Class Action 101: From Basics to High-Level Choice of Law Issues

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Rule 23's implicit requirements

1. Live controversy
2. Class membership
3. Definable class (ascertainability)

Rule 23(a)'s requirements

1. Numerosity
2. Commonality
3. Typicality
4. Adequacy of class representative and counsel

Rule 23(b)'s requirements

Type 1: (1)(A) Separate actions would create risk of inconsistent adjudications for class members that would establish incompatible standards of conduct for defendant

ERISA

Rule 23(b)'s requirements

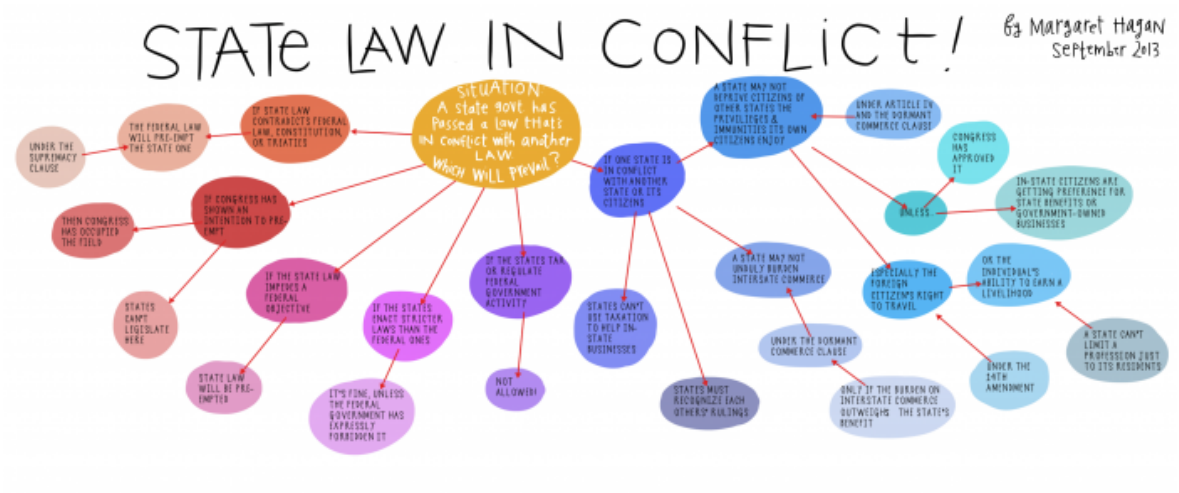
Type 1: (1)(B) Adjudications of class members' claims would dispose of other class members' interests or would impede other class members' ability to protect their interests

Rule 23(b)'s requirements

Type 2: (b)(2) declaratory or injunctive relief

Rule 23(b)'s requirements

Type 3: Common factual or legal questions *predominate* over class members' individual questions

