

The Class Action Fairness Act's Impact on State Consumer Protection Laws

An Overview of the Act's Effect on Forum-Shopping

**By Emilia L. Sweeney and
Rudy A. Englund**

CLAIMING that it will prevent trial lawyers from shopping around for courts where they expect to win the most money, keep out-of-state businesses from being dragged before unfriendly local juries, and provide new safeguards for the consumer, President Bush signed into law the "Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions," commonly referred to as the "Class Action Fairness Act" ("CAFA") on February 18, 2005.¹ But will CAFA address the issues that gave rise to its enactment? To answer that question, this article synthesizes the likely impact CAFA will have on various state liability statutes designed to protect the consumer. Additionally, the article surveys business's perceptions states' ability to provide a fair litigation environment, to determine whether CAFA will prevent forum-shopping in consumer class actions.

1) Impetus for Change: Growing Perception of Unfairness in Our States' Civil Justice Systems

The majority of respondents in a recent survey concluded that the state court liability system was doing an increasingly poor job of creating a fair and reasonable litigation environment. While different state statutes across the United States produce varying outcomes, popular sentiment and informed opinion view the different outcomes that a litigant may obtain as not purely a result of the substantive law. Instead, there is a growing perception that

IADC member Emilia L. Sweeney is a shareholder at Lane Powell PC in Seattle, Washington. She concentrates her practice on unfair trade practices and defends product liability and regulatory actions on behalf of manufacturers and product sellers. Ms. Sweeney serves as a trustee for the Washington Defense Trial Lawyers.

IADC member Rudy A. Englund is a shareholder and Co-Chair of General Litigation for Lane Powell PC. Mr. Englund's practice focuses on the defense of complex litigation and dispute resolution for corporate clients. He has served in several leadership positions with the ABA Section of Litigation, including the role of Council Member.

unfairness in our state courts influences the outcome.

The Institute for Legal Reform² ("ILR") has surveyed the business and legal community to determine individuals' attitudes toward each states' legal systems since 2002. The aim of the surveys is to quantify how in-house general counsel and other senior litigators view the state court systems by asking respondents to grade several different areas of the states' civil justice systems. The last study surveyed nearly 1,500 litigators, all of whom graded their states on the following criteria: treatment of tort and contract litigation, class action suits, punitive damages, timeliness of summary judgment dismissal, discovery, scientific and technical evidence, judges' impartiality and competence, and juries' predictability and fairness. The ILR then combined these grades to arrive at an overall ranking of state liability systems.

The 2005 ILR/Harris Poll State Liability Systems Ranking Study was released

¹ P.L. 109-2 (Feb. 18, 2005); 41 WEEKLY COMP. PRES. DOC. 7, p. 265 (Feb. 21, 2005).

² The Institute for Legal Reform is an affiliate of the U.S. Chamber of Commerce.

March 8, 2005. Of those surveyed, sixty percent ranked the state court liability system in America fair or poor, a slight increase over the previous year. The five states rated as doing the poorest job of providing a fair and reasonable litigation environment were Mississippi, West Virginia, Alabama, Louisiana, and Illinois. Respondents perceived these states as having the least number of impartial and competent state court judges. These five states, with the exception of Illinois, were deemed to do the most dissatisfactory job with respect to the treatment of tort and contract litigation. Alabama, California, Illinois, Louisiana, and West Virginia were ranked the lowest with respect to class action suits. Alabama, California, Illinois, Mississippi, and West Virginia were deemed the most unsatisfactory in punitive damages treatment.

The survey also revealed that certain cities and counties had the capacity to impact a state's overall ranking. The local jurisdiction identified as having the worst reputation was Los Angeles, followed by various jurisdictions in Texas. Tied for third were local jurisdictions in the New York greater metropolitan area, San Francisco, California, and Cook County, Illinois. Madison County, Illinois, followed close behind. CAFA was enacted against this backdrop.

2) Class Action Fairness Act of 2005

In enacting CAFA, Congress found that state courts were sometimes acting in ways that demonstrated bias against out-of-state defendants and that abuses of the class action practice in state courts undermined the free flow of interstate commerce.³ Congress also found that class members often received little or no benefit from class actions, while class counsel were awarded large fees. Seeking to assure prompt and fair recovery for class members, restore the

intent of the framers by providing federal court consideration of interstate cases of national importance, and benefit society by encouraging innovation and consumer prices, Congress enacted CAFA.

