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Practice Tip

Representing the Client Who Failed to Read the Label

By Lawrence Goldhirsch

When analyzing a product liability case involving a failure to adequately warn, keep in mind that an element of that claim is causation.

Restatement (2d) of Torts 402A, comment J provides that a manufacturer may assume that users will read and heed an adequate warning; however, that presupposes the plaintiff can read. Suppose the plaintiff cannot read because he or she is an infant, illiterate, a foreign speaking laborer or a factory worker who never had access to any printed warnings?

How can a consumer who does not read the label on the product claim to have been injured because the text of such label did not provide adequate warning?

In *Sosna v. American Home Products*, 298 AD2d 158, 748 NYS2d 548 (AD 1st Dept. 2002), the plaintiff alleged the content of the warning was inadequate; however, he admitted he did not read the manufacturer's warnings prior to his injury. The court dismissed, ruling that the plaintiff's burden included adducing proof

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Editor's Note

This month *LJN's Product Liability Law & Strategy* departs from its normal format in order to provide coverage of the recent Vioxx verdict. The Case Notes and Online features will resume next month.

The Class Action Fairness Act of 2005: The Defense Discusses Benefits and Minefields

By Victor E. Schwartz

We were there at the beginning. Members of Shook, Hardy & Bacon's Public Policy Group were seated at the table with others in the business community when plans were first discussed to create a law that would change the jurisdiction of the federal courts so that cases that were truly interstate in nature were resolved in those courts, and not in what has been referred to as state "Judicial Hellholes"™. (A full explanation and description of Judicial Hellholes is located at www.atra.org.)

In that regard, as General Counsel to the American Tort Reform Association, we helped develop the Judicial Hellholes project, which annually names places in the United States where defendants simply cannot obtain a fair trial.

Judicial Hellholes were magnets for class actions in cases that really did not belong in those courts. For example, plaintiffs would bring a class action against an out-of-state defendant in Madison County, IL, and simply add a nominal in-state defendant — a retailer or an agent of the company. The sole purpose of this exercise was to deprive federal courts of jurisdiction. The only weaponry to stop this practice — federal rules against fraudulent claims — was toothless and useless.

Many other groups that represented the business community also identified the problem. The Institute for Legal Reform at the U.S. Chamber of Commerce ("ILR") took the lead to help bring about class action reform. The ILR and other groups learned from mistakes made in the past by other civil justice reform efforts. They agreed upon the reforms that were needed, and they were embodied in federal legislation: the Class Action Fairness Act ("CAFA"). The purpose of CAFA was to assure fair forums and treatment for all parties in interstate class actions.

We authored some of the early principal articles discussing the need for the legislation. See Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity*

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Jurisdiction Reform, 37 HARV. J. ON LEGIS. 483 (2000); see also Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Fair Federal Forums Should Decide Interstate Class Actions*, CLASS ACTION LITIG. (BNA), Vol. 1, No. 8, at 285, Aug. 11, 2000. We also believed that if class action fairness only covered technical class actions, it would miss some of the true "litigation tourism" to Judicial Hellholes. "Litigation tourism" occurs when people bring lawsuits in jurisdictions that have no connection to the litigation: The plaintiffs do not live there; they were not injured there; the defendant's primary place of business is not there. We suggested that mass actions also be included in CAFA. The need for inclusion of mass tort lawsuits was highlighted by mass asbestos trials in West Virginia and Mississippi. At the time CAFA was developed, some of the worst Judicial Hellholes were located in Mississippi (which has since greatly improved its litigation climate) and the state did not have class actions, only mass consolidation of cases.

CAFA showed that when the business community truly unites to address a real problem, it can prevail, even against the might of the organized plaintiffs' bar, its friendly consumer group allies, and well-meaning judges, who opposed CAFA because they believed that there were problems in extending federal court jurisdiction.