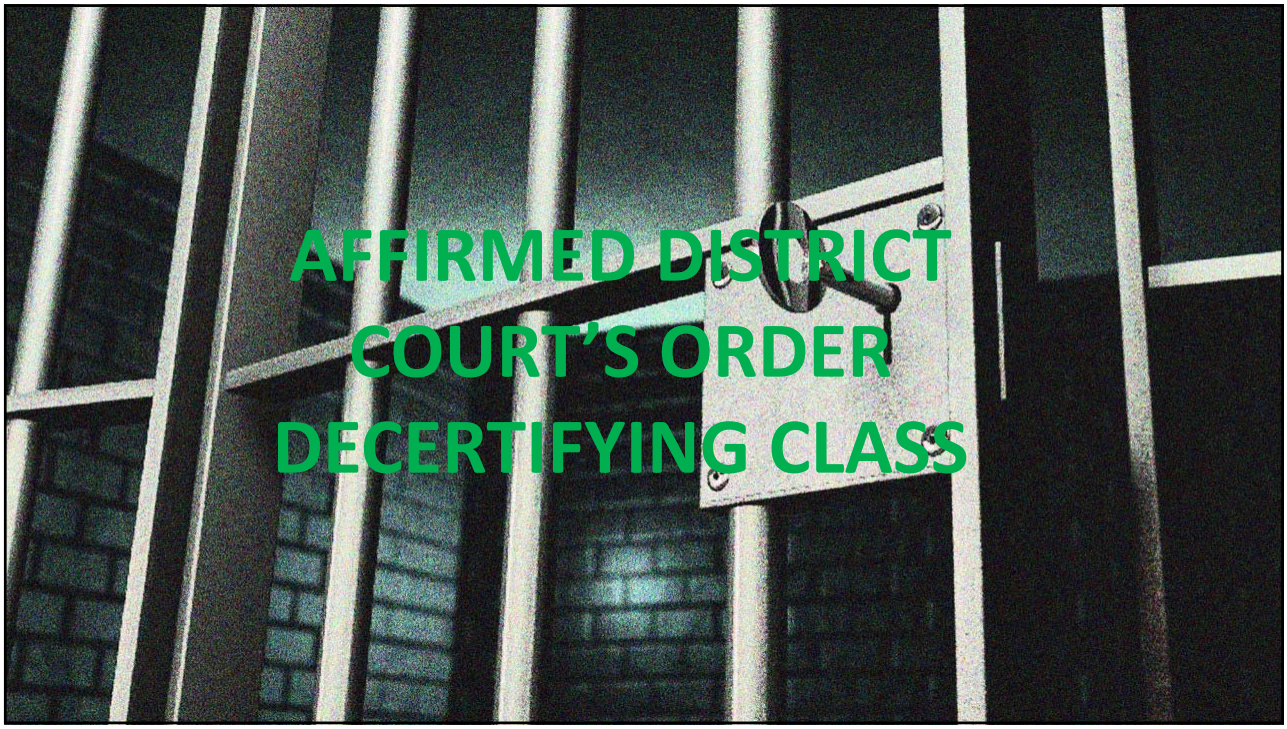


Rule 23(b)'s requirements

Type 3: Class action is the *superior* method for adjudicating plaintiff's claim


AUDIENCE
PARTICIPATION

***Thomas v. County of Los Angeles*, Nos. 14-56183, 15-55418, 2017 U.S. App. LEXIS 13004 (9th Cir. July 19, 2017)**



AFFIRMED DISTRICT COURT'S ORDER DECERTIFYING CLASS

Schwartz v. Avis Rent a Car Sys. LLC,
No. 11-4052, 2014 U.S. Dist. LEXIS 121322
(D.N.J. Aug. 28, 2014)

"When Congress gives you lemons . . ."

Plaintiffs' attorneys are forced by the Class Action Fairness Act to devise innovative new ways to prosecute interstate class actions

Daniel R. Karon

The Class Action Fairness Act, which creates federal jurisdiction over multi-state class actions, caused many plaintiffs' attorneys to predict multi-state, class-action lawsuits' demise. But this isn't true. Rather, if properly pleaded, creative plaintiffs' attorneys can resolve class actions in federal court on the same multi-state basis as in the past.

The Class Action Fairness Act of 2005[1] transformed class-action practice and procedure as we know it. CAFA's major changes involve: (1) expanding federal-diversity jurisdiction to include virtually all interstate class actions; (2) allowing defendants to remove state-court, class-action lawsuits, restricting federal courts' ability to remand them, and providing expedited appellate review; (3) adding noteworthy steps to the procedure for settling class actions; and (4) providing a structure for evaluating coupon settlements and attorneys' fees in coupon settlements.

Since CAFA's enactment, some plaintiffs' attorneys have conceded the ability to pursue multi-state, class-action lawsuits alleging violation of one or multiple states' substantive laws. Perhaps this is because scant commentary exists describing and examining the new ways that creative plaintiffs' attorneys can actually plead their previously state-court, class-action lawsuits to appreciate CAFA's effects.[2] After explaining CAFA's requirements, this article will describe some innovative, new methods for pleading successful multi-state, class-action cases after CAFA.

CAFA's subject-matter-jurisdictional effect

CAFA changed federal subject-matter-jurisdictional doctrine with regard to class-action claims based on diversity jurisdiction. Before CAFA amended the federal diversity-jurisdiction statute (28 U.S.C., §1332), to create federal jurisdiction for claims involving minimal diversity[3] and amounts in controversy that, individually, total less than $ 75,000,[4] federal courts were not allowed to aggregate class members' claims to establish the jurisdictional minimum.[5] Rather, for federal subject-matter jurisdiction to exist, "each plaintiff in a Rule 23(b)(3) class action [had to] satisfy the jurisdictional amount, and any plaintiff who [did] not [had to] be dismissed from the case. . . ."[6]

But believing that, due to the non-aggregation rule, "class-actions [were long being] manipulated for personal gain,"[7] and that "lawyers who represent plaintiffs from multiple states [were] shopping around for the state court where they expected to win the most money,"[8] on February 10, 2005, Congress passed CAFA, and on February 18, 2005, President Bush signed it into law. CAFA amended the federal-diversity statute and abrogated the non-aggregation rule, thus creating original federal-court, subject-matter jurisdiction for class-action claims exceeding $5 million in potential aggregate damages. As a result, plaintiffs can no longer realistically sue multi-state, class-action lawsuits alleging application of a single state's substantive law in state court – assuming their claims involve any worthwhile damages (i.e., over $5 million) – but must rather file their class-action lawsuits in federal court.

A new world view

Although some plaintiffs' attorneys continue to test federal judges, due to class actions' new forum the notion of multi-state class actions alleging violation of a single state's substantive law has all but vanished after CAFA. While plaintiffs occasionally succeeded in certifying and settling multi-state cases in state courts pre-CAFA, plaintiffs' class-action attorneys generally agree that federal courts are reluctant to certify multi-state class-actions applying a single state's substantive law, even though the U.S. Supreme Court's *Phillips Petroleum Co. v. Shutts*[9] decision suggests this approach's propriety under

certain circumstances.[10] Since plaintiffs can now no longer necessarily expect courts to certify multi-state classes alleging violation of a single state's substantive law, some plaintiffs' attorneys have begun to devise new and innovative ways to achieve a hopefully similar result while accepting CAFA's restrictions and realities.

Pursuing 50-state class actions

• *Suing one or only a few cases for victims in all 50 or multiple states*

As suggested, plaintiffs' counsel can still file 50-state, class-action lawsuits even after CAFA. Although, before CAFA, plaintiffs' lawyers often sued multi-state claims on behalf of an individual class representative, this practice invoked inevitable standing, subject-matter jurisdiction, and – if plaintiff even reached class certification – class-membership issues. Plaintiffs' counsel sued in this manner (and sometimes still do) because they sought to capture the most expansive class possible while spending the least effort necessary.

But a properly alleged multi-state, class-action lawsuit usually requires multiple class representatives – ethically retained and with genuine damages. And while plaintiffs' counsel can certainly sue these multiple clients' lawsuits in these clients' home-state federal courts, counsel might instead prefer to sue these clients' claims together in a single federal forum under a single state's (forum's or otherwise) substantive law.

