The Mass Action Provision of CAFA

Where Defendants Fea

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Legislation's relatively straightforward definition of "mass actions" has created "an opaque, baroque maze of interlocking cross-references that defy easy interpretation."

—Lowery v. Alabama Power Co.

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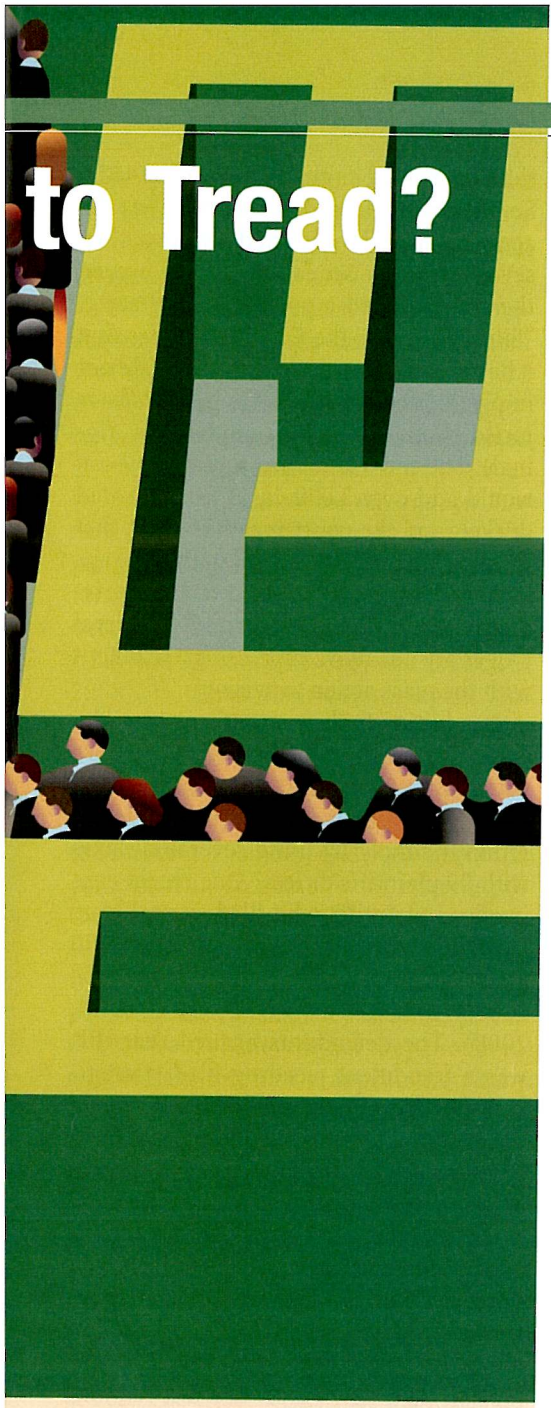

to Tread?

The denial of class actions in federal court is often a double-edged sword for defendants—they've defeated the plaintiffs' attempts to certify the class, but they've left the door open for the individual plaintiffs to re-file their lawsuits in state court. The Class Action Fairness Act of 2005 (CAFA) has given those defendants wishing to stay in federal court new life through its so-called mass action provision. In its desire to keep class actions and similar proceedings in federal court, the United States Congress included a section in CAFA that allows federal courts to retain jurisdiction over large, common-issue lawsuits that are not, in and of themselves, class actions. Unfortunately, the language of the provision is dense and ambiguous, and it has caused various courts throughout the United States considerable consternation. So, those willing to undertake the mass action would be wise to tread lightly into this new area of federal law.

What Is a Mass Action?

Despite its title, CAFA pertains to more than just class actions. While CAFA's primary aim is the removal of most class action lawsuits to federal court, *see* 28 U.S.C. §1453 (2008), the act sanctions the removal of "mass actions," as well. 28 U.S.C. §1332(d)(11)(A) (2008). CAFA defines a mass action as any civil action in which it is proposed to jointly try monetary relief claims of 100 or more persons on the grounds that the claims involve common questions of law or fact. *Id.* §1332 (d)(11)(B)(i). CAFA deems any action fitting that description removable to federal court. *Id.* §1332 (11)(A).

