PRODUCTS LIABILITY

American Bar Association ■ Section of Litigation ■ Committee on Products Liability Litigation

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In This Issue

Class Action Fairness Act: The Year In Review

By Eileen Tilghman Moss and Hassia T. Diolombi

The Class Action Fairness Act of 2005 ("CAFA") was signed into law by President Bush on February 18, 2005.[1] It was designed to address "a technical glitch in the diversity jurisdiction statute" that resulted in interstate class actions typically being excluded from federal court despite the establishment of diversity jurisdiction under Article III of the Constitution.[2]

CAFA proponents maintained that as a result of this glitch, interstate class actions were "present[ing] the precise concerns that diversity jurisdiction was designed to prevent: there appear[ed] to be state court provincialism against out-of-state defendants or a judicial failure to recognize the interests of other states in the litigation."[3] To address these concerns, the drafters created a rule of "balanced diversity." [4] Under this rule, a larger number of class actions are allowed into federal courts, but primary state court jurisdiction is maintained over primarily local matters.[5]

This article recaps selected reported decisions involving CAFA issues that have arisen around the country since this significant reform was passed through the date this newsletter went to press.

I. CASES REMANDED

D. Arizona

Baldwin v. Monier Lifetile, L.L.C., No. CIV05-1058PHXJAT, 2005 WL 3334344 (D. Ariz. Dec. 7, 2005)

Plaintiffs filed their complaint after CAFA's effective date. The defendant removed the case to federal court. The district court remanded the case for lack of subject matter jurisdiction because neither the plaintiffs' complaint nor the defendant's notice of removal alleged adequate facts to enable the court to determine the state of citizenship of the plaintiffs or the defendant. Therefore, the parties failed to satisfy the minimum diversity requirements for class actions. The court stated that diversity jurisdiction is based on citizenship not residency. The court determined that unlike a corporation, an unincorporated entity such as a L.L.C. is not, without more, a citizen

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Message From The Co-Chairs

As the new co-chairs of the Products Liability Committee, we are delighted to give a welcome to all Committee members and a general overview of plans for the upcoming year. First, we begin on a note of congratulations to the editors of the Products Liability Newsletter (Eileen Tilghman, James Rotondo, James O'Reilly, and Richard Gaal). As a result of their efforts, the Products Liability Newsletter received the "Outstanding Newsletter" award for the Section of Litigation. Good going editors! We also congratulate the chairs of the Automotive Regional Workshop, Nate Cade, Eric Lund, Fabrice Vincent, and Cynthia Cohen, for the successful seminar in September in California on Automotive Litigation and Policy.

Looking ahead to the coming year, we look forward to meeting each Committee member at an upcoming CLE program or on-line, and we welcome all inquiries about participating in Committee life. If you have an interest in national, regional, or local program planning, publishing articles, or on-line columns, or even web page design, and would like to work with a highly collegial and diverse group of lawyers with interests in products liability law and practice, then you've come to the right Committee! Just let us know your interest and we promise to get you involved in an area that interests you! We'd also like to get on your CLE calendar and invite you to attend our events during 2006. During the year, brochures and registration forms for 2006 events will be available on-line at http://www.abanet.org/litigation/programs/home.html (organized by date of program).

We are also committed to developing "Distance CLE" programs especially on hot topics such as new case law, legislation or regulations. Our model is a 45-minute to 1-hour presentation through a webcast. If you have an idea for one such event or a series, please contact us and we can help you make it happen. Given the reach of the Committee in all 50 states, our goal includes more local programming. Along with other Committees in the Section, we hope to encourage local "Brown Bag" seminars.

We look forward to your participation and ideas. Please contact the chair of any subcommittee that interests you to get involved immediately. We welcome your calls and emails! There is a place for every Committee member!

Cordially,

Stephanie A. Scharf
Gary J. Spahn

An Invitation to Submit Articles

Whether or not you are a member of the ABA's Products Liability Committee, we invite you to submit articles to the Products Liability Newsletter, published by the Committee.

If you would like to submit an article, please e-mail your article or your proposal for an article to any one of the editors. Their names and e-mail addresses are on the cover page of this newsletter.

of the state that created the entity. Thus, the citizenship of such an entity should be determined by looking at the citizenship of each of the individuals who comprise the legal entity. Unincorporated legal entities are citizens of every state in which each of their members or partners are citizens, and in the case before the court, neither party had alleged the citizenship of defendant's partners or members.

Amount In Controversy Less Than CAFA's $5,000,000 Minimum Requirement

C.D. Cal. 2005
Berry v. Am. Express Publ'g Corp., 381 F.Supp.2d 1118 (C.D. Cal. 2005)

Defendants attempted to remove plaintiff's class action seeking injunctive relief, filed after CAFA's effective date, to federal court. The federal court found that CAFA placed the burden on the party opposing removal to show why removal was improper. The court remanded the case because plaintiff met his burden of showing that the amount in controversy was less than CAFA's $5,000,000 requirement where plaintiff did not seek monetary damages, but rather sought only injunctive relief (which the court found difficult to value because monetary valuation would be speculative at best) and plead that he had no adequate remedy at law. The court acknowledged that CAFA now allows plaintiffs to aggregate their claims to invoke diversity jurisdiction. The amount in controversy may be satisfied from the view of the aggregate value of the cause of action to either the class members or defendants. Although plaintiff's general prayer for relief sought statutory damages, the court believed and took at face value plaintiff's representation to the court that he and the class did not seek to recover more than $5,000,000 because the court had no reason to assume that plaintiff misstated the amount in controversy to defeat jurisdiction. The court noted that given plaintiff's representations regarding the amount in controversy, he would be estopped from later asserting a harm and recovering damages in excess of $5,000,000 in damages.

Jurisdictional Exceptions Applied – Corporate Internal Affairs And Securities

N.D. Cal. 2005
In re: Textainer P'ship Sec. Litig., No. C05-0969 MMC, 2005 WL 1791559 (N.D. Cal. July 27, 2005)

Plaintiffs filed a class action for breach of fiduciary duty. Defendants removed the action from state court pursuant to CAFA. The federal court found that CAFA places the burden on the plaintiff to prove that an action should be remanded to state court and that plaintiffs' class action did not meet CAFA's threshold jurisdictional requisites. In reaching its decision on the issue of minimum diversity, the court noted that for purposes of CAFA, an unincorporated association is deemed to be a citizen of the state where it has its principal place of business and the state under whose laws it is organized. Although the action met CAFA's threshold jurisdictional prerequisites, the district court remanded the case to state court because it found that plaintiffs' breach of fiduciary duty claim was specifically excluded from CAFA jurisdiction where the plaintiffs' claims (1) were solely related to the internal affairs or governance of defendants' partnerships, and (2) arose under or by virtue of the laws of the state in which the business enterprises were organized. The court further concluded that it lacked jurisdiction over the action because the limited partnership interests in the defendants' partnerships were securities and a court's jurisdiction under CAFA does not extend to causes of action that solely involve a claim relating to the rights, duties (including fiduciary duties), and obligations related to or created by or pursuant to any security as defined by the Securities Act of 1933.

M.D. Tenn. 2005
Ind. State Dist. Council of Laborers & HOD Carriers Pension Fund v. Renal Care Group, Inc., No. 3:05-0451, 2005 WL 2000658 (M.D. Tenn. Aug. 18, 2005)

The court found it clear that any class action solely based upon breach of fiduciary duty in connection with a security was a "carve out" from CAFA making removal of such a cause of action to federal court improper under the Act.

Commencement Of Action - Date Of Filing Controls

1st Cir. 2005
Natale v. Pfizer, Inc., 424 F.3d 43 (1st Cir. 2005)

Plaintiff consumers filed two separate class actions before CAFA's effective date. The defendant removed the two actions to federal court arguing that the actions were

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commenced on March 25, 2005, after CAFA's effective date, which was the date defendant removed the cases to federal court. Relying on decisions from the Seventh and Tenth Circuits, the First Circuit found that an action is "commenced" by the filing of the action in state court, and not when the action "commences" in federal court by the filing of the removal petition. Therefore, the two cases were filed before CAFA's effective date and would be remanded to state court because the federal court lacked jurisdiction under CAFA. The First Circuit also refused to rewrite CAFA by carving out a class of late-filed actions based on defendant's argument that removal was proper because it had removed the action within the 30-day period from service of the complaint, rather than after the action had been pending for some years.

7th Cir. 2005
Pfizer, Inc. v. Lott, 417 F.3d 725 (7th Cir. 2005)

Pfizer was sued for allegedly overcharging for two drugs in violation of state consumer-protection laws. The state court action was filed the date before CAFA's effective date, but the complaint was not served until afterwards. The suit was removed to federal court within the 30 days permitted for removal to federal district court. The court found that although the original deadline for removal is 30 days, unless removal does not become possible until later, defendant's argument that removal only became possible when CAFA was passed was unavailing because such an argument would cause CAFA to have a dramatic retroactive effect. Since the filing of the complaint commenced the suit, and nothing changed by removal except the forum of the lawsuit, the complaint was filed before CAFA's effective date, and it was therefore necessary to remand the case to state court for lack of federal jurisdiction.

