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You CAFA be kidding me.

Common misconceptions about federal jurisdiction over class actions

By Allan Kanner & Josephine Ellis

Let's begin with the obvious. A basic premise of judicial separation of powers is that the jurisdiction of the federal courts is limited.¹ This limitation is enshrined in Article III and reflects a structural respect for states' sovereignty. It's the first lesson many legal professionals learn.

Yet judicial federalism has come to the fore since the enactment of the Class Action Fairness Act of 2005 (CAFA), which expanded removal and federal diversity jurisdiction over certain class actions and "mass actions," implicating separation-of-powers and state sovereignty issues.²

Defendants preferring to litigate in federal court have urged that CAFA's removal provisions are game-changers that should be read expansively. Some contend that CAFA does away with the limits normally imposed by judicial federalism, arguing, for instance, that there is now a presumption in favor of CAFA removal; that state public enforcement actions are removable mass or class actions; and that such lawsuits present "embedded" federal questions because they implicate federal regulatory schemes.

Those arguments have largely failed, and rightly so. Judicial federalism is alive and well. Plaintiffs are the masters of their complaints, the removing party has the burden of "proving" federal jurisdiction, and federal questions must be apparent on the face of a complaint—not lurking in the background. CAFA

changed none of this. Using examples from successful remand motions in state attorney general (AG) and consumer fraud suits, we'll explain why.

CAFA background

CAFA was enacted in 2005 to bring cases of "national importance" into federal courts. As the Supreme Court observed, in enacting CAFA, "Congress recognized that '[c]lass action lawsuits are an important and valuable part of the legal system.'"³

Namely, class actions protect consumers' rights and ensure that those harmed have the means to seek redress in court when would be impractical to seek individual relief.⁴ Despite the notion that class actions strong-arm inculpable defendants into settling, the "law and empirical evidence . . . demonstrate that it is neither objectively accurate nor legally sound."⁵ At its heart, CAFA is pro-consumer.⁶ "Significantly, despite the anti-class action rhetoric of some, Congress only targeted some specific and abusive practices."⁷ CAFA streamlined certain class action procedures, but it also helped protect consumers from poorly planned litigation, collusive tactics, and coupon settlements. In fact, much of the uptick in federal adjudication of class and mass actions since 2005 can be attributed to original filings, not simply removals.⁸

Yet CAFA did not create a federal monopoly on large-scale enforcement actions, as some have argued.

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Author Spotlight

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CAFA's modest expansion of federal jurisdiction

CAFA added to the limited set of instances in which litigants may invoke the jurisdiction of federal district courts, but did so narrowly and expressly. It imposed minimal diversity for class actions and “mass” actions involving 100 or more plaintiffs, and granting jurisdiction over such actions with an aggregate amount in controversy of \$5 million or more, though for mass actions, individual claims must still satisfy the \$75,000 threshold.⁹

Exceptions to CAFA's jurisdictional grants in class actions include the mandatory “local controversy” and “home-state” exceptions,¹⁰ and a fact-intensive discretionary remand provision.¹¹ CAFA also precludes the removal of actions akin to private attorneys' general suits that might otherwise qualify as mass actions.¹²

Bearing in mind how delimited CAFA's provisions are, we'll look at some common misconceptions about CAFA jurisdiction.

1. Judicial federalism

Some defendants contend that traditional federalism arguments do not apply when it comes to CAFA removal, citing Congress's intent to expand federal jurisdiction over class actions of national importance.¹³ They point to miscellaneous remarks in CAFA's legislative history, for instance, that in cases where “a Federal court is uncertain . . . the court should err in favor of exercising jurisdiction over the case.”¹⁴

However, CAFA must be applied in a manner appropriate for what it is: a federal statute. The statute is limited, clear, and generally unambiguous. The traditional canons of interpretation apply—for instance, the plain text will govern, and resort to extratextual sources, such as stray comments in the congressional record, is discouraged if not prohibited outright.¹⁵ CAFA does not affect the constitutionally enshrined principles of limited federal court jurisdiction and state sovereignty, nor could it.¹⁶

Upending traditional principles of judicial federalism may have been the defense bar's hope at the time CAFA was first enacted, but it has amounted to wishful thinking.

2. Removal burden

In a similar vein, the defense bar has urged that plaintiffs should now shoulder the burden of establishing that federal jurisdiction is improper.¹⁷

A principal problem with this proposal is that, across the board,¹⁸ the party seeking to invoke the jurisdiction of a federal court, whether as a plaintiff or removing defendant, has the burden to demonstrate that the court possesses subject-matter jurisdiction.¹⁹ This is due to the nature of federal jurisdiction, which, as we observed at the outset, is inherently limited.²⁰ A federal statute can hardly displace this structural constitutional principle—let alone without some explicit provision in the text of the statute.²¹

Appeals courts have unanimously lain to rest the notion that CAFA shifts this burden to plaintiffs opposing removal.²² And in a 2010 decision regarding CAFA jurisdiction, the Supreme Court reiterated that “[t]he burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it.”²³ Nevertheless, the burden-shifting argument has gotten a second wind from passing language in a recent Supreme Court opinion, *Dart Cherokee Basin Operating Co. v. Owens*, that “no antiremoval presumption attends cases invoking CAFA[.]”²⁴

But *Dart Cherokee*, a pleading-specificity case, did not address this jurisdictional issue. The Court held that the removal statute requires only a “short and plain statement of the grounds for removal,” not evidence in support thereof, “track[ing] the general pleading requirement stated in Rule 8(a)[.]”²⁵ The opinion does not suggest that there is a presumption in favor of removal, nor does it overturn the generally prevailing rule that the removing party must bear the burden of demonstrating that federal jurisdiction exists. Post-*Dart Cherokee* cases, including those cited as favorable by the CAFA defense bar, have continued to hold defendants to their burden to “prove” subject-matter jurisdiction.²⁶

Litigants should avoid using dicta as talismanic, and this passing language in *Dart Cherokee* is a slender reed on

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which to lean in the absence of supporting precedent or reasoning.

