

SIMILAR REASONING IN FEDERAL APPELLATE COURTS

Recent federal appellate court rulings also seem to look beyond the strict language of CAFA to find a broad right to federal jurisdiction under the statute. These include:

- ***Raskas v. Johnson & Johnson.*** 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. The Eighth Circuit held that the defendant need not prove that damages actually will exceed the $5 million threshold to remove a case to federal court under CAFA (*719 F.3d 884, 887-88 (8th Cir. 2013)*). This follows similar holdings in the US Courts of Appeals for the Ninth and Seventh Circuits (see *Lewis v. Verizon Commc'ns, Inc., 627 F.3d 395, 400-402 (9th Cir. 2010)*; *Spivey v. Vertrue, Inc., 528 F.3d 982, 985-86 (7th Cir. 2008)*).
- ***Freeman v. Blue Ridge Paper Products, Inc.*** 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 its holding, 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
  - noted that 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."

  (*551 F.3d at 406-407*.)

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

MASS ACTION GAMESMANSHIP

In the context of mass actions, however, 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. Despite the Senate Judiciary Committee's report deeming class actions and mass actions to be essentially the same for jurisdictional purposes, courts have focused on CAFA's 100-plaintiff numerosity requirement for mass actions in refusing to allow defendants to remove groups of similar but separate state court cases where no single case has enough plaintiffs to meet the threshold.

To evade federal jurisdiction, counsel for mass action plaintiffs 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). Several federal appellate courts have allowed these tactics by emphasizing certain aspects of CAFA's mass action provisions, namely:

- The "proposed to be tried jointly" language (*28 U.S.C. § 1332(11)(B)(i)*).
- The exclusion for claims joined by a defendant (*28 U.S.C. § 1332(11)(B)(ii)(II)*).

These courts effectively take the position that, despite CAFA's clear intent to discourage jurisdictional gamesmanship, the plain language of CAFA's mass action provisions provides a roadmap for how plaintiffs can in fact avoid federal jurisdiction (see *Scimone v. Carnival Corp., 720 F.3d 876, 885 (11th Cir. 2013)*; *Abrahamsen v. ConocoPhillips, Co., 503 F. App'x 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)*; *Tanoh v. Dow Chem. Co., 561 F.3d 945, 954-55 (9th Cir. 2009)*).

Search CAFA Mass Actions: How Do You Count to 100? for more on the judicial interpretation of CAFA's mass action provisions.

ELEVENTH CIRCUIT: *SCIMONE v. CARNIVAL CORP.*

A recent case decided by the US Court of Appeals for the Eleventh Circuit provides a textbook example of how plaintiffs can keep mass actions in state court (see *Scimone, 720 F.3d at 875-76*). *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. Had those plaintiffs been added to the initial complaint, it would have raised the total number of plaintiffs to 104 and triggered federal jurisdiction under CAFA.

To avoid CAFA jurisdiction, the initial 39 plaintiffs dismissed their complaint and then re-filed the action on the same day 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 the defendants (see *Scimone, 720 F.3d at 879, 883*). The only difference between the two actions was that one was filed on behalf of plaintiffs with last names starting from A to L, while the other was filed on behalf of plaintiffs with last names starting

PRACTICE NOTES

The following related Practice Notes can be found on practicallaw.com

>> Simply search the resource title

Class Action Fairness Act of 2005 (CAFA): Overview
Class Actions: Overview
Removal: How to Remove a Case to Federal Court
Removal: Post-removal Procedure
Removal: Remanding the Case to State Court
Removal: Why Remove?

L through Z (see *Abeid-Saba v. Carnival Corp., Civil Action No. 12-26072 CA 02 (Fla. Cir. Ct. 2012) (A-L)*; *Scimone v. Carnival Corp., Civil Action No. 12-26076 CA 30 (Fla. Cir. Ct. 2012) (L-Z)*).

The defendants argued that removal 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, "which was to expand federal jurisdiction over class and mass actions and to facilitate their removal" (*Scimone, 720 F.3d at 885*).

The Eleventh Circuit rejected these arguments and affirmed the district court's order remanding the case, reasoning that:

- At no point had the plaintiffs explicitly proposed to try one case with all 104 plaintiffs, and 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 the purpose behind 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 "the 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 (*Scimone, 720 F.3d at 886*).

