Bloomberg BNA

Class Action Litigation Report®

SUPREME COURT

JURISDICTION

The U.S. Supreme Court's January ruling in *Mississippi v. AU Optronics*, which involved a jurisdictional dispute arising from the ''mass action'' provision of the Class Action Fairness Act, resolved a jurisdictional issue with significant implications for state enforcement authorities and private litigants in mass tort cases, attorney David M. Cialkowski says in this BNA Insight. The author praises the decision for foreclosing entire lines of inquiry with respect to CAFA removal, which had ''gummed up threshold jurisdictional proceedings in numerous federal courts.''

Supreme Court: A CAFA 'Plaintiff' Means, Well, a Plaintiff; Does 'Claims . . . Tried Jointly' Mean a Joint Trial of the Claims?

BY DAVID M. CIALKOWSKI

David M. Cialkowski practices complex and class litigation at Zimmerman Reed in Minneapolis. He represented the Mississippi Attorney General's Office in AU Optronics before the Fifth Circuit as arguing counsel and before the Supreme Court on brief. He can be reached at david.cialkowski@zimmreed.com.

The U.S. Supreme Court's decision in *Mississippi v. AU Optronics Corp.* resolved a jurisdictional issue with significant implications not only for state enforcement authorities but also, potentially, for private litigants in mass tort cases. The decision[1] involved a jurisdictional dispute arising from the ''mass action'' provision of the Class Action Fairness Act (CAFA) using simple, text-based guideposts. Nothing punctuated that approach to resolving jurisdictional matters better than the unanimous vote supporting the Court's decision.

In *AU Optronics*, Mississippi filed an antitrust complaint against several foreign manufacturers accused of fixing the price of LCD screens incorporated into products sold in Mississippi.[2] Defendants removed the enforcement action to federal court arguing that Mississippi residents, on whose behalf some of the claims were asserted, were the ''real parties in interest'' to some claims, making the case a removable ''mass action'' under CAFA.[3] They argued that CAFA permits removal of cases where the claims of 100 or more persons

[1] 134 S. Ct. 736 (2014).
[2] *Id.* at 740.
[3] *Id.* at 740-41.

 ISSN 1529-0115

have been proposed to be tried jointly, and that Mississippi residents were such persons.[4] A state enforcement action that includes a request for monetary relief on behalf of state residents, Defendants argued, is a class action in disguise. Mississippi was the only plaintiff named in the complaint.

Under then-binding Fifth Circuit precedent, the district court agreed that Mississippi's case was a mass action, but that it was brought on behalf of the general public, and qualified for remand under CAFA's general public exception provision.[5] The Fifth Circuit accepted review and reversed, holding that the general public exception is a ''dead letter,'' and that the ''real parties in interest test'' it previously created to construe the mass action provision roped the enforcement action into federal court.[6] The concurring opinion by Judge Elrod noted that the Fifth Circuit's precedent maintained an intractable circuit split, and ''that we should consider whether we have staked out the correct position.''[7] Rehearing *en banc*, however, was not granted.[8]

Upon reaching the Supreme Court, the case had thus fomented a seemingly obscure jurisdictional issue but, behind the scenes, it brought to bear the fervent arguments and resources of 46 state attorneys general, pro-enforcement public interest groups, big pharma, big insurance, and the defense bar in an intractable war over forum in large-stakes enforcement cases. In the end, the Court did not touch on the politics or the acrimony, but instead followed its own charge that ''simplicity is a virtue'' in deciding jurisdictional matters. Because CAFA is not a paragon of simplicity as a whole, the Court did the judiciary a favor by foreclosing entire lines of inquiry with respect to CAFA removal that had already gummed up threshold jurisdictional proceedings in numerous federal courts.

CAFA's Passage and Text

Congress passed CAFA in 2005 to make it easier to remove some interstate class actions to federal court. Although lengthy and convoluted,[9] essentially CAFA permits ''class actions,'' as defined by Rule 23 or ''similar rule'' of procedure allowing representative actions,[10] to be removed under a ''minimal diversity'' standard.[11] As a backup, CAFA also makes ''mass actions'' removable as CAFA ''class actions.'' Thus, if 100 people get together as plaintiffs and sue on the same complaint pursuing a common question of law or fact in a joint trial, but leave out any allegation of class representation, the case may be removable despite the absence of class allegations.

Prior to the Court's *AU Optronics* decision, the mass action definition had become the center of gravity in the battleground over whether federal jurisdiction was appropriate in large state enforcement cases. The statute provides that a ''mass action'' is

> any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).[12]

Congress's use of the terms ''persons'' and ''plaintiffs'' in the definition set the stage upon which defendants involved in high stakes enforcement actions would strut and fret.