3. State sovereignty

At the outset, we observed that defendants have attempted to use CAFA to sweep state public enforcement actions into federal court. This issue is now easily dispensed with; the Supreme Court held in *Mississippi ex rel. Hood v. AU Optronics Corp.* that state AG *parens patriae* suits are not mass actions subject to removal under CAFA.²⁷

The same reasoning holds with state public enforcement actions generally. Following *Hood*, courts have held that a common law *parens patriae* suit is not a procedural device similar to Rule 23.²⁸ And as for private AG suits, typically brought by an individual in the “public interest” or on behalf of the general public, CAFA’s general public exception carves them out of the definition of “mass action.”²⁹

These are all sensible rulings. And judicial federalism concerns are particularly acute when the removed action has been filed by the State in state court.³⁰

4. “Embedded” federal questions

An allegation of federal-question jurisdiction often accompanies an attempt to remove under CAFA. In so doing, defendants often misinterpret the plaintiff’s claims and allegations or rely on what in reality is a defense they hope to raise. However, it remains improper to look “behind” a complaint to suss out potential bases for federal jurisdiction. As before, plaintiffs are still the masters of their complaints and may elect to rely solely on state causes of action.³¹

Nevertheless, defendants attempt to federalize cases by contending that they “implicate” some “significant federal issue.”³² For instance, in state AG pharmaceutical cases, defendants may argue that the State’s claims turn on interpretations of the Federal Medicaid statute or its implementing regulations; allege violations of the federal Food, Drug, and Cosmetic Act; or allege claims based on false “best price” reporting allegations, implicating the Medicaid Rebate Statute. Defendants have succeeded in removing based on such “embedded” federal questions in one district court, but have failed elsewhere.³⁴

Importantly, defendants are up against the well-pleaded complaint rule, holding that federal-question jurisdiction exists

only if “the plaintiff’s statement of his own cause of action shows that it is based upon federal law.” So-called “embedded” federal-question jurisdiction is limited to “a ‘special and small category’ of cases[.]”³⁶ The federal issue must be necessarily raised, actually disputed, substantial, and “capable of resolution in federal court without disrupting the federal-state balance of judicial responsibilities approved by Congress.”³⁷

A common problem is that defendants confuse “setting” with “plot” in their removal papers. Often, peripheral issues of federal law are part of the backdrop of a complaint, an insufficient basis for federal-question jurisdiction. As the Supreme Court has put it, “[t]he most one can say is that a question of federal law is lurking in the background, just as farther in background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.”³⁸

Careful pleading can help ensure that courts remand the case to state court, honoring the plaintiff’s choice of forum. This proved invaluable in a recent series of successful remand orders in state AG matters handled by our firm.³⁹ The same principles militating against federal-question bootstrapping apply as well to private AG suits, consumer fraud suits, and other large-scale actions in which one might anticipate arguments or defenses sounding in federal law.

Practice pointers and concluding remarks

CAFA litigants are well advised to remain cognizant of these first principles. Federal jurisdiction is inherently limited and state sovereignty continues to loom large. Plaintiffs remain the masters of their complaints; defendants must bear the burden on removal and are up against the well-pleaded complaint rule. Litigants should also be careful to distinguish “setting” from “plot” as well as remain cognizant of other circumstances that will defeat removal (e.g., a defendant’s waiver of the right to remove).⁴⁰ These strategies can improve the quality of CAFA litigation and help preserve the structural values affecting interstate and federal practice.

