



GAMING OF CAFA'S JURISDICTION EXEMPTION FOR "MASS ACTIONS": HOW IT CAN BE STOPPED

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Plaintiffs' lawyers know that the Class Action Fairness Act (CAFA) does not extend federal jurisdiction to "mass actions" that seek monetary relief for less than 100 persons in a joint trial. They have adroitly circumvented federal courts and kept cases that, in actual fact, involve more than 100 persons in friendly Judicial Hellhole™ style state courts by filing mass actions in separate groups. The allegations on behalf of these groups of plaintiffs are identical: same drug (or other product), same alleged harm, and same allegations of defect. The plaintiffs' lawyers then request that a state court consolidate these cases for all procedural purposes, being careful not to specifically request consolidation of the cases "for trial." Their purpose is to obtain state court action on all aspects of the litigation and obtain mass action "clout" that will push defendants into a substantial settlement regardless of the merits of the cases. Defendants can effectively counter such attempts, which are contrary to the purpose of CAFA.

Key Case Law on the Subject of CAFA Under 100 Manipulation. In *In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012), plaintiffs' lawyers filed ten separate lawsuits for hundreds of plaintiffs in three Illinois courts with a reputation as Judicial Hellholes™: St. Clair County, Madison County, and Cook County. The plaintiffs' lawyers then sought to consolidate discovery and consideration of pretrial motions in St. Clair County. Abbott removed the cases to federal courts.

In seeking remand to state court, the plaintiffs' lawyers argued that their consolidation request did not "specifically" ask for a joint trial. Speaking for the Seventh Circuit, Judge John Tinder noted, that the plaintiffs had asked the Illinois Supreme Court to consolidate their cases in St. Clair County "through trial" and "not solely for pretrial proceedings." *Id.* at 571 (emphasis added). "Plaintiffs may not have explicitly asked that their claims be tried jointly," the Seventh Circuit found, "but the language in their motion comes very close." *Id.* at 573. A proposal for a joint trial, which raises federal jurisdiction over mass actions, "can be implicit." *Id.* at 572. The Seventh Circuit denied remand of the case to St. Clair County. Judge Tinder perceptively did not allow the plaintiffs' lawyers to play a manipulative game with the CAFA requirement that mass actions must involve joint trials of over 100 people.

By way of contrast, as other legal commentators have noted,¹ the Ninth Circuit, in *Romo v. Teva Pharmaceuticals*, No. 13-56310, 2013 WL 5451919 (9th Cir. Sept. 24, 2013), the plaintiffs' game plan succeeded. They kept their multi "under 100" mass actions in a friendly state court. The plaintiffs' lawyers filed over forty cases with multiple plaintiffs in California state courts. Each mini mass action alleged the same defect in products containing the drug proxyphene. The plaintiffs' lawyers asked a state court to consolidate the litigation under California Code of Civil Procedure 404 which allows coordination on "all of the actions for all purposes." *Id.* at *7. Nevertheless, in *Teva*, the Ninth Circuit began its opinion by discussing the "presumption against removal," construing "any uncertainty as to removability in favor of remand" to state courts. *Id.* at *2. The court then repeated the tired maxim that plaintiffs' lawyers are the "master of their complaint." *Id.* at *3. The Ninth Circuit allowed consolidation of the cases in state court even when the plaintiffs' lawyers themselves said that the consolidation was "for all purposes" and to avoid "inconsistent judgments." *Id.* at *2. The plaintiffs' lawyers had carefully not asked for a "joint trial," but as a practical matter that is exactly what they had achieved. Otherwise, their desire to guard against "inconsistent verdicts" could not be met.

Judge Gould issued a strong dissent. He recognized the meaning of the plaintiffs' petition when they "justif[ied]

¹ See, e.g., R. Samp, *Ninth Circuit Endorses Gaming of Class Action Fairness Act & Creates Circuit Split*, WLF LEGAL PULSE, Sept. 16, 2013, available at <http://wlflegalpulse.com/2013/09/26/ninth-circuit-endorses-gaming-of-class-action-fairness-act-creates-circuit-split/>.

their request in part by asserting a need to avoid inconsistent judgments.” *Id.* at *5. If that was plaintiffs’ purpose, then what they actually sought was a joint trial “in substance;” they simply did not use the magic words, “joint trial.” Judge Gould recognized that a “joint trial” may take different forms. By way of illustration, when a court decides pre-trial issues for numerous cases, then conducts a “bellwether” trial featuring a small group of plaintiffs that precludes or decides the claims or issues of a larger group, it has still conducted a joint trial. *Id.* at *6. Judge Gould brought reality into the court room: the Ninth Circuit majority had put form over substance.

