

INTRODUCTION

Be Careful What You Ask For: Unintended Consequences and Unfinished Business Under the Class Action Fairness Act

BY D. JARRETT ARP

THE CLASS ACTION FAIRNESS ACT of 2005,¹ which significantly expands federal court diversity jurisdiction to cover what is likely to be the vast majority of state-law based class action lawsuits, was signed by President George W. Bush on February 18, 2005, with a declaration that the Act marked “a critical step toward ending the lawsuit culture in our country.”² Critics of the legislation have suggested the Act may be a fateful step toward ending meaningful access to the courts for scores of deserving plaintiffs. Yet, both proponents and objectors seem to agree on one thing: The Act will effect significant changes in how most class actions based on state law claims will be litigated and resolved going forward.

The question, of course, is precisely what those changes will be and whether, once CAFA is interpreted and applied by counsel and courts, it will actually advance the Act’s stated purposes. For antitrust counsel, these questions can be narrowed to examining how CAFA will affect antitrust class action lawsuits and related settlements—especially those arising from state laws providing for claims by indirect purchasers. This issue of *ANTITRUST* focuses on the potential practical impact of the Act, including how the Act may influence removal strategies and timing of removal motions, multidistrict coordination of state and federal claims, class certification standards, the timing and incentives relevant to settlements, and other tactical and strategic litigation considerations relevant to both plaintiffs and defendants.

That is not to say the path ahead is clear. As Niels Bohr famously cautioned, “Prediction is very difficult, especially about the future.”³ This is especially true with respect to a statute that, while clear and certain as to some of its provisions, nevertheless contains any number of as yet undefined terms.⁴ In addition, the Act may alter in material respects the economic incentives of some participants in litigation and, for

that and other reasons reviewed in this issue, may well have consequences that Congress did not intend. Understanding what Congress intended in passing CAFA is itself an interesting exercise because the Act’s “legislative history” was circulated and adopted after, not before, passage of the Act.⁵

The articles that follow illuminate these and other issues arising from CAFA’s passage. Collecting and editing these articles has been a collaborative effort of Professor William Page of the University of Florida’s Levin College of Law and his colleagues on the ABA Section of Antitrust Law Civil Practice and Procedure Committee.⁶

The articles in this issue of *ANTITRUST* represent a variety of perspectives on the likely impacts of CAFA. First, Bruce Spiva and Jonathan Tycko consider indirect purchaser litigation after CAFA from the plaintiff’s perspective, both critiquing the stated rationale for the legislation and suggesting that the Act, while favorable to defendants in many respects, may lead to an increase in the overall number of multistate indirect purchaser class actions filed—a result presumably at odds with the objectives of CAFA’s sponsors. Spiva and Tycko also consider from a plaintiff’s perspective how the increased likelihood of multidistrict coordination under 28 U.S.C. § 1407 and the application of Federal Rule of Civil Procedure 23 to class certification will impact indirect purchaser actions in the future.

Ian Simmons and Charles Borden provide a defendant’s perspective on many of the same issues. They also review how access to federal court affords defendants what Simmons and Borden believe are different and better tools for defending their clients, including the Federal Rules of Evidence, *Daubert* principles, and potentially greater opportunities for early appellate review.

Of course, most antitrust class action lawsuits filed in federal courts never go to trial, in many cases due to negotiated settlements. CAFA alters the landscape in some important ways with respect to settlement, limiting plaintiff’s counsel fees in connection with coupon settlements and requiring the parties to notify appropriate state and federal agencies before settlements are approved by the court. With these and other

D. Jarrett Arp, Associate Editor of Antitrust, is a partner at Gibson, Dunn & Crutcher LLP in Washington, D.C.

changes in mind, the third and fourth articles in this issue consider CAFA's impact on settlements and the settlement process. Charles Casper considers how CAFA will affect settlement negotiations from the standpoint of private counsel. He suggests that CAFA's unintended consequences may include greater frequency in plaintiff demands for cash, rather than coupon-based settlements, and delays in reaching settlement agreements. On the other hand, Casper notes, the streamlining of discovery, and other procedural efficiencies flowing from federal court MDL consolidation, may increase the ease with which comprehensive settlements are reached in the future.