As CAFA moved forward, it was also clear that compromises would and should take place, and lawyers in leadership position on the bill, such as John Beisner of O'Melveny & Myers, understood that compromise did not mean gutting the bill; it simply meant that there were practical ways and reasonable compromises

Victor E. Schwartz is a senior partner at Shook, Hardy & Bacon LLP (Washington, DC) and General Counsel to the American Tort Reform Association. He is also the co-author of PROSSER, WADE & SCHWARTZ'S TORTS (11th ed. 2005) and author of COMPARATIVE NEGLIGENCE (4th ed. 2002).

to obtain the support of federal legislators. As is often true with compromises in legislation, some were seeds for future litigation. (More on that later.)

We believe that an undisclosed reason that the legislation became law was due to a quiet, but real division within the personal injury bar. Personal injury lawyers who represented individual clients saw their business decline because of improprieties in the then-existing class action system. Individual practitioners lost many clients to class action lawyers. While it was never stated in the extensive class action debate, the class action system "run wild" had harmed the livelihood of many general practitioners. This was fueled by the fact that Judicial Hellhole state courts certified personal injury class actions even though clear differences existed in key factual issues among class action members.

The final push to get CAFA "over the goal line" was provided by President Bush. By making CAFA an administration priority, President Bush helped assure that the legislation would be considered early in the 109th Congress. With liability reform bills, the "early bird" does get the worm. The reverse is also true; delay is denial. For example, if the bill had been delayed until May 2005, it might have been caught in a dispute over judicial nominees or pushed behind other Senate business. Fortunately, that did not occur.

On Feb. 10, 2005, the U.S. Senate passed CAFA by a strong vote of 72-26. The House of Representatives approved the bill on Feb. 17, 2005, by a vote of 279-149. We were pleased to be present, along with other long-time supporters, when President Bush signed the bill into law on Feb. 18, 2005. All claims filed after that signing are now subject to CAFA. It had been a long road toward a successful conclusion.

MOVING MULTI-STATE CLASS ACTIONS TO FEDERAL COURT

There has been confusion over the contents of the bill because of attempts to describe it in generalities

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Circulation e-mail: subspa@alm.com

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that are too broad. To understand its major aspects, one must first focus on the situation wherein a defendant is sued in a state other than its home state. (From the bill's perspective, a corporation's home state is its principal place of business or where it is organized.) The second very different situation occurs when class actions are brought in the defendant's home state.

When a Defendant Is Sued in a State Other Than Its Home State

A defendant can remove the class action to a federal court if a defendant is sued in a state other than where it has its principal place of business or it is organized; the class involves more than 100 plaintiffs, and the aggregate in controversy exceeds \$5 million, as a practical matter. The \$5 million is a total amount — plaintiffs' lawyers can no longer defeat jurisdiction by breaking individual claims into smaller amounts, *eg*, into individual claims equaling less than \$75,000, as was possible under the prior law. Moreover, federal courts will accept jurisdiction even if every class member resides in the forum state when the case was commenced and all the claims are state law claims — if the "primary" defendant is an out-of-state defendant, the cases are removed to federal court.

In our judgment, protection of out-of-state defendants against unwarranted class actions is one of the most important aspects of CAFA. It will end the ability of personal injury lawyers to name nominal defendants to defeat complete diversity. A well-known West Virginia Supreme Court Justice once candidly stated what others already knew to be true, "As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so." Richard Neely, *The Product Liability Mess: How Business Can Be Rescued from the Politics of State Courts* 4 (1998).

As leaders of the personal injury bar have recognized, apart from placing cases in a neutral federal court, federal court jurisdiction will

limit the attempt to expand liability law in the context of class actions. For example, the U.S. Court of Appeals for the Seventh Circuit has stated:

When we are faced with opposing plausible interpretations of state law, we generally choose the narrower interpretation which restricts liability, rather than the more expansive interpretation which creates substantially more liability. We avoid speculation about trends in diversity cases: our policy will continue to be one that requires plaintiffs desirous of succeeding on novel state law claims to present those claims initially in state court. *Birchler v. Gehl*, 58 F.3d 518, 521 (7th Cir. 1996).

