

# Class Actions in Federal Court

## Navigating Federal Subject Matter Jurisdiction and the Road to Class Certification

by Kerri E. Chewing

**T**he Class Action Fairness Act of 2005 (CAFA)<sup>1</sup> and recent Supreme Court precedent may make removing a class action to federal court an easier task, but the road to class certification is still difficult to navigate. Litigating class actions in federal court has changed dramatically over the last several years, and practitioners need to be aware of the changes before filing or removing a class action in federal court.

### Subject Matter Jurisdiction for Class Actions

The question of how to litigate a class action in federal court begins with the question: how do you get there? Federal courts may exercise jurisdiction over class action cases through traditional methods of obtaining subject matter jurisdiction—federal question and diversity.<sup>2</sup> Thus, any case that satisfies the requirements of complete diversity among the parties and the amount in controversy may be filed in, or removed to, federal court. This includes class actions. In 2005, CAFA amended the diversity statute to provide a broader ability for federal courts to exercise jurisdiction over class action cases by modifying certain diversity jurisdiction requirements.<sup>3</sup> Specifically, if there are at least 100 class members, the district court may exercise jurisdiction if there is minimal diversity and if the aggregate sum or value of the claim exceeds \$5 million.<sup>4</sup>

CAFA also created new statutory provisions relaxing certain requirements for removal as they relate to class actions. The new CAFA provisions eliminated the one-year limitation on removal, the “forum defendant rule,” and the requirement that all defendants consent to removal.<sup>5</sup> To remove a class action, defendants must still comply with the general requirements for filing a notice of removal, which must contain a “short and plain statement of the grounds for

removal....”<sup>6</sup> Thus, a defendant’s notice of removal must include the basis for federal court subject matter jurisdiction.

In addition to expanding the opportunity for class action defendants to remove cases to federal court, CAFA also expressly provided for appellate review of remand orders.<sup>7</sup> This represents a departure from other statutory provisions prohibiting appellate review of remand orders generally.<sup>8</sup> Appellate review, however, is subject to the discretion of the circuit court.<sup>9</sup>

The Supreme Court recently exercised the appellate powers created by 28 U.S.C. §1453 to consider the question of whether a removing defendant in a class action is required to provide evidentiary proof of federal subject matter jurisdiction with the notice of removal in *Dart Cherokee Basin Operating Co., LLC v. Owens*.<sup>10</sup> The Court rejected 10th Circuit precedent, which was interpreted as requiring defendants to file such evidentiary proof at the time of removal.<sup>11</sup>

The plaintiff, Brandon Owens, filed a putative class action in Kansas state court against defendants Dart Cherokee Basin Operating Company, LLC and Cherokee Basin Pipeline, LLC (Dart) alleging underpayment of royalties owed to class members under oil and gas leases.<sup>12</sup> The defendants removed to federal court under CAFA and alleged that all necessary requirements were satisfied.<sup>13</sup> Dart asserted in its pleading that it calculated the purported underpayments as totaling more than \$8.2 million.<sup>14</sup> In moving to remand, the plaintiff argued that removal was deficient because the defendants failed to submit evidentiary proof that the amount in controversy exceeded the \$5 million minimum.<sup>15</sup>

The Supreme Court determined that a defendant removing a purported class action under CAFA should not be subjected to a higher pleading standard than a plaintiff invoking federal court jurisdiction.<sup>16</sup> Therefore, it is sufficient for a removing defendant in a CAFA case to submit a pleading with a “short and plain statement” indicating that the amount in contro-

versy may be plausibly satisfied.<sup>17</sup> The Court further held that if a plaintiff contests the removing defendant's calculation of the amount in controversy, the district court should obtain evidentiary submissions from both sides to determine whether the preponderance of the evidence supports the defendant's assertion.<sup>18</sup>

*Dart Cherokee* is also notable because it expressly rejected any presumption against removal of class action cases. The Court held "[i]t suffices to point out that no anti-removal presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court."<sup>19</sup>

The Supreme Court has expressly rejected any presumption against removal of class action cases and sent the clear message that federal courts should be receptive to class actions satisfying the CAFA requirements. Now that the stage is set, however, the question becomes, in light of precedent that has developed over the last several years, how do parties navigate the road to class certification?