Early Interpretation of Mass Action: 'Persons' are 'Real Parties in Interest'

Any hope that the mass action provision would be interpreted according to its plain terms seemed dashed as soon as CAFA left the factory floor. In 2007, citing CAFA's ''mass action'' definition, a group of defendants filed a notice of removal in an antitrust enforcement action challenging bid rigging and coordinated undervaluing of insurance claims in the wake of Hurricanes Katrina and Rita.[13] Buddy Caldwell, the Attorney General (AG) of Louisiana, did not bring the case as a representative of any class,[14] but he did seek monetary relief on behalf of injured citizens, along with broad injunctive relief.[15] The defendants' theory supporting removal was that although the State of Louisiana was the only plaintiff in the case, the real persons in interest were the individual policyholders in Louisiana. Essentially, they argued, the State was the plaintiff in name only, and the presence of over 100 policyholders' antitrust claims in the action permitted removal.[16]

The district court agreed[17] and the Fifth Circuit affirmed, holding that the ''mass'' in mass action comprises not the named plaintiff(s), but rather the real parties in interest to any of the claims in the suit.[18] Because General Caldwell had sued under the *private enforcement* provision of the Louisiana antitrust law[19] seeking private damages, the Fifth Circuit held, the real parties

---

[4] *Id.*

[5] *Id.*

[6] *Mississippi v. AU Optronics Corp.*, 701 F.3d at 796, 802 (5th Cir. 2012), *rev'd and remanded*, 134 S. Ct. 736 (2014).

[7] *Id.* at 805.

[8] *Mississippi v. AU Optronics Corp.*, No. 12-60704 (5th Cir. Feb. 4, 2013).

[9] *See Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1198 (11th Cir. 2007) (''CAFA's mass action provisions present an opaque, baroque maze of interlocking cross-references that defy easy interpretation''); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 682, 686 (9th Cir. 2006) (noting CAFA's ''thorniest'' provisions and that its mass action language is ''bewildering'').

[10] 28 U.S.C. § 1332(d)(1)(B).

[11] Minimal diversity differs from complete diversity in that the removing party need only show that *any* member of an alleged class has citizenship different from *any* defendant. *Id.* § 1332 (d)(2).

[12] *Id.* § 1332(d)(11)(B)(i).

[13] *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 422-23 (5th Cir. 2008).

[14] This distinction has also been litigated to some extent. At least in the Fifth Circuit, a state AG is not immune from removal under CAFA's ''class action'' provision if in fact the State proposes that the attorney general join other private plaintiffs as class representatives pursuant to a Rule 23-like rule of judicial procedure. *See In re Katrina Canal Litig. Breaches*, 524 F.3d 700 (5th Cir. 2008) (where state AG and private plaintiffs joined in suit including class allegations and seeking to be named class representatives, removal was proper under CAFA ''class action'' definition).

[15] *Id.* at 423.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 429-30.

[19] La. Rev. Stat. Ann. § 51:137.

   ISSN 1529-0115

in interest were the persons who held the right to those claims.[20]

Despite the fact that the State had also asserted a claim for injunctive relief, which the court of appeals agreed belonged to the State and could be ''severed'' and ''remanded''—whatever that meant—the monetary relief portion of the case was still removable.[21] This became known as the ''claim-by-claim'' approach, because even if one claim out of several involves unnamed real parties in interest, it would be removable. So district courts within the Fifth Circuit went dutifully about the business of piercing state AGs' enforcement actions to see if they had been ''fraudulently''[22] pleaded to avoid removal.

State AGs' Perspective

There was another side to the story because, even if pleading piercing and real-party-in-interest testing were called for under CAFA, state AGs strongly believed that their *parens patriae* powers (exercised on behalf of the people), in conjunction with their quasi-sovereign interests in helping their citizens recover, in fact made the *State* the real party in interest, no matter whether other parties in interest may benefit from the relief sought.

After all, the Supreme Court had determined decades earlier that a State is the real party in interest in a *parens patriae* case as long as it invokes a sovereign or quasi-sovereign interest apart from private interests (such as (1) suing over the kind of issue likely to be addressed through lawmaking powers or (2) suing on behalf of a substantial segment of the population).[23] Most *parens patriae* cases, and in particular antitrust enforcement actions, easily fit that bill. AGs were understandably perplexed and frustrated.

Ensuing Circuit Split

Defendants litigating in states outside the Fifth Circuit began removing state enforcement actions on the perceived strength of *Caldwell*'s back. They met with a brick wall. The adverse reaction to the *Caldwell* decision of three sister Circuit Courts of Appeals created a deep and mature circuit split, imposing a wall of authority barring federal jurisdiction over enforcement actions in 18 states.

The Seventh Circuit was the first to reject *Caldwell*'s conclusion and reasoning. In Illinois's enforcement action against the same cadre of defendants redressing the same concerted conduct as in *AU Optronics*, the court of appeals noted that the Fifth Circuit did not base its ''claim-by-claim analysis'' on any language in CAFA.[24]

The Seventh Circuit thus provided the first clue as to how the Supreme Court would ultimately resolve the issue, focusing on CAFA's requirement that the 100 persons be ''plaintiffs'': ''[O]nly the Illinois Attorney General makes a claim for damages (among other things), precisely as authorized by [Illinois's antitrust statute]. By the plain language of § 1332, this suit is not removable as a mass action.''[25] Even if a real party in interest test were appropriate, the Seventh Circuit commented, ''the traditional 'whole complaint' analysis'' would need to be followed, which the district court had appropriately done in ordering remand of the State's case.