The Third Circuit has expressed similar views. It has stated:

[E]ven if we are torn between two competing yet sensible interpretations of Pennsylvania law and did not find the district court's deductive reasoning to be persuasive, we should opt for the interpretation that restricts liability, rather than expands it until the Supreme Court of Pennsylvania decides differently. *Werwincki v. Ford Motor Co.*, 286 F.3d 661, 680 (3d Cir. 2002).

Plaintiffs' lawyers who appreciate these facts will, understandably, do anything practical and possible to nail an out-of-state defendant in a state class action. How are they going to do this under CAFA? Well, they will begin by explaining the fact that CAFA applies its rule when the "primary defendant" is from out-of-state, but it does not define the "primary defendant." In a hypothetical instance, a plaintiff's lawyer files suit against a pharmaceutical company and names an in-state doctor, claiming that the doctor is the "primary defendant." Alternatively, if the product is sold in an in-state department store, the store may be named as the "primary defendant." I do not believe that this tactic will work with learned federal judges. The Senate Judiciary Committee Report provides clear guidance to judges. Defense attorneys should bring that instruction to the attention of federal district

court judges. The Committee Report states:

[T]he Committee intends that 'primary defendants' be interpreted to reach those defendants who are the real 'targets' of the lawsuit — *ie*, the defendants that would be expected to incur most of the loss if liability is found. Thus, the term 'primary defendants' should include any person who has substantial exposure to significant portions of the proposed class in the action, particularly any defendant that is allegedly liable to the vast majority of the members of the proposed classes (as opposed to simply a few individual class members). S. Rep. No. 109-14, at 43 (2005).

The main impact of this new legislation will be on cases brought against out-of-state defendants. How will plaintiffs' lawyers get around this rule, other than to attempt to characterize people who are not "primary defendants" as "primary defendants"? One way is to make and build smaller client packages. CAFA will not apply in a "mass action" of less than 100 plaintiffs. We will see repackaging all over the place in cases against out-of-state defendants. Plaintiff lawyer seminars are already instructing their attendees on this point, even adding the caution to count husband and wife plaintiffs as two people not one, so as to keep within the rule of less than one hundred plaintiffs. There is nothing a defendant can do about this other than applying traditional defenses as to why the packaging is inappropriate under state law.

This loophole should be closed. Further reform is needed, and that reform is embodied in H.R. 420, the Lawsuit Abuse Reduction Act ("LARA"). LARA embraces CAFA's stand against "litigation tourism." Seventy-two U.S. senators have voted that "litigation tourism" is unsound policy. LARA will prevent litigation tourism in all claims. LARA is both fair and practical. Plaintiffs can sue the defendant where it resides, where the plaintiff resides and where

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the plaintiff was injured, but nowhere else. LARA is supported by the Commerce Clause since it only applies to cases that truly involve interstate commerce. In its practical effect, LARA closes the 99 or fewer defendant's loophole. LARA is equally in favor of sound public policy as CAFA, and needed because of the clear spillover that will occur as a result of CAFA's enactment.

CAFA also can be avoided by plaintiffs' lawyers who package their class action claims under the \$5 million threshold. We would not be surprised to see class action claims seeking relief of "no more than \$4,999,999." Judges need to be vigilant that plaintiffs' lawyers do not plead below the threshold and then up the ante later. This minefield can be avoided by the vigilance of judges as well as defense attorneys.

Finally, plaintiffs' lawyers may be able to escape CAFA by seeking non-monetary relief. We are likely to see imaginative claims of this type in the next several years.