- 1 *E.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005).
- 2 28 U.S.C. §§ 1332(d), 1453, & 1711-15; *see, e.g., Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d 278, 281 (5th Cir. 2007) (“As ‘the effect of removal is to deprive the state court of an action properly before it, removal raises significant federalism concerns.’” (citation omitted)).
- 3 *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 739 (2014) (quoting CAFA § 2, reprinted in notes following 28 U.S.C. § 1711).
- 4 *See, e.g., Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997).
- 5 Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 Baylor L. Rev. 681, 682 (2005); *see, e.g., Klay v. Humana, Inc.*, 382 F.3d 1241, 1266 (11th Cir. 2004), *abrogated in part on other grounds, as recognized by Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1253 (11th Cir. 2014).
- 6 Allan Kanner, *Interpreting the Class Action Fairness Act in A Truly Fair Manner*, 80 Tul. L. Rev. 1645, 1655-56 (2006) (hereinafter “Interpreting CAFA”).
- 7 *See, e.g., id.* (citing CAFA § 2).
- 8 Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts 1-2, 7-11* (Federal Judicial Center 2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/\\$file/cafa0408.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf).
- 9 28 U.S.C. § 1332(d); *see Kanner, Interpreting CAFA, supra* n.6, at 1650-62.
- 10 *Id.* § 1332(d)(4)(A) & (B).
- 11 *Id.* § 1332(d)(3).
- 12 *Id.* § 1332(d)(11)(B)(ii)(III).
- 13 *See, e.g., H. Hunter Twiford, III et al., CAFA’s New ‘Minimal Diversity’ Standard for Interstate Class Actions Creates a Presumption that Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 Miss. C. L. Rev. 7, 9 (2005).
- 14 151 Cong. Rec. 7326 (statement of Rep. Jim Sensenbrenner).
- 15 *See, e.g., Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) (“Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.”); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring); Kanner, *Interpreting CAFA, supra* n.6, at 1660-61.
- 16 *See, e.g., Kanner, Interpreting CAFA, supra* n.6, at 1662-66.
- 17 *See Twiford, supra* n.13, at 18 & n.29 (citing S. Rep. 109-14, 2005 WL 627977 (2005)).
- 18 Not just in “complete-diversity cases,” as some have suggested. *Cf. id.* at 12-13.
- 19 *See, e.g., Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Hood ex rel. Mississippi v. JP Morgan Chase & Co.*, 737 F.3d 78, 84-85 (5th Cir. 2013). *But cf., e.g., Coleman v. Estes Exp. Lines, Inc.*, 631 F.3d 1010, 1013 (9th Cir. 2011) (remanding plaintiffs have burden on CAFA exceptions); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006) (same).
- 20 *E.g., Kokkonen*, 511 U.S. at 377.
- 21 *See, e.g., Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447-48 (7th Cir. 2005).
- 22 *See, e.g., Woods v. Std. Ins. Co.*, 771 F.3d 1257, 1262 (10th Cir. 2014); *Romulus v. CVS Pharmacy, Inc.*, 770 F.3d 67, 80 (1st Cir. 2014); *Quicken Loans Inc. v. Alig*, 737 F.3d 960, 964 (4th Cir. 2013); *Hood*, 737 F.3d at 84-85 (5th Cir.); *Erie Ins. Exch. v. Erie Indem. Co.*, 722 F.3d 154, 158 (3d Cir. 2013); *Hartis v. Chi. Title Ins. Co.*, 694 F.3d 935, 944 (8th Cir. 2012); *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1208 (11th Cir. 2007); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 404 (6th Cir. 2007), *abrogated on other grounds by Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 57 (2d Cir. 2006); *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006) (per curiam); *Brill*, 427 F.3d at 447-48; Wright & Miller, *Removal Based on the Class Action Fairness Act*, 14B Fed. Prac. & Proc. Juris. § 3724 & n.10 (4th ed.).
- 23 *Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010).
- 24 35 S. Ct. 547, 554 (2014); *see, e.g., Anthony Rollo et al., Dart Cherokee Portends Litigation Over Presumption in Favor of CAFA Removal*, 19 No. 2 Consumer Fin. Services L. Rep. 2, May 29, 2015.
- 25 135 S. Ct. at 553.
- 26 *See Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 913 (11th Cir. 2014); *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015); Rollo, *supra* n.24.
- 27 134 S. Ct. 736 (2014).
- 28 *E.g., Hawaii ex rel. Louie v. HSBC Bank Nevada, N.A.*, 761 F.3d 1027, 1039 (9th Cir. 2014).
- 29 28 U.S.C. § 1332(d)(11)(B)(ii)(III); *cf. Hood*, 134 S. Ct. at 745 n.7 (declining to reach question of general public exception); *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1121 (9th Cir. 2014) (holding CAFA removal improper in action brought under California’s Private Attorneys General Act), *cert. denied*, 135 S. Ct. 870 (2014).
- 30 *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 n.22 (1983) (“[C]onsiderations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it.”); *accord, e.g., Hood*, 737 F.3d at 84-85.
- 31 *See, e.g., Std. Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (observing that “plaintiffs, who are the masters of their complaints,” may avoid federal jurisdiction by stipulating to amounts in controversy below the federal minimum); *Hawaii ex rel. Louie v. HSBC Bank Nev., N.A.*, 761 F.3d 1027, 1040, 1042 (9th Cir. 2014) (plaintiff’s disclaimer of class status defeats CAFA removal); *see also, e.g., Jessica D. Miller & Jordan Schwartz, A Practical Guide: Defending Against State Attorney General Litigation*, 55 No. 9 DRI For Def. 50 (2013).
- 32 *See Grable & Sons Metal Prods. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005).
- 33 In connection with the Zyprexa litigation. *See In re Zyprexa Prods. Liab. Litig.*, 476 F. Supp. 2d 230, 233 (E.D.N.Y. 2007); *West Virginia ex rel. McGraw v. Eli Lilly & Co.*, 476 F. Supp. 2d 230, 233 (E.D.N.Y. 2007).
- 34 *See, e.g., Hood v. AstraZeneca Pharm., LP*, 744 F. Supp. 2d 590, 600 (N.D. Miss. 2010) (collecting cases); *see also, e.g., In re Methyl*

Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 488 F.3d 112, 135 (2d Cir. 2007).

35 *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009); accord, e.g., *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936) ("[T]he controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. . . . Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." (citations omitted)).

36 *Gunn v. Minton*, 133 S. Ct. 1059, 1064-65 (2013) (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006)).

37 *Id.* at 1065.

39 See, e.g., *In re Fresenius Granuflo/Naturalyte Dialysate Prods. Liab. Litig.*, MDL No. 13-02428-DPW, 2015 WL 44528 (D. Mass. Jan. 2, 2015); *Louisiana ex rel. Caldwell v. Abbott Labs.*, No. 3:11-cv-542-BAJ-SCR (M.D. La. March 28, 2012) (Doc. Nos. 14 & 17); *Louisiana ex rel. Caldwell v. GlaxoSmithKline, LLC*, No. 3:13-cv-191-JJB-SCR (M.D. La. June 28, 2013) (Doc. No. 23); *Louisiana ex rel. Caldwell v. Bristol Myers-Squibb Sanofi Pharms.*, No. 2:12-CV-443, 2012 WL 3866493 (W.D. La. Sept. 4, 2012); *Louisiana v. GlaxoSmithKline, LLC (In re Avandia)*, MDL No. 1871, 2012 WL 1137097 (E.D. Pa. Apr. 4, 2012).

40 See, e.g., *Waxler Transp. v. Valspar Corp.*, No. 08-1363, 2008 WL 4936510, at *3 (E.D. La. Aug. 6, 2008).

THIRD CIRCUIT CREATES TURMOIL OVER CERTIFICATION

Appeals court won't rehear case that changes long-standing inquiry regarding class definition.

By Arthur H. Bryant

What should judges do when a class action charges a company with cheating thousands of people out of small amounts of money each, but there are no records of who those people are? For decades, the answer has been clear: Certify the class if it meets the requirements for class certification, then distribute any funds recovered to class members who submit valid claim forms or affidavits. If that's not sufficient, distribute the funds to appropriate others via cy pres awards so the case compensates the class members to the extent it can, holds the defendant accountable and deters the defendant and others from violating the law and class members' rights in the future.

In a series of recent decisions exemplified by *Carrera v. Bayer*, however, the U.S. Court of Appeals for the Third Circuit has come up with a new answer: Refuse to certify the class because

the class members are not "ascertainable" and let the defendant keep the money. The court on May 1 declined to rehear the case en banc.