The Ninth Circuit was the next to reject *Caldwell*'s claim-by-claim approach, and noted Nevada's ''substantial state interest'' in suing ''to protect the hundreds of thousands of homeowners in the state allegedly deceived'' by a bank's foreclosure processes, in holding that ''Nevada—not the individual consumers—is the real party in interest.''[26] The court specifically noted the Nevada Attorney General's statutory authority to pursue the claims, and that the ''essential nature and effect of the proceeding'' demonstrated that the AG was properly pleaded as the sole plaintiff.[27] ''That individual consumers may also benefit from this lawsuit does not negate Nevada's substantial interest in this case.''[28]

The Fourth Circuit also rejected *Caldwell*'s claim-by-claim approach in the context of South Carolina's enforcement action against the LCD defendants. Agreeing with the Seventh and Ninth Circuits, the court held,

> That the statutes authorizing these actions in the name of the State also permit a court to award restitution to injured citizens is incidental to the State's overriding interests and to the substance of these proceedings.[29]

Fifth Circuit Expands CAFA Further

Despite companion circuits' rejection of the Fifth Circuit's approach in *Caldwell*, the Fifth Circuit expanded its *Caldwell* holding in the context of Mississippi's enforcement action against the LCD defendants in *AU Optronics*. As noted above, critical to the *Caldwell* court's holding—or so Mississippi believed—was the fact that Louisiana had acted under the private enforcement provision of Louisiana's antitrust law.

Mississippi, to the contrary, sued solely under the public, attorney general enforcement provisions, making the State the party with statutory authority to seek the relief requested, which included the State's proprietary losses, injunctive relief, civil penalties, and restitution based on harm to its citizens. The State, therefore, should have been considered the real party in interest for purposes of the remedies sought, regardless of who else may benefit.

The Fifth Circuit in its *AU Optronics* decision, however, doubled down on *Caldwell*, expanding CAFA removal of cases brought under attorney general enforcement statutes as well. Any case in which citizens could realize individual monetary benefits, regardless of whether those citizens could have brought suit under

---

[20] *Caldwell*, 524 F.3d at 429.

[21] No portion of *Caldwell* was ever remanded to state court, and the case was dismissed on the pleadings.

[22] *I.e.*, by not naming all the state's citizen purchasers as plaintiffs.

[23] *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex. rel. Barez*, 458 U.S. 592, 607 (1982) (citing 787 injured citizens out of 3 million as a segment sufficiently substantial to trigger the State's independent interest).

[24] *LG Display Co. v. Madigan*, 665 F.3d 768, 773 (7th Cir. 2011).

[25] *Id.* at 772.

[26] *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 670 (9th Cir. 2012).

[27] *Id.* at 670; *see also id.* at 672 (''The State of Nevada is the real party in interest, so the action falls 99 persons short of a 'mass action.' '').

[28] *Id.* at 671 (internal quotations omitted).

[29] *AU Optronics v. South Carolina*, 699 F.3d 385, 394 (4th Cir. 2012).

the public action provision, would be considered a mass action because ''the real parties in interest include not only the State, but also individual consumers residing in Mississippi.''[30] No longer was the court concerned about whether the State had a sufficient interest over the case to sue in its own name. Instead, it determined that even if the State was ''a'' real party in interest, if *any* other parties might get money as a result of the lawsuit, they were to be considered plaintiffs under CAFA's mass action provision.[31]

Supreme Court Champions a Plain Text Approach

Lost in the rubble of the circuits' discussions of and disagreements over *parens patriae* powers, whole-case versus claim-by-claim approaches, and real party in interest tests, was the actual text of CAFA's mass action definition. Once the Supreme Court granted its petition,[32] Mississippi decided to unearth the text of CAFA that had been buried from the get-go by *Caldwell*. The State placed at the heart of its appeal a plain language interpretation of CAFA, arguing the legislature's use of the word ''plaintiffs'' to describe those bringing monetary claims in the statute meant just that, and the lower court's analysis of real parties in interest was in violation of that congressional limitation.