When a Defendant Is Sued in Its Home State

When a defendant is sued in its home state, the class involves more than 100 plaintiffs, and the aggregate amount exceeds \$5 million, the defendant will be able to move the case into a federal court if more than two-thirds of the plaintiffs come from out-of-state. If more than two-thirds of the plaintiffs hail from the forum state, state court jurisdiction will prevail.

Here, we approach one of the minefield areas that is likely to have the most litigation under CAFA: when the number of plaintiffs suing a defendant in its home state is less than two-thirds from the home state, but more than one-third from out-of-state. In those instances, federal courts are instructed to consider whether:

- the claims asserted involve matters of national or interstate interest;
- the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states;

- the class action has been pleaded in a manner that seeks to avoid federal court jurisdiction;
- the action was brought in a forum with a distinct nexus to the class members, the alleged harm, or the defendants;
- the number of citizens of the state in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other state, and the citizenship of the other members of the proposed class is dispersed among a substantial number of states; and
- during the 3-year period preceding the filing of that class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

CAFA requires federal courts to *decline* jurisdiction and send the case back to state court when either of two tests is satisfied. First, federal courts *must* decline jurisdiction where:

- more than two-thirds of the plaintiffs are from the forum state;
- at least one defendant whose conduct forms a "significant basis" for the claims and from whom "significant relief" is sought is a citizen of the forum state;
- the principal injuries occurred in the forum state; and
- during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.

Second, federal courts must decline to exercise jurisdiction over any class action in which two-thirds or more of the proposed members and the "primary defendants" are citizens of the forum state. The Committee Report makes clear that its "intention" with respect to each of these exceptions is that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of the exception. Obviously, this helps defendants.

Just as CAFA does not define "primary defendant," it similarly leaves the identification of a defendant

whose conduct forms a "significant basis" for the claims and from whom "significant relief" is sought to the courts. In this regard, the Committee report explains:

[T]here must be at least one real local defendant. By that, the Committee intends that the local defendant must be a primary focus of the plaintiffs' claims — not just a peripheral defendant. The defendant must be a target from whom significant relief is sought by the class (as opposed to just a subset of the class membership), as well as being a defendant whose alleged conduct forms a significant basis for the claims asserted by the class. S. Rep. No. 109-14, at 40 (2005).

For example, the Committee Report notes that a local agent of an out-of-state insurance company would not be a person from whom significant relief would be sought or whose alleged conduct forms a significant basis for the claims asserted. "[T]he real target in this action (both in terms of relief and alleged conduct) is the insurance company, and if that company is not local, this criterion would not be met," the Committee observed. *Id.* This may be another area subject to litigation.

In general, we anticipate that CAFA will bring about more in-state class actions. In plain English, cases that might otherwise have been "national class actions" will be repackaged and efforts will be made to sue a defendant in its home state. Suddenly, home state location — the defendant's principal place of business, and a place where a business obtains its charter — is a new and important ingredient. Would a company want to locate itself in a "Judicial Hellhole"? If it does, it is going to be a target for class actions and CAFA will only provide solid protection if more than two-thirds of the plaintiffs are from out-of-state.

REINING IN COUPON

SETTLEMENTS

A second key purpose of CAFA is to rein in unfair coupon settlements. The provisions addressing this topic

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restrict the use of coupon settlements by both plaintiffs' lawyers and corporations. The abuses at which it is aimed are "private deals," where a defendant gets rid of messy litigation and a plaintiffs' lawyer receives a huge fee. The actual clients, who may not even know they are involved in a class action, receive very little — sometimes a discount on products from the very same business with which they were allegedly unsatisfied.

CAFA approaches the problem in a very practical way — unredeemed coupons may not be used to bolster an attorney's fee. Attorneys may not receive a contingency fee based on potential aggregate value of the coupons available to class members. Instead, attorneys' fees would be based on the value of coupons actually redeemed by the class members. The attorney may still receive a fee based on the hours he or she expended on the case. As a practical matter, however, if the coupons are not redeemed, the fee would be substantially lower than if worthwhile coupons or other resolutions that actually benefited clients were achieved between the parties. In addition, judges are instructed to

closely scrutinize such "coupon settlements." Appropriate state officials are to be notified, and they would have an opportunity to intervene to assure that the public interest is represented. These protections apply to the settlement of class action lawsuits filed in federal court or removed to federal court.