CAFA changes class action practice in two principal ways: First, it expands federal diversity jurisdiction over most class and some mass actions, and second, CAFA changes the procedure and substance for settling class actions in federal court. Specifically, CAFA amends 28 U.S.C. § 1332(d) to confer federal jurisdiction over any class action (with some limited exceptions) if (i) the claims of all plaintiffs, aggregated together, exceed \$5 million, and (ii) at least one plaintiff is diverse from at least one defendant.⁴ In conjunction with the expansion of federal diversity jurisdiction over class actions, CAFA also eliminates the prohibition against removing a state court class or mass action more than one year after the action was commenced. Additionally, CAFA allows a defendant who is a citizen of the state in which the action is brought to remove it to a federal court.⁵

CAFA also provides that where a settlement provides for recovery of coupons to a class member, any contingent fee award shall be based upon the value to the class member of the coupons redeemed.⁶ Attorney fees cannot be calculated until the time for redemption has expired, which necessarily delays awarding attorney fees.⁷ Among other things, CAFA also provides for judicial scrutiny of coupon settlements and notifications of class settlements to federal and state officials.

³ Class Action Fairness Act of 2005, § 2(a), 28 U.S.C. § 1453.

⁴ *Id.* at § 4(a); *The Class Action Fairness Act of 2005: A Preliminary Analysis*, 20 TOXICS L. REP. (BNA) 264 (Mar. 10, 2005).

⁵ Class Action Fairness Act, § 5, 28 U.S.C. § 1453.

⁶ Class Action Fairness Act, § 3, 28 U.S.C. § 1712(d).

⁷ *Preliminary Analysis, supra* note 4, at 264.

3) State Consumer Protection Laws

a) Background

All fifty states have enacted legislation designed to protect individual consumers from unfair business practices. With names ranging from Consumer Protection Acts, Consumer Fraud Acts, Deceptive Trade Practices Acts, "little FTCs," or some combination thereof, state statutes are primarily designed to complement the body of federal law governing unfair competition and unfair, deceptive, and fraudulent acts or practices, while simultaneously providing a private right of action to consumers.⁸ The rights afforded under these various acts to the individual states' citizens, however, vary from jurisdiction to jurisdiction, and, not surprisingly, result in widely divergent outcomes. This article only addresses those actions that may be brought by private citizens, as opposed to those brought by the state attorney general.

b) Class Actions Under State Consumer Laws

Whether CAFA will apply depends first upon whether the claims are brought as a class. Several state statutes, including those in Connecticut, Idaho, Indiana, Kansas, Massachusetts, Michigan, Missouri, New Mexico, Ohio, and Utah expressly allow class actions within particular consumer protection statutes. Some statutes are silent on the issue of class actions, thus allowing class actions by default where otherwise permissible. Still other states, namely Alabama, Georgia, Louisiana, Mississippi, and Montana, do not allow class actions, or do not allow consumers to bring class actions, under their states' respective acts.

⁸ Not all state statutes provide a private right of action. Some states, such as Iowa, only allow the attorney general's office to investigate and enforce the Act. See IOWA CODE ANN. § 714.16.

Interestingly, three of these states (Alabama, Louisiana, and Mississippi) were ranked in the bottom fifth of all states in their ability to provide a fair and reasonable litigation environment.

Illinois is one of several states that allows class certifications of nationwide classes under their respective statutes.⁹ In *Price v. Phillip Morris*,¹⁰ an Illinois class action made famous by its \$10.1 billion judgment, however, the class consisted entirely of Illinois citizens. Although the action was between citizens of different states, federal diversity jurisdiction was avoided by pleading damages less than the jurisdictional threshold for each individual plaintiff or class member. Under CAFA, which mandates that the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds \$5 million,¹¹ this result is prevented.

c) State Claim Requirements

Whether CAFA will continue to apply once a class action has been brought or removed depends upon whether the class survives certification, which depends in part on the individual elements of the claim. Although the specific elements required to state a claim in each state vary significantly, generally, a plaintiff must establish that a defendant committed an unfair or deceptive trade practice in order to establish a violation of the consumer protection statutes in all states. However, the elements required to establish an unfair or deceptive trade practice are evaluated differently throughout the states. For example, whether a deceptive act is misleading is evaluated from the standpoint of the least

⁹ *Avery v. State Farm Mutual Ins. Co.*, 321 Ill. App. 3d 269 (5th Dist. 2001).