This relatively straightforward definition, however, has created "an opaque, baroque maze of interlocking cross-references that defy easy interpretation." *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1198 (11th Cir. 2007); *see also Lowery v. Honeywell Int'l, Inc.*, 460 F. Supp. 2d 1288, 1293 (N.D. Ala. 2006) (describing the mass action provision as a "Gordian knot"); *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006) (describing the language as "clumsy" and "far from straightforward"). The first difficulty in understanding the mass action provision is that the definition is not the only jurisdictional hurdle. See 28 U.S.C. §1332(d)(11)(A). The action must also meet the other CAFA requirements for the removal of ordinary class actions. *Id.* These requirements include minimal diversity, an aggregate $5 million amount in controversy, a significant interstate impact, and several others. *Id.* §1332 (d)(2)–(10). When the normal class action requirements are added to the definition, four requirements emerge as necessary for an action to become a mass action: (1) an aggregate amount in controversy of $5 million, (2) minimal diversity, (3) at least 100 plaintiffs, and (4) a commonality requirement that the plaintiffs' claims involve common questions of law or fact. *See Lowery*, 483 F.3d at 1202–03; *see also* 28 U.S.C. §1332(d). Civil actions that include these four elements are removable "mass actions" under CAFA.

Even presiding federal judges are not above expressing discontent with the mass action provision.

These four requirements are subject to an important limitation, which brings us to the second major difficulty in understanding mass actions. Under CAFA, a defendant may remove a mass action, "except that [removal] jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the [$75,000] jurisdictional amount requirement." 28 U.S.C. §1332(d)(11)(B)(i). Courts have wrestled with this language: does it mean that those individual plaintiffs who cannot satisfy the $75,000 provision are singled out and remanded to state court, or does it mean that the entire case is remanded if each plaintiff does not meet the $75,000 threshold? *See Lowery*, 483 F.3d at 1203; *Abrego*, 443 F.3d at 687. The U.S. Court of Appeals for the Eleventh Circuit has written that if certain individual plaintiffs do not meet the $75,000 amount in controversy, only those plaintiffs' claims are remanded to state court. *See Lowery*, 483 F.3d at 1207; *see also Abrego*, 443 F.3d at 689 (declining to answer the question, but holding at a minimum that at least one plaintiff must meet the $75,000 requirement). Sensibly, the court reasoned that if the entire action were remanded because each plaintiff did not satisfy the $75,000 requirement, this would create a de facto amount in contro-

versy requirement of $7,500,000—$75,000 each for at least 100 plaintiffs. *Lowery*, 483 F.3d at 1204. That situation flies in the face of the established $5,000,000 prerequisite, so the court refused to interpret the limitation so that the limit invalidated CAFA's established requirements. *See id.* Supporting the Eleventh Circuit's decision is the Senate committee report written when Congress adopted CAFA. *See* S. Rep. No. 109-14, at 47 (2005). The report confirms that the purpose of the limitation was to remand individual plaintiffs without $75,000 in controversy, as opposed to the entire action. *See id.*

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Yet, as is common in the mass action arena, resolving one question often raises others—if lawsuits of individual plaintiffs result in remand for failing to reach the $75,000 amount, what would happen to the original mass action if the remand of individual plaintiffs' suits reduced the total number of plaintiffs to less than 100, or the aggregate amount in controversy to less than $5 million? In other words, must the 100-plaintiff and $5 million requirements be satisfied only at the time of removal or for the duration of the action? The Senate committee report provides guidance on the question:

> [I]t is the Committee's intent that any claims that are included in the mass action that standing alone do not satisfy the jurisdictional amount requirements of Section 1332(a) (currently $75,000), would be remanded to state court. Subsequent remand of individual claims not meeting the section 1332 jurisdictional amount requirement may take the actions below the 100-plaintiff jurisdictional threshold or the $5 million aggregated jurisdictional amount requirement. However, so long as the mass action met the various jurisdictional requirements *at the time of removal*, it is the Committee's view that those subsequent remands should not extinguish federal diversity jurisdictional over the action.

See S. Rep. No. 109-14, at 47 (2005) (emphasis added); *see also Cooper v. R.J. Reynolds Tobacco Co.*, 586 F. Supp. 2d 1312 (M.D. Fla. 2008).