Carrera was a typical consumer class action that would have been regularly certified in the past. It sought damages from Bayer Corp. for falsely and deceptively promoting WeightSmart, a dietary supplement. The proposed class was clearly defined in objective terms (all people who purchased WeightSmart in Florida in a specified time period). Bayer's total liability was capped at a finite amount based on its records and Bayer could not have been held accountable without a class action. The district court certified the class.

But the Third Circuit reversed because the class members were not "ascertainable." It held that consumer class actions cannot be certified unless the plaintiffs can prove they will be able to: first, identify — or "ascertain" — the individual members of the class; second, do so through a process that is "reliable," "administratively feasible," and does not require "much, if any, individual factual inquiry"; and third, do so without relying on affidavits and claim forms because they are not sufficiently "reliable."

Carrera and the Third Circuit's related decisions have created enormous confusion because they take what has long been viewed as an implicit requirement for class certification

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— that the class be ascertainable and defined in objective terms
— and turn it into a new requirement that the class members be ascertainable and identifiable through what the Third Circuit calls objective evidence (business records).

A MATTER OF LOGIC

The former was implied as a matter of logic. For a class action to effectively resolve a group's claims, the group had to be defined in objective terms (such as all people who bought a specific product between specific dates), not subjective terms (such as all people "active in the peace movement") or terms that turn on the merits (such as people adversely affected by "the invalid regulation"). The latter is impossible to meet in almost all cases involving small, over-the-counter purchases and conflicts with what the U.S. Supreme Court has called the "policy at the very core of the class action mechanism," ensuring justice can be done where "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."

This inherent conflict is creating extraordinary turmoil. Clients, lawyers and judges are spending enormous resources litigating whether previously routine class actions can be certified, what "ascertainability" means, whether it is required, what a "reliable" and "administratively feasible" process is and whether it's required, how much factual inquiry is enough but not too much, and why affidavits and claim forms — used for decades and recommended to judges in the Manual for Complex Litigation — are suddenly not "reliable" in class actions.

Courts are issuing varying rulings. And some are arguing that — combined with the U.S. Supreme Court's decisions in *Concepcion* and *Italian Colors* enforcing class action bans in corporations' adhesive consumer and small business "agreements" — the Third Circuit's "ascertainability" requirement will eliminate consumer class actions and let wholesale violations of the law go unchecked.

But the confusion from *Carrera* may be otherwise resolved, as it was long ago. The Ninth and Eleventh circuits are poised to address the Third Circuit's approach. The New Jersey Appellate Division has just rejected it. The Advisory Committee on the Civil Rules and its Rule 23 Subcommittee are being urged to rule it out. And the Third Circuit just issued *Byrd v. Aaron's*, which

overturned a district court's decision denying class certification on "ascertainability" grounds. The decision tries to "clarify" its reasoning and says the district courts have overreacted to the Third Circuit's rulings. Concurring in the result, Judge Marjorie Rendell urged the Third Circuit to admit it had made a mistake: "It is time to retreat from our heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23," she said.

To find that meaning, look back to 1967, when this "ascertainability" confusion was first expressed and resolved. In what the Rule 23 Subcommittee calls the "famous California case of *Daar v. Yellow Cab*," the cab meters had been set too high in Los Angeles for a period of time and a class action was filed. The company argued the class could not be certified because the class members were impossible to identify. The court said, "Defendant apparently fails to distinguish between the necessity of establishing the existence of an ascertainable class and the necessity of identifying the individual members of such a class as a prerequisite to a class suit."

The court held that the former was required; the latter was not, and *Yellow Cab* was held accountable. We will see if the current federal courts resolve the confusion the same way.

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Taxation of e-Discovery Costs Under 28 U.S.C. §1920(4): A Cost Shifting Trap for the Unwary

By Dena C. Sharp and Elizabeth A. Kramer

It's no secret that cost-shifting is very much on the minds of civil litigators and rule makers alike these days. While the presumption that the producing party bears its own discovery costs remains the law of the land (at least for now), creative practitioners continue to find ways to attempt to shift the costs of discovery to their adversaries.

28 U.S.C. § 1920, for example, allows the prevailing party in a lawsuit to seek to tax certain costs and provides that a "judge or clerk of any court of the United States may tax as costs... (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." Section 1920(4) has enjoyed something of a renaissance in the past few years, with recent decisions resulting in losing parties being taxed with costs associated with certain aspects of the prevailing party's e-discovery work.

A bill of costs for e-discovery costs under section 1920 can come as a nasty surprise at the end of an unsuccessful case. But with some planning and foresight, the savvy litigator can preempt or at least neutralize the potential for taxation of costs under section 1920(4).

Background and Recent Case Law

Section 1920 originally applied to "exemplification and copies of papers," but a 2008 amendment to subsection (4) replaced "copies of papers" with "copies of any materials." While the amendment acknowledged that electronically stored information (ESI) may be subject to section 1920(4), the amendment left open the question of how the statute should be applied in the

e-discovery context.

Several courts have since addressed the issue, with one of the most influential decisions coming from the Third Circuit in *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3d Cir. 2012). In *Race Tires*, the prevailing party sought to recover costs for "collecting and preserving ESI; processing and indexing ESI; keyword searching of ESI for responsive and privileged documents; converting native files to tag image file format (TIFF); and scanning paper documents to create electronic images." *Id.* at 167. The Third Circuit held that only the costs associated with TIFF conversion and scanning were taxable under section 1920(4), because they were the only identified activities akin to "making copies" of paper documents. *Id.* at 169-170. A series of decisions have since followed *Race Tires'* reasoning. See e.g., *Country Vintner of N. Carolina, LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d at 252-3, 262 (4th Cir. 2013) (affirming recovery of only \$218.59 in ESI-related costs, where the bill of costs was over \$111,000); *Johnson v. Allstate Ins. Co.*, No. 07-cv-0781-SCW, 2012 WL 4936598, at *6 (S.D. Ill. Oct. 16, 2012) (declining to award costs for creating and hosting an ESI database, extraction of metadata, de-duplication, and preparation for production of ESI, but awarding costs for conversion to TIFF, conversion of documents into a searchable format through optical character recognition (OCR), and hard copy productions); *El Camino Resources, Ltd. v. Huntington Nat. Bank*, No. 1:07-cv-598, 2012 WL 4808741, at *7 (W.D. Mich. May 3, 2012) ("Under the *Race Tires America* approach, the only compensable costs are (a) the conversion of native digital files to the agreed-upon production format and (b) the scanning of paper documents to create digital duplicates for production in discovery."); but see also *CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320, 1333 (Fed. Cir. 2013) (allowing costs for imaging source media and extracting documents to preserve metadata, and noting that the

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court thereby expanded the types of costs allowed in *Race Tires* and *Country Vintner*).