¹⁰ *Price v. Philip Morris*, in the Circuit Court, Third Judicial Circuit, Madison County, Illinois, Cause No. 00-2-112.

¹¹ Class Action Fairness Act 28 U.S.C. § 1332 (d)(6).

sophisticated reader in Arizona,¹² whereas in Massachusetts, the test is based upon the perspective of a reasonable consumer.¹³

The elements required to state a claim differ in scope from state to state. For example, a Colorado plaintiff must prove the defendant committed (1) an unfair or deceptive act or practice, (2) in the course of business, (3) that impacts the public interest, (4) that injury resulted, and he or she must also prove (5) causation.¹⁴ In Florida, a plaintiff must prove (1) a representation, omission or practice (2) that is likely to mislead the consumer acting reasonably in the circumstances (3) to his or her detriment.¹⁵ A plaintiff in Oregon must demonstrate (1) an ascertainable loss (2) as a result of the defendant's willful use (3) of an unlawful trade practice.¹⁶

Some states, including Illinois, Kentucky, Louisiana, Michigan, Mississippi, Montana, Pennsylvania, and Virginia, provide a private cause of action only to the individual who purchases goods or services for personal, family, or household goods. Other states, such as Nebraska, New Hampshire, North Dakota, Texas, and Washington, also allow businesses to bring suit under their respective acts. Alabama, California, Massachusetts, Texas, and Wyoming require that the plaintiff give notice and/or attempt to resolve the issue with the alleged offender prior to filing suit.

Generally, state consumer protection statutes are distinguishable from common law fraud claims. For instance, few states require that a plaintiff demonstrate intent, although in Illinois, a plaintiff must prove that the defendant intended to induce

reliance on the deception.¹⁷ Some states, such as New York and North Dakota, do not require a plaintiff to establish reliance upon the unfair or deceptive trade practice.¹⁸ Indeed, consumers need not actually be misled by a deceptive act in either New Mexico or Kansas in order to secure recovery.¹⁹ In other states, such as Illinois and Pennsylvania, reliance is a component of the proximate cause analysis.²⁰ However, reliance must be proved in some circumstances in states such as Maryland,²¹ Texas,²² and Pennsylvania.²³ In those states, class actions are subject to the defense that a common factual basis among individuals of the class cannot be proved.²⁴

All states do not require the plaintiff to prove pecuniary loss in order to obtain recovery. New York requires "actual injury," although it does not require pecuniary harm.²⁵ While Washington state requires a plaintiff to show some injury in his or her business or property, injury is distinguished from monetary damages, and no monetary damages need be proven.²⁶ Other states, such as

¹² Madsen v. Western Am. Mortgage Co., 694 P.2d 1228, 1232 (Ariz. Ct. App. 1985).

¹³ Lowell Gas Co. v. Attorney General, 385 N.E.2d 240 (Mass.1979).

¹⁴ Hall v. Walter, 969 P.2d 224, 236 (Colo. 1998).

¹⁵ PNR, Inc. v. Beacon Prop. Mgmt., 842 So. 2d 773, 777 (Fla. 2003).

¹⁶ OR. REV. STAT. § 646.638. (2003).

¹⁷ See, e.g., Cuculich v. Thomson Consumer Elecs., Inc., 739 N.E.2d 934 (Ill. App. 1st Dist. 2000).

¹⁸ See, e.g., Stutman v. Chemical Bank, 731 N.E.2d 608 (N.Y. 2000); N.J. CENT. CODE § 51-15-02 (1999).

¹⁹ Smoot v. Physicians Life Ins. Co., 87 P.3d 545 (N.M. Ct. App. 2003); KAN. STAT. ANN. § 50-626(b)(LEXIS through 2004 legislation).