After all, since counsel must now file these lawsuits in federal rather than state court, these cases are subject to multi-district consolidation,[11] meaning the Multi-District Litigation (MDL) Panel will most likely consolidate and transfer them to a single district court anyway. So, to avoid multiple filing fees and hiring multiple local counsel, plaintiffs' counsel may prefer to file in a single federal court having proper venue. When doing so, plaintiffs' counsel should strongly consider the defendant's (or main defendant's, where multiple defendants exist) home state (assuming its law is good there), since doing so permits plaintiffs' counsel to encourage classwide application of that state law's substantive under *Shutts*,[12] even if class representatives may not exist from all states for whose citizens counsel has filed suit.

• *Suing in 50 states under 50 states' respective substantive laws*

Suing 50 individual class-action lawsuits or alleging state-law claims on behalf of 50 states' class members in a single, colossal class-action lawsuit involves immense labor and organization. As such, plaintiffs' counsel should consider whether this exercise is worth it, meaning they should balance the benefit of complete, multi-state coverage versus the risk of leaving some states unsued. Although suing on claims for victims nationwide (whether via 50 initially separate lawsuits or one master complaint) deters uninvited plaintiffs' attorneys from joining in plaintiffs' counsel's cause, suing in this ambitious manner may present significant manageability issues to the transferee (or original, as the case may be) judge, which the judge may consider insurmountable even well before considering superiority at class certification.[13] Therefore, plaintiffs' counsel needs to balance the risk of additional, unwanted plaintiffs' counsel against the risk of upsetting and alienating their trial judge right from the start when deciding whether to sue multiple cases that end up consolidated or one super-case alleging multiple states' claims.

The effectiveness of suing "exemplar-state," class-action lawsuits

Suing on behalf of class members in a limited number of states – "exemplar states" – is an innovative alternative to suing multiple cases or one mega-case and can potentially solve the likely management issues involved with over-ambitious pleading at potentially minimal, if any, eventual cost.[14] Exemplar states simply means a handful of states, whether sued separately or together, for whose alleged victims plaintiffs' counsel, by way of appropriate class representatives, file a single class-action complaint.

If plaintiffs' counsel pursue the exemplar route, they must include class representatives from enough states (however their judgment determines that is) to effectively litigate their case, while, of course, focusing on states with good substantive state law and significant populations. Doing so allows plaintiffs' counsel's exemplar case to remain small enough to avoid manageability issues yet big enough to hopefully coax a global settlement should the opportunity arise.

But since other plaintiffs' attorneys can immediately access all federal class-action case filings through the electronic databases PACER, Courtlink, and Casestream, suing only exemplar states leaves plaintiffs' counsel vulnerable to other attorneys suing overlapping or competing class actions. This means other counsel may sue for consumers in states not yet in suit or may even sue on top of pending cases. Plaintiffs' counsel suing exemplar-state, class-action lawsuits must therefore organize and consolidate their leadership structure and positions early (perhaps by requesting a pre-trial order, or orders depending on the status of consolidation, appointing them interim lead or co-lead counsel), thus helping defeat any likely future leadership attacks. Because if plaintiffs' counsel does not take the time and care to organize their claim's politics, they had better be prepared to argue and win inevitable lead-counsel motions by demonstrating their extensive (if true) pre-filing investigation, their class-action lawsuit's proprietary nature, and their entitlement to a lead or co-lead counsel position.

Embracing or avoiding CAFA's federal subject-matter jurisdiction

Of course, suing in the above-described manner will most certainly subject a plaintiff's lawsuit to CAFA's newly created federal subject-matter jurisdiction, which exists so long as plaintiffs' alleged claims exceed $5 million

and minimal diversity exists, which occurs when at least one plaintiff resides in a different state from at least one defendant. But even where minimal diversity exists, state-court jurisdiction may remain if plaintiff alleges less than $5 million in damages or pleads one of CAFA's "local case" exceptions.

• *Alleging damages less than $5 million in damages*

Although long ago the U.S. Supreme Court ruled that district courts could not aggregate class members' damages to satisfy minimum jurisdictional requirements,[15] CAFA now requires aggregation to determine whether a plaintiff's amount in controversy satisfies CAFA's new jurisdictional minimum by exceeding $5 million. So, if class plaintiffs want to remain in state court, they may want to consider alleging under $5 million in damages.

With respect to injunctive relief, before CAFA, district courts measured injunctive relief's value by determining whether the injunctive relief sought exceeded the federal-diversity statute's $75,000 threshold. And while relief to individual class members would not typically exceed $75,000, the injunctive relief's total cost to defendants typically did. But CAFA's mandatory aggregation provision now appears to require that courts measure injunctive and other nonmonetary relief according to the total classwide benefit sought or the total cost to defendant. As a result, plaintiffs who desire to remain in state court might want to consider avoiding requests for injunctive relief while at the same time pleading damages less than $5 million.[16]

• *CAFA's "home-state" and "local-controversy" exceptions*

According to CAFA's home-state exception,[17] if two-thirds or more of the proposed class members and the primary defendants are citizens of the state where plaintiff filed suit, federal subject-matter jurisdiction under CAFA does not exist. And under CAFA's local-controversy exception,[18] if two-thirds of the plaintiffs and at least one defendant against whom significant relief is sought are citizens of the state where plaintiff filed suit; the principal injuries occurred in that state, and no other class actions against any of the defendants on behalf of the same class have been filed in the past three years, federal subject-matter jurisdiction under CAFA does not exist either.