9th Cir. 2005
Bush v. Cheaptickets, Inc., 425 F.3d 683, 688 (9th Cir. 2005)

Plaintiff filed a civil class action in state court a day before CAFA was signed into law. Defendant removed the case to federal court, and the district court ordered the case remanded to state court. As a preliminary matter, the court found that defendant filed a timely appeal of the district court's remand order because it filed the appeal on the seventh day following entry of the order. An appeal of a district court's order granting or denying a motion to remand a class action to state court is timely if it is filed after more than seven days from entry of the district court's order. The court noted that there is apparently no upper limit on when an appeal may be taken pursuant to 28 U.S.C. § 1454(c)(1). The Ninth Circuit affirmed the remand and held that a class action is "commenced" for purposes of CAFA when the original complaint is filed in state court, and not when the action is removed to federal court. In determining when a suit is commenced for purposes of CAFA, a state's own laws and rules of procedure determine when the dispute is deemed a cognizable legal action in state court. Removal does not commence a new cause of action.

10th Cir. 2005
Pritchett v. Office Depot, Inc., 420 F.3d 1090 (10th Cir. 2005)

Plaintiff employee filed a state court class action for overtime wages against defendant before CAFA's effective date. Defendant sought to remove the action to federal court pursuant to the newly enacted CAFA after the Act's effective date. The district court granted the plaintiff's motion to remand the proceedings to state court, agreeing with plaintiff that CAFA did not apply to actions already pending in state courts. The court held that the action began when plaintiff filed his class action complaint with the

Colorado District Court because a cause of action is “commenced” only once, when it is first brought in an appropriate court of competent jurisdiction. Removal is traditionally not seen as recommencing a cause of action or creating a new cause of action. The court stated that although there were some instances in which actions other than filing a complaint in court are deemed to “commence” the lawsuit, for instance in states that provide that service of process commences a suit, these instances are unique and are exceptions to the federal rule that a lawsuit is commenced at the filing of the original compliant in a court of competent jurisdiction. The Tenth Circuit noted that although 28 U.S.C. § 1453(c) states that an application for an appeal of a remand order cannot be taken within seven days of the order, in the court’s opinion, the statute contained a typographical error and must be read to say “not more than” seven days after entry of the order.

Commencement Of Action - Date Of Filing Controls – Burden Of Proof - Amendment Of Complaint

S.D. Iowa
Comes v. Microsoft Corp., No. 05-CV-562, 2005 WL 3454427 (S.D. Iowa Nov. 22, 2005)

The plaintiffs filed their initial complaint five years before CAFA’s effective date. A fourth amended complaint was filed after CAFA’s effective date, which the defendant claimed interjected a new claim that did not arise out of the same conduct, transaction, or occurrence as any of the alleged conduct set out in the plaintiffs’ previous pleadings. The court stated that the party seeking to remove the case to federal court bore the burden to demonstrate that removal was proper. It went on to state that in Iowa, a civil action is commenced by filing a petition with the court. The court ruled that although plaintiffs’ amendment to their complaint was not a routine amendment, the amendment did not “kick off” a wholly distinct claim. Plaintiffs were not seeking recovery for a new claim against defendant and had explicitly disavowed any intent to seek relief based upon new allegations set forth in four paragraphs of the amended complaint. The court held that removal under CAFA was inappropriate because the plaintiffs were not seeking recovery for a new claim and the addition of four paragraphs to a 94-page complaint did not create a wholly distinct claim such that it commenced a new civil action under CAFA. The court declined to award plaintiffs attorneys’ fees, costs, and expenses associated with defendant’s removal because it found that it was plaintiff’s extensive amendment after more than five years of litigation that led to defendant’s removal of the case.

Commencement Of Action – Relation Back – Correction Of Named Defendant

M.D. Ala. 2005
Eufaula Drugs, Inc. v. ScripSolutions, No. 2:05CV370-A, 2005 WL 2465746 (M.D. Ala. Oct. 6, 2005)

Plaintiff filed its complaint before CAFA’s effective date against ‘ScriptSolutions’ and various other fictitious parties. Plaintiff filed an amended complaint after CAFA’s effective date correcting the name of defendant to ‘ScripSolutions.’ Other than the name correction in the style of the amended complaint, and the correction of the defendant’s address, the two complaints were substantially identical. ScripSolutions moved to have the case removed under CAFA and the traditional diversity statute. The federal court stated that if the amended complaint related back to the filing of the original complaint for statute of limitations purposes, CAFA would not apply. The court found that the notice to defendant was such that it would not be prejudiced in maintaining a defense on the merits of the lawsuit where ScripSolutions was on notice within 120 days of the filing of the original complaint that but for the mistake in defendant’s

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name, it would have been named in the original complaint. In addition, the amended complaint only substituted one defendant for another. Further, under Alabama law a complaint is commenced for purposes of statute of limitations when it is filed with the intention of having process served in due course, under the facts of the case. The court found that plaintiff timely filed suit with the intention of having process served in due course even if it initially named the wrong defendant. Therefore, since the amended complaint related back to the original complaint, despite the error in naming the correct defendant, the case was commenced prior to CAFA's effective date and would be remanded to state court for lack of federal jurisdiction.

Commencement Of Action – Relation Back - Additional Factual Allegations

E.D. Mo. 2005
Judy v. Pfizer, No. 4:05CV1208RWS, 2005 WL 2240088 (E.D. Mo. Sept. 14, 2005)

Plaintiff filed a class action lawsuit before CAFA's effective date. An amended complaint was filed after CAFA's effective date. The amended pleading included four additional causes of action. The court found that the additional claims related back to the original complaint where defendant was on notice of the claims from the original complaint and the new claims arose out of the conduct, transaction, or occurrence set forth in the original complaint. Further, although the amended complaint added additional factual allegations, these additional factual allegations merely refined the class allegations. The court did not equate these changes with the commencement of a new case under CAFA because a change in class definition does not present a novel claim for relief or add a new party sufficient to commence a new cause of action after CAFA's effective date. The case was therefore remanded to state court. The court declined to award plaintiff her costs and attorneys' fees incurred as a result of defendant's removal because the law of removal under CAFA was in its developmental stages at the time of removal and defendant's removal of the action was not undertaken in bad faith.

Commencement Of Action – Relation Back - Amended Class Definition

7th Cir. 2005
Schorsch v. Hewlett-Packard Co., 417 F.3d 748 (7th Cir. 2005)

Plaintiffs filed a class action in state court before CAFA's effective date against the manufacturer of drum kits used in printers. Plaintiffs filed a proposed second amended complaint after CAFA's effective date to change the class definition from purchasers of drum kits to purchasers of all printer consumables that contained the same chip as the drum kits. The Seventh Circuit stated that plaintiffs' class action would remain in state court because the modification of the class definition did not add new parties or present new claims sufficient to constitute commencement of a new action for purposes of CAFA because the parties remained the same and, from the outset, the litigation was about the actual chip in the drum kits, and not the drum kits themselves. Amendments that could in principle initiate new litigation include adding a new defendant or adding a wholly distinct claim for relief to an already pending lawsuit after CAFA's effective date. Further, the court found that plaintiffs' amended complaint expanding the class definition related back to the original complaint because the amended complaint concerned the same transaction as the original complaint as a matter of Illinois law. The original complaint "furnished … the defendant all the information necessary … to prepare a defense to the claim subsequently asserted in the amended complaint." The court invited plaintiffs to file an appropriate request for reimbursement of their legal expenses in defending against defendant's efforts to remove the litigation to federal court pursuant to 28 U.S.C. § 1447(c), which makes an award of attorney's fees appropriate for improper removal.

7th Cir. 2005
Knudsen v. Liberty Mut. Ins. Co., 411 F.3d 805 (7th Cir. 2005)

Defendant attempted to remove a lawsuit filed before CAFA's effective date where plaintiffs attempted to expand the proposed class from the insureds of only one insurance company to the insureds of two insurance companies. The district court ruled that the case was improperly removed to federal court and remanded the case to state court. The defendant petitioned for leave to appeal the remand. The Seventh Circuit denied the petition. In reaching its decision, the court held that defendant's notice of removal itself did not commence a new case because "equating filing with commencement is the norm in civil practice" and none of the few exceptions to this rule applied to the case pending before the court (i.e. where a litigant seeks to proceed in *forma pauperis* but must wait for the judge to accept the complaint and authorize service on the defendants for the suit to commence). The court was not persuaded by defendant's argument that a substantial change to class definition commenced a new case because plaintiffs routinely amend their complaints and proposed class definitions, and even assert entirely novel legal theories in mid-suit, without creating a new cause of action. For an action in an already pending proceeding to be considered a "commencement" of the action, the action must be significant enough to constitute a "restart" that would enable the defendant to assert the statute of limitations as a defense (such as adding a new claim for relief or a new defendant). Since the change in class definition was not sufficient to commence a new action for purposes of CAFA, the Seventh Circuit remanded the case to state court. However, because the second insurance company added to the class definition was never made a party to the litigation, the court noted, as dicta, that if the company were ever added to the litigation as a party it would enjoy a right to remove under CAFA.