The Supreme Court agreed. First, the Court reasoned that ''the statute says '100 or more persons,' not '100 or more named or unnamed real parties in interest.' ''[33] CAFA's ''class action'' definition, by contrast, expressly included ''unnamed'' persons, and Congress intentionally left that word out of the mass action definition.[34]

Second, the Court reasoned that the word ''persons'' cannot mean anything other than ''the very 'plaintiffs' referred to later in the sentence.''[35] This was because Congress used similar language to describe the joinder procedure in the federal rules,[36] which requires actual lawsuit-filing plaintiffs,[37] and because it would make no sense that unnamed parties in interest could be considered to have proposed a joint trial on the basis that ''some completely different group of named plaintiffs share common questions.''[38]

Third, once the Court had determined that ''persons'' are the same people referred to in the mass action clause as ''plaintiffs,'' it held that the LCD defendants' idea that they could include unnamed real parties in interest ''stretches the meaning of 'plaintiff' beyond recognition,'' which means ''a 'party who brings a civil suit in a court of law.' ''[39]

Fourth, the Court pointed out that if ''plaintiff'' means unnamed parties in interest, then CAFA's ''requirement that 'jurisdiction shall exist only over those plaintiffs whose claims [exceed $75,000]' becomes an administrative nightmare that Congress could not possibly have intended.''[40] How would district courts identify the unnamed persons? Even if they could be identified, what would happen to those holding small claims? Severance? Wouldn't most of the case then be returned to State court anyway?[41] ''We think it unlikely that Congress intended that federal district courts engage in these unwieldy inquiries.''[42]

Fifth, the Court determined that another provision of CAFA (and statutes must be read in context) provides that a mass action removed to federal court cannot be transferred to any other court without the consent of ''a majority of the plaintiffs.''[43] Acquiring such consent from unnamed consumers would result in further administrative nightmares Congress could not have intended to create.

Finally, the Court determined that CAFA displaced any potential real party in interest test because that test has traditionally been used to identify whose citizenship should be considered to determine diversity, not ''to count up additional unnamed parties in order to satisfy'' a numerosity provision.[44] Congress also displaced any such test by prohibiting defendants from joining unnamed individuals as a basis for removal and by repeatedly using the term ''plaintiffs'' to describe the 100 or more persons required by the statute.[45]

In the end, the Court decided that the text of the statute, and the context of its enactment, shows that the mass action definition serves as a ''backstop'' to ensure that ''a suit that names a host of plaintiffs rather than using the class device'' does not evade CAFA's compass.[46] An Attorney General's enforcement action where the State is the only plaintiff does not qualify.

AU Optronics May Impact What Constitutes a Proposal to Try Cases Jointly

Meanwhile, recent circuit decisions have created another apparent split in construing the mass action provision. In addition to addressing whether AG enforcement suits are CAFA mass actions, several circuit courts have addressed the issue of when multiple, private, common issue complaints filed in a single state court become a ''proposal'' for such claims to be ''tried jointly'' under the mass action provision.

Circuit courts have consistently held that naming 100 or more plaintiffs on a single complaint alleging common issues *does* constitute a proposal for a joint trial of those claims.[47] Circuit courts have also agreed that the

[30] *Mississippi v. AU Optronics Corp.*, 701 F.3d at 796, 800 (5th Cir. 2012).
[31] *Id.* at 802 (''[W]e hold that the real parties in interest in this suit include both the State and individual consumers of LCD products. Because it is undisputed that there are more than 100 consumers, we find that there are more than 100 claims at issue in this case.'').
[32] *Mississippi v. AU Optronics Corp.*, 133 S. Ct. 2736 (2013).
[33] *Mississippi v. AU Optronics Corp.*, 134 S. Ct. 736, 742 (2014).
[34] *Id.*
[35] *Id.*
[36] Fed. R. Civ. P. 20.
[37] 134 S. Ct. at 742.
[38] *Id.*
[39] *Id.* at 743 (quoting Black's Law Dictionary 1267 (9th ed. 2009)).
[40] *Id.*
[41] *Cf. id.* at 743-44.
[42] *Id.* at 744.
[43] *Id.* at 744; 28 U.S.C. § 1332(d)(11)(C)(i).
[44] 134 S. Ct. at 745.
[45] *Id.* at 746.
[46] *AU Optronics*, 134 S. Ct. at 744.
[47] *Visendi v. Bank of America, N.A.*, 733 F.3d 863, 868 (9th Cir. 2013) (jurisdiction present where there was one action and

   ISSN 1529-0115

mere filing of several common-issue complaints, which in the aggregate present a total of 100 or more plaintiffs in a single court (but not on a single complaint), *does not* constitute a proposal to try those claims jointly.[48] Critics of the latter practice, some of whom asperse it as ''gamesmanship,'' ignore the clear language of CAFA and the intent of Congress, which places control over whether to pursue a joint trial of claims solely within the discretion of plaintiffs. That is, a joint trial (1) must actually be ''proposed''[49] and (2) cannot be proposed by a defendant.[50] In any event, there is no circuit split over this issue.

However, plaintiffs can propose joint trials in contexts other than the complaint itself, and this is where the split has occurred. Post-filing activities, such as proposals for consolidation to a single judge, have had mixed results.