The Ninth Circuit recently took up the issue in *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914 (9th Cir. 2015), where it affirmed in part and reversed in part the district court's award of costs under section 1920 to defendants who had prevailed on summary judgment. Consistent with *Race Tires*, the *Online DVD-Rental* court explained that "consideration of whether certain tasks are taxable pursuant to § 1920(4) calls for some common-sense judgments guided by a comparison with the paper-document analogue." *Id.* at 929.

The Ninth Circuit concluded that costs attributable to converting to TIFF, making documents searchable through OCR, and "endorsing" activities (*i.e.* bates stamping) were all recoverable as versions of "making copies" under the statute, particularly when they are selected by the requesting party. *Id.* at 929; *see also Bisbano v. Strine Printing Co., Inc.*, 2013 WL 3246089 (D.R.I. 2013) (citing conflicting authorities but finding "a modest Bates labeling cost" necessary and taxable). By contrast, "keywording" charges in *Online-DVD Rental* were found to be more like reviewing documents than "making copies" and were thus held to be non-recoverable under section 1920(4). 779 F.3d at 930. And the court remanded for a determination as to whether "professional services" or "native review processing" could be taxed as costs. *Id.*

Online DVD-Rental emphasizes that section 1920(4) only allows costs for copies that were "necessarily obtained for use in the case." The party submitting the bill of costs has the burden of describing the work performed and establishing that it was necessary; failure to do so may result in denial of the request. *Online DVD-Rental*, 779 F.3d at 930 (holding that "data upload" was similar to making a copy for purposes of the statute, but denying cost request because the defendant failed to identify any purpose the upload served for the other side); *see also Chavis Van & Storage of Myrtle Beach, Inc. v. United Van Lines, LLC*, No. 4:11-CV-1299, 2014 WL 1729152 (E.D. Mo. May 1, 2014) (denying costs because prevailing party did not provide adequate supporting information); The requirement that the party seeking costs substantiate the necessity of the copies for use in the case also gives the other side an opportunity to attack the showing. *See, e.g., Kwan Software Eng'g, Inc. v. Foray Techs.*,

No. C 12-03762, 2014 WL 1860298 (N.D. Cal. May 8, 2014) (upon plaintiff's challenge, court cut costs awarded by over \$50,000, noting defendant's invoices were not sufficiently detailed to inform the court what expenditures were taxable as costs, and the invoices appeared to relate to processing documents that were not ultimately produced in the litigation).

Lest these cases lull us into a false sense of security, recent decisions like in *Comprehensive Addiction Treatment Center, Inc. v. Leslea*, No. 11-CV-03417, 2015 WL 638198 (D. Colo. Feb. 13, 2015) remind us that some courts have not felt constrained to the approach developed in *Race Tires* and *Online DVD-Rental*. In *Leslea*, the prevailing defendants were awarded \$55,649.98 in costs for the services of an outside consultant to retrieve and convert ESI into a useable format. The plaintiffs sought review of that decision, asserting that consultant services do not constitute "copying" under section 1920(4). The court disagreed, noting that the "complexities and time-intensive efforts" in discovery required several extensions of time, and that "Plaintiffs were well aware that Defendants required the services of an outside consultant in order to produce the information requested, and they were kept apprised of the difficulties encountered by the vendor." *Leslea*, 2015 WL 638198, at *2. The plaintiffs' appeal is currently pending before the Tenth Circuit.

Practice Tip: Anticipate and Get Ahead of a Section 1920 Bill of Costs

Don't wait until the end of the case to worry about getting taxed with costs. Armed with the knowledge that your adversary may be able to wield section 1920 to his advantage if the case goes south for you, you can and should plan ahead. Discussions about taxation of costs related to production of ESI should occur early in the case, typically when the parties are conducting their Rule 26(f) conference and discussing form of ESI production.

One approach is request that each side waives its right to seek costs under section 1920, and to tie that request to the parties' discussions about the form of production. The negotiation may go something like this: the parties discuss in the form ESI productions; the side producing the majority of the discovery in the case (usually the defendants in a class case) asks to produce ESI as TIFFs with load files, with certain types of files to be produced in native format. At this point, plaintiff's counsel may

agree to TIFF productions *but only subject to the defendant's agreement to waive the right to tax costs associated with that production.* If the parties agree on that point, it should be memorialized in an ESI or case management order that includes language along these lines: "The parties agree that each party bears its own costs of producing ESI and that the producing party shall waive the right to seek reimbursement or taxation of such costs pursuant to 28 U.S.C. § 1920, or any other state or federal cost recovery provision."

Things get trickier if your adversary is unwilling to agree to waive the right to tax costs associated with ESI productions in their preferred form of production. If that happens, you may want to forego TIFF productions and instead request an all-native production. While native productions are not (yet) the norm, they do avoid at least some of the costs that have been found to be recoverable under section 1920(4), including TIFF conversion, OCRing and "native review processing." Requesting production in native may increase your leverage on the cost-waiver request, as producing parties are typically skittish about

all-native productions, largely because it is unfamiliar territory and, as a practical matter, bates stamping native productions can prove more challenging than TIFF productions.

Another route is to request early court intervention. Even if the court does not resolve once and for all how e-discovery costs should be allocated, you will have made your record of affirmatively addressing the costs and proposing alternatives to "making copies." That record should be useful later to rebut any argument that copies of ESI were "necessarily obtained for use in the case," as the statute requires.