N.D. Illinois
Knudsen v. Baker, No. 05 C 5924, 2005 WL 3454092 (N.D. Ill. Dec. 13, 2005)

The state court certified plaintiff's amended class definition after the Seventh Circuit denied the defendant's petition for leave to appeal the district court's remand of the case to state court. The defendant filed a second notice for remand, and the plaintiff moved to have the case remanded to state court. The certified class definition expanded the class from all insureds of Liberty Insurance Company to all insureds of Liberty, its affiliates and subsidiaries. The defendant argued that the new class definition contained wholly distinct claims that did not relate back to the original complaint because it (1) involved additional policies, (2) created different theories of liability, (3) reached back farther in time, and (4) arose under federal law. First, the court ruled that while the expanded class definition involved additional and different policies, the potential for a larger amount of legal research and discovery in and of itself was not a significant enough step to create new litigation. Second, although the new class definition added the defendant's affiliates and subsidiaries, Illinois state courts and the Seventh Circuit agree that new legal theories, in particular those adding vicarious liability theories of liability, do not create new claims and do not commence a new cause of action for removal to federal court. Third, the alleged change in time frame, which did not change plaintiff's original claims, did not commence a new cause of action because the change did nothing more than increase the potential for a larger amount of legal research and discovery. Fourth, the court's class certification order certifying the newly expanded class did not add ERISA claims and thus did not commence a new cause of action for removal purposes. The case was remanded to state court for lack of federal jurisdiction. The court awarded attorneys' fees in view of the history of the case.

Commencement Of Action – Relation Back - Amended Class Definition – Clerical Error In Naming Of New Defendant

7th Cir. 2005
Schillinger v. Union Pac. R.R. Co., 425 F.3d 330 (7th Cir. 2005)

Plaintiff landowners, as representatives of a putative class, sued defendant before CAFA's effective date. The court granted a motion to amend the complaint after CAFA's effective date. The amendment expanded the proposed class to include landowners nationwide and dismissed one of the defendants. The dismissed defendant was never removed from the caption of the amended complaint or from the allegations. Defendants once again removed the case to federal district court. The Seventh Circuit denied the defendant's petition for permission to appeal, agreeing with the district court's conclusion that the naming of a new defendant in plaintiff's amended complaint was a scrivener's or clerical error, which constituted an insufficient ground for the federal court to take jurisdiction. Further, expansion of the class was not significant enough to create a new claim or new action for purposes of removing the case to federal court pursuant to CAFA because the suit was still between the same class of similarly situated parties and defendant, and concerned the same claims alleged in the original complaint. The federal court did note that if the plaintiffs' amendment was made simply to destroy diversity, rather than merely to correct a clerical mistake, the district court should not have remanded the case.

Commencement Of Action – Relation Back – Addition Of New Plaintiff And Correcting Name Of Defendant

W.D. Mo. 2005
New Century Health Quality Alliance, Inc. v. Blue Cross & Blue Shield of Kan. City, Inc., No. 05-0555-CVWSOW, 2005 WL 2219827 (W.D. Mo. Sept. 13, 2005)

Plaintiffs filed their cause of action before CAFA's effective date. After CAFA's effective date, plaintiffs filed a fifth amended petition clarifying various allegations and providing the exact names of the several party defendants. The petition corrected the name of an incorrectly named defendant, and added a new plaintiff and proposed class representative. Defendants contended that adding a new plaintiff and substituting the proper defendant for the incorrectly named defendant, constituted a "step sufficiently distinct" to commence a new cause of action, thereby creating a basis for removal. The court did not agree that these acts constituted the addition of a new party, or new or novel claims against an additional defendant such that a new piece of litigation commenced after CAFA's effective date. The court found that the claims made in the amended petitions related back and were not independent of the original claims alleged by plaintiffs because each amended complaint alleged the same general claims against the defendants and each was amended before any defendant was served. Even as to the corrected defendant, the court found that the company was timely served. The case involved a mere misnomer where the right party was sued by the wrong name. Thus, the 'new' defendant added after CAFA's effective date did not enjoy the right of removal as a newly added defendant under CAFA. The federal court remanded the case to state court.

Commencement Of Action – Procedural Defect In Notice Of Removal Did Not Warrant Remand - Relation Back – Amendment Of Complaint To Add Named Plaintiffs

C.D. Illinois
Boxdorfer v. DaimlerChrysler Corp., 396 F. Supp. 2d 946 (C.D. Ill. 2005)

Plaintiff filed a second amended complaint after CAFA's effective date adding four named plaintiffs and allegations of the individual claims of each new plaintiff. As a threshold matter, the court refused to remand the case based on plaintiff's allegation that defendant's removal was procedurally defective. Defendant failed to attach a copy of all process, pleadings, and orders served on it since the initial filing of the action in 2000 as set forth in the removal statute. The court found that failure to attach the documents was not jurisdictional and would not result in remand because defendant had attached sufficient documents to show the basis for the court's jurisdiction. However, the court remanded the case to state court because the class action claim commenced before CAFA's effective date.
Under Illinois law, an amendment to pleadings does not commence a new action if the amendment related back to the original complaint. In the case before it, the amendment encompassed the allegations in the previously filed complaints and related back to the original complaint because it furnished the defendant with all of the information necessary for it to prepare a defense to the claim subsequently asserted in the amended complaint. The court also ruled that the change in the named plaintiffs and incorporation of their individual claims into the second amended complaint related back to the original complaint. The court stated that a class action does not start over again even if the new plaintiff has individual claims based on facts unique to him or her. Because the case presented a novel issue regarding removal under CAFA, and defendant had a good faith basis to seek removal, the court did not award plaintiff his attorneys' fees.

Commencement Of Action - Relation Back - Amendment Of Complaint To Allege Diversity Jurisdiction

E.D. New York
McAnanney v. Astoria Fin. Corp., No. 04-CV-1101, 2005 WL 2857715 (E.D. N.Y. Nov. 1, 2005)

Plaintiffs sought leave to file a second amended consolidated class action complaint. The amended complaint included new class action jurisdictional provisions contained in CAFA and added a new statutory cause of action. The parties agreed that despite the amendment made after CAFA's effective date, the action was commenced before CAFA's effective date with the filing of the original complaint. Further, the parties conceded, and the court agreed, that the amendment of the complaint to allege a new statutory cause of action related back to the original complaint. The court ruled that an amendment to allege diversity jurisdiction relates back to the original complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure. Based on the parties' concessions and its ruling, the court found that CAFA did not apply to the case before it. Accordingly, plaintiffs' motion to amend the complaint to add jurisdictional provisions was denied.

Commencement Of Action – Amendment Of Complaint To Allege Newly Pled Class Action – Relation Back Doctrine Irrelevant

E.D. Ark. 2005
Weekley v. Guidant,
No. 1:05CV00064JLH, 2005 WL 2348476 (E.D. Ark. Sept. 23, 2005)

Plaintiff filed a complaint against defendants before CAFA's effective date alleging that defendants supplied him with a defective pacemaker. The initial complaint implicated only the law of Arkansas. Plaintiff filed an amended complaint and, for the first time, sought nationwide class certification after CAFA's effective date. Defendants filed a notice of removal under CAFA. Defendants argued that the initial complaint could not have put them on notice that all of their cardiac devices were in issue or that the laws of all 50 states were implicated. The court found that whether or not the amended complaint related back to the original complaint was irrelevant because CAFA does not apply to causes of action that were amended after its effective date. The court held that the removed cause of action was the same civil action initially filed by plaintiff since an action can only be commenced once, when the complaint is filed. Amending pleadings does not commence a civil action. The court noted that even if an amendment dramatically changes a cause of action, it is axiomatic that a civil action must already have been commenced before a pleading can be amended and only the filing of an initial complaint commences the lawsuit. The parties and the causes of action remained the same, and even if class certification would greatly expand the scope of the litigation, Congress rejected a proposal to authorize removal of actions certified as class actions after CAFA's date of enactment. Therefore, CAFA did not apply to the lawsuit and plaintiff's motion to remand was granted.

Commencement Of Action – Burden Of Proof - Effect Of Demurrer On Pleading

E.D. California
Richina v. Maytag Corp., No. Civ. S05-1281MCEKJM, 2005 WL 2810100 (E.D. Cal. Oct. 26, 2005)

After CAFA's effective date, the Superior Court overruled in part and sustained in part defendant's demurrer to plaintiff's complaint with leave to amend. Thereafter, plaintiff filed an amended complaint. The court noted at the outset that the removing party bears the burden of establishing federal jurisdiction. In determining whether plaintiff's second amended complaint commenced a new action for purposes of subject matter jurisdiction, the district court noted California's well settled rule that if a pleading is such that all of its parts are interdependent, constituting one complete and connected statement of a cause of action or defense, the granting of a demurrer leaves no pleading on file. However, the court noted that the rule only applies if a complaint is amended in substance as opposed to amended in form. The court found that plaintiff's claim against defendant survived the demurrer, remained in substantively the same form as plaintiff's initial filing, and did not commence a new action for jurisdictional purposes. Although the court granted plaintiff's motion to remand, the court denied plaintiff's request for attorneys' fees because defendant's removal was not defective as a matter of law.