The Current Split

The Ninth Circuit held in *Romo v. Teva Pharmaceuticals USA, Inc.*, that seeking assignment of 100 or more plaintiffs' cases to a single judge ''for all purposes'' and, in part, to avoid ''inconsistent rulings, orders, or judgments,'' did not constitute a proposal for a joint trial of those claims.[51] Reasoning that single-judge assignments do not necessarily result in joint trials, and that judgments do not necessarily arise from trials, the court held that mentioning these words as a basis for consolidation does not constitute a proposal for joint trial. *Id.*

Prior to *Romo*, the Seventh Circuit had held in *In re Abbott Laboratories, Inc.*, that, where the plaintiffs moved the state supreme court for ''consolidation of the cases 'through trial' and 'not solely for pretrial proceedings,' '' it did not matter that the trial court had not yet decided to order a joint trial because one had been ''proposed.''[52] *Abbott* is possibly distinguishable from *Romo* because in *Romo* the plaintiffs did not move for single judge consolidation ''through trial''—language essential to both holdings.[53] However, the *Romo* plaintiffs sought assignment to a single judge ''for all purposes,'' feeding Teva Pharmaceuticals USA's theory that plaintiffs implicitly sought single-assignment through trial.[54] In none of these cases, however, did the plaintiffs explicitly request a joint trial of 100 claims, so the courts took the extra step of determining what events the plaintiffs' requests would implicitly involve.

In this respect, *Abbott* laid the groundwork for a significant expansion of CAFA jurisdiction. Plaintiffs there argued that a request for consolidation of cases through trial did not necessitate a ''joint'' trial. The Seventh Circuit rejected this argument, opining, ''[I]t is difficult to see how a trial court could consolidate the cases as requested by plaintiffs and not hold a joint trial *or an exemplar trial with the legal issues applied to the remaining cases*. In either situation, plaintiffs' claims would be tried jointly.''[55] Thus, the proposal for consolidation and a trial appears to satisfy the requirement of cases ''tried jointly,'' because the Seventh Circuit assumes that the single trial will bind the other plaintiffs.

The Eighth Circuit took this concept and ran with it. In *Atwell v. Boston Scientific Corporation*, plaintiff groups—each numbering less than 100—moved to have their common-issue cases assigned to a single judge for purposes of discovery and trial.[56] As in *Abbott*, no proposal was made for a joint trial. Two groups of plaintiffs explicitly disavowed any joint trial whatsover, and one group commented at oral argument that a single judge would oversee ''a process in which to select the bellwether case to try.''[57] The Eighth Circuit held that plaintiffs' request for a single judge assignment where at least one ''exemplar case'' would ''inevitabl[y]'' be tried was a proposal that the cases be tried jointly, ostensibly because ''legal issues [would be] applied to the remaining cases.''[58] The court supported its interpretation of a joint trial proposal by reasoning that to find otherwise would make the mass action provision ''defunct.''[59] This presents at least a practical circuit split because, like in *Romo*, no plaintiff in *Atwell* sought consolidation for purposes of trial, yet, unlike in *Romo*, the Eighth Circuit found a basis for federal jurisdiction under CAFA.

Guidance From *AU Optronics*

Abbott, *Romo*, and *Atwell* were all decided prior to the Court's decision in *AU Optronics*. On June 19, 2014, the Ninth Circuit reheard *Romo en banc*,[60] and Teva

over 160 named plaintiffs, victims of a ''common plan and scheme''); *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008) (complaint identifying 144 plaintiffs was mass action because ''one complaint implicitly proposes one trial'').

[48] *Parson v. Johnson & Johnson*, No. 13-6287, 2014 BL 102257 (10th Cir. Apr. 11, 2014) (where 12 complaints filed in same court named over 700 plaintiffs, but where no complaint had at least 100 named plaintiffs, CAFA jurisdiction was absent because joint trial had not been proposed); *Scimone v. Carnival Corp.*, 720 F.3d 876, 883 (11th Cir. 2013) (jurisdiction absent where plaintiffs, by dividing themselves into two separate complaints, were ''actually proposing two separate trials rather than a joint trial''); *Koral v. Boeing Co.*, 628 F.3d 945, 946-47 (7th Cir. 2011) (29 separate complaints of 117 plaintiffs were not considered a single mass action: ''one complaint, one trial, is the norm''); *Anderson v. Bayer Corp.*, 610 F.3d 390, 392-94 (7th Cir. 2010) (four complaints, each with fewer than 100 plaintiffs, could not be considered one mass action, because plaintiffs have a choice of filing separate actions, of which defendant cannot seek joinder to create CAFA jurisdiction); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 955-56 (9th Cir. 2009) (jurisdiction absent where plaintiffs filed seven complaints, each fewer than 100 plaintiffs); *Abrahamsen v. ConocoPhillips, Co.*, 503 Fed. Appx. 157, 160 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 1820 (2013) (where each of four suits had fewer than 100 persons, plaintiffs did not propose to try their claims jointly).

[49] 28 U.S.C. § 1332(d)(11)(B)(i).

[50] *Id.* § 1332(d)(11)(B)(ii)(II).

[51] *Romo v. Teva Pharmaceuticals USA, Inc.*, 731 F.3d 918, 921-23 (9th Cir. 2013), *reh'g en banc granted*, 742 F.3d 909 (9th Cir. 2014).

[52] *In re Abbott Labs., Inc.*, 698 F.3d 568, 573 (7th Cir. 2012).