In sum, taxation of costs associated with e-discovery work is no longer a threat that civil litigators can afford to ignore. By anticipating and addressing the issue early in the litigation, however, you will at least stand a chance of avoiding what could otherwise be a blow that adds insult to injury at the end of an unsuccessful case.

New Trends in Multidistrict Litigation

By Kelly Hyman

What is Multidistrict Litigation?

Multidistrict litigation ("MDL") is a procedure utilized in the federal court system to transfer all pending civil cases concerning similar types of cases filed throughout the United States to one federal judge in order to efficiently process the cases. MDLs can involve hundreds or thousands of cases pending in dozens of different courts. The Chief Justice of the United States Supreme Court appoints seven federal judges to sit on a panel (the "Panel") that determines whether MDL process is appropriate.

The goal of MDL is to conserve judicial resources and promote consistent court rulings among different lawsuits that involve similar legal issues. Rather than multiple judges issuing piecemeal and perhaps inconsistent rulings on identical issues, the MDL judge makes one decision that applies to all cases in the MDL.

The following types of cases commonly qualify as MDLs:

- suits arising from airplane crashes;
- suits involving dangerous drugs, medical devices, and other products liability claims;
- suits involving employment practices;
- suits involving intellectual property infringement, and
- suits involving securities fraud.

Author Spotlight

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MDL classification is beneficial for both defendants and plaintiffs. Defendants are benefitted by MDL classification because the MDL procedure consolidates the pre-trial process and streamlines multiple cases into one. In addition, defendants usually prefer to have their witnesses deposed only once in the MDL proceeding rather than multiple times (which is what occurs if numerous lawsuits are not consolidated into a MDL) because multiple depositions are time consuming and increase the likelihood that the defendants' witnesses will give inconsistent answers. For corporate defendants in particular, it is usually cheaper and more efficient to litigate similar issues of law before one judge instead of many judges. Plaintiffs' attorneys are benefitted by MDL classification because they are able to pool their resources and coordinate discovery efforts, decreasing the amount of the money and resources necessary to litigate their cases. On the other hand, MDL classification can be negative for defendants because publicity surrounding a MDL can prompt additional plaintiffs to file lawsuits, which increases the defendants' exposure for claims.

Generally, the MDL court will enter pretrial orders informing lawyers of the deadlines and procedures to be followed in the MDL. A MDL judge also has the power to issue rulings on motions that may be dispositive of similar issues in all the MDL cases. This may result in the entry of summary judgment in all MDL cases with similar legal issues. In addition, a dismissal of a cause of action in a complaint in one case may result in dismissal of similar causes of action in other cases.

What are the factors the Panel considers in approving a MDL?

Proceedings for transfer may be initiated by the Panel *sua sponte* or upon a motion filed with the Panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings may be appropriate. Pursuant to 28 U.S.C. § 1407, classification as a MDL is appropriate if the group of cases share "common questions of fact," and transferring the cases to one judge will be convenient for the "parties and witnesses and will promote the just and efficient conduct of such action."¹

Before cases are designated as a MDL and transferred to one federal Judge, the Panel convenes a hearing with notice to all parties. According to the MDL statistics Report,² there are currently 286 MDLs pending in the United States.³

Although the Panel continues to grant more MDL motions than it denies, the Panel has denied a substantial number of MDL motions as the number of requests have increased. Recent decisions from the Panel reflect its leanings toward other means of accomplishing the same goals of coordination and efficiency, without turning every garden variety lawsuit into a MDL. The Panel touts old-fashioned transfers⁴ as an alternative to MDL centralization. When there are a small number of pending cases, and those cases are in their early stages, transfers to a single court by agreement among parties may accomplish the same goals of coordination and efficiency.

Other than common question of facts, the convenience of the parties and witnesses, and efficiency, 28 U.S.C. § 1407 does not provide guidance regarding what other factors the Panel should use in establishing a MDL. However, the Panel often considers the following factors when determining whether MDL is appropriate:

- the avoidance of conflicting pretrial rulings;
- the condition of the docket in the courts that would be affected by transfer;
- the number and size of the cases to be transferred;
- the possibility of coordinating discovery that would otherwise be duplicative; and
- the potential to avoid conflicting class action cases.⁵

Parties who oppose classification as a MDL commonly assert the following arguments:

- the coordination of discovery is not efficient;
- the presence of individual issues, particularly where the injuries alleged are not pathognomic or occur in others who have not used the defective product, is unfair to the defendants; and
- the small number of existing cases at the time that centralization is sought does not warrant the establishment of a MDL.⁶

Since 2007, the Panel has frequently found the possibility of coordination, the lower number of cases at the time of the request, and/or the presence of individual issues outweigh the benefits a MDL offers. Having said that, a MDL is a good process to pursue when there are a large number of complex cases with

similar factual or legal issues.

What are New Trends in MDLs?

One new trend in MDL litigation is the utilization of “*Lone Pine*” orders. A *Lone Pine* order is a case management tool that takes its name from an environmental mass tort case in which a New Jersey court required the plaintiffs to substantiate their allegations of personal injury, property damage and causation before proceeding with discovery.⁷ When the plaintiffs failed to meet this burden, the court dismissed their claims. MDL judges have recently utilized such *Lone Pine* orders to dismiss MDL cases.

Another trend is the use of tolling agreements which extend the time in which a claim must be filed.⁸ This practice enables attorneys in a MDL proceeding is to reduce the number of cases that are filed initially and transferred to the MDL court. This reduces legal fees, costs, and the impact on the courts and their staff in handling thousands of cases in a MDL proceeding.

In addition, a MDL judge can indicate that “in the interest of efficient management” it is necessary to obtain a more accurate accounting of the number of claims being presented against a defendant in a pretrial orders. Pursuant to such pretrial orders, plaintiffs’ lawyers are required to register their cases by a given date. Often, attorneys are directed in such pretrial orders to complete a “census” spreadsheet, providing the name of each potential plaintiff, information about the specific products used by the plaintiff, and brief details about subsequent complications experienced by the plaintiff. This “census” spreadsheet results in a list of all potential claims a MDL defendant is facing, including claims filed in various state courts, those not yet transferred into the MDL, and claims that are not yet filed in any jurisdiction.⁹ This allows the court and the defendants to assess the number and types of cases that may be and have been filed.