• *Facing or forgetting the remand fight*

If less than one-third of all class members are citizens of the original forum state, CAFA requires federal subject-matter jurisdiction and remand cannot occur. But district courts have discretion to decline subject-matter jurisdiction if between one-third and two-thirds of the class members and the primary defendants are citizens of the state where plaintiff filed suit. And when exercising their discretion to decline jurisdiction, CAFA requires district courts to consider the following additional factors:

- Whether the claims involve matters of national or interstate interest;
- Whether the claims will be governed by the laws of the State in which the action was originally filed or by the laws of other States;
- Whether the class action has been pled in a manner that seeks to avoid federal jurisdiction;
- Whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
- Whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
- Whether, during the three-year period preceding the filing of that class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.[19]

Finally, district courts must remand class actions if they satisfy CAFA's home-state or local-controversy exceptions.

As shown, CAFA's remand considerations involve the number of plaintiffs and where they reside, but from a plaintiff's perspective, counting class members and identifying their geographical locations can be virtually impossible at a lawsuit's inception. After all, defendants – not plaintiffs – are in a better position to know class members' identities and addresses. Further exacerbating this problem is the reality that many class members will likely have moved or purchased the product involved in the lawsuit through third parties, like distributors or retailers. These problems all create the very real risk of remand-related mini-trials over class size and class members' geographic locations, which mini-trials will likely require information that defendants will be uncomfortable disclosing. And even more uncomfortable is the possibility that if plaintiffs allege under $5 million in damages and forego a request for injunctive relief, defendants will be forced to argue that class members' damages actually exceed $5 million, which no defendant would relish doing.

Furthermore, while CAFA refers to "primary" defendants and defendants from whom "significant" relief is sought or who caused plaintiff's alleged "principal injuries," CAFA does not define either of these terms. Nevertheless, plaintiffs' counsel can try to influence remand by naming (or not naming) certain defendants; describing them as primary defendants or as defendants from whom they seek significant relief; or by describing injuries so as to make the injuries principal injuries.

Given the above-described likelihood of uncertainty and confusion, where minimal diversity exists trying to massage CAFA's contours into a formula that requires remand, is an all-but-impossible undertaking, whether concentrating on a class-action lawsuit's amount

in controversy; class members' number and/or locations; which defendant is primary or significant; or which defendant caused plaintiff's alleged principal injuries. Given this difficulty, plaintiff's counsel should not try too hard to retain state-court, subject-matter jurisdiction for fear that attempting to do so may result in a remand-related sideshow, which plaintiff may lose after spending substantial time and money. Instead and most fundamentally, even given CAFA's enactment if plaintiffs' attorneys continue to sue responsible and worthwhile cases and believe in their cases with the ardor, zeal and fervor required by all states' ethical rules, it should make no real difference where plaintiffs' counsel try their cases, and justice should prevail whether sought in state or federal court.

Crafting broad settlements under CAFA

Come hopeful settlement time, drafting a suitably broad settlement agreement in a 50-state, class-action lawsuit (where class representatives from all 50 states are involved) is rather straightforward, as the settlement agreement will necessarily affect claims in all 50 states. But crafting a satisfactory settlement agreement in an exemplar-state, class-action lawsuit requires additional thought.

During litigation, defendants understandably strive for the narrowest class possible, but during settlement defendants endorse the broadest class possible. Since a typical exemplar-state, class-action complaint only alleges claims on behalf of people under comparable substantive laws in a handful of states, at settlement time the parties must figure out how to provide defendants expansive relief (without which defendants likely will not agree to settle) while recognizing and respecting due process and perhaps comity concerns. Because if the parties' settlement involves only the exemplar states, this leaves multiple states available for later lawsuits by other attorneys, which situation will surely discourage defendants from settling under any approach. And with the exemplar-state case possibly (but likely not) tolling any unsued state claims' statutes of limitations, even if an exemplar-state case lingered for years, huge exposure to defendants may still exist by way of other plaintiffs' lawyers bringing claims for citizens residing in any unsued states.

So, to be safe at settlement time, plaintiffs' counsel should consider amending their complaint to allege claims on behalf of class members in all 50 states. If plaintiffs sued their complaint in the defendant's (or the main defendant's, when multiple defendants exist) home state, amending their complaint in this manner does not necessarily create the standing, subject-matter jurisdiction, and class-membership issues described earlier since *Shutts* permits the forum state substantive law's extraterritorial application if doing so does not violate due process, such as when plaintiffs sue in the defendant's home state.[20] On the other hand, if plaintiffs sued (or the MDL Panel consolidated and transferred) their complaint in some other state, *Shutts* similarly allows the extraterritorial application of the pleaded states' substantive laws so long as no conflicts exist among these laws and the newly added states' substantive laws.[21] Finally, certain state's substantive laws, independent of *Shutts*, allow their extraterritorial application, which means that a federal court may approve multi-state settlements pursuant to these certain substantive laws without even the need to conduct a *Shutts* analysis.[22]

So even after CAFA, multi-state resolutions are possible, indeed desirable. If the parties take care while crafting their multi-state, class-action settlement agreements (keeping the aforementioned due process, jurisdictional and standing concerns that CAFA created in mind), the parties can likely resolve their litigation with the relief and peace of mind that everyone desires.

Conclusion

CAFA unquestionably made pleading, litigating, and settling multi-state, class-action cases more difficult, but it hardly made this procedure impossible. Although substantial class-action cases are now in federal court to stay, their new venue need not unduly agitate plaintiffs' counsel. If plaintiffs' attorneys pursue sensible and worthwhile multi-state, class-action lawsuits with the foregoing pleading themes in mind, plaintiffs' attorneys should be able to successfully resolve these claims even after CAFA.

Endnotes:

[1] 28 U.S.C., §1332(d).

[2] Since this article examines federal class-action lawsuits, it will not discuss methods for avoiding CAFA's federal-subject-matter-jurisdictional requirements, such as pleading multiple city, county, or even smaller classes, each alleging under $5 million in potential damages.