CAFA Inapplicable To **Parens Patriae** *Cases*

D.N.J. 2005
Harvey v. Blockbuster, Inc., 384 F.Supp.2d 749 (D.N.J. 2005)

State Attorney General brought an action in state court after CAFA's effective date pursuant to New Jersey statute. The complaint was based on the states *parens patriae* power. The court determined that the action was not a class action as defined by statute where the attorney general filed suit on behalf of aggrieved New Jersey consumers. Enforcement actions by state attorneys general under the laws of a state to protect its citizens are not class actions, although the cases are sometimes *parens patriae* cases similar to class actions in the sense that the state attorney general represents the people of the state. *Parens patriae* cases are not class actions under rule 23 of the Federal Rules of Civil Procedure and CAFA does not apply to these actions. Congress did not intend for CAFA to encroach on state statutes that specifically authorize an attorney general to seek remedies on behalf of aggrieved consumers. As to the issue of diversity of citizenship, the court stated that it lacked jurisdiction under CAFA because the action was not between citizens of different states. This is because it is well settled law that a suit between a state, or its alter ego, and a citizen or a corporation of another state is not between citizens of different states for diversity purposes under federal jurisdiction. An attorney general or other official is considered to be a state's alter ego, and the official's citizenship is not considered for diversity purposes when the official seeks to enforce state law claims on behalf of the state. Although the motion to remand the case to state court was granted, the court declined to award attorney's fees and costs where the defendant, although unsuccessful, provided a good faith argument for removal because the issues raised by the newly enacted CAFA were replete with uncertainty and complexity where explanatory case law was lacking.

CAFA Applicable Only To Cases Filed Under Fed. R. Civ. P. 23 – Burden Of Proof

E.D. Arkansas
Fisher v. Beverly Enters., Inc.,
No. 5:05CV00316SWW, 2005 WL 3409589 (E.D. Ark. Dec. 12, 2005)

The plaintiff filed her lawsuit after CAFA's effective date and the defendants removed the case to federal court. The court determined that the removing party carries the burden of establishing federal jurisdiction and that the court was required to resolve all doubts in favor of a remand to state court. Although the defendants argued that CAFA should be interpreted liberally to include lawsuits that resemble class actions, the court agreed that CAFA limits federal jurisdiction to civil actions filed under Rule 23 of the Federal Rules of Civil Procedure. The district court held that it lacked federal jurisdiction over the lawsuit because the lawsuit was not filed under Rule 23, or a similar state statute, and despite claims made by the plaintiff in a motion before the court that she represented a class comprised of similarly situated nursing home neglect victims.

II. CASES NOT REMANDED

$5,000,000 Amount In Controversy – Burden Of Proof

S.D. Illinois
Fiore v. First Am. Title Ins. Co.,
No. 05-CV-474-DRH, 2005 WL 3434074 (S.D. Ill. Dec. 13, 2005)

Plaintiff filed a motion for remand alleging that the damages incurred by his putative class did not exceed CAFA's $5,000,000 jurisdictional threshold. In deciding whether to grant plaintiff's motion for remand, the court noted that the rule that the proponent of federal jurisdiction bears the risk of non-persuasion remains unchanged by CAFA. Thus, the defendant bore the risk of non-persuasion on plaintiff's motion for the remand. Further, the court found that it is the removing party's burden to show, by a reasonable probability, what the stakes of the litigation are given the plaintiff's demands. The court determined that under CAFA, the $5,000,000 threshold pertains to the aggregate amount in controversy. In the case before the court, the aggregate amount in controversy was not limited by the plaintiff's complaint even where plaintiff attempted to alleged a cap of $5,000,000. The court found that such a cap was effective only if it was alleged in good faith. However, such was not the case before the court. The plaintiff could not in good faith place a $5,000,000 limitation on the recovery of the putative class. The court denied the plaintiff's motion for remand finding that the defendant had made its showing that there was a reasonable probability that the amount in controversy exceeded CAFA's $5,000,000 jurisdictional threshold because there appeared to be more than 8.6 million class members in the case, each with potentially significant claims.

W.D. Wash. 2005
Waitt v. Merck & Co., Inc., No. C05-0759L, 2005 WL 1799740 (W.D. Wash. July 27, 2005)

Plaintiff filed a class action after CAFA's effective date setting forth a number of causes of action for economic damages. Defendant removed the case to federal court. Plaintiff sought to have the case remanded to state court on the assertion that defendant had failed to meet its burden of proving the propriety of removal under CAFA. The court stated that although CAFA lacked specific burden shifting language for determining the propriety of removal under the Act, based upon CAFA's legislative history, the burden is on the plaintiff opposing removal to demonstrate that removal from state court was improvident. The court found that plaintiff failed to meet his burden where his only attempt to discharge the burden was to argue that he had made a prima facie showing that his damages did not meet CAFA's $5,000,000 amount in controversy requirement. However, plaintiff failed to include any of the economic damages suffered by the nationwide class he purportedly represented and failed to mention that his complaint sought treble and/or punitive damages. Based upon the foregoing, the court stated that remand to state court was inappropriate.

$5,000,000 Amount In Controversy Met

C.D. Cal. 2005
Yeroushalmi v. Blockbuster, Inc., No. CV 05-225-AHM(RCX), 2005 WL 2083008 (C.D. Cal. July 11, 2005)

Plaintiff filed a complaint against defendant after CAFA's effective date. Defendant timely removed the action to federal court. The complaint established that the parties' respective citizenships were diverse. In determining whether it had jurisdiction of the controversy under CAFA, the district court stated that although plaintiff attempted to limit the amount in controversy to avoid federal court jurisdiction, plaintiff's allegation of the amount in controversy did not control or end the court's analysis. Courts must conduct an independent assessment to determine whether the amount in controversy is met. Since CAFA allows aggregation of separate and distinct claims of two or more plaintiffs to satisfy the jurisdictional amount requirement, a district court may have to engage in limited discovery to assess whether jurisdiction is proper. In assessing whether the amount in controversy requirement was met, the district court first determined the estimated amount of damages plaintiffs would receive from compensatory damages, restitution and disgorgement, punitive damages, attorney's fees, and the cost of injunctive relief. The court also considered the aggregate amount of attorney's fees attributed to each class member for purposes of calculating the amount in controversy. As to punitive damages, plaintiff had the burden of showing that punitive damages would be limited in such a way as to avoid meeting the jurisdictional amount. The district court found that once all the forms of relief plaintiff sought were taken into account and aggregated, it was evident that CAFA's jurisdictional amount was met, and the court had jurisdiction of the case.

Commencement Of Action – No Relation Back – Addition Of Defendant – 2/3rd Rule Inapplicable

W.D. Ky. 2005
Adams v. Fed. Materials Co., Inc., No. 5:05 CV-90-R, 2005 WL 1862378 (W.D. Ky. July 28, 2005)

Plaintiffs filed their complaint before CAFA's effective date. After CAFA's effective date, plaintiffs added a new defendant to the case. The new defendant was initially named via a third-party complaint. The defendants timely removed the case to federal court. Although a large part, if not all, of the class, and two of the defendants were from Kentucky, minimal diversity existed where the newly added defendant was an Indiana corporation with its principal place of business in Tennessee. The court ruled that plaintiffs' addition of a new defendant after CAFA's effective date was the type of decision that commenced a new action for purposes of removal pursuant to CAFA. This ruling was based on the reasoning that for statute of limitations purposes, a defendant brought into court by an amendment, and who thereby has for the first time an opportunity to defend against the action, has a right to treat the proceeding as commenced as to him by the process that brought him into court. In addition, the court found that remand was not necessary under the provisions of CAFA that require remand where two-thirds or more of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state in which the action was originally filed. To meet this exception, plaintiffs attempted to distinguish primary defendants, those defendants that are allegedly directly liable to the plaintiffs, from secondary defendants, defendants joined for purposes of contribution or indemnification. Plaintiffs claimed that the newly added diverse defendant was a secondary defendant and could not be included in meeting CAFA's diversity requirements. The court did not agree with plaintiffs' liability distinctions. The case remained in federal court.