## The Road to Class Certification in Federal Court

Procedurally, Federal Rule of Civil Procedure 23 governs class actions. Rule 23(a) requires that class actions satisfy the four prerequisites of numerosity, commonality, typicality, and adequacy.<sup>20</sup> Rule 23 further requires satisfaction of one of the three enumerated conditions in Rule 23(b). This article will focus on class certification requirement of predominance under Rule 23(b)(3).<sup>21</sup>

Satisfying Rule 23(b)(3) requires a finding that the questions of law or fact common to class members predominate over any questions affecting only individual members.<sup>22</sup> The rule further requires the proponent of class treatment show that a class action is superior to other available methods for fairly

adjudicating the controversy.<sup>23</sup>

Over the last several years, Supreme Court and Third Circuit decisions have made it clear that federal courts must review the class certification requirements through the lens of what will be required to prove the merits of the claims in the action. This trend began in the Third Circuit with the decision in *In re: Hydrogen Peroxide Antitrust Litigation*.<sup>24</sup>

The decision in *Hydrogen Peroxide* involved the question of predominance of the common questions in the case pursuant to Rule 23(b)(3). The court held that "[c]lass certification is proper only 'if the trial court is satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met."<sup>25</sup> The court further held that class certification would not be warranted based on just a "threshold showing" of the requisite elements of Rule 23.<sup>26</sup> Rather, courts are required to perform a "rigorous analysis" that "delve[s] beyond the pleadings to determine whether the requirements for class certification are satisfied."<sup>27</sup> The Third Circuit clarified that its decision in *Hydrogen Peroxide* was intended to apply to all class actions.<sup>28</sup>

The Third Circuit's decision in *Hydrogen Peroxide* is consistent with the conservative approach later taken by the Supreme Court in the highly publicized class certification decision in the employment discrimination context in *Wal-Mart v. Dukes*.<sup>29</sup> The *Wal-Mart* case addressed the question of commonality required by Rule 23(a)(2). *Wal-Mart* pronounced that commonality under Rule 23(a)(2) is not a readily established element in the class certification analysis.<sup>30</sup> The case further held that establishing commonality requires "the plaintiff to demonstrate that the class members 'have suffered the same injury.'"<sup>31</sup> The Supreme Court held that the requirement of commonality for class treatment is not the mere existence of a class-wide question, but instead the potential for a "class-wide resolution" because "[w]hat matters to class certifica-

tion...is not the raising of common 'questions'—even in droves—but the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation."<sup>32</sup>

The Supreme Court acknowledged that 'rigorous analysis' of the Rule 23 elements will invariably overlap with the merits of the case, but determined that such a result cannot be avoided.<sup>33</sup> The Court also emphasized that defendants in cases seeking predominantly monetary damages must be entitled to an individualized determination of damages regarding each class member.<sup>34</sup> In line with this determination, the Court further held that district courts may not circumvent these protections by allowing plaintiffs to prove damages in a "trial by formula"—utilizing sampling in lieu of individualized damage determinations.<sup>35</sup>

The Supreme Court again addressed the issue of the overlap between the determination of class certification and the merits of the asserted claims in *Comcast Corp. v. Behrend*. The plaintiffs alleged antitrust violations regarding certain marketing and billing practices by Comcast Cable.<sup>36</sup> The plaintiffs sought certification under Rule 23(b)(3) in order to recover individual damages.<sup>37</sup>

The Court applied the *Wal-Mart* principles addressing Rule 23(a)(2) to the question of whether the plaintiffs had satisfied the obligations imposed by Rule 23(b)(3).<sup>38</sup> In so doing, the Court remarked that Rule 23(b)(3) created situations where class action treatment is "not as clearly called for" as it is in cases seeking class certification under Rule 23(b)(1) or (b)(2).<sup>39</sup> This explains the court's duty to take a "close look" at whether common questions predominate over individual ones in evaluating the appropriateness of class treatment in (b)(3) class actions.<sup>40</sup>

The plaintiffs' claim required proving damages on a class-wide basis, which in turn required expert calculation and testimony.<sup>41</sup> The district court determined

that the plaintiffs' remaining antitrust theory was capable of such proof.<sup>42</sup> On appeal, a divided panel of the Third Circuit refused to evaluate whether the expert's proposed methodology was a just and reasonable inference or simply speculative, and affirmed the district court opinion granting class certification.<sup>43</sup>