SIMILAR REASONING IN OTHER CIRCUITS

Scimone is consistent with other federal appellate decisions similarly interpreting the mass action numerosity requirement (see *Abrahamsen, 503 F. App'x at 160*; *Anderson, 610 F.3d at 393-94*; *Tanoh, 561 F.3d at 954-55*). For example, the following decisions did not take issue with the plaintiffs' tactic of filing separate identical actions for the undisguised purpose of circumventing CAFA's jurisdictional requirements:

- ***Anderson v. Bayer Corp.*** The Seventh Circuit held that removal could be avoided in a case involving hundreds of plaintiffs who filed four mostly identical complaints in state court. It found that CAFA's mass action provision excluding claims joined by a defendant is 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" (*610 F.3d at 393* (quoting *Garbie v. DaimlerChrysler Corp., 211 F.3d 407, 410 (7th Cir. 2000)*)).
- ***Tanoh v. Dow Chemical Co.*** The Ninth Circuit held that removal could be avoided in a case where 664 West African foreign nationals filed seven suits, each with fewer than 100 plaintiffs. The court concluded 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 that 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" (*561 F.3d at 953*).

The Seventh, Ninth and Eleventh Circuit decisions can be distinguished from the reasoning in the Supreme Court's decision in *Standard Fire* and the Sixth Circuit's decision in *Freeman*, both of which admonished plaintiffs' attempts to artificially avoid CAFA jurisdiction, only on the grounds that those cases involved class actions rather than mass actions. Invoking the "proposed to be tried jointly" language and the exclusion for claims joined by a defendant, neither of which are included in CAFA's class action provisions, the circuit courts found that CAFA's class action and mass action provisions are distinct and precedent for one is not applicable to the other (see *Scimone, 720 F.3d at 881, 885-86*; *Anderson, 610 F.3d at 393*; *Tanoh, 561 F.3d at 955-56*; *28 U.S.C. §§ 1332(d)(11)(B)(i), (ii)(II)*).

LIMITATIONS ON THE JUDICIAL APPROACH TO MASS ACTIONS

The strict construction approach to CAFA's "proposed to be tried jointly" language and the exclusion for claims joined by a defendant raises several issues. In particular:

In the context of mass actions, 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.

Standard Fire as a Roadmap to the Future

The tension between the plain language of CAFA and the congressional intent behind CAFA has led to competing interpretations of its mass action and class action provisions. For the time being, 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.

There appears to be growing support, however, for increased scrutiny of plaintiffs' attempts to consolidate or coordinate similar state court cases where CAFA's requirements are otherwise met. On the other hand, defendants' counsel who want to remove related but separate mass actions to federal court under CAFA should be aware that, until the courts more generally extend the same standards applied in class actions to mass actions, they may still face an uphill battle.

Despite the narrow approach taken by the federal appellate courts regarding the mass action numerosity requirement, the Supreme Court's ruling in *Standard Fire* signals the high court's interest in looking at the purpose behind CAFA in determining whether certain cases fall within its scope. Earlier this year, the Supreme Court granted certiorari in *Mississippi ex rel. Hood v. AU Optronics Corp.*, in which the US Court of Appeals for the Fifth Circuit held that cases filed by Mississippi state attorneys general could be removed under CAFA's mass action provisions 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 seeking "to avoid the rigors associated with class actions (and avoid removal to federal court)." By piercing the pleadings and finding that Mississippi was not the sole party in interest, the Fifth Circuit 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, 802, 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 trying to game the system.

The Supreme Court heard oral argument in this case on November 6, 2013. No decision had been issued as of press time.

Search Fifth Circuit: Mississippi Suit on Behalf of Itself and Consumers is a CAFA Mass Action for more on *AU Optronics Corp.*

- Without limits on the notion that plaintiffs are masters of the complaint, plaintiffs have the ability to artificially divide related cases solely to defeat CAFA jurisdiction.
- Congress may not have intended the "proposed to be tried jointly" language to be a meaningful distinction between CAFA's mass action and class action provisions.
- Plaintiffs' proposals on how to try claims are not determinative of how the case actually proceeds.

PLAINTIFFS AS MASTERS OF THE COMPLAINT

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*; *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 situations where plaintiffs artificially divide concededly related cases "for no colorable reason" other than to defeat CAFA jurisdiction (*Freeman, 551 F.3d at 407*; see *Standard Fire Ins. Co., 133 S. Ct. at 1350* (rejecting plaintiff's attempt to artificially limit damages to avoid federal jurisdiction)). Where attorneys effectively wish to expand recovery on behalf of a large number of plaintiffs nationwide, they should 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, other decisions have acknowledged that there should be a check on how far plaintiffs can engineer mass actions to avoid the federal jurisdiction statute. For example, similar reasoning was applied in the mass action context at the district court level in *Hamilton v. Burlington Northern Santa Fe Railroad Co.*, which involved six identical actions with an aggregate of more than 600 plaintiffs (*No. 08-0132, 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 [p]laintiff's ability to evade removal jurisdiction through artful pleading" (*Hamilton, 2008 WL 8148619, at *5*).