Commencement Of Action – No Relation Back – Addition Of New Parties, New Claims And Class Certification Request

E.D. Okla. 2005

Plummer v. Farmers Group, Inc., 388 F.Supp.2d 1310 (E.D. Okla. 2005)

The district court denied plaintiff's motion to remand where plaintiff's decision to amend the petition by adding new parties, new claims, and a request for class certification was a de facto commencement of a new cause of action. Plaintiff filed her initial cause of action before CAFA's effective date. The original lawsuit consisted of a single plaintiff with a single claim of breach of contract against three separate legal entities. Plaintiff filed an amended complaint after CAFA's effective date that added thousands of additional plaintiffs, added two additional causes of action, and requested class certification under Oklahoma's class certification statute. In determining that the new plaintiffs were not closely related to the original plaintiff such that the amended complaint related back to the filing of the original complaint, the court found that the plaintiffs did not share an identity of interests. This was so because the new plaintiffs had numerous differences from the original plaintiff. Namely, all the plaintiffs had separate contracts, for separate property, with different monetary values, and the facts related to each individual's claim were unique to each plaintiff. In addition, defendants did not receive fair notice of the new plaintiffs and their claims from the original complaint because the original complaint did not provide adequate notice of all claims on behalf of all plaintiffs who might someday fall within the class definition.

W.D. Wash. 2005

Heaphy v. State Farm Mut. Auto. Ins. Co., No. C05 5404RBL, 2005 WL 1950244 (W.D. Wash. Aug. 15, 2005)

Plaintiff filed her complaint before CAFA's effective date on behalf of a class of nationwide insureds. The case was litigated in state court, and plaintiff was forced to arbitrate her claims. Prior to confirmation of the arbitration award in state court, plaintiff amended her complaint to include a new class of plaintiffs and a new class representative. The state court subsequently confirmed an arbitration award and defendant moved to have the case removed to federal court. The district court held that removal to federal court was proper where the amended complaint was "sufficiently independent" of the original complaint that it did not relate back to the original complaint for purposes of jurisdiction. Plaintiff's initial complaint was fully adjudicated against plaintiff and she had no remaining claims at the time the amended pleading was filed. The existence of viable claims by the class did not resurrect her claims. Any new pleading asserting claims that plaintiff may or may not have had a right to assert would necessarily be a new action and would not relate back to the original, fully adjudicated complaint. Removal was proper where defendant could not have been on notice from the allegations of the initial complaint of all claims on behalf of all plaintiffs who might someday fall within the class because (1) the claims of the only class representative had been fully adjudicated prior to the filing of the amended complaint, (2) the new class representative was not a member of the original class, (3) the new plaintiffs' claims could not have occurred until after CAFA's effective date, (4) the new plaintiffs' claims were materially different from those of the original plaintiff and were unique to the plaintiffs, and (5) the amended complaint sought to add new substantive claims on behalf of the plaintiff class. Thus, there was no identity of interest between the original plaintiff and the new plaintiffs. For the foregoing reasons, a new cause of action was "commenced" after CAFA's effective date, and removal was proper.

Commencement Of Action – No Relation Back - Amended Class Definition

S.D. Ga. 2005
Senterfitt v. Suntrust Mortgage, Inc., 385 F.Supp.2d 1377 (S.D. Ga. 2005)

Plaintiff filed a class action before CAFA's effective date. Plaintiff filed a second amended complaint after CAFA's effective date, expanding the class to include individuals allegedly injured by defendants during an additional 16-year period. Defendant removed the case to federal court. The court found that although the second amended complaint alleged the same systematic conduct set forth in the original complaint, it could not relate back to the original complaint for CAFA purposes where the original complaint and the first amended complaint did not provide defendant with adequate notice of the size of the new prospective class and defendant's obligation to defend against a significantly larger class whose claims stretched 20 years into the past. Adequate notice to a defendant includes notice of the substance of the claims against it. Defendant would be unfairly prejudiced by having to expand its defense to encompass 16 additional years of claims after it spent the year preceding the filing of the second amended complaint preparing to defend against a much smaller class. This was not a minor modification, and was significant enough to "commence" a new cause of action under CAFA. The court denied plaintiff's motion to remand because the second amended complaint met all of CAFA's removal and jurisdictional requirements, including the minimum diversity and minimum $5,000,000 jurisdictional amount requirements.

Commencement Of Action – Date Of Filing And Intention To Serve Controlled – Briefs Ordered On Issues Of Burden Of Proof And Amount In Controversy

M.D. Alabama
Main Drug, Inc. v. Aetna U.S. Healthcare, Inc., No. 2:05-CV-292-F, 2005 WL 3440636 (M.D. Ala. Dec. 14, 2005)

Plaintiff filed a class action in state court before CAFA's effective date, but did not provide summonses for the defendants until after CAFA's effective date. Under Alabama law, the filing of a complaint commences an action only if it is filed with the *bona fide* intention of having it immediately served. The court noted that if a complaint is filed but the plaintiff's failure to take a particular action prevents the clerk from immediately beginning the process of service, the filing of the complaint does not constitute commencement of the action. The court found that without receiving sufficient properly completed copies of the summons to be issued and served, the clerk could not immediately begin the process of service. The court ruled that plaintiff objectively failed to show a *bona fide* intent to proceed with the action by his intentional failure to file copies of the summonses with the complaint. Thus, for purposes of CAFA, the action was not commenced until after CAFA's effective date when the plaintiff filed the summonses with the clerk. Having determined that CAFA applied to the cause of action, the court decided that it had insufficient information to determine whether CAFA's amount in controversy requirement was met. The plaintiff was ordered to brief the issue of which party bore the burden of demonstrating that federal jurisdiction existed and to provide specific evidence supporting its assertion that the amount in controversy was less than $5,000,000. The defendants were ordered to file a reply brief addressing the same issues.

Commencement Of Action – Date Of Filing And Service Controlled

D. Maine
Dinkel v. Gen. Motors Corp., No. CIV 05-190-PH, 2005 WL 3006728 (Nov. 9, 2005)

Plaintiff filed his complaint before CAFA's effective date. However, plaintiff did not serve three of the defendants until 90 days after the filing of the complaint, which was after CAFA's effective date. Under Kansas law, the filing of a complaint only commences a cause of action if process was served within 90 days of the filing. If service was made more than 90 days from the filing of the complaint, the lawsuit would not commence until service of process occurred. The district court stated that as to the three defendants served after CAFA's effective date, the lawsuit was commenced when the three were actually served. The late service of the three defendants made the entire lawsuit, rather than just the claims against those defendants, properly removable under CAFA. The plaintiff subsequently attempted to dismiss his cause of action against the three defendants. The court found that the plaintiff's voluntary dismissal of the three defendants from the lawsuit could not retroactively make the lawsuit improperly removed and could not undo the transformation of the lawsuit that occurred as a result of the service on the three defendants after 90 days from the original court filing. Therefore, the court denied the plaintiff's motion to remand and instructed the parties to bear their own costs.

III. RULING ON MOTION FOR REMAND POSTPONED PENDING LIMITED DISCOVERY

Applicability Of Home State And Local Controversy Exceptions Determined At Time Action Removed - Burden Of Proof - Limited Discovery Ordered –

E.D. Pa. 2005

Schwartz v. Comcast Corp., No. Civ.A. 05-2340, 2005 WL 1799414 (E.D. Pa. July 28, 2005)

Plaintiffs filed a class action complaint after CAFA's effective date, which did not restrict the definition of class members to citizens of Pennsylvania. Plaintiffs amended their complaint after removal of the case to federal court to allege that all class members were citizens of Pennsylvania and not diverse from defendant. The court adopted the rule that a removing defendant bears the burden of proof for establishing diversity jurisdiction. Defendant argued that removal was proper because minimal diversity of citizenship existed where plaintiffs' broad class definition in their original complaint included not only citizens of Pennsylvania, but also citizens of other states. Defendant claimed it was a citizen of both Delaware and Pennsylvania, its state of incorporation and its principal place of business respectively. Plaintiffs argued that the class definition pursuant to the amended complaint precluded diversity jurisdiction under CAFA's "home state controversy" and "local controversy" exceptions. The court agreed with defendant that plaintiffs could not rest upon the allegations of an amended complaint after the filing of defendant's notice of removal because the nature of a plaintiff's claim must be evaluated, and the propriety of remand decided, on the basis of the record as it stood at the time the petition for removal was filed. Plaintiffs' attempt to clarify the definition of the proposed class in an amended complaint to eliminate diversity jurisdiction would be insufficient to defeat subject matter jurisdiction. The court never completed its analysis of whether diversity of citizenship existed for jurisdictional purposes under CAFA due to a lack of discovery on the issue. The court ordered defendant to produce additional discovery on the issue of the citizenship of proposed plaintiff class members as of the date the complaint was filed because defendant had within its control the information that would establish the citizenship of the various members of the proposed plaintiff class.

1 Class Action Reform Act of 2005, Pub. L. No. 109-2, § 5, 119 Stat. 4.
2 S. Rep. No. 109-14, at 6 (2005).
3 Id.
4 Id.
5 Id.

To Our Readers

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Follow The Global Supply Chain & Anticipate Problems With Imported Components

By Prof. James T. O'Reilly

Astute defense counsel fighting product liability claims often check the factory for clues. But the downside of today's global product supply chains is that the trail of the suspect ingredients does not lead to a clean, modern factory in Minnesota. With increasing frequency, component construction and final product assembly has moved offshore, and when we say "offshore" we really mean "off" the shore of Pakistan or Malaysia. So if you are the defense counsel in product liability cases, and you routinely ask a series of questions when taking on a new case, be sure to ask the client: "How do you know that it was in fact your product with the parts you specified?"