A second article addressing settlements applies economic principles to the litigants' settlement calculus under CAFA. Roger Blair and Christine Piette illustrate how economic analysis suggests, among other things, that CAFA may lead to two ostensibly unintended effects. First, CAFA's restrictive attorneys' fee provisions may impede conclusion of some settlements that would have been reached pre-CAFA, thereby potentially prolonging, not shortening, the litigation in those instances. Second, lower costs and related efficiencies realized through federal MDL consolidation make litigation less expensive for plaintiffs, likely leading to an increase in these lawsuits and lower rates of settlement.

Unintended Consequences

Read together, these articles suggest that, while CAFA in many respects does coordinate and streamline what otherwise could be uncoordinated lawsuits in state courts applying different procedural and class certification standards, that is only part of the story. There may be some unanticipated consequences. Indeed, CAFA may operate to complicate and prolong litigation, as well as introduce new inefficiencies, with respect to certain lawsuits. There are a variety of examples developed in the articles that follow. For example, as Spiva and Tycko note, while CAFA allows defendants to remove indirect purchaser class actions to federal court on a much more permissive basis than before the Act was enacted, it sets no deadline for seeking removal.⁷ If, for example, a case proceeds forward in state court but, at some later date, evidence of a fact supporting removal under CAFA develops—\$5 million in aggregate damages claimed by the class, in light of expert testimony assessing injury for example—the case could be removed to federal court at the eleventh hour, despite all the time and resources expended to date to litigate the claim in state court.

Another example arises in the settlement context. Casper suggests that CAFA's attorneys' fee provisions relating to coupon settlements, which limit percentage-of-settlement attorneys' fee awards to the value of coupons actually redeemed, will increase the instances in which plaintiff's counsel will have to base their fee claims on an alternate approach provided for in CAFA—the so-called lodestar method. The lodestar method calculates class counsel's fees based in part on the amount of time counsel spent working on the case, not based on some percentage of the overall settlement. As Casper notes, if counsel's fees are based on the hours they spent lit-

igating the case, not the amount of the settlement they achieve for the class, then plaintiff's counsel have incentives to settle later in the process, when the basis for their fee award may be better supported by a record of litigating the case over a meaningful period of time.⁸ That may increase, rather than reduce, the length and cost of litigation.

Coordination Without Reconciliation

Needless to say, the precise contours of CAFA's impact on how indirect purchaser class actions are litigated and settled will become clearer in time. There appears to be no uncertainty, however, with respect to the fact that CAFA inevitably will push a substantial number of state indirect purchaser class action lawsuits into federal court, where they will be consolidated for pretrial purposes. Indeed, there is some early evidence that this is occurring now.⁹

This is a curious development because it means that federal courts, which otherwise must follow *Illinois Brick's*¹⁰ prohibition of indirect purchaser claims, are now more likely to find themselves making potentially dispositive judgments on indirect purchaser claims pulled before them under CAFA. A critical threshold issue in any indirect purchaser class action is, of course, whether the proposed class should be certified—a decision that will now reside with a federal district court judge applying Federal Rule of Civil Procedure 23. Evaluating class certification with respect to putative classes of indirect purchasers requires federal courts to assess whether the class plaintiff's claim is typical of other class members and whether there are questions of law and fact that are common to the class.

By definition, indirect purchaser actions involve products that were purchased by intermediate parties before the products were sold to the plaintiff. The products at issue may have found their way to consumers through varied, multi-tiered distribution channels. In some cases, the products are merely components of, or ingredients in, the downstream product purchased by members of the proposed class. Regardless of the precise trail of manufacture and distribution, the indirect nature of the purchases in these cases can give rise to difficult questions with respect to commonality of impact and damages—questions that must be examined in assessing whether a class should be certified.

Typically, this examination requires courts to evaluate whether the alleged overcharges paid by upstream *direct purchasers* were in fact passed on by various manufacturers, distributors, and retailers to members of the proposed *indirect purchaser* class in a predictable manner that can be demonstrated through common proof. In many cases, this examination under Rule 23 presents the very sort of difficulties and complexities that led in part to *Illinois Brick's* rejection of indirect purchaser liability under federal antitrust law.¹¹ In *Illinois Brick*, the Supreme Court cited the difficulty in apportioning damages among direct and indirect purchasers in declining to permit indirect purchaser claims in federal court. Now, in evaluating motions for class certification in indirect purchaser

cases under Rule 23, federal courts effectively face some of the same issues of apportionment as they evaluate whether establishing and tracing alleged pass-through of overcharges to indirect purchaser are susceptible to common proof.