[3] 28 U.S.C., §1332(d)(2)(A).

[4] *Id.* at §1332(d)(2)(C).

[5] *See Snyder v. Harris* (1969) 394 U.S. 332, 336 (The Court explained that "when two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount."). *See also Zahn v. Int'l Paper Co.* (1973) 414 U.S. 291, 299 (The Court explained that "class actions involving plaintiffs with separate and distinct claims were subject to the usual rule that a federal district court can assume jurisdiction over only those plaintiffs presenting claims exceeding the $10,000 minimum specified in 1332 [, and that a]ggregation of claims was impermissible.").

[6] *Zahn*, 414 U.S. at 301.

[7] Press release, The White House, President Signs Class-Action Fairness Act of 2005, http://www.whitehouse.gov/news/releases/2005/02/20050218-11.html (last visited June 18, 2006).

[8] *Ibid.*

[9] 472 U.S. 797 (1985).

[10] *See id.* at 821 (Allowing extraterritorial application of single state's substantive law so long as "the choice of [one state's] laws is not arbitrary or unfair."). *See also In re St. Jude Med., Inc.* Silzone Heart Valves Prods. Liab. Litig., MDL No. 01-1396, 2006 U.S. Dist. LEXIS 74797 (D. Minn. Oct. 13, 2006), *11-12 ("Given defendant's significant contacts with Minnesota, no one would doubt that an individual class member could sue defendant in Minnesota and apply Minnesota law. Similarly, the Court concludes that it is constitutionally permissible to apply Minnesota law in the class action context.").

[11] *See* 28 U.S.C., §1407(a) (2006) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.").

[12] Of course, if the MDL Panel transfers the consolidated case to a "neutral" forum, plaintiffs may still argue that defendant's (or the main defendant's, if any) home state's law applies classwide under *Shutts*.
[13] *See* Fed. Rules Crim. Proc. 23(b)(3)(D) (When deciding whether a class action is the superior to other ways to resolve a controversy, the court may consider "the difficulties likely to be encountered in the management of a class action.").
[14] *See. e.g., In re New Motor Vehicles Canadian Export Antitrust Litig.* (D. Maine 2006) 235 F.R.D. 127, 148 (certifying exemplar-state classes of indirect automobile buyers and lessees); *D.R. Ward v. Rohm & Haas Co.* (E.D. Pa. 2006) 470 F. Supp. 2d 485, 494 (denying defendants' motion to dismiss plaintiffs' exemplar-state complaint in consumer price-fixing case).
[15] *Zahn v. Int'l Paper Co.* (1973) 414 U.S. 291.
[16] Although avoiding a request for injunctive relief for the sole purpose of remaining in state court, when injunctive relief should be sought as an integral part of the class's damages, may subject class counsel to an adequacy-of-representation challenge at the lawsuit's class-certification stage.
[17] 28 U.S.C., §1332(d)(4)(B).
[18] *Id.* at §1332(d)(4)(A).
[19] *Id.* at §1332(d)(3)(A)-(F).
[20] *See supra* note 9.
[21] *See Shutts*, 472 U.S. at 816 (A court may apply a single state's substantive law extraterritorially so long as the law sought to be applied "is not in conflict with that of any other jurisdiction connected to the suit.").
[22] *See, e.g., Freeman Indus., LLC v. Eastman Chem. Co.* (Tenn. 2005) 172 S.W.3d 512, 523 (Non-Tennessee residents may invoke Tennessee's antitrust statute so long as the defendants' "alleged anticompetitive conduct affects Tennessee trade or commerce to a substantial degree.").

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Karon

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Expert Analysis

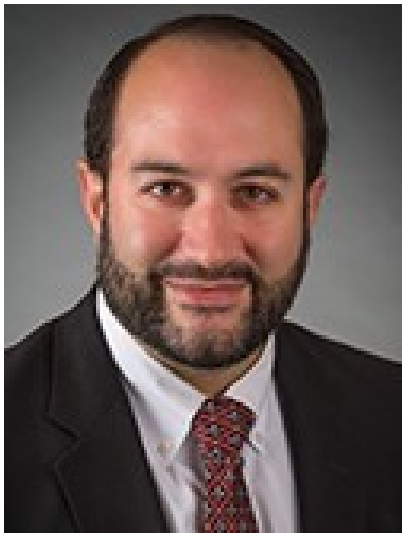
How Plaintiffs and Defense Counsel Misperceive Each Other

By **Daniel Karon and Philip Calabrese** September 25, 2017, 11:05 AM EDT

Daniel Karon

What part of our job makes us most miserable? What part makes us want to quit? Here's a hint. It has to do with lawyers.

Tell your friends that lawyers are required to take continuing education classes not only on the law but also on alcoholism and substance abuse. Most other jobs — cashiers, secretaries, computer-repair techs, furniture salespeople, gas station attendants — don't require classes like ours. Add that our divorce rate is sky high and that, according to CNN, of all jobs, lawyers rank fourth in suicide.



Philip Calabrese

Sure, law has its stressors. What job doesn't? But what is it that uniquely qualifies our profession for heightened misery? Misery to the point that lawyers who've left the practice jokingly (yet seriously) brand themselves "recovering"?

Our nonscientific thesis posits that our unhappiness comes from being terrible to each other. We believe this terribleness derives from a mutual demonization, objectification and vilification that, these days, seems baked into the art of advocacy.

Civility, as state bar associations call it, is a topic we frequently discuss within ranks but never with our opposition. These discussions, therefore, tend to stoke their own fire since when a group of lawyers agrees with itself (especially when centering on castigating its opponent) nothing understanding or conciliatory tends to emerge.