The urgency of this new inquiry is the result of a wave of product copying, diversion, repackaging, offshore sourcing, and use of counterfeit ingredients and components. The inquiry poses the problem of tracing the product that the injured victim used, and the condition of the product or component when it left the control of the manufacturer. For example, many electronic and appliance product controls now rely on microchips; fraud in sourcing or switching for less valuable components may reduce the safety margin for users of the electronic device. Your client's warehouse sends off products hourly; once the product leaves the control of the manufacturer, strict liability applies unless it is shown that a user or intermediary altered the product.

Consumer product assembly and component fabrication is no longer a uniformly pristine and controlled operation, even for sensitive products. The particular injury may have occurred with a product or component that the ambulance crew discarded or that burned down with the rest of the house. When defense counsel probes the manufacturing records for identification of the specific sources of the component, counsel may find that multiple small suppliers in the Third World competed for sales and the defendant had intermingled supplied parts from numerous vendors.

Except in tightly regulated product categories, "just in time" sourcing and flexible supply techniques may result in frequent variations in suppliers, which may make it harder for the defense to rebut arguments that a deficient component was present when the product or component left the possession of the defendant. All of the "total quality" testimony about a firm's process may be valueless, if the records show the supply chain managers substituted alternatives to attain the lowest prices and highest productivity.

Flaws in the supply chain should be differentiated from criminal tampering. In the 1980s, deaths resulting from tampering of nonprescription drugs with poison alarmed the nation, and resulted in the now-ubiquitous wrappers and seals that seek to assure the purchaser that the factory-sealed container holds the genuine product, mandated by 21 C.F.R. 211.132. Today, few cases of tampering are established, though an occasional hoax (a federal felony with very severe penalties) has been attempted, such as the well-publicized severed finger in the Wendy's chili container.

Impurities in a pharmaceutical product may cause serious problems if not carefully screened. Counterfeiting of drug ingredients is unfortunately a growing phenomenon in the bulk generic drug industry. Diversion of legitimate sourced goods may occur despite the manufacturer's best intents, if the product surplus quantities get into the hands of certain salvagers and transshipping dealers. The consumer could purchase the right box, the right bottle, but not the right widget or pill, if the diverter covered its unlawful acts with the appearance of normal product attributes.

A 2004 FDA research report indicates that the FDA "has recently seen an increase in counterfeiting activities as well as increased sophistication in the methods used to introduce finished dosage form counterfeits into the otherwise legitimate U.S. drug distribution system." (FDA, "Combating Counterfeit Drugs", on web at http://www.fda.gov/oc/initiatives/counterfeit/report02_04.html#scope). Increasingly, these investigations have involved "well-organized criminal operations that seek to introduce finished drug products that may closely resemble legitimate drugs yet may contain only inactive ingredients, incorrect ingredients, improper dosages, sub-potent or super-potent ingredients, or be contaminated." *Id.* The FDA concluded that drug counterfeiting "poses real public health and safety concerns today, and may pose an even greater threat in the future if we fail to take preventative measures now. As counterfeiters continue to seek out new technologies to make deceptive products and introduce them into legitimate commerce, our systems for protecting patients must respond effectively." *Id.*
Was your child's medication made with a counterfeit active drug and then packaged for sale by an unwitting reseller? In other non-drug categories, as well, the vulnerability of the product may be its fast-changing, flexible-sourcing supply chain.

The most sensitive agency for product supply deficiencies, the FDA, also struggles with the marginal practices of three “cottage industries” which have drawn criticism. First, the large scale mixture of the ingredients of generic drug active ingredients, by a “compounding pharmacy,” may use less expensive imported ingredients to mimic the marketed brand-name drug. A diet drug importer’s potential liability illustrates the confusing chain of product “pedigree” in the case of *Fisher v. Professional Compounding Centers of America,* 318 F.Supp.2d 1046 (D.Nev. May 18, 2004).

Second, recycling of the single use medical device for subsequent uses has been reduced somewhat by regulations that severely limit the reprocessors, assuming that the reprocessors are legitimate and not fraudulent resellers. *See* http://www.fda.gov/cdrh/reuse/. But the potential exists that the discarded item that caused the patient’s death was on its third or fourth trip to the operating room, despite its “use once and discard” labels. FDA is wary of these recycling practices but lacks sufficient inspectors to find all those who are but should not be engaged in this lucrative trade.

Third, the FDA has attempted to address the persistent illegal diversion of free drug samples from pharmaceutical sales representatives. At the drug industry’s behest, Congress sought to suppress this practice in the 1987 Prescription Drug Marketing Act, Pub.L. 100-293, 21 U.S.C. 353(e). Some of the sales samples are not well tracked, [this sentence is unclear]; some are “discarded” because they pass their expiration date but are opened, repackaged, and given a false new date of expiration. *Ferndale Labs v. Cavendish,* 79 F3d 488 (6th Cir., 1996).

Dealing with each of these uncertainties of product sourcing makes the defense effort more difficult. Proof of compliance with a standard becomes less frequent, and in some cases, violations of federal rules occur, some of which can be punished as “negligence per se.” Any claims for preemption by virtue of federal standards would be unavailable if, in fact, the federal norms had not been followed as the product was made or assembled. In the face of diminished uncertainty, settlement is more probable.

A few suggestions are in order. Ask if the client imported some or all components from non-U.S. sources. If so, the client may have registered its import operations with U.S. Customs & Border Protection’s CT-PAT compliance systems. This is a voluntary system for verification of container security, establishing that the imported containers do in fact have the pedigree or authenticity of contents that they are labeled to have. In the event that authenticity is doubtful, the CT-PAT participant records will be helpful to rule out the likelihood of tampering. *See* http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/.

Determine the methods used by your client to check on its suppliers; the absence of a check on the critical safety components may suggest a shortfall in safeguards that could make plaintiff’s claims more plausible. A client’s designer or marketer who says “there’s no way this could happen” may be detached from the daily reality of the factory floor or warehouse.

Emphasize yet again to client managers the importance of records, specificity, and security. A delicate or safety-risk product that exists under a storm cloud of doubt will be soaked by jurors. Internal controls are not forgotten when the client’s manufacturing source moves east or west; to forget controls is to risk a severe tort reaction someday.

Discovery Tools For Defending The Pediatric Traumatic Brain Injury Case

By Eric L. Probst, Esq.

Each year millions of Americans suffer non-penetrating, or closed, head injuries. Some of the individuals are children. When lawsuits result, they involve complex medical, academic, and legal issues. When the plaintiff is a child, the defense attorney faces numerous challenges in defending the matter. The purpose of this article is to explain discovery tools necessary to simplify and defend the pediatric traumatic brain injury ("TBI") lawsuit. These tools, though used in traditional personal injury cases, take on added significance because of the age of the child and the nature of the injury.

I. Defining the Plaintiff

The first step is to define the plaintiff. The term pediatric encompasses birth through adolescence.[1] Age cannot be the exclusive defining factor because the child's status as a student also plays a role. Thus, the discovery tools explained below apply to the college student as well. More important, counsel must be aware of factors – race, socioeconomic background, family relationships, education, state of residence, and health – besides the child's age that influence the child's development. As a result, counsel must treat the pediatric plaintiff as a complex individual whose development is shaped by these factors.

II. Defining the Type of Injury

The next step is to define a "traumatic brain injury." A traumatic brain injury can be defined as an injury from any source that "disturbs or damages brain function."[2] Brain injuries are caused by a variety of events: assaults, strokes, tumors, motor vehicle accidents, sporting event injuries, falls, workplace accidents, medical malpractice, and illicit drug use. While the cause of the injury is certainly important, the defense attorney also must understand and appreciate the impact of the injury on the child's brain function. To fully develop the defense liability and damage strategy, the attorney has to examine the child's pre-accident medical history and the injury's effect on the child's academic, cognitive, mental, and emotional development. The defense attorney – and for that matter the plaintiff's attorney – must treat the pediatric-plaintiff as a unique individual and not stereotype the child's injury based upon other closed-head trauma cases the attorney has litigated.

III. Discovery Tools

The discovery tools explained below are not specific to the pediatric brain trauma case. However, the age of the child and the nature of the injury alter the focus of the discovery requests that needs to be considered when defending these cases.

(1) Interrogatories: As in all personal injury cases, interrogatories are an invaluable first tool to discover the basic information about the plaintiff: age, address, schools attended, pediatrician's name, identities of treating doctors and hospitals, pharmacies used by the family, employers, and the family's medical, academic, and employment history. The identities of medical, academic, and employer providers are needed to facilitate the collection of medical records.