It is a potentially awkward situation and one that provides a pointed reminder of what CAFA does and does not do. Clearly CAFA will contribute to forcing direct purchaser and indirect purchaser cases before the same court for pretrial coordination and resolution of class certification issues. What it does not do is take any direct steps forward toward reconciling the fundamentally inconsistent approaches to accounting for damages in direct purchaser cases under federal law versus indirect purchaser cases under the law of states that rejected or repealed the rule in *Illinois Brick*.

The question whether there should be a substantive reconciliation that would allow direct and indirect purchaser claims to be fully, intelligently litigated together in federal court under a single standard is worthy of serious examination. It is a question that the Antitrust Modernization Commission has rightly flagged for consideration.¹² The Commission received testimony on this issue during its June 27, 2005, hearing concerning indirect purchaser actions, and a number of proposals were advanced.¹³ Were the Commission to recommend, and Congress to enact, a uniform national standard applicable to direct and indirect purchaser actions, this could have an impact on the litigation and resolution of indirect purchaser claims going forward that could be as significant as—or more significant than—the changes CAFA appears to have wrought.

Cases Beyond CAFA's Reach

A uniform approach to direct purchaser and indirect purchaser claims would also presumably cover the small category of state law class action lawsuits that do not fall under CAFA, but nevertheless find their way into federal court. Although the category of class actions not impacted by CAFA may be small, there have been some developments that merit note. Arguably there has been a developing trend, evident before and after CAFA was enacted, toward federal courts hearing state law-based indirect purchaser claims pursuant to supplemental jurisdiction.¹⁴ The Third Circuit's September 21, 2005, decision

in *Howard Hess Dental Laboratories Incorporated v. Dentsply International, Inc.*¹⁵ illustrates this, but it is not the only notable development bearing on potential pathways to federal court for state indirect purchaser claims that fall outside the jurisdictional sweep of CAFA.

As Christian Vergonis and Edwin Fountain note in this issue, the Supreme Court clarified the bounds of supplemental jurisdiction in June in connection with *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611 (2005). There, the Court interpreted the supplemental jurisdiction statute, 28 U.S.C. § 1367, in a manner that increases access to federal courts for litigation of state law claims that are related to pending federal claims. Specifically, the Court expanded diversity jurisdiction by clarifying that the threshold amount-in-controversy requirement mandates merely that *one* named plaintiff have claims on the order of \$75,000 or more, rather than requiring that *each* member of the class meet this jurisdictional requirement. This development, like CAFA itself, underscores the undeniable trend toward federal courts evaluating both direct purchaser and indirect purchaser class action claims at the same time.

As the articles that follow illustrate, CAFA promises many changes to the way antitrust class actions are litigated, and certainly some of those changes may surprise CAFA's proponents. At the same time, it bears noting that, in the antitrust context, CAFA presents as just one piece of a larger puzzle, with active consideration under way concerning whether there should be a single approach for evaluating the claims of all plaintiffs who purchased products at prices that may have been affected by the same anticompetitive conduct. In most instances going forward, those plaintiffs—whether direct or indirect purchasers—will find themselves present together in the same multidistrict action before the same judge, asserting claims against the same defendants, and seeking to certify their respective classes under the same federal rule. That much is clear. Only time will tell whether direct purchasers and indirect purchasers, now inevitably thrust together, will continue to advance their causes of action based on differing, un-reconciled approaches for evaluating injury and apportioning damages. ■

¹ Class Action Fairness Act of 2005, Pub. L. No. 109-002 (codified at 28 U.S.C. §§ 1332, 1453, 1711–1715 et al.).

² Press Release, The White House, President Signs Class-Action Fairness Act of 2005 (Feb. 18, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050218-11.html>.

³ The quote is widely attributed to Bohr, the Nobel Prize-winning atomic physicist. See, e.g., Niels Bohr, Wikipedia: the Free Encyclopedia, http://en.wikipedia.org/wiki/Niels_Bohr.

⁴ See Bruce V. Spiva & Jonathan K. Tycko, *Indirect Purchaser Litigation on Behalf of Consumers After CAFA*, *infra* this issue, at 12.

⁵ See *id.* at 13.