[53] *See* 731 F.3d at 923 (distinguishing *Abbott* based on plaintiffs' request for consolidation ''through trial and not solely for pretrial proceedings,'' as opposed to coordination).

[54] *See also id.* at 925 (Gould, J., dissenting) (commenting that majority ''creates a circuit split, for practical purposes, with the Seventh Circuit's decision in *Abbott*'').

[55] 698 F.3d at 573 (emphasis added).

[56] 740 F.3d 1160, 1163-64 (8th Cir. 2013).

[57] *Id.* at 1164.

[58] *Id.* at 1165-66.

[59] *Id.* at 1163.

[60] 742 F.3d 909 (9th Cir. 2014); video of argument available at http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000006467.

Pharmaceuticals USA has petitioned the Supreme Court for certiorari in the same case.[61] The question is to what extent *AU Optronics* has on the construction of the language, ''in which monetary relief claims of 100 or more persons are proposed to be tried jointly.''[62] With the Court's focus on the narrow construction of the mass action provision, the ground has shifted away from broad readings of that clause.

The Court in *AU Optronics* determined that the mass action provision ''encompasses suits that are brought jointly by 100 or more named plaintiffs who propose to try their claims together.''[63] If there is one lesson from *AU Optronics*, it is that reaching beyond the plain language of the mass action provision to expand federal jurisdiction is not a winning strategy.[64] In order to engender federal jurisdiction, the plaintiffs must propose to try monetary relief claims of 100 or more persons jointly.

The Seventh and Eighth Circuits have adopted a rule that a joint trial of 100 claims can include a single, bellwether trial of one claim because those trials can preclude claims or resolve issues for a whole group. This does not appear to comport with the mass action provision, for three reasons.

Courts Can't Ignore the Word 'Claims'

The first reason a single, bellwether trial does not satisfy the ''tried jointly'' requirement is based on the language of the statute. The mass action provision requires that 100 ''claims'' be tried jointly, not merely that ''issues'' or ''questions'' related to those claims be resolved together. It is true that the claims must be proposed to be tried jointly *on the ground* that common questions of law or fact are present, but the fact that common questions may be resolved in one fell swoop is not sufficient to satisfy the provision. Instead, all the individual *claims* must be jointly resolved in a trial.

Without addressing the ''claims'' requirement, the court in *Koral v. Boeing Company* suggested, ''Suits sought to be treated as a mass action must seek monetary relief, but section 1332(d)(11)(B)(i) requires only that the plaintiffs' claims involve common issues of law or fact,''[65] and the *Abbott* panel concluded that this means a joint trial would include a trial on liability for a few plaintiffs, with *separate* trials on damages for everyone else later.[66]

But the plain language of the mass action provision appears to dictate otherwise, requiring that what must be proposed to be tried jointly are the ''*monetary relief claims* of 100 or more persons,'' not merely common issues attendant to their claims. A plaintiff's claim is her ''[r]ight to payment.'' Black's Law Dictionary 247 (6th ed. 1990). Monetary relief is inseparable from a plaintiff's claim, and according to CAFA, it must be part of the joint trial. To the extent there is a proposal that a ''common issue'' will be resolved through a bellwether trial, but where only a single plaintiff's *claim* is adjudicated in that trial, and no other *claims* are resolved in that trial, CAFA's plain text has not been satisfied.

Bellwether Trial Can't Preclude Others' Claims

The second reason the single, binding bellwether theory does not comport with the mass action provision is because, by the time of CAFA's passage, a bellwether trial was *not* capable of resolving or precluding the claims of others.[67] The possibility that bellwether trials could be binding on others outside the context of a class action may have been conceivable at a point in history. However, that idea has long since been abandoned. The Fifth Circuit's 1998 opinion in *Cimino v. Raymark Industries, Inc.*,[68] holding that such trials are unconstitutional, acted as a ''strong influence'' in ending the budding practice of binding bellwether trials.[69]

Instead, bellwether trials ''are chosen, not quite randomly, for trial on a particular issue. *The results of the trials are not binding* on the other litigants in the group. The outcomes can be used by the parties to assist in settlement, but *the parties can also ignore these results and insist on an individual trial*.''[70] Thus, at the time Congress passed CAFA in 2005, courts had long abandoned the the idea of applying issue preclusion based on bellwether trials—indeed, defendants had successfully defeated that idea as unconstitutional.

This is no minor point, particularly in light of the fact that the outcomes in *Abbott* and *Atwell* hinge forcefully on the binding bellwether concept. In 2005, one would have been hard pressed to find a defendant willing to waive its Seventh Amendment rights, and agree to conduct a bellwether trial that would have any preclusive effect on 100 or more other individual claims against it. Defendants use bellwether trials as leverage in future settlements, not as collateral estoppel, and common issues in mass tort cases are re-tried regularly by the same court.[71] This reality demonstrates that the con-

---

[61] http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-1015.htm.

[62] The question presented to the Supreme Court by Teva Pharmaceuticals USA is whether a motion by plaintiffs to coordinate or consolidate their cases for all purposes before a single trial judge to avoid inconsistent judgments and promote judicial economy constitutes a proposal to try the claims jointly.