(2) Medical Record Collection: The defense attorney must take a scorched-earth approach to medical record collection – obtain every medical record prepared about the child. There are several goals of medical-record collection: to develop alternative causation theories, to identify witnesses to depose, and to build a plan to minimize damages. Using HIPAA[3]-compliant authorizations, the attorney must send requests to every pediatrician, family doctor, hospital, and specialist who treated the child. Pediatrician records are an invaluable source of information for several reasons: (1) the records track the physical, emotional, and mental development of the child from birth to the event; (2) the records contain reports from specialists, allowing the defense attorney to obtain records directly from those providers; (3) they document any post-accident sequelae and the child's academic performance; and (4) the records also reveal whether the child underwent

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diagnostic testing to allow counsel to obtain the films.

The medical record collection efforts should not be limited to the child. The mother's OBGYN records could reveal important information. Similarly, the medical records of the parents and siblings may be needed if a congenital abnormality is suggested as the cause of the event. The best approach is not to foreclose any avenues of potentially discoverable information.

(3) **Academic Records:** Academic records are vital to the defense of the pediatric closed head injury case. Records from nursery school through college should be obtained through an academic authorization. Because privacy interests are implicated, attorneys should consult the Federal Education Rights Privacy Act.[4]

Academic records are more than report cards – the entire academic file has to be requested. The academic file will contain achievement and IQ test results, report cards, and notes from teachers and other school personnel. With head injuries, the potential for an impact on academic development and abilities is real. The child may be in a special needs class or require additional tutoring and monitoring. The school may have developed an Individual Education Plan ("IEP") for the child. An IEP is a written description of the child's special education program and can reveal the significance of the injury's impact on the child's cognition. The IEP also will reveal names of additional fact witnesses to interview or possibly depose.

Defense counsel should cautiously select deposition witnesses to avoid developing bad deposition testimony. The first question should be – "do I need to depose this witness?"

Pre-accident and post-accident report cards and achievement test results must be compared to evaluate the effects of the injury. A post-event decline in grades in a certain subject may reveal whether the injury caused the drop. For example, the left hemisphere of the brain controls language. An injury to this area will affect the child's performance in language arts and spelling. If the language arts grades of the child have suffered post-incident, but the brain injury is isolated to the right hemisphere, another explanation, possibly unrelated to the event, may exist to explain the drop in grades. Further, if the child's post-event grades have not suffered, the defense's damages case has improved.

Yearbooks should be requested from middle and high school students. The yearbook will reveal the child's hobbies and extracurricular activities, while identifying friends and teachers who can be interviewed and deposed.

(4) **Employment Records:** If the teenage plaintiff works, employment records should be obtained. These records often contain policies and procedures the teenager-employee had to review and consent to before working, demonstrating the teenager's ability to understand and appreciate important safety information. The defense can use the records to bolster an argument that the event did not significantly affect the child's cognitive functioning. Further, supervisors and co-workers also are viable candidates for an interview or deposition.

(5) **Depositions:** Depositions of some witnesses will be needed. The record review should reveal potential deponents: mother, father, child, relatives, babysitter, friends, teachers, coaches, guidance counselors, family friends, neighbors, doctors, nurses, EMTs, and pharmacists. However, once the witness has been identified, counsel should not rush to prepare the deposition notice.

Defense counsel should cautiously select deposition witnesses to avoid developing bad deposition testimony.[5] The first question should be – "do I need to depose this witness?" The answer depends on who the witness is and the type of information they may possess.

At first blush, treating physicians may be attractive deponent selections. But their medical records may not contain sufficient facts to justify the time and expense associated with the deposition, or worse, contain bad facts plaintiff's counsel can develop on cross. To circumvent the problem, the defendant can have its defense expert rely on the record and testify about the records' salient findings.[6]

Additionally, defense counsel should consider whether plaintiff will subpoena the witness to testify at trial. In out-of-state plaintiff cases, the chances are remote a teacher, doctor, or employer will testify in court; thus, a deposition may not be needed at all. Likewise, if the testimony is potentially damaging, counsel can interview the witness before deciding whether a deposition is needed. For in-state plaintiffs, each treater may need to be deposed.

Finally, the witness should not be deposed for deposition's sake. Deposing the witness to just obtain information is not wise – counsel must have a plan to obtain facts needed for causation and damages theories and for direct or cross-examination purposes at trial.

Having decided to depose the witness, counsel must then devise a deposition strategy. Deposition goals are important and tailored to each witness; the witness cannot simply be deposed to find out what he knows. Several goals for the TBI deposition are:

- *Obtain the child's pre-event history:* The child's pre-incident medical, academic, and employment histories are needed to build alternative causation theories, to assess damages, and to identify additional fact witnesses.
- *Obtain the child's family history:* The medical, academic, and employment histories of the child's family members are needed from parents and grandparents. The testimony will reveal possible alternative explanations for the injury and provide a forecast of academic and employment success because a parent's academic success is a strong indicator of the level of education the child will obtain.
- *Assess the child's jury appeal:* The child must be deposed for several reasons. First, counsel can evaluate the child's potential jury impact. The deposition can provide the defense attorney – and in turn the client – with a different perspective of the injury beyond medical records. This view can assist with settlement strategy.
- *Convert the physician into a defense witness:* Not all pediatric TBI cases are defense nightmares. The pediatric brain is more resilient to trauma than the adult brain and can compensate for an injury. Post-event medical and academic records may reveal that the child has little or no physical or cognitive limitations. Physicians and teachers can be turned into "star" damages defense witnesses by testifying about the child's recovery and academic success.
- *Assess the damages case:* Each witness, including the child, can reveal important damages testimony. When deposing the child, the defense attorney needs to talk to the child, as if his own, and learn what goes on in the child's life – from friends, to school, to pets, to hobbies. Counsel must have the witnesses describe the effects of the injury on the child.

> *Pediatric TBI cases are expert-intensive. Type, quality, and quantity are issues the defense attorney must consider.*

(6) **Experts:** Pediatric TBI cases are expert-intensive. Type, quality, and quantity are issues the defense attorney must consider. The threshold issue is the type of expert to retain.

a. *Type of expert:* The type of expert is influenced by the two phases of litigation: liability and damages.

1. *Liability:* TBI cases are first and foremost brain cases. A pediatric neurologist must be retained, if possible, but at the least, a neurologist. A pediatric neurologist can better address the nuances of the developing child brain, and its ability to compensate for an injury, than an adult neurologist. If the child underwent surgery, a neurosurgeon should be brought onto the defense team. Ideally, again, a pediatric neurosurgeon should be the choice. A radiologist, or better yet, a neuroradiologist, should examine the films to determine the cause of the injury. If a prescription or over-the-counter drug is blamed, a pharmacologist should make the defense expert team. In traditional trauma cases – *e.g.* involving a blow to the head, or injury resulting from a motor vehicle accident – accident reconstructionists and engineers may be needed to refute

plaintiff's theory of how the accident occurred.

2. *Damages:* Damages experts implicate the quantity issue – are experts needed in every field to match the experts plaintiff has retained? The answer is yes, but with some qualification as there is no requirement that the defendant match every expert report served by the plaintiff.

At times, a plaintiff's expert's methodology, reasoning, and conclusions are acceptable to the defendant – the child's injuries are not severe or the value of the life care plan is conservative. Similarly, sometimes a defense expert cannot undermine his counterpart's conclusions without proving or bolstering the plaintiff's case. In these situations, the defendant has two options: 1) consult with the expert to prepare for cross-examination; or 2) have the expert prepare a report limited to challenging the plaintiff's methodology, interpretation of test results, and conclusions, without providing the plaintiff a basis for recovery. For example, the defense economist can point out the inconsistencies with the plaintiff's report, yet not calculate a lost wage claim. This exercise must be done for each expert.

Several damages experts may need to be retained. One expert is the pediatric neuropsychologist. These experts evaluate the injury's impact on the areas and functions of the brain. They administer tests to evaluate the effects of a TBI on IQ, verbal and abstract/visual reasoning, quantative reasoning, short-term memory, vocabulary comprehension, recall, problem solving, processing speed, and cognition.[7] The testing also evaluates depression, anxiety, and malingering. The pediatric neuropsychologist also can examine academic records and administer an independent neuropsychology test if required.

The defense expert should critically examine the plaintiff's report. The defense neuropsychologist should approach the plaintiff's report in several ways: (1) has the plaintiff's expert administered age-appropriate and current versions of tests; (2) has the plaintiff's expert properly scored the tests (a request for the plaintiff's expert's raw data is required); (3) did environmental factors influence the test; and (4) did the plaintiff's expert omit tests that should have been administered.

After the defense neuropsychologist has undertaken this review, the expert and attorney have to determine whether an independent neuropsychological examination is needed. The decision will turn on whether the expert believes the plaintiff's neuropsychologist's testing and scoring were accurate, valid, and proper, and a favorable result will be achieved by examining the child. In jurisdictions like New Jersey, a plaintiff will be entitled to discover the expert's findings even if the neuropsychologist does not serve a report.[8] In these jurisdictions, counsel must carefully weigh the decision to conduct an independent medical examination.