An additional new trend in MDL litigation is use of online fact sheets. A plaintiff’s fact sheet¹⁰ usually is a fill-in-the-blank type form that takes the place of the generic first round of interrogatories and document requests that the defendant would serve on a plaintiff. It elicits from each plaintiff their general personal information such as education, employment, insurance, and medical information as well as very detailed information about the plaintiff’s alleged injuries and the harm he or she suffered from the product at issue. Use of the online system

allows a person to fill out the fact sheet online making it easier for clients and/or attorneys to input their information.

The online fact sheet system has the advantage of tracking deadlines. This allows the parties to easily ascertain when the fact sheets are due and it allows plaintiff’s counsel to keep track of when the fact sheets are completed. The online system also helps ascertain what cases are subject to the MDL, the nature and extent of the injuries, and the use or duration of use or prescribers. If there are medical records that are requested to be produced with the fact sheet, they may be uploaded and stored in the online system. If there are medical authorizations or medical records authorizations forms, the claimant can also sign them online or sign a hard copy that is stored in the system. The online system allows for easy access which enables counsel and the court to pick sample cases or bellwether trials. Bellwether trials are the first trials in mass tort litigations.¹¹ Finally, all the data concerning the claim and plaintiffs is present in the online system making it easier to evaluate the merits of a claim and the merits of a potential settlement.

In the *Xarelto (In Re: Xarelto (Rivoroxaban) Products Liability Litigation*, MDL 2592,¹² the plaintiff’s steering committee¹³ and plaintiff’s liaison counsel for the first time have agreed to use an online fact sheet system.¹⁴

Conclusion

MDL is a procedure utilized in the federal court system to transfer multiple pending civil cases with similar factual or legal issues to one federal judge in order to efficiently process the cases. Although MDLs have many advantages, unfortunately, the Panel who decides whether to establish a MDL is beginning to reject more and more MDLs despite their advantages. MDLs increasingly will utilize online fact sheets to stream line the discovery and analysis process of MDL claims.

1 28 U.S.C. § 1407(a)

2 See http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-April-15-2015.pdf

3 There are two in Alabama, one in Arkansas, thirty-eight in California, one in Colorado, three in Connecticut, five in D.C., three in Delaware, ten in Florida, seven in Georgia, one in Idaho, twenty in Illinois, three in Indiana, four in Kansas, five in Kentucky, three in Louisiana, one in Massachusetts, seven in Maryland, one in Maine, four in Michigan, ten in Minnesota, eight in Missouri, two in North Carolina, two in New Hampshire, eighteen in New Jersey, two in Nevada, forty four in New York, ten in Ohio, two in Oklahoma, twenty one in Pennsylvania, two in Rhode Island, four in South Carolina, four in Tennessee, ten in Texas, two in Washington, one in Wisconsin, and eight in West Virginia.

4 See 23 U.S.C. § 1404- Change of Venue- (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented. (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

5 See David F. Herr, *Multidistrict Litigation Manual* (2013), Ch.5.

6 See *In re: Cook Medical, Inc., IVC filter MKTG, Sales Practice and Prods. Liab. Litig.*, MDL No. 2570, ___ F. Supp. 3d ___, 2014 WL 5318059 (J.P.M.L. Oct. 15, 2014).

7 *Lore v. Lone Pine Corp.*, No L-3306-85, 1986 WL 37507 (N.J. Super Ct. Law. Div. Nov. 18, 1986).

8 For example, see a sample tolling agreement for Coloplast, MDL No. 2387 (*In Re Coloplast Corp. Pelvic Support Systems Products Liability Litigation*, available at: http://www.wvsc.uscourts.gov/MDL/2387/pdfs/Coloplast_Sample_Tolling_Agreement.pdf).

9 One such MDL that this was done was in the *In re C.R. Bard, Inc. Pelvic Repair System Products Liability Litigation* MDL 2187, pretrial order #97. See http://www.wvsc.uscourts.gov/MDL/2187/pdfs/PTO_97.pdf

10 For example, see a plaintiff's profile form that was used in the *In Re: Stryker Rejuvenate and ABG II Hip implant Product Liability Litigation*, MDL No. 13-2441, available at <http://www.mnd.uscourts.gov/MDL-Stryker/Orders/2014/2014-0722-3rdAmendPretrialOrderNo%208-ExhibitB-Ord13md2441.pdf>.

11 The purpose of bellwether trial is to "produce a sufficient number of representative verdicts" to "enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of value the cases may have if resolution is attempted on a group basis." See *Manual for Complex Litigation* § 22.315 (2004); See also *Hydroxycut Mktg. & Sales Practices Litig.*, No. 09-MD-2087 BTM (KSC), 2012 U.S. Dist. Lexis 118980 at *56 (S.D. Cal. Aug. 21, 2012).

12 In the *Xarelto MDL (In Re: Xarelto (Rivoroxaban) Products Liability Litigation*, MDL 2592), transcript for the monthly status conference on January 29, 2015, available at <http://www.laed.uscourts.gov/Xarelto/Transcripts/Transcript.StatusConf.2015.01.29.pdf>.

13 The Judge appoints a Plaintiff's Steering Committee which is comprised of attorneys to take charge of the litigation such as briefing, discovery and trial strategy.

14 See *In re: Xarelto Product Liability Litigation*, MDL 2592, pretrial order 17, available at <http://www.laed.uscourts.gov/Xarelto/Orders/PTO17.pdf>.

CFPB's Arbitration Study Supports Class Actions

By Graham Newman

The Consumer Financial Protection Bureau (CFPB) released a monumental report in March that firmly establishes that class actions are benefiting the American consumer.¹ The full report is a 728-page analysis of mandatory arbitration in the financial industry and its effects on both lenders and borrowers. The CFPB was mandated, within the Dodd-Frank Wall Street Reform and Consumer Protection Act, to conduct a thorough study of arbitration and the other traditional means of resolving disputes between lenders and borrowers. The

agency reviewed extensive data from lending disputes filed during the years 2010, 2011, and 2012.