[63] *Mississippi v. AU Optronics Corp.*, 134 S. Ct. 736, 741 (2014).

[64] *See*, *e.g.*, *id.* at 741 (''Our analysis begins with the statutory text.''); *id.* at 742 (''the statute says '100 or more persons,' not '100 or more named or unnamed real parties in interest.' Had Congress intended the latter, it easily could have drafted language to that effect.''); *id.* at 742 (holding that construing ''plaintiffs'' to include both named and unnamed real parties in interest ''stretches the meaning of 'plaintiff' beyond recognition''); *id.* at 744 (construing term ''in accordance with its usual meaning . . . leads to a straightforward, easy to administer rule'').

[65] *Koral v. Boeing Co.*, 628 F.3d 945, 947 (7th Cir. 2011).

[66] *In re Abbott Labs., Inc.*, 698 F.3d 568, 573 (7th Cir. 2012).

[67] *See AU Optronics*, 134 S. Ct. at 744 (Court will decide statutory questions in ''[t]he context in which the mass action provision was enacted'').

[68] 151 F.3d 297 (5th Cir. 1998).

[69] Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 581 (2008) (citations omitted).

[70] *Id.* (emphasis added).

[71] *See*, *e.g.*, *Schedin v. Ortho-McNeil-Janssen Pharms., Inc.*, No. 08-cv-05743-JRT, ECF Nos. 183-84 (D. Minn. Dec. 8, 2010) (in first *In re Levaquin* bellwether trial, plaintiff succeeded on failure to warn claim and obtained punitive damages); *Christensen v. Johnson & Johnson*, No. 07-cv-03960-JRT, ECF No. 239 (D. Minn. June 23, 2011) (in second *In re Levaquin* bell-

   ISSN 1529-0115

templation of a bellwether trial does not stand as an ''implicit'' proposal for a joint trial hidden in a request for consolidated proceedings. Once defendants won the constitutional war in *Cimino* barring bellwether trials from being binding on others' claims, no serious mass tort lawyer on either side would think that proposing a bellwether trial was a proposal to try anything other than the single claim being considered in that trial. It is simply not plausible, therefore, that in 2005 Congress contemplated, let alone intended, that a proposal to consolidate actions, which would likely result in one or a handful of single, bellwether trials, was the same as a proposal to try monetary relief claims of 100 persons jointly.

'Tried Jointly' Means, Well, Tried Jointly

The third reason the mass action provision's ''tried jointly'' language should not be extended to include rulings on ''common issues'' or a single ''exemplar'' trial is that the joinder rule requires a single trial of multiple claims, not adjudication of piecemeal issues. The terms Congress used in the mass action provision are ''just as they are used in Federal Rule of Civil Procedure 20, governing party joinder.''[72] The Court in *AU Optronics* further stated,

> Where § 1332(d)(11)(B)(i) requires that the 'claims of 100 or more persons [must be] proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact,' [Rule 20 provides that] '[p]ersons may join in one action as plaintiffs if they assert any right to relief jointly . . . and any question of law or fact common to all plaintiffs will arise in the action.'[73]

This significant development in mass action jurisprudence makes Rule 20 a necessary prism through which to view a proposal for the joint trial of monetary relief claims. Essentially, the Court concluded that a proposal to try claims jointly under CAFA would need to look like a proposal to try claims jointly under Rule 20. However, unlike with resolution of common issues (which does not include a judgment), and unlike with a single bellwether trial (which does not bind others), ''where two or more plaintiffs join their claims under the joinder provisions of Rule 20, each and every joined plaintiff is bound by the judgment.''[74]

Rule 20 permits ''reasonably related claims for relief by or against different parties to be *tried in a single proceeding*.''[75] If there were any doubt, the Supreme Court's impression of the language caused it to refer to the ''100 or more persons'' in the statute as ''the parties who are proposing to join their claims in a *single trial*.''[76]

In contrast to the Supreme Court's ''single trial'' and Rule 20 joinder analysis, the discussions found in *Abbott* and *Atwell*, which focus on resolution of common issues, appear to corral the standards of Rule 42, governing proposals for consolidation, which may simply entail a joint hearing on any matters at issue.[77] But as discussed above, while common issues are necessary conditions to triggering mass action status, they are not sufficient to do so in the absence of the proposal for a joint trial of 100 claims. In passing CAFA, ''Congress [was] aware of existing law . . . ,''[78] and the law it was aware of—and modeled the mass action ''joint trial'' provision after—was Rule 20. A proposal to invoke Rule 42's issue joinder procedures is therefore not adequate to satisfy the mass action provision.

CAFA Counsels Against Extending Mass Actions to Bellwether Trial Proposals in Coordinated Cases

Conditioning federal jurisdiction on the presence of a proposal to actually try 100 claims jointly does not enable gamesmanship or exalt form over substance. To the contrary, it fits squarely into the literal confines of the statute and within the policy considerations of Congress. Proceedings that coordinate hundreds of cases for pre-trial purposes, but that do not threaten a single trial and judgment of 100 or more claims in one fell swoop, do not invoke the same risks as class action certification.