Closing the Mass Action Loophole: Let the Public Policy Behind CAFA Govern. The Seventh Circuit’s decision in *Abbott* and Judge Gould’s dissent in *Teva* follow the public policy at the core of CAFA. The old saying, if it looks like a duck and quacks like a duck, it is a duck, readily applies. The plaintiffs’ lawyers may have artfully worded their motions for consolidation and left out magic words “for trial”; nevertheless, that is what they wanted and it is likely that is what they will essentially obtain. They may have a state court judge simply select certain plaintiffs as “lead trials” to set the pattern for settlement. They could also seek to have joint “issue trials” for all of the mass action “under 100” groups. They hope that a plaintiffs’ verdict in an issue trial will force defendants to settle. The plaintiffs’ lawyers will have achieved their goal: they ducked CAFA and avoided having a mass action case tried in federal court. The Seventh Circuit and Judge Gould understood, however, that when plaintiffs’ lawyers “consolidate” numerous claims, they want to resolve all of these separate cases in one friendly state court.

Courts should go further to preserve the public policy behind CAFA. Defendants should be able to file motions in federal court, spell out exactly how plaintiffs’ counsel have manipulated CAFA to avoid federal jurisdiction, and have federal judges impose reality by consolidating the manipulatively filed “separate” mass “under 100” plaintiff action cases. We recognize that there is a specific Ninth Circuit case that indicates that this cannot be done. See *Tanoh v. Dow Chemical Corp.*, 561 F.3d 945, 953-54 (9th Cir. 2009), but there the court was giving overly broad obeisance to the old maxim about the plaintiffs being “masters of their complaint.”

The worship of the “masters of their compliant” maxim flies in the face of the purposes of CAFA, which is to prevent plaintiffs’ counsel from filing lawsuits involving numerous plaintiffs in friendly state courts. Further, the defendant’s motion requesting that the federal court consolidate cases in light of the plaintiffs’ ruse around CAFA is not seeking or empowering defendants to “join” all of the plaintiffs’ separate “under 100” mass actions for all purposes. Rather, it is looking to the extensive and specific legislative history of CAFA and Congress’s repeated caution to federal courts to not permit gamesmanship by plaintiffs’ lawyers. Thus, a federal court’s action is not in violation of the specific words of CAFA, which says that “the term ‘mass action’ shall not include any civil action in which ... the claims are joined upon motion of a defendant.” 28 U.S.C. § 1322(d)(11)(B)(ii)(II). Independent minded federal judges should ask themselves, “What is going on here?” Are these truly separate “under 100” mass actions, or have the plaintiffs’ lawyers cloaked them as such to avoid neutral federal court jurisdiction?

The Supreme Court in *Standard Fire Insurance Company v. Knowles*, 133 S. Ct. 1345 (2013), recognized the general purposes of CAFA did not allow a plaintiff’s lawyer to manipulate another exception, namely, that class action cases seeking under \$5 million could be filed in state court. While the Court mentioned the old maxim about plaintiff’s being “master of the complaint,” the Court unanimously did not allow the plaintiff’s lawyer to avoid federal jurisdiction simply by asserting in his complaint that the class action was under \$5 million in value. Class members themselves had not agreed to such a limitation.

In rendering its decision, the Supreme Court would not allow plaintiffs’ lawyers to “[e]xact form over substance.” *Id.* at 1350. The Court did not permit a practice that would “run directly counter to CAFA’s primary objective: ensuring “federal court consideration of interstate cases of national importance.” *Id.* (citing CAFA § 2(b)(2), 119 Stat. 5). The Court recognized that such stipulations, if permitted, would “have the effect of allowing the subdivision of a \$100 million action into 21 just-below-\$5-million state-court actions simply by including nonbinding stipulations; such an outcome would squarely conflict with the statute’s objective.” *Id.*

The Supreme Court’s statement about CAFA’s public policy has direct relevance in the mass action “under 100” jurisdictional game playing context. When plaintiffs’ lawyers file numerous state court cases, all involving the same or similar product, the same alleged defect, and the same injury, and then attempt to consolidate these cases for all purposes in a state court, alert federal judges, if and when asked, should provide a welcome mat for such cases in federal court.

Conclusion. In federal appellate courts where the issue is undecided, defendants should persuade federal courts to follow the Seventh Circuit’s analysis in *Abbott Labs*. They should also, with *amicus curiae* support where needed, create case law that disagrees with the *Tanoh* decision. Reality, not maxims, should govern justice, and CAFA should be construed in light of its important national purposes, rendering fairness in what in reality are large mass action cases.