²⁰ Olivera v. Amoco Oil Co., 776 N.E.2d 151 (Ill. 2002); 73 PA. CONS. STAT. ANN. § 201-9.2 (West, LEXIS through 2004 legislation).

²¹ Phillip Morris v. Angeletti, 752 A.2d 200 (Md. Ct. App. 2000).

²² TEX. BUS. & COM. CODE § 17.50(a)(1).

²³ Weinberg v. Sun Co., 777 A.2d 442 (Pa. 2001).

²⁴ Angeletti, 752 A.2d at 200; Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 685-86 (Tex. 2002); Seth William Goren, *A Pothole on the Road to Recovery: Reliance and Private Class Actions Under Pennsylvania's Unfair Trade Practices and Consumer Protection Law*, 107 DICK. L. REV. 1, 12 (2002).

²⁵ Stutman v. Chemical Bank, 731 N.E.2d 608 (N.Y. 2000).

²⁶ Sorrel v. Eagle Healthcare, Inc., 38 P. 3d 1024 (Wash. Ct. App. 2002).

New Jersey, adhere to the “ascertainable loss” doctrine.²⁷ There, a private plaintiff “must produce some specific proof to demonstrate a discernable loss.”²⁸ Connecticut courts describe ascertainable loss as something other than what the plaintiff bargained for.²⁹ Oregon courts require that ascertainable loss be “capable of being discovered, observed, established.”³⁰ Still other states, such as Vermont, do not require that “actual injury be shown at all.”³¹

d) The Measures of Recovery

Although President Bush claimed that CAFA would prevent trial lawyers from shopping around for courts where they expect to win the most money, CAFA cannot level the playing field completely. Substantive law, rather than the procedural rule, ultimately provides the remedy. Not surprisingly, different states provide different remedies for the same, or similar, tortious activities.

i) Actual Damages

Nearly all states allow recovery for actual damages, but some states restrict recovery to actual damages. For example, a private plaintiff in Arizona or South Dakota may only recover actual damages suffered.³² On the other hand, a plaintiff in New York may recover the greater of actual damages or \$50.³³ In New

Mexico, a plaintiff may recover actual damages or \$100,³⁴ whichever is greater. In Oregon, recovery is limited to actual damages or \$200, whichever is greater.³⁵ In Michigan, that same plaintiff may recover actual damages or \$250 (except in a class action), whichever is greater.³⁶ Plaintiffs in Virginia may recover actual damages or \$500, whichever is greater,³⁷ while in Utah, plaintiffs have the option to recover actual damages or \$2,000 (except in a class action), whichever is greater.³⁸

ii) Attorneys' Fees and Costs

A prevailing plaintiff may additionally recover attorney fees and costs in nearly half of all jurisdictions, including Alabama, Alaska, Colorado, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Mexico, New Jersey, New York, North Carolina, Ohio, Oregon, Tennessee, Vermont, Virginia, Washington, and Wisconsin. Of those jurisdictions whose statutes expressly allow for attorney fee awards, Illinois, Indiana, New Mexico, and Oregon, all allow attorney fees to the prevailing party. The fact that a defendant may recover attorney fees from a plaintiff in an unsuccessful action would seem to serve as a considerable disincentive to filing a case, but that is clearly not so in all jurisdictions. A closer examination of the specific statutes that grant attorney fee awards to

²⁷ N.J. STAT. ANN. 56:8-19 (West, LEXIS through 2005 legislation).

²⁸ Thiedemann v. Mercedes-Benz USA, LLC, A.2d __, 2005 WL1159430 (N.J. May 18, 2005).

²⁹ Hinchcliffe v. American Motors Corp., 440 A.2d 810 (Conn. 1981).

³⁰ Feitler v. Animation Election, Inc., 13 P.3d 1044 (Or. Ct. App. 2000).

³¹ Carter v. Gugliuzzi, 716 A.2d 17 (Vt. 1998).

³² Peery v. Hansey, 585 P.2d 574, 578 (Ariz. Ct. App. 1978); Wyman v. Terry Schulte Chevrolet, Inc., 584 N.W.2d 103, 107 (S.D. 1998).