Despite the clarification in the Senate report and the court decisions adopting its view, the time-of-removal solution creates its own set of problems. The Eleventh Circuit pointed out the "extreme example" that could occur under that interpretation, in which remand of unqualified claims could result in a mass action that included a single plaintiff with a $75,000 claim. *Lowery*, 483 F.3d at 1204. The Eleventh Circuit's fears were justified in part by *Cooper v. R.J. Reynolds Tobacco Co.*, in which the defendants removed an action under CAFA's mass action provision, and then readily admitted that they planned to sever the cases once in federal court so that each plaintiff's case could be tried individually. 586 F. Supp. 2d at 1318. The court had to decide whether its jurisdiction was established at removal, or whether subsequent events, such as severance, had an impact. *Id.* at 519. In making its decision, the court acknowledged that the statutory language in CAFA was not entirely in agreement. On the one hand, CAFA only required that that the plaintiffs "proposed" to try the claims jointly, not necessarily that they are actually tried jointly; on the other, CAFA stated that an action is not removable if claims are solely joined for pretrial purposes, which is exactly what would occur if the defendants could remove and then sever for trial. *Id.* at 1320. The tiebreaker came from the limitation, discussed above, involving remand of individual plaintiffs' claims that do not meet the $75,000 jurisdictional requirement. *Id.* (citing *Lowery*, 483 F.3d at 1207). Knowing that an action must at some point meet CAFA's requirements for removal, the court determined that if CAFA included a limitation that could theoretically result in a trial involving less than 100 plaintiffs, CAFA must have intended the courts to examine an action's removability qualifications at the time of removal. *See id.* The court also noted that the legislative history, while thin, confirmed its analysis. *See id.* at 1322. So, the court retained jurisdiction over the action despite the admitted "remove, then sever" strategy. *See id.* at 1323. However, the court offered a parting shot, stating, "Simply because the Court concludes that it has jurisdiction over this case should not imply that the Court believes it *should* have jurisdiction." *Id.* at 1322 (emphasis in original). The court lamented that its decision would add over 3,000 cases to a crowded docket, and the court recommended that the plaintiffs take an appeal so that the appellate court could confirm federal jurisdiction. *Id.* at 1323. Even presiding federal judges are not above expressing discontent with the mass action provision.

In addition to these questions raised by CAFA, another question involves the mass action provision's 100-plaintiff requirement. Specifically, can plaintiffs defeat removal simply by filing several lawsuits with 99 plaintiffs or less? One recent case involved plaintiffs who filed several state court lawsuits, each with less than 100 plaintiffs. *See Tanoh v. Amvac Chem. Corp.*, 2008 WL 4691004, *5 (C.D. Cal. Oct. 21, 2008). The defendants argued that this was a fraudulent pleading filed strategically to prevent removal. *Id.* The court rejected that argument, holding that Congress easily could have made removal available in these situations by allowing state court defendants to consolidate the actions and subsequently remove. *See id.* In fact, Congress expressly rejected that maneuver by excluding from CAFA's mass action definition claims that are joined on the motion of a defendant. *See id.*; *see also* 28 U.S.C. §1332(d)(11)(B)(ii)(II). Consequently, allowing removal under those circumstances would permit the defendants to upset the explicit provisions Congress established in CAFA. *See Tanoh*, 2008 WL 4691004 at *5. Besides *Tanoh*, there is little authority from the federal courts on this issue. If courts adopt *Tanoh*'s narrow reading in the future, defendants may completely lose the chance, which is currently available in some jurisdictions, "to pierce the pleadings to show that the claim has been fraudulently pleaded to prevent removal." *See Louisiana* ex rel. *Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424–25 (5th Cir. 2008). Courts may agree with *Tanoh*'s ruling that if Congress wanted to ward off

artful pleading, it could have allowed for pre-removal consolidation or could have eliminated the 100-person requirement altogether.

The final issue crucial to understanding mass actions is the CAFA requirement that these actions are proposed to be tried jointly. While this issue came up tangentially in *Cooper*, some plaintiffs have seized on the phrase, which appears in the act, as the main justification for remand. In *Bullard v. Burlington N. Santa Fe Ry. Co.*, the plaintiffs argued that they never intended for a single joint trial of all the issues to occur, so there was no "proposed" joint trial. 556 F. Supp. 2d 858, 859 (N.D. Ill. 2008). However, their actions up to that point undermined their argument: they filed one action joining 144 plaintiffs into one suit, paid the clerk a single jury fee, asserted a single common factual basis as the reason for joinder, and even wrote the complaint in singular form, referring to the case as a single "suit," "action" or "lawsuit." *Id.* at 860. The desire for a single jury trial was inherent in the very fact that the plaintiffs filed a single complaint, so the district court believed that they proposed a joint trial. *See id.* On appeal, the plaintiffs tried another creative argument—that their complaint did not "propose" a trial because they would be satisfied to obtain relief through settlement or dispositive motion. 535 F.2d 759, 761 (7th Cir. 2008). The request for trial would come a later time, if it came at all. *See id.* However, the U.S. Court of Appeals for the Seventh Circuit rejected the plaintiffs' remand. *See id.* at 762. The court wrote that the methods for resolving the case, such as a full trial on the merits, were immaterial; all that mattered was a proposal that the claims be tried jointly. *Id.* The plaintiffs' complaint, which alleged questions common to the entire group, proposed a single proceeding, and thus, a single trial. *Id.*