While the mechanics seem straightforward, resolutions involving coupons may be subject to substantial delay until the procedures have some actual experience in the courts. In my judgment, the most important effect of these provisions will be deterrence, and it is unlikely that coupon settlements will be used at all, except in very extraordinary and unusual cases.

CONCLUSION

CAFA's greatest impact will be where out-of-state plaintiffs are named in class actions. The normal federal court dodges, such as naming nominal defendants or pleading individual relief less than \$75,000, will no longer work. Nevertheless, plaintiffs' lawyers may try to create uncertainty by claiming and naming an in-state defendant as "primary" along with an out-of-state defendant, or repackaging such class actions against out-of-state defendants as mass actions under the 100 ceiling.

It is very unlikely that the "Doomsday" scenario, portrayed by CAFA's opponents will, in fact, occur; namely, that CAFA will put an end to class actions or create unfairness. It is important for those who embrace the legislation to remind its opponents of its success. In that regard, in 1994, one of the few times that Congress enacted a civil justice reform, it focused on providing substantive tort law protection for the aviation industry, the General Aviation Revitalization Act of 1994, or GARA. GARA, simpler than CAFA, is an 18-year statute of repose for private aircraft. Today, none of the opponents' predictions of a "parade of horrors" have occurred — planes are neither falling from the sky nor being deficiently designed. To the contrary, the General Aviation Revitalization Act of 1994 fulfilled its mission — more than 25,000 new jobs, safer planes and a revitalized industry.

CAFA is also likely to achieve its public policy objectives. Arguably, its only negative impact will be to provide new and interesting work for attorneys, who will assist courts in interpreting the nuances of the bill.



Vioxx

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death in May 2001. He died in his bed of what an autopsy report says was a heart arrhythmia.

In his opening statement on behalf of plaintiffs Carol Ernst and her deceased husband's children, Houston attorney W. Mark Lanier accused Merck of putting marketing and the pursuit of profits above concerns for consumer safety. During his passionate remarks to the jury, Lanier displayed the phrase "Merck-y ethics" on a screen and promised to prove that Merck knew of the dangers posed by the use of Vioxx long before the drug was pulled from the market in September 2004, but failed to do anything about it because the pain medication was so profitable.

Merck claimed that Vioxx had never been shown to cause heart arrhythmia, so could not have been the cause of Ernst's death. However, against defense objections, Lanier was permitted to present a videotaped deposition of Dr. Maria M. Araneta, the coroner who performed the autopsy on Ernst, and her testimony was quite damaging to Merck's defense. Although Dr. Araneta wrote in her autopsy report that Ernst died of a heart arrhythmia caused by hardening of the arteries, she opined in deposition testimony that a blood clot interfered with the flow of blood to Ernst's heart, thus causing the arrhythmia. Other plaintiff experts whose testimony was presented at trial agreed with this theory. Merck's attorneys, who were apparently relying heavily on the statements made in the autopsy report, presented the

testimony of their expert, Dr. Thomas M. Wheeler, head pathologist at Baylor University, to show that clogged arteries were the cause of Ernst's arrhythmia, not his Vioxx use.

Merck attorney David C. Kiernan of Washington, DC's Williams & Connolly, pointed out in his opening statements to the five women and seven men on the jury that Vioxx had been tested for 8 years prior to its approval by the FDA and that 10,000 patients — not merely the 1500 required for FDA-compliant trials — took part in the studies. Of those 10,000 patients, 5400 were given Vioxx for up to 18 months.

THE DAMAGES

While the legal team for Merck presented its case on a scientific level, Lanier went the emotional

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