³³ N.Y. GEN. BUS. § 349(h) (LEXIS through Ch. 8, 02/02/2005).

³⁴ N.M. STAT. ANN. § 57-12-10(B)(LEXIS through 2004 legislation).

³⁵ OR. REV. STAT. 646.638(1) (2003).

³⁶ MICH. COMP. LAWS § 445.911(2) (LEXIS through 2004 legislation).

³⁷ VA. CODE ANN. § 59.1-204(A) (WESTLAW through 2005 legislation).

³⁸ UTAH CODE ANN. § 13-11-19(2) (LEXIS through 2004 legislation).

defendants may assist in clarifying this concept: In Illinois, for example, the prevailing defendant may be awarded fees if the plaintiff's suit is "oppressive. . .malicious, fraudulent, deliberate, or will-ful."³⁹ Oregon specifically exempts an award of attorney fees to the prevailing defendant in a class action case premised upon the CAFA.⁴⁰ Attorney fees are not recoverable in Delaware.⁴¹

CAFA may not change attorney fees awards in those states that allow attorney fees to prevailing plaintiffs under their respective statutes. While CAFA will change the calculation of class action counsel's contingent fee award that is based upon a settlement, where recovery of coupons is not used to determine the attorney fee in a settlement, "any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action."⁴² This language is consistent with most attorney fee award provisions.

iii) Civil Penalties, Treble Damages, and Punitive Damages

Many jurisdictions also impose a civil penalty and/or allow recovery of treble damages or punitive damages to the prevailing plaintiff. As one might expect, the requirements necessary to impose a civil penalty or permit the recovery of treble or punitive damages varies widely from jurisdiction to jurisdiction. For example, should an Oklahoma

plaintiff succeed in demonstrating an unconscionable violation of the Act, a civil penalty may be levied up to \$2,000, whereas a demonstration of a willful violation of the CAFA can result in a civil penalty up to \$10,000.⁴³

The treatment of treble damages exhibits perhaps the greatest variation among the states, with some treating treble damages as punitive in nature, while others characterize such recovery as compensatory. In Vermont, for example, treble damages may only be awarded where the plaintiff can show "malicious conduct" or ill will or wanton conduct.⁴⁴ On the other hand, once evidence indicates that a consumer has suffered damage, the courts are authorized to treble damages without further findings in the District of Columbia because treble damages serve a remedial purpose.⁴⁵ Plaintiffs in New Mexico,⁴⁶ Tennessee,⁴⁷ or Virginia⁴⁸ must show the violation is intentional or willful to obtain exemplary or treble damages, but the recovery is limited to \$300 for a New Mexico plaintiff and \$1,000 for the Virginia plaintiff. In Massachusetts, a plaintiff may recover treble damages if the defendant committed a willful or knowing violation or if the defendant refused to grant relief upon demand in bad faith.⁴⁹ On the other hand, a

³⁹ *Industries v. Diamond Multimedia Systems, Inc.*, 17 F. Supp. 2d 775, 777 (N.D. Ill. 1998).

⁴⁰ OR. REV. STAT. 646.638(4) (2003).

⁴¹ *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1078 (Del. 1983).

⁴² Class Action Fairness Act § 3, 28 U.S.C. § 1712(b)(1).

⁴³ OKLA. STAT. tit. 15, § 761.1 (WESTLAW through 2004-05 legislative session).

⁴⁴ *Winton v. Johnson & Dix Fuel Corp.*, 515 A.2d 371 (Vt. 1986).

⁴⁵ *District Cablevision Limited Partnership v. Bassin*, 828 A.2d 714, 725-26 (D.C. 2003).

⁴⁶ N.M. STAT. ANN. § 57-12-10(B) (LEXIS through 2004 legislation).

⁴⁷ TENN. CODE ANN. § 47-18-109(3) (LEXIS through 2004 legislation).

⁴⁸ VA. CODE ANN. § 59.1-204(A) (LEXIS through 2004 legislation).