What a Mass Action Is *Not*

As one can see so far, it is difficult to fully understand what constitutes a mass action because CAFA seems to explain more about what a mass action is not than what it actually is. The first pronouncement states that a mass action does not include any civil action covered by 28 U.S.C. §1711(2) (2008). 28 U.S.C. §1332 (d)(11)(B)(i). Section 1711 provides that a "class action" is any action filed in federal court under Rule 23 or in state court under a state statute allowing for class actions. 28 U.S.C. §1711(2). This exclusion both prevents an ordinary class action from doubling as a mass action and allows removal of a mass action without a corresponding responsibility to prove Rule 23 requirements, such as numerosity and typicality.

Second, CAFA states that a mass action does not include any civil action in which (1) all the claims in the action arise from an event in the state in which the action was filed, and that allegedly resulted in injuries in that state or contiguous states; (2) the claims are joined on a defendant's motion, which is a major bar to the removal of several actions filed with 99 plaintiffs or less; (3) all the claims are asserted on behalf of the general public; or (4) the claims have been consolidated solely for pretrial purposes. 28 U.S.C. §1332(d)(11)(B)(ii). Perhaps the most important of these limitations is the first, which amounts to a local controversy exception. Otherwise removable claims remain in a state court if the basis for all of the plaintiffs' claims is an event that occurred in the state where the action was originally filed. *Id.* Presumably, this exception and the local controversy exception applicable to regular class actions are "narrow [exceptions]... with all doubts resolved in favor of exercising jurisdiction over the case." *See Evans v. Walter Indus.*, 449 F.3d 1159, 1163 (11th Cir. 2006). In support of that presumption is that the exclusion applies only if *all* of the plaintiffs' claims arise from a single event.

Finally, the mass action provision blocks mass action transfers to other courts unless a majority of plaintiffs seek a transfer. *Id.* 28 U.S.C. §1332(d)(11)(C)(i). The provision next states that this transfer language will not apply to actions certified under Rule 23 of the Federal Rules of Civil Procedure or actions in which plaintiffs have proposed Rule 23 status. *Id.* §1332(C)(ii). But, that makes no sense, because the original definition of mass action excludes any action filed in a United States District Court under Rule 23. There is no need to include the exception because such actions are not "mass actions" in the first place. Their transfer could never occur. *See id.* §1332(d)(11)(B)(i). This illustrates the difficulty in understanding CAFA's mass action provision's twists and turns.

How CAFA Changes Removal Jurisdiction

CAFA in general, and the mass action specifically, represents a dramatic change in removal jurisdiction. While the established rule states that remand is necessary if federal jurisdiction is doubtful, CAFA institutes a contrary presumption regarding mass actions. *See* S. Rep. No. 109-14, at 47 (2005). The CAFA Senate Report states that exclusions to the mass action provision are to be read strictly so that federal courts retain jurisdiction over mass actions in most situations, and it reminds the reader that supplemental jurisdiction under 28 U.S.C. §1367 is equally applicable in the mass action context. *Id.* at 47–48. The report makes clear Congress' intent to have mass actions decided by the federal courts rather than remanded for resolution in state forums. *See id.* Yet, while Congress puts forth a forceful argument for federal jurisdiction in its report, the actual language of the mass action provision is anything but. Congress may have desired federal jurisdiction in most situations, but it passed a law that is puzzling, overly complex, and at times contradictory. Furthermore, the law creates the potential for abuse and malpractice if defendants do not understand how the provision fits together.

Conclusion

In summary, the Class Action Fairness Act of 2005 mass action provision has provided certain defendants with a new opportunity to try cases in federal court. However, Congress drafted the provision in a way that leaves serious questions unanswered regarding the application of mass actions, creating the potential for significant and costly mistakes. Defendants seeking to utilize the mass action provision must act carefully but aggressively to press these issues that are undecided. As this article attempts to demonstrate, the mass action provision is ambiguous and conflicting. The federal court system will have to sort out the answers in the years to come, but that will not happen unless defendants remove cases and press these issues in that setting. FD