The Supreme Court has recognized that class actions are cases in which ''damages allegedly owed to tens of thousands of potential claimants are aggregated and *decided at once*,'' risking ''*in terrorem* settlements.''[79] Congress has determined that a single complaint joining only 99 plaintiffs' claims, which necessarily proposes a single, joint trial of such claims, sits just outside that threshhold. The filing of many such complaints merely creates a risk that several different joint trials may result in a number of 99-person (or fewer) judgments. But those judgments may differ. Even if one group of plaintiffs wins such a judgment, a defendant may win all the rest. Congress has clearly determined that this risk is not large enough to garner federal jurisdiction.

The fact that a single trial of 100 or more persons may be rare provides no reason to expand CAFA. Rather, it underscores Congress's intent that the mass action provision is quite narrow. ''The mass action provision thus functions largely as a backstop to ensure that CAFA's relaxed jurisdictional rules for class actions cannot be evaded by a suit that names a host of plaintiffs rather than using the class device.''[80]

As the Tenth Circuit recently noted in *Parson v. Johnson & Johnson*, ''The primary 'abuses' Congress identified were misuse of the 'complete diversity requirement' and abuse of the 'amount-in-controversy' requirement. Neither is at issue in this [''proposed to be tried jointly''] CAFA removal action.''[81] Unlike binding bellwether trials, a 100-person single trial has not been found to be unconstitutional. Even if Congress had not

---

wether trial before same judge, jury determined that defendant did not fail to warn at all); *Straka v. Johnson & Johnson*, No. 08-cv-05742-JRT, ECF No. 240 (D. Minn. Jan. 26, 2012) (in third *In re Levaquin* bellwether trial before same judge, jury determined that defendant failed to warn, but found no causation; many settlements ensued).

[72] *AU Optronics*, 134 S. Ct. at 742.

[73] *Id.*

[74] *Snyder v. Harris*, 394 U.S. 332, 337 (1969).

[75] *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974) (emphasis added).

[76] *AU Optronics*, 134 S. Ct. at 742 (emphasis added).

[77] *See* Fed. R. Civ. P. 42(a)(1).

[78] *Id.*

[79] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752, 179 L. Ed. 2d 742 (2011).

[80] *AU Optronics*, 134 S. Ct. at 744.

[81] No. 13-6287, 2014 BL 102257 (10th Cir. Apr. 11, 2014).

explicitly required that the plaintiffs propose a single trial of their whole claims, opening the statute up to removal based on the prospect of a binding bellwether trial (a long-abandoned and unconstitutional concept) is not sound statutory construction.[82]

The Seventh and Eighth Circuit's reading of the mass action provision, in essence holding that it is enough to propose that a common *issue* would be resolved by a single judge, not only appears to overlook the text requiring joint trial of whole *claims*, but it also runs counter to the Supreme Court's recent authority, which mandates fealty to CAFA's actual text and compares the language to that found in Rule 20 (joinder of claims for single trial) as opposed to Rule 42 (joinder of common questions for hearing). *AU Optronics* will undoubtedly provide some guidance for the *en banc* panel in the Ninth Circuit's rehearing in *Romo*—and perhaps for the Supreme Court itself, should it grant review.

Simplicity

Diversity jurisdiction has always been a rich canvass. It can combine lofty arguments regarding federalism and public policy with compelling practical considerations. These and everything in between were brought to bear in the *AU Optronics* case. Ultimately, however, the Court re-applied an observation it made in its previous term in another CAFA case, *Standard Fire v. Knowles*: ''when judges must decide jurisdictional matters, simplicity is a virtue.''[83] The current ''tried jointly'' split demonstrates just how thorny CAFA's thicket can be. Just as defendants in those cases urged their circuit panels, the LCD defendants had hoped the Court would expand upon *Knowles*'s warning not to ''exalt form over substance,''[84] by arguing that CAFA endeavors to capture such large cases of national importance.

However, the Court determined that the text of CAFA was not equal to the task. Instead, the Court described the mass action provision as a ''backstop'' to ensure that CAFA ''cannot be evaded by a suit that names a host of plaintiffs rather than using the class device.''[85] Construing the ''claims . . . proposed to be tried jointly'' language in any way other than its straightforward meaning would abandon the virtue of simplicity the Court has repeatedly held is essential in deciding issues of jurisdiction.

---

[82] *See AU Optronics*, 134 S. Ct. at 745 (citing *Meyer v. Holley*, 537 U.S. 280, 286 (2003), for proposition that courts may infer, through Congress's silence, an intent to apply ordinary background legal principles, not an intent to apply unusual modifications to those principles).

[83] *Id.* at 744 (quoting *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013)).

[84] *Knowles*, 133 S. Ct. at 1350.

[85] *AU Optronics*, 134 S. Ct. at 744.

  CLASS ISSN 1529-0115