In *Hamilton*, 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. 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*).

The court concluded that 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 MEANING OF "PROPOSED TO BE TRIED JOINTLY"

The "proposed to be tried jointly" language has been interpreted as a term of exclusion, setting out a threshold requirement for federal jurisdiction that must be met for mass actions but not for class actions. However, it is questionable whether Congress truly intended this statutory language to be a meaningful distinction between CAFA's mass action and class action numerosity requirements, raising doubt as to whether it is appropriate to treat this language as a true jurisdictional requirement at all.

As discussed above, the Senate Judiciary Committee's report accompanying CAFA did not specifically differentiate between mass actions and class actions. 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, at 46-47 (2005), 2005 WL 627977*).

Read in light of the congressional intent to have CAFA cover both class actions and large actions where plaintiffs do not seek class certification, "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. A similar provision may have been omitted from CAFA's language regarding class actions merely because Congress did not believe the extra language necessary, as class actions by their very nature are proposed to be tried jointly.

PROPOSALS TO TRY CLAIMS TOGETHER IN PRACTICE

Overemphasis on plaintiffs' explicit requests to try claims jointly is also improper because of the reality in which mass actions actually move forward.

For example, where plaintiffs' attorneys file multiple similar but separate state court actions to avoid federal jurisdiction, it is unlikely that they will ultimately proceed with separate trials, each requiring individualized proof on similar claims. Indeed, plaintiffs themselves will often try to consolidate or coordinate separate related state court cases. The Seventh Circuit addressed such a situation in *In re Abbott Laboratories, Inc.*, in which several hundred plaintiffs filed ten separate state court cases against the defendant in several different counties (*698 F.3d 568 (7th Cir. 2012)*). The plaintiffs later made a motion to consolidate and transfer the related cases to one state 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 be tried jointly, triggering CAFA jurisdiction, the Seventh Circuit determined that their conduct constituted such a proposal where "the assumption would be that a single trial was intended" (*In re Abbott Labs., Inc., 698 F.3d at 573* (quoting *Koral v. Boeing Co., 628 F.3d 945, 947 (7th Cir. 2011)*)). As a result, the Seventh Circuit 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 (*In re Abbott Labs., Inc., 698 F.3d at 573*). This ruling served to limit the Seventh Circuit's prior holding in *Anderson* (see above *Similar Reasoning in Other Circuits*).

Notably, a recent dissenting opinion in *Romo v. Teva Pharmaceuticals USA, Inc.* followed the Seventh Circuit's reasoning (*731 F. 3d 918, 925 (9th Cir. 2013)*). In *Romo*, the Ninth Circuit held that removal under CAFA was improper, even though the plaintiffs had sought to coordinate more than 40 similar actions in part to avoid inconsistent judgments. After emphasizing the purpose of CAFA, dissenting Judge Gould found that the inevitable result of the plaintiffs' motion to coordinate was in fact a joint trial as the means to avoiding inconsistent results.

Although the majority required an explicit request for a joint trial, Judge Gould emphasized that substance should control, particularly where the "case fits CAFA removal like a glove under a reasonable assessment of what is a proposal for joint trial." The dissent therefore concluded that the circumstances supported a proposal for a joint trial within the meaning of what Congress said and intended in CAFA. (*Romo, 731 F. 3d at 926-27 (Gould, J., dissenting)*; see also *Atwell v. Boston Scientific Corp., Nos. 13-8031, 13-8032, 13-8033, 2013 WL 6050762, at *5 (8th Cir. Nov. 18, 2013)* ("We agree with *Abbott Labs* and with Judge Gould's interpretation of [CAFA] ... ").)

Because the majority opinion in *Romo* seems to diverge from the Seventh Circuit's *In re Abbott Laboratories* decision and the Eighth Circuit's *Atwell* decision, the issue of what constitutes a proposal in substance to try claims jointly may be ripe for a petition for certiorari (see *731 F. 3d at 925*).

Search Ninth Circuit: No CAFA Removal Where Plaintiffs' Petition for Coordination Did Not Explicitly Request Joint Trial for more on the *Romo* decision.

Moreover, even where plaintiffs do specifically propose to jointly try the cases of multiple individual plaintiffs together, such a proposal rarely, if ever, will come to fruition given the way in which mass actions are actually litigated and tried.

For example, usually in mass actions, 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 (see *Romo, 731 F.3d at 928 (Gould, J., dissenting)* (noting that a bellwether trial may only feature a small group of plaintiffs, but it is still a joint trial when the claims or issues of a larger group are precluded or otherwise decided by the results)). 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.")).