The results are in. Arbitration overwhelmingly favors lenders while class actions prove to be an effective—and remarkably efficient—way for borrowers to enforce their rights. Here are some of the key conclusions:

Amount of Litigation

- From 2010 through 2012, an average of 616 individual AAA cases were filed per year for six product markets combined: credit card; checking account/debit cards; payday loans; prepaid cards; private student loans; and auto loans.

Author Spotlight

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- From 2010 to 2012, for the same six product markets covered in the arbitration analysis, an average of 187 putative class cases were filed per year — that is, cases that were filed in federal court or in selected state courts by at least one individual who sought to sue on behalf of a class.

Relative Success Rates of Borrowers

- Of the 341 cases filed in 2010 and 2011 that were resolved by an arbitrator and where the CFPB was able to ascertain the outcome, consumers obtained relief regarding their affirmative claims in 32 disputes. Consumers obtained debt forbearance in 46 cases (in five of which the consumers also obtained affirmative relief). This is a startlingly low total success rate: 22.9%. The total amount of affirmative relief awarded was \$172,433 and total debt forbearance was \$189,107. The average financial relief obtained by each litigating consumer was \$4,635.
- Of the class actions filed between 2010 and 2012, 25% resulted in individual settlements and 17% resulted in class settlements for a total success rate of 42%.

Speed of Litigation

- Arbitration was relatively fast. Where there was a decision on the merits by an arbitrator or where the record indicates that the case was settled, the decision generally was issued or the settlement reached within five months after the case was initiated.
- When they were not transferred to or filed in MDL proceedings, federal class cases filed in 2010 and 2011 closed in a median of 218 days and 211 days, respectively, from the date of the filing. Class cases transferred to or filed in MDL proceedings in 2010 and 2011 were markedly slower, at a median of 758 days and 538 days, respectively. State class cases filed in 2010 and 2011 were also somewhat slower, at a median of 407 days and 255 days, respectively.

Amount of Compensation Received by Borrowers

- Of the 341 arbitration cases filed in 2010 and 2011 that were resolved by an arbitrator and where the CFPB was able to ascertain the outcome, the total amount of affirmative relief awarded was \$172,433 and total debt forbearance was \$189,107. The average financial relief obtained by each litigating consumer was \$4,635.
- The CFPB could identify class size or a class size estimate in around 78% of class actions filed from 2008 to 2012. Based on these cases only, estimated class membership across all five years was 350 million. Excluding one class action involving 190 million estimated class members, the total class size for the cases where we were able to find data was 160 million. The settlement value of these classes included more than \$2 billion in cash relief including fees and expenses and more than \$600 million in in-kind relief, for total compensation of \$2.6 billion. These figures represent a floor because a number of settlements also required companies to change business practices. The average financial relief obtained by each litigating consumer was \$7.43.

Attorneys Fees

- The CFPB was not able to track attorneys fees of individual litigants in arbitration because such fees are not approved by the arbitrating panel. Approximately 60% of litigants in arbitration were represented by counsel, however.
- All class actions analyzed reported attorneys' fee awards. Across all settlements that reported both fees and gross cash and in-kind relief, fee rates were 21% of cash relief and 16% of cash and in-kind relief. The CFPB was able to compare fees to cash payments in 251 cases (or 60% of the data set). In these cases, of the total amount paid out in cash by defendants (both to class members and in attorneys' fees), 24% was paid in fees.

The results of this study reveal—quite clearly—why the financial industry would like to use mandatory arbitration

agreements to eliminate consumer class actions. Class actions have proven to be vastly more successful for consumers than arbitration in terms of relative rates of success and total dollar financial relief obtained. Class actions have also provided a vehicle of relief to consumers with much smaller financial “stakes”—claims which would not economically justify individual litigation before an arbitration panel.

Furthermore, the economies of scale produced by the class action mechanism allow the attorneys’ fees approved by the courts to be about half of that in a traditional individual case (20% to 40%). Now, the CFPB did conclude that arbitration is a faster means of resolving a dispute. For consumers, however, this almost always means its a faster way to a losing decision.

The CFPB’s report also debunks many of the myths attributed to class action litigation. For example, class action opponents often allege that “coupon settlements” proliferate throughout the industry as attorneys collect fees on agreements in which class members receive little to no benefit. However, of the 419 class settlements examined by the CFPB, 410—or 98% of the settlements approved—provided some sort of cash relief. Notions of “settlement collusion” between plaintiff’s attorneys and defendants were also unsupported, with the average case age at final settlement approval stretching to 690 days. Nearly half (46%) of settled class actions survived a motion to dismiss and/or a motion for summary judgment.

So what will the practical effect be of the CFPB’s report? Well, in the words of Paul Bland—executive director of the Public Justice Foundation—“this report changes everything.” The hard data compiled by the CFPB’s exhaustive study pulls the stuffing out of many, if not all, of the arguments used by class action opponents to gut Rule 23 in both federal and state laws. Of course, facts are a mere inconvenience to the industries seeking to push such laws, as shown by several pieces of legislation introduced in Congress this session.

But those of us battling mega-corporations on the front lines of Rule 23 are now armed with the truth necessary to prove to our policy makers that class actions not only are not the boogeymen they’ve been portrayed, but rather they are a vital part of the American judicial system.

¹ The full report can be found at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

CALG EVENTS IN MONTREAL

We are looking forward to seeing you at AAJ's annual convention in Montreal: The following CALG Events are scheduled for the annual convention:

Saturday July 11:

3:30-5:00 p.m. CALG Business Meeting Room 514, Level 5
5:00-6:00 p.m. CALG Reception, Intercontinental Montreal, Vieux-Montreal, 2nd Floor

Sunday Jul 12:

8:30-10:00 a.m. Rule 23 Subcommittee Meeting Room 512 D/H, Level 5
2:00-5:20 p.m. CALG/Consumer Privacy CLE Room 513 C/D, Level 5

THE CLASS ACTION
LITIGATION GROUP'S

NEWSLETTER

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