Another expert to consider retaining is a life care planner. A life care planner (LCP) "provides a comprehensive summary of the therapeutic modalities, education, attendant care services, medical follow-up, equipment needs, supplies, and medication for individuals with TBI."[9] They serve as liaisons between the medical professional caring for the child and the third-party vendors who supply medical and other services the injured child needs. LCPs can be medical doctors, registered nurses, nurse practitioners, and rehabilitation professionals. The LCP reviews the medical records, interviews the patient and doctors, and prepares a report or plan that outlines the services and equipment the plaintiff needs, with their purchase/replacement costs, and replacement schedule.

If the plaintiff retains a LCP, the defendant must retain one. The defense LCP should determine whether the plaintiff's plan is redundant, providing double and triple services. For example, the plaintiff LCP may provide for several yearly visits to a physiatrist, physical therapist, and pediatrician, when the pediatrician alone can provide the service. Similarly, the defense expert can determine whether the plaintiff's expert has inflated the cost of services, or, better yet, provided services not warranted by the medical records. Moreover, the plaintiff's plan may include medications taken before the event, and of which plaintiff should not recover the cost from the defendant. Finally, counsel should not hesitate to consult with its pediatric neurologist to determine if the services are medically appropriate to the injury.

Additionally, the defense LCP can advise counsel if the plan is conservative. In such a situation, the defense expert should consult for cross-examination purposes. A report should only be served when the plaintiff's expert has included redundant services and the cost of the defense LCP projected services is a floor the defense can accept.

A defendant may need to retain additional experts such as psychiatrists and economists. Depression is a common sequela of head trauma. Economists will be needed to calculate the cost of the life care plan to present value and to address a plaintiff's future-wage-loss claim. Again, the defense needs to be careful that the economist does not set a floor for a plaintiff verdict on damages.

b. *Quality:* Retaining well-credentialed experts is another important consideration. The potential for a significant settlement or jury verdict means considerable effort must be made when investigating experts. Quality also is dictated by the facts of the case. If the child underwent surgery, matching a defense neurologist against a plaintiff neurosurgeon could have a drastic impact at trial. Similarly, retaining a neuroradiologist to combat the plaintiff's neurologist's interpretation of the radiology films could favorably impact liability if the neuroradiologist can detect a brain abnormality the neurologist could not. As with all personal-injury cases, the well-traveled expert could undermine the defense when battling a phalanx of board certified neurologists on the plaintiff's side. Finally, with the jury sympathy the plaintiff will attract an almost foregone conclusion, the defense experts must be skilled jury communicators and have an excellent "bed side manner" on the stand.

IV. Conclusion

These discovery tools are by no means exhaustive, but are fairly consistent considerations when defending a pediatric TBI case.

At each step, the discovery tools will reveal to the defense attorney new facts, liability theories, and damages explanations that require additional witness investigation, depositions, and expert review. Not until the case is settled can the defense attorney stop discovering the pediatric TBI case.

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1 *PDR Medical Dictionary,* (1995), defines pediatrics as the medical specialty concerned with the study and treatment of children in health and disease during development from birth through adolescence.
2 Blackwell, Powers, Weed, *Life Care Planning for Traumatic Brain Injury,* 1 (1994).
3 "Health Insurance Portability and Accountability Act," 42 U.S.C. § 201 *et seq.*
4 20 U.S.C. 1232g.
5 Bromberg, "Oral Depositions: Skills, Procedures, and Common Errors," *New Jersey Law Journal,* April 26, 2004.
6 F.R.Evid. 803(4).
7 *See generally* Lezak, *Neuropsychological Assessment* (4th ed. 2004) for a comprehensive overview of the field of neuropsychology.
8 Pressler, Current N.J. Court Rule, 4:10-2(d)(3) (2005).
9 Blackwell, et al., *Life Care,* 2-3 (1994).

Let’s Recall Our Other Audience: Stock Market Responses To Product Crises

By Prof. James T. O’Reilly

Television business programs, newsmagazines, and newspaper economics discussions create an image of the securities analyst as an omniscient predictor of the future growth or decline of companies. In their tech-savvy ivory tower, the “health care analysts” of mutual funds appear to be remote, as in the Emerald City of Oz, divining whether the economy will reward or punish corporate management.

As with the fabled Oz, there is usually a person behind that wizard’s image, an individual who is overwhelmed with statistical charts and corporate reports, seeking to do better than the peer analysts in each quarter’s results. Managing money in the health care sector involves the ability to respond to surprises such as product recalls and large jury verdicts. Surprises are the analysts’ worst enemy. Spending time in conversation with them, one learns that the predictability and solidity of a company’s response to a crisis makes a big difference in their long term outlook for a stock “buy and hold” investment.

These are the stock analysts who are trying to determine whether to invest in your client’s company. Millions of equity dollars in share value may depend on this person’s evaluation of the crisis and its impact on the next quarter of your company’s profits and productivity. For the analysts, performance is graded and careers are made or altered by their fund’s quarterly results. Failure of a company to perform now, or trust in its management’s longer term prudence, is a sufficient reason to dump its shares.

The crisis that comes with a potential recall hits the company in at least five ways–

1. In lost sales,
2. In potential penalties from government agencies,
3. In restocking charges from customers,
4. In reputational harm for the brand name, and
5. In distraction of managers from productive activity.

Some of these are able to be mitigated. Handling the recall crisis well preserves the consumer’s trust in that company, which helps to preserve the reputation of the brand for quality. Handling the relationships with the FDA, CPSC, or EPA well may shield the company from potential penalties. Unfortunately, the recall will cause a loss of sales, and it will cause customer expenses and management distractions.

From the executive’s viewpoint, the share price of a publicly held company is a crucial barometer of public confidence in that company’s CEO and management team. The defense attorneys counseling the client in the crisis period are not always tuned in to this part of the executive’s decisional process. If the news media pillory corporate management, the speculators will probably sell the stock short. The snowballing effect of short sellers will drive down the corporate stock price, and if serious flaws in the product are alleged, a large portion of the equity that sustains the company will evaporate, as the mistrust drives prices lower.

The advice that litigators provide to their clients may appear to be more impactful where the advice is aggressive – sure, we can fight the government, yes, we can prevent this recall – but sophisticated observers may consider this approach to be counter-productive.

The financial analyst is betting millions that a company’s shares will be a successful long-term investment. Will fighting the recall alienate the FDA? Will the FDA’s dreaded “Application Integrity Policy” be invoked to hold up your next approval or next change to the product? For general consumer products, will CPSC inspectors scrutinize the files and demand penalties for late announcement of the problem under CPSC’s mandatory reporting rules? In the long-term, will the company be a target for regulators and a pariah for federal product approval licensing officers?

Sometimes the art of accommodation is disregarded in the litigator’s desire to appear “macho.” The aggression channeled into fighting might in some cases have been better devoted to energetic drafting of the terms of an agreement with the FDA or other agency under which the company will evaluate the units to be retrieved, and will return them to market under new identification numbers to avoid confusion. The product’s flaw may be fixed with changes that satisfy the regulator or in some cases, assuage the plaintiff’s ardor for protecting others through punishing the deficient manufacturer. Although it may seem counter-intuitive, markets reward accommodation and consensus once a product problem has been identified; the executive’s ego-driven quest for a principled vindication of the product’s integrity rarely impresses investment analysts.

Defense counsel may become frustrated with in-house counsel’s obsession with Sarbanes-Oxley compliance. The complexities of Sarbanes-Oxley interact with the product recall on a systemic level.

Prudent in-house counsel realize that the audit committee of their Board of Directors has the responsibility to examine recalls as part of internal "controls" that should be in place to avoid material financial negative effects on the company.

Viewed in this context, the system of corporate quality standards and the recalls procedures are "controls," and controls must be robust enough to withstand the pressure of a crisis. It may be that the recall could have been avoided, lessened, or mitigated by something the executives could have done better.

The trial defense lawyer's first meeting with the client's quality assurance team may be an eye-opener. Defense counsel may arrive at the scene months after the first reports of a serious product problem with the regulators. Prudent companies think ahead and timely participate in the remedial effort by their litigation defense team.

If the problem was a manufacturing defect, the market tolerates these occasional problems and does not react much so long as capacity and market movement of goods is minimally impaired. If the alleged injuries from the product were claimed to have been chemically induced, then the defendant company faces strategic, educational, and practical difficulties. Will the product be off the market while it is being reformulated? Is there a larger concern about class action challenges against the company for this product's wide exposure to consumers? Did the company's design standards omit a safety feature for reasons that were debated in emails?

Typical analyst questions include:

1. Is the company acting fast enough to end the crisis?
2. Are they accurate in predicting that only minimal costs will result from this recall?
3. Is public or prescriber awareness of the recall likely to cost the company long-term sales, or to alienate customers?
4. Will the regulator penalize the company, and to what extent?
5. Will this confrontation affect future relationships with the regulatory gatekeepers for product approvals?
6. Did the company's aggressive arguments impress or annoy the regulatory "gatekeepers"?
7. Will class actions be successfully sustained against the company for this alleged defect?

Although most defense counsel will never see the "man behind the curtain," prudent defense counsel should discuss with in-house counsel how defense strategies can be aligned with the preservation of the company's long-term shareholder value. The analysts are watching. They should not be overlooked.

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