The Supreme Court ultimately held that class certification was improper because the plaintiffs' proffered expert could not tie the plaintiffs' claimed damages to the remaining alleged antitrust injury.<sup>44</sup> The Court expressly rejected the Third Circuit's determination that proof of whether damages could be proven on a class-wide basis was not required at the class certification stage.<sup>45</sup>

These precedents translate to a heavy burden for plaintiffs seeking class certification. In the wake of *Hydrogen Peroxide*, *Wal-Mart*, and *Comcast*, plaintiffs must be prepared to demonstrate, at the time they file a class certification motion, that the claims are capable of class-wide proof. Note that class certification should be determined "at an early practicable time."<sup>46</sup>

Thus, plaintiffs must be prepared at the time of filing to develop a trial plan addressing issues such as how to approach discovery, what experts will be necessary, when to engage them and for what purpose, as well as the definition of the class, including potential sub-classes. This will require a thorough examination of the claims at issue and the elements of proof required for each claim.

This leads to tactical questions related to how plaintiffs should marshal evidence to satisfy the requirements for class certification. The approach to class actions typically dictated discovery separated into class and merits discovery, but plaintiffs can no longer adequately address the class certification requirements relying solely on basic information about the number of class members

and a generalized idea of how those class members are similar. Rather, plaintiffs must carefully weigh the benefits of proceeding as a class against the substantial work required to arrive at the class certification stage. For example, plaintiffs will usually need to engage an expert who can demonstrate that damages may be evaluated on a class basis, or that claims may be proven regarding the entire class, before a determination is made about whether a class can be maintained.

Although the current status of class certification law in the federal courts imposes significant burdens on plaintiffs seeking class treatment, it also creates burdens for defendants. Defendants can no longer rely on conducting strictly class certification discovery with the hope that class certification will be denied, which would narrow the scope of merits discovery. Rather, defendants now must engage in exhaustive discovery relative to the merits of claims on a class-wide basis, even before class certification has been granted, in order to satisfy plaintiffs' discovery demands. Defendants in a class action also need to be cognizant of the type of discovery they will need to argue against class certification. For example, defendants may want to seek discovery of absent class members to ascertain whether there are differences in claims, circumstances, damages calculations, or other factual information that could impact the class certification motion. Obtaining discovery from absent class members usually requires court approval.

### The Impact on Class Certification Motions

Ultimately, changes in statutory provisions regarding subject matter jurisdiction and removal have made obtaining and maintaining federal subject matter jurisdiction easier. The procedures for class certification, however, have become increasingly difficult and require an in-depth analysis of the

claims and potential defenses. Parties to purported class actions must begin considering these issues even before filing a case. Plaintiffs and defendants must be realistic about the appropriateness of class action treatment to avoid unnecessary discovery and motion practice in navigating their collective way to a class action determination. ☛

**Kerri E. Chewning** is of counsel with Archer & Greiner, P.C. in Haddonfield, where she practices in the area of complex commercial litigation in the federal and state courts of New Jersey and Pennsylvania and before the Third Circuit Court of Appeals. Her practice focuses primarily on the defense of class actions and civil rights claims, as well as intellectual property litigation. She currently serves as a member of the Lawyers Advisory Committee for the District of New Jersey, is the immediate past chair of the Federal Practice and Procedure Section of the NJSBA and was recently selected as treasurer for the Association of the Federal Bar of New Jersey.

### ENDNOTES

1. See 28 U.S.C. §§1332(d), 1453, 1711-1715. In addition to changes in technical requirements for jurisdiction that will be discussed in this article, CAFA also created a consumer bill of rights aimed at assuring fair and prompt recoveries for class members. See 28 U.S.C. §§1711-1715. These provisions will not be addressed in this article.
2. See 28 U.S.C. §§1331, 1332.
3. See 28 U.S.C. §1332(d).
4. See 28 U.S.C. §§1332(d)(2), (d)(5)(B). The amendments to the diversity statute also set out complex rules specifying when district courts may or must decline to exercise jurisdiction over class actions. See *id.* §§1332(d)(3), (d)(4). The specifics of these provisions will not be reviewed in this article, but practitioners should be aware of these limitations.
5. See 28 U.S.C. §1453(b). Under traditional removal provisions, a defendant removing an action to federal court based upon diversity jurisdiction, must do so within one year of the action being commenced. See 28 U.S.C. §1446(c)(1). In addition, all plaintiffs must be diverse from all defendants, see 28 U.S.C. §1332(a), and the amount in controversy must exceed \$75,000 inclusive of