Why do opposing lawyers have such a dreadful time getting along? We think it stems from a shared misconnection, sowing a reciprocal misunderstanding, that leads to communal meanness.

It's not a fundamental or anthropological misconception, of course, because we're all just people. People who have families and mortgages. Who work hard to send our kids to school and to save for retirement. Who want to achieve these things by creating our vision and performing our version of the right thing.

We perceive our professional misconnection as centering on the previous paragraph's last point — our vision and version of the right thing. To unpack our thesis — that lawyers don't understand, appreciate or consider their opponents' vision or version of the right thing — we looked inward. We did this because we believe much of our misconnection derives from misperceiving (or outright ignoring) each other's goals, purposes and motivations.

To validate our theory, we chose not to consider what we thought of ourselves. We conduct that exercise all the time. These opinions tend to be gratuitously high.

We also chose not to consider what we thought of each other. That approach, we felt, was fraught with peril. It held too much judgment and was a good way to ruin our friendship.

So we crafted a more imaginative approach. We — a plaintiffs class action lawyer and a defense class action lawyer — examined ourselves. We asked what we believed our opposition thought about us and how our opposition judged us. Afterward, we presented this self-portrait to each other for assessment. We wanted to see how accurate we were about what we believed our opposition thought.

From this exercise, we hoped an understanding might emerge about what plaintiffs and defense lawyers think of each other. From this understanding, we hoped to draw comparisons and to recognize contrasts. We hoped to reveal an understanding that would

demonstrate how similar we are and why, based on these similarities, there exists no basis for the professional consternation that infects our profession.

How Dan Believes the Defense Bar Perceives the Plaintiffs Bar

The defense bar thinks plaintiffs lawyers fall into two principal camps: serious lawyers and shakedown lawyers.

Serious lawyers file cases like VW diesel emissions, Enron and Exxon Valdez. They are technically competent, ceaselessly committed and creative.

Shakedown lawyers file cases like Subway footlong, Starbucks iced coffee and the Ford truck coupon case. They walk the aisles at CVS looking for lawsuits concerning products whose labels, in their expert pharmacological opinion, don't hold up. They file a dozen alleged food-mislabeling cases, hoping one will stick since one settlement will pay their yearly nut.

Serious lawyers politick cases in ways that would dazzle Congress and make John Grisham wince, blithely horse-trading inventories and bargaining leadership. After all, there's a reason the bestselling novels and Hollywood blockbusters are about us.

Despite our never-ending list complaints about how the deck is stacked against us, defense lawyers think our work is rather easy, never mind the array of defenses available to dash even our best cases.

And, of course, we're all rich, only flying commercial when our private jets are down for repair. (I was at a hearing recently where defense counsel asked whether I'd flown my jet. I told her I hadn't; that I'd flown Southwest. Middle seat. Boarding group C.)

Finally, despite serious lawyers' serious acumen, the defense bar is convinced that we're largely, if not exclusively, profit-driven. Never mind that the cause is existentially valid; that's not why we filed the case. Any true purpose is pure pretext. It's the money that drives us. Period.

What the Real Plaintiffs Bar Looks Like

That's what I believe the defense bar largely (though, I'm certain, not entirely) thinks of my practice. Phil has read my remarks and has largely confirmed them.

Now, here's the truth. I'm not a shakedown lawyer, so I can't speak to how they perceive themselves or think anyone else does. I can only agree with defense counsel's perception of them.

As for serious lawyers, only a smattering of us fits the defense bar's stereotype. Serious lawyers are not viciously entrepreneurial, we do not place politics over our plaintiffs and we are not purely profit-driven. We are not uniformly rich, we don't all fly private and we are not fodder for the next Grisham novel.

Instead, we put everything on the line for what we believe in. We risk our families' comfort and security, often, these days, for the same wages as we could make doing hourly work, that is, if we won. We teach, we lecture and we write because we think our message of fairness, accountability and responsibility is important and worth sending — now more than ever.

We read Law360 every morning, dreading the possibility that the House has proposed another bill that will put us (and you) out of business. So we lobby Congress and testify on the Hill, doing our part (typically as one witness of four) to save the ever-dwindling bucket rights that remain for consumers, which consumers, of course, include defense lawyers and the real people who work at corporations.

We've made a life choice not to stand idle while the next defective product kills someone or the next Ponzi scheme guts a retired couple's savings. That's why we resent when someone paints us with the same ugly, entrepreneurial, profit-driven brush as they do shakedown lawyers. Indeed, we work to discourage shakedown lawyers from filing cases that would advance congressional efforts to eviscerate consumers' rights and our shared practice.

We do all this on our own time and our own dime because we care about protecting access to justice, keeping the marketplace fair and ensuring that everyone — including defendants — retains the rights that our Constitution guarantees.

We're comfortable with the notion that risk deserves reward and that getting paid for doing good work is not an illicit concept. We know that without risk-taking plaintiffs lawyers — lawyers who put everything on the line for what they believe in — not only would corporate cheaters would run amuck, ravaging consumers and victimizing well-behaving corporations, but also there would be no defense lawyers. After all, our practice is essential to yours. Yours is not essential to ours.

At bottom, we believe it's the shakedown lawyers who spur defense counsel's misperception of our practice. Shakedown lawyers are so brash, shameless and visible that it's easy for the defense bar, the Chamber of Commerce and social media to graft their ugliness onto the better, more important and more virtuous aspects and people of the plaintiffs bar. If ever a few bad apples ...