⁶ Three of these articles build on earlier versions published in the Committee's newsletter last summer. See *Symposium: The Class Action Fairness Act of*

2005 and Related Issues of Federal Jurisdiction and Procedure, ANTITRUST PRACTITIONER (ABA Section of Antitrust Law), June 2005.

⁷ Spiva & Tycko, *infra* at 14.

⁸ See Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, *infra* this issue, at 26.

⁹ See *id.* at 32 (citing preliminary data suggesting that during the period February 18–August 30, 2005, “788 proposed class actions raising claims under state laws were commented in or removed to federal district courts, compared to 507 such cases during the same period in 2004”).

¹⁰ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

¹¹ See, e.g., *id.* at 746–47. In *Illinois Brick*, the Court concluded, among other things, that the difficulty in apportioning damages among direct and indirect purchasers made permitting indirect purchaser claims unacceptable.

Consequently, in calculating their damages under federal law direct purchasers are entitled to all overcharges due to the antitrust violation—regardless of whether they passed on all or a portion of the overcharge to indirect purchasers. Indirect purchasers, on the other hand, are free under many state laws to claim from the defendants any overcharge they can show was passed on. The fact that direct purchasers may have already recovered all of the overcharge in a federal action does not preclude the indirect purchasers from making their additional claim.

¹² Antitrust Modernization Commission, Request for Public Comment, 70 Fed. Reg. 28,902 (May 19, 2005), available at http://www.amc.gov/pdf/meetings/fr_notice28902.pdf. The Commission posted the following questions:

What actions, if any should Congress take to address the inconsistencies between state and federal rules on antitrust actions by indirect purchasers? For example, should Congress establish *Illinois Brick* as the uniform national rule by preempting *Illinois Brick* repealer statutes, or should it overrule *Illinois Brick*? If Congress were to overrule *Illinois Brick*, should it also overrule *Hanover Shoe*, so that recoveries by direct purchasers can be reduced to effect recoveries by indirect purchasers (or vice versa)? Assuming both direct and indirect purchaser suits continue to exist, what procedural mechanisms should Congress and the courts adopt to facilitate consolidation of antitrust actions by indirect and direct purchasers?

Id. at 28,903–04.

¹³ See, e.g., Statement of Michael L. Denger Before the Antitrust Modernization Commission (June 27, 2005), available at http://www.amc.gov/commission_hearings/pdf/Denger.pdf; Statement of Andrew I. Gavil Before the Antitrust Modernization Commission (June 27, 2005), available at http://www.amc.gov/commission_hearings/pdf/Gavil_Statement_corrected_6.27.05_version_with_app.pdf. Other statements, as well as the transcript of the June 27, 2005 hearing's second panel, "State Indirect Purchaser Actions: Proposals for Reform," are available at http://www.amc.gov/commission_hearings/indirect_purchaser.htm.

¹⁴ See, e.g., Order on Certain Defendants' Motion to Decline Supplemental Subject-Matter Jurisdiction and to Dismiss for Lack of Personal Jurisdiction over State Claims, *In re New Motor Vehicles Canadian Export Antitrust Litigation*, MDL Docket No. 1532 (D. Me. Sept. 7, 2004) (exercising pendent jurisdiction over state law-based indirect purchaser claims for purposes of pretrial proceedings), available at http://www.med.uscourts.gov/opinions/hornby/mdl/mdl1532_2004_09_07.order9.pdf.

¹⁵ 2005 WL 2291967 (3d Cir. Sept. 21, 2005), available at <http://www.ca3.uscourts.gov/opinarch/041979p.pdf>.



AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW

International Cartel Conference

FEBRUARY 9 – 10, 2006

THE SAVOY

LONDON, ENGLAND

► This program addresses the strategic decisions made by enforcers, clients, and counsel in international cartel investigations, primarily through demonstrations offered by lawyers and government officials who perform these roles for clients on a daily basis. Enforcement officials from various key antitrust jurisdictions will discuss how they coordinate multinational cartel investigations and prosecutions, including the exchange of information under their respective confidentiality laws and in the face of private litigation and discovery. Defense counsel will discuss how they formulate multijurisdictional defense strategies, simultaneously tackle civil and criminal actions, and organize joint defense efforts. Counsel and client representatives will discuss the factors that determine whether they seek amnesty from the enforcers and their strategies for settlement. Members of the plaintiffs' bar will discuss their tactics in bringing treble or other damages actions.