- interest and costs. See 28 U.S.C. §1332(b). Finally, under the forum defendant rule, the removing defendant may not be a citizen of the state in which the original action was filed. See 28 U.S.C. §1441(b)(2).
6. See 28 U.S.C. §1446(a).
  7. See 28 U.S.C. §1453(c)(1).
  8. See 28 U.S.C. §1447(d).
  9. See 28 U.S.C. §1453(c)(1).
  10. 135 S. Ct. 547 (2014). After deciding the substantive question presented, the Supreme Court dispensed with the assertion in an *amicus* brief raising a challenge to the Supreme Court's jurisdiction to hear the appeal based upon the 10th Circuit's rejection of the defendant's appeal of a remand order. See *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 553, 555 (2014) ("[W]e find no jurisdictional barrier to our settlement of the question presented."). Notably, the parties never objected to the Court's jurisdiction. See *id.*
  11. See *Dart Cherokee*, 135 S. Ct. at 558.
  12. See *Dart Cherokee*, 135 S. Ct. at 551.
  13. See *Dart Cherokee*, 135 S. Ct. at 551-52.
  14. See *Dart Cherokee*, 135 S. Ct. at 552.
  15. See *Dart Cherokee*, 135 S. Ct. at 552.
  16. See *Dart Cherokee*, 135 S. Ct. at 553.
  17. See *Dart Cherokee*, 135 S. Ct. at 551.
  18. See *Dart Cherokee*, 135 S. Ct. at 553-54.
  19. See *Dart Cherokee*, 135 S. Ct. at 554.
  20. See Fed. R. Civ. P. 23(a).
  21. Rule 23(b)(1) provides for class treatment if prosecuting separate actions would create the risk of inconsistent or varying adjudications with respect to individual class members that would be dispositive of the interests of other members not parties to the individual adjudication. Rule 23(b)(2) provides for class treatment if the party opposing the class acted or refused to act on grounds that apply generally to the class making injunctive or declaratory relief appropriate as to the whole class.
  22. See Fed. R. Civ. P. 23(b)(3).
  23. See Fed. R. Civ. P. 23(b)(3).
  24. 552 F.3d 305 (3d Cir. 2008).
  25. *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 309 (3d Cir. 2008) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).
  26. *In re Hydrogen Peroxide*, 552 F.3d at 321.
  27. *In re Hydrogen Peroxide*, 552 F.3d at 319.
  28. *In re Hydrogen Peroxide*, 552 F.3d at 307 ("In this appeal, we clarify three key aspects of class certification procedure. First, the decision to certify a class calls for findings by the court, not merely a "threshold showing" by a party, that each requirement of Rule 23 is met. Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence. Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits-including disputes touching on elements of the cause of action. Third, the court's obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it.").
  29. 131 S. Ct. 2541 (2011).
  30. *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2551 (2011).
  31. See *Wal-Mart*, 131 S. Ct. at 2551.
  32. See *Wal-Mart*, 131 S. Ct. at 2551 (internal citations omitted).
  33. See *Wal-Mart*, 131 S. Ct. at 2551 ("Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.").
  34. See *Wal-Mart*, 131 S. Ct. at 2559.
  35. See *Wal-Mart*, 131 S. Ct. at 2561.
  36. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).
  37. *Comcast*, 133 S. Ct. at 1430.
  38. *Comcast*, 133 S. Ct. at 1430.
  39. *Comcast*, 133 S. Ct. at 1432.
  40. *Comcast*, 133 S. Ct. at 1432.
  41. *Comcast*, 133 S. Ct. at 1430.
  42. *Comcast*, 133 S. Ct. at 1430.
  43. *Comcast*, 133 S. Ct. at 1431.
  44. *Comcast*, 133 S. Ct. at 1433-34.
  45. *Comcast*, 133 S. Ct. at 1434.
  46. See Fed. R. Civ. P. 23(c)(A).