The plaintiffs bar is necessary. Consider how things would look without us. We'd be left with an uncomfortable choice between governmental regulation and an unenforced wasteland where companies steal and products kill. Just like corporations are people, the plaintiffs bar is people. People who work hard and risk everything to do something that they believe is right and that matters.

How Phil Believes the Plaintiffs Bar Perceives the Defense Bar

The plaintiffs bar thinks defense lawyers have it easy. We have clients who pay us monthly, allowing us to have lucrative practices and extravagant (or at least comfortable) lifestyles with little risk.

We command vast resources that includes legions of associates, paralegals and secretaries, around-the-clock docket clerks and word-processing departments, and Lexis, Westlaw and the latest software, industry resources and online tools — all enshrined in lavish offices bedecked in weekly floral arrangements and rotating artwork.

According to the plaintiffs bar, our clients leverage these resources to mount a vigorous, but largely frivolous, defense to generally meritorious claims. We fight for every scrap of ground — removal, standing, dismissal, Twombly, ascertainability (is that even in Rule 23?), interlocutory appeals and more.

We have never seen an unobjectionable discovery request, we rarely produce all relevant discovery, we feign mistake when we intentionally fail to produce relevant documents, we move to disqualify every expert under Daubert and we file an endless series of motions, whether on discovery issues, Rule 23 or summary judgment. Our game is one of delay and driving up costs, hoping to break plaintiffs counsel's will and spirit and to outlast their resources.

On the merits, we know the Federal Rules of Civil Procedure better than we know our own children, and we deploy these rules to distract from the real and substantial harm that our clients have done.

When it comes to taking a deposition or arguing a motion, maybe a few of us have decent (but not great) stand-up skills. Even fewer of us have any meaningful trial experience. But our focus on procedure and discovery distracts from these weaknesses and the largely indefensible merits of every plaintiff's case.

Supporting and enabling all of this are our well-heeled clients, whose wealth is only exceeded by their depth of personnel and resources available to educate us about the lawsuit's factual and legal background that we'll never disclose to the extent it damages our client's case.

At bottom, our clients seek to make a buck by selling shoddy products, marketing deceptively or engaging in other behavior so egregious that its illegality is patently obvious to anyone who is not a defense lawyer.

What the Real Defense Bar Looks Like

I have shared these perceptions with Dan, and he tells me I'm right. He tells me large swaths of his bar (not him, of course) perceive my practice largely along these lines.

Like most generalizations, this portrait has some kernels of truth but largely misses the mark. The businesses we represent employ many people. These businesses and their people make significant positive contributions to society. They make the products we love and use every day. They build our cars, they produce our food and they make our country the wealthiest the world has ever seen.

They do all this at great cost, with great risk and in the face of myriad challenges and obstacles. In many cases, class actions challenge (usually with the benefit of hindsight) a product or practice at the core of a company's success. This makes the case personal for the real people whose product or practice is targeted.

Do some companies engage in shady or illegal practices? Of course. But these companies — these people — are the exception. The problem is too many cases have too little merit and do little more than impose cost with little benefit to customers or society. In these circumstances, litigation feels more like legalized extortion than the administration of justice.

As for our litigiousness, the burdens of discovery are generally asymmetrical. Most plaintiffs have few, if any, worthwhile documents. Plaintiffs counsel often lack any idea how difficult and costly harvesting documents or identifying custodians can be, particularly in large, sprawling organizations with high turnover and frequent acquisitions, and where plaintiffs allegations often span decades.

In many cases, plaintiffs counsel has had months or years to investigate their claims before filing suit, so it should not surprise them that defense counsel and its clients need time too. Moreover, the motions that plaintiffs lawyers complain about protect rights and interests important not only to defendants but also to plaintiffs. Though plaintiffs counsel might prefer that defendants confess judgment and pay a fee, there is nothing wrong with insisting that plaintiffs carry their burden of proof.

Plaintiffs counsel also has little visibility into the broad and diverse range of company stakeholders, even on small matters. So when a case should settle, stakeholders need to reach that conclusion. That takes time and effort.

Every time plaintiffs lawyers talk about the risk they face when filing suit, we and our clients hear two things. First, plaintiffs counsel doesn't appreciate the risks and costs to defendants. To the contrary, we often perceive plaintiffs counsel as part of a calculated strategy to force settlement of a defensible claim.

Second, plaintiffs counsel has little appreciation for how much the economics facing law firms have changed in the past ten years. Even meritless claims can net plaintiffs counsel more fees than defense counsel, to say nothing of the increased risk of fee disputes and malpractice claims that accompany unfavorable results.

The defense bar is not a band of soulless mercenaries who defend the indefensible for the right price. It's a group of thoughtful lawyers doing their jobs, protecting people and businesses who deserve it and encouraging accountability where necessary and appropriate.

Owning and Deconstructing Our Stereotypes

So we thought we had each other figured out? Apparently not. Because of this, is it any surprise that we treat each other so poorly? Given our misperceptions, what could we expect?

But now we know our professional stereotypes aren't true. We've seen how essential it is to deconstruct these stereotypes — stereotypes that discourage good behavior and encourage the ugliness that makes us unhappy.

Given the professional and personal overlap we've exposed, we hope everyone can begin to appreciate that plaintiffs and defense lawyers are just people who have committed their professional lives to helping people solve their problems.

And these problems are shared in that their solution requires the involvement of plaintiffs and defense attorneys. It's just that we approach these shared problems from different entry points and from different perspectives. But this doesn't make one approach right and the other wrong. It just makes them different.

Lawyers are lawyers. There's no need for misery, particularly when considering what lies at the nub of our professional charge — helping people. Every day should invigorate us because every day carries the prospect of doing something great for another person.