⁴⁹ MASS. GEN. LAWS ANN. ch. 93A, § 9(3) (WESTLAW through ch. 14 of 2005 Annual

successful plaintiff in New Jersey is entitled to treble damages without a showing of willfulness,⁵⁰ but he or she must show that a demand was made prior to filing suit.⁵¹ In New York, a plaintiff may obtain up to \$1,000 in treble damages for willful and knowing violations.⁵² Conversely, in Ohio, a plaintiff may recover treble damages if he or she shows the conduct had been deemed to violate the CAFA by the attorney general or by case law, and the recovery is limited to \$200, but not in a class action.⁵³ In Washington, where the prevailing plaintiff recovers actual damages, those damages may be trebled up to \$10,000.⁵⁴

In contrast, states' treatment of punitive damages, though varied, appears more uniform than states' treatment of treble damages. A plaintiff in Delaware may recover punitive damages if the fraud is gross, oppressive, or aggravated, or where the violation involves a breach of trust or confidence.⁵⁵ A Nevada plaintiff, in contrast, may obtain punitive damages only upon a showing of clear and convincing evidence that the defendant committed a fraud.⁵⁶ In Connecticut, the issue of recovering punitive damages remains in the court's

discretion.⁵⁷ In order to recover punitive damages in the District of Columbia, a plaintiff must show by clear and convincing evidence "outrageous or egregious wrongdoing" with evil intent.⁵⁸ In Idaho, a plaintiff may obtain punitive damages where there is a repeated or flagrant violation of the Idaho Consumer Protection Act.⁵⁹ An Oregon plaintiff may obtain punitive damages where the defendant acted with malice or showed reckless or outrageous indifference by clear and convincing evidence.⁶⁰

CONCLUSION

To the extent that each state's consumer protection statutes vary in terms of remedies and damages that a plaintiff may recover, CAFA is unlikely to fully resolve the issue of forum-shopping for greatest personal gain. The exercise of federal court jurisdiction will not eliminate application of the substantive consumer protection statute in a given state. However, to the extent that forum-shopping is induced in part by one's perception of a particular state or local jurisdiction's civil justice system, CAFA may be effective. For example, President Bush noted upon signing the CAFA that twenty-four class actions were filed in Madison County during the six weeks prior to CAFA's execution on February 18, 2005.⁶¹ In fact, thirty-six class actions had been filed there between January 1 and February 18, 2005, thirteen of which were filed on February 17. However, in the ten weeks following February 18, just four class actions were filed in Madison County.

Session).

⁵⁰ N.J. STAT. ANN. 56:8-19 (LEXIS through 2005 legislation).

⁵¹ *Feinberg v. Red Bank Volvo, Inc.*, 752 A.2d 720, 723 (N.J. Super. Ct. App. Div. 2000).

⁵² N.Y. GEN. BUS. § 349(h) (LEXIS through Ch. 8, Feb. 2, 2005).

⁵³ OHIO REV. CODE ANN. § 1345.09(B) (LEXIS through Apr. 1, 2005).

⁵⁴ *Mason v. Mortgage America, Inc.*, 792 P.2d 142 (Wash. 1990).

⁵⁵ *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1076-77 (Del. Super. Ct. 1983).

⁵⁶ NEV. REV. STAT. 42.005 (LEXIS through 2004 legislation).

⁵⁷ CONN. GEN. STAT. § 42-110g(a) (LEXIS through 2004 legislation).

⁵⁸ *District Cablevision Limited Partnership v. Bassin*, 828 A.2d 714, 725-26 (D.C. 2003).

⁵⁹ *Mac Tools, Inc. v. Griffin*, 879 P.2d 1126, 1131, 1134 (Idaho 1994).

⁶⁰ OR. REV. STAT. § 31.730(1) (2003).

⁶¹ 41 Weekly Comp. Pres. Doc. 7, p. 265 (Feb. 21, 2005).

It is unclear whether the decrease in filings is because all the cases that would have been filed there during this time frame were filed prior to February 18, because the cases were simply filed elsewhere, or because the simple threat of federal court jurisdiction has deterred claims that might otherwise have been brought in that particular venue. The dramatic difference between the number of class actions filed in Madison County before and after CAFA was signed into law, however, suggests that CAFA has succeeded in removing at least one court from the forum-shopping circuit.