Sure, our process is an adversarial one. We don't mean to suggest it isn't. But adversarial needn't mean personal. If we keep in mind that we're the same person, just on the other side of the v., we believe our profession can go a long way toward recapturing the civility and consideration that once defined the art of advocacy and the practice of law.

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Why 'Class Action Attorney Fees' Are Such Dirty Words

By **Daniel Karon** July 13, 2017, 9:18 AM EDT


Daniel Karon

“Look at this. It’s one of those class action settlement notices.”

“I can never understand those things. What’s it say?”

“I don’t know. But whatever it says, I’m sure those plaintiffs lawyers are making out.”

How many times have we heard this discussion? Hell, how many times have we had this discussion? For eons, the notion that plaintiffs class action lawyers deserve payment — sometimes handsome — for their services has drawn ridicule and scorn.

But why? Why do so many people insist that payment to plaintiffs class action lawyers deserves unrivaled scrutiny — scrutiny reserved for no other profession, even when these lawyers have achieved good results?

Does the answer lie in the gauche television spots that advertise for mass tort clients? No, those are just irksome. Is the answer found in the manufactured law firm studies that purport to show that plaintiffs class action lawyers make gobs of money at their clients’ expense? No, those are just lies.

Then what’s driving the public’s disdain? Disdain that has spilled into our courts and routinely affects attorneys’ fee requests at final approval. What has gotten people so riled up that the first thing they look for in class action settlement notices is the attorneys’ fee provision, never mind that these notices provide their readers a benefit that they didn’t have moments earlier?

When you boil it down, the issue really isn't plaintiffs class action lawyers getting paid. Everybody deserves to get paid for their work. Defense lawyers deserve to get paid for their work. Judges deserve to get paid for their work. Other professionals, like doctors, engineers and accountants, deserve to get paid for their work.

Turning to corporate America, certainly no one would question that Bill Gates, Jeff Bezos and Mark Zuckerberg deserve to get paid for the work that they do. Because when you do a job and when you add value, you deserve to get paid. Just not plaintiffs class action lawyers.

Presently, I have a class action lawsuit pending against a health club chain for stealing wages from its group fitness instructors by refusing to pay them for all the time that they worked. I also have a class action case against a health insurer for slipping secret charges into its administrative contracts with cities, counties and school districts, leaving these groups with less money to pay for vital community programs and services.

What I do not have is a class action case against Subway for failing to provide customers twelve inches of sandwich, despite the store's advertisement that it would. Nor do I have a case against Starbucks because its ten-ounce iced coffee drinks are slightly less than ten ounces, since, after all, Starbucks needs to leave room for the ice that makes its drinks iced in the first place.

My cases are sensible. They involve real clients. And they strive to solve my real clients' real problems. Easily, Subway and Starbucks don't fit that bill. Those were "lawyers' cases." They were intended to do but one thing — make plaintiffs counsel money. No sensible person can fairly say that if I win my cases — if I spend thousands of hours, risk hundreds of thousands of my own dollars and forego other fee-paying opportunities — I don't deserve to make a respectable fee.

So back to my question: What's driving the public's disdain for plaintiffs class action lawyers getting paid? Actually, I answered this question when I remarked that "when you add value, you deserve to get paid." Because it's not about moving papers and exchanging capital. It's about making a difference. It's about adding value.

I suspect that no one questioned class counsel's impressive payday in the breast implant litigation. There, attorneys recovered $3.4 billion for women who suffered autoimmune disease from defective silicone breast implants. I also doubt anyone honestly believed that plaintiffs counsel didn't earn their fee in the Enron securities case. That case settled for $7.2 billion and compensated shareholders whose stock became worthless when the company collapsed.

But when 1 million owners of defective Ford trucks received the opportunity to claim coupons worth $300 or $500 toward the purchase of a new vehicle while plaintiffs lawyers took home $25 million in fees, that was a problem. (Sounds an awful lot like Subway and Starbucks, doesn't it?)

No one can deny the age-old maxim that risk deserves reward. Without risk-taking plaintiffs lawyers — lawyers who put everything on the line for what they believe in — there would be no defense lawyers and corporate cheaters would run amuck, ravaging consumers and victimizing well-behaving corporations.

But no one should expect plaintiffs lawyers to risk their families' comfort and security for the same wages as these lawyers could make performing hourly work. Anyone who thinks different is either delusional or professionally jealous, though that jealousy tends to dissipate at the specter of no direct deposit every two weeks or at losing class certification after having spent four years and half a million dollars of your own money pursuing something you believed in.

Considering all this, it's little wonder that in Amchem Products v. Windsor, the U.S. Supreme Court, when centering on small recoveries, expressed that "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights," and that "[a] class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

It's not the class action system that's defective. That system is thoughtful, sensible and well intentioned. It's the system's all too frequent manipulation by reckless plaintiffs lawyers and their defense colleagues' complicity in supporting senseless settlements that's the problem.

And when considering defense counsel's insistence that their clients have instructed them to settle lawyers' cases, the easiest response is for them simply to resist plaintiffs counsel's demands for outlandish fees and to let the judge decide. After all, it's unethical to negotiate attorneys' fees until the parties have settled anyway.

Stupid class action lawsuits filed by feckless lawyers are a disgrace. They are a tax on society. They torture Rule 23's purpose, which is to help people on a mass basis, not hurt them. But as destructive as bad class actions are, good class actions are that essential.

So the next time you wince at a class action settlement notice's description of attorneys' fees, ask yourself whether you're troubled by the lawyers' right to get paid or by the remedy that these lawyers obtained as their basis for doing so. I think you'll be surprised at how your perception has changed.

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