# Nineteenth Annual Corporate Counsel Symposium

***Material from the breakout session "Tort Reform: Is the World Flattening?"***

## PART ONE: OVERVIEW OF CLASS ACTION FAIRNESS ACT (CAFA)

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Enacted in 2005, the primary purpose of CAFA was to encourage the litigation of nationwide class actions in federal courts, rather than state courts. CAFA sought to achieve this by relaxing the standards for diversity jurisdiction for class actions. Under the Act, federal courts have original jurisdiction over a claim if: (1) the class size is 100 or more, (2) the aggregate of the plaintiffs' claims exceeds $5,000,000, and (3) any plaintiff is diverse from any defendant.[1] The minimal diversity rule is subject to an exception, coined the "local controversy exception," under which a class action can remain in state court if two thirds of the class members and the primary defendants are from the forum state.[2]

**CAFA's Impact on Class Action Litigation**:

1. Increased Class Action Litigation in Federal Courts: Recent data collected by the Federal Judicial Center demonstrates that CAFA has been successful in shifting multi-state class actions to federal court.

    - There has been a significant increase in original filings of diversity class action claims in federal courts. The pre-CAFA average of original diversity class action filings was 11.9 per month. The post-CAFA average is 34.5 per month.[3]
    - 8 of the 12 federal circuits experienced at a least a doubling of diversity class action filings when pre-CAFA calendar years 2002 and 2003 were compared with post-CAFA July 2005 through June 2007.[4]
    - Contrary to the national trend, the District of Minnesota experienced decreases in both the number of original filings and removals of diversity based class action claims during the post-CAFA period.[5]

2. Forum Shopping by Circuit: The distribution of post-CAFA increases in original class action filings suggests that forum shopping by circuit is an emerging practice. Rather

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[1] Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d) (2008).
[2] 28 U.S.C. § 1332(d)(4)(B). Additionally, if the primary defendants are states, state officials or other government entities, the federal court must decline jurisdiction. *See* 28 U.S.C. § 1332(d)(5).
[3] FED. JUDICIAL CTR., IMPACT OF CAFA ON THE FEDERAL COURTS: FOURTH INTERIM REPORT 1–2 (2008).
[4] *Id.* at 9
[5] *Id.*

than wait for removal to federal court, plaintiffs' attorneys are choosing to file multi-state class actions in circuits with more favorable law.[6] In the 12 months following CAFA's enactment, federal circuits thought to be more liberal experienced significantly higher increases in original class action filings.[7]

- Second Circuit: 200% increase
- Third Circuit: 513% increase
- Ninth Circuit: 560% increase
- Eleventh Circuit: 488% increase[8]

3. Closer Scrutiny of Coupon Settlements: Although CAFA's minimal diversity rules are largely considered pro-defendant, the statute also contains components intended to be pro-plaintiff in its new rules for judicial review of coupon settlements.[9]

  - Reduced Attorney's Fees: Pre-CAFA, contingency fees were based on the value of coupons distributed. Under CAFA, fees are calculated from the number of coupons actually redeemed.[10] As an example, in *Fears v. Wilhelmina Model Agency, Inc.*, plaintiffs' counsel sought a $7 million fee award under the coupon settlement. The court instead awarded $4 million, based on the redeemed coupons alone.[11]

  - But What Qualifies as a Coupon Settlement? In setting forth new restrictions on these awards, CAFA failed to define what qualifies as a coupon settlement under the statute, opening a likely new area for litigation.[12]

## FEDERAL RULE OF CIVIL PROCEDURE 23

**Amendments to Rule 23**: The second most significant change in the realm of class action litigation occurred in 2003, prior to CAFA's enactment, in the form of amendments to Rule 23.

1. Heightened Judicial Scrutiny of Settlements: A court may not approve a class action settlement until it holds a "fairness" hearing, during which the history and terms of the deal are examined to ensure both the settlement and attorney fees are reasonable.[13]

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[6] Terry Carter, *A Step Up in Class: Plaintiffs lawyers adapt to class action law—and hunt for congenial circuits*, ABA JOURNAL, May 2008, http://abajournal.com/magazine/a_step_up_in_class/.
[7] *Id.*
[8] *Id.*
[9] Coupon settlements are generally considered those in which plaintiffs are not compensated with monetary awards, but rather with coupons for products or services. Critics of coupon settlements assert that they are more of a marketing tool for defendants than fair compensation to plaintiffs. Crystal Carreon*, Coupon Deal in Car Suit Cleared: Ford case lawyers get $25 million; for eligible, vouchers*, SACRAMENTO BEE, Dec. 4, 2007, http://www.sacbee.com/101/story/540803.html.
[10] 28 U.S.C. § 1712(a).
[11] Fears v. Wilhelmina Model Agency, Inc., 2005 WL 1041134, *16 (S.D.N.Y. 2005).
[12] Allan Kanner & M. Ryan Casey, Consumer Class Actions After CAFA, 56 Drake L. Rev. 303, 305 (2008) (discussing that courts are already struggling to determine whether "free minutes in a wireless provider class action amounts to a coupon deal").
[13] FED. R. CIV. P. 23(e) (CAFA also contains a similar requirement for the judicial review of settlements).

2. Second Opportunity to Opt Out: Any class member may object during the hearing, and the court may then require a new opportunity for class members to opt out after learning the terms of the settlement.[14]

3. Elimination of Conditional Class Certification: Another significant change to Rule 23 is the deletion of conditional class certification. This amendment ended the practice of granting class certification on a tentative basis when it is unclear whether the rule's requirements were met by the class.[15]

## CONTINUING TENSION BETWEEN STATE AND FEDERAL JURISDICTION

Although CAFA has significantly increased the number of class actions filed in federal court, courts are still struggling with circumstances where the line between state and federal jurisdiction is not clear and the statute does not provide a conclusive answer. Even when the jurisdictional question is resolved, the question regarding choice of law still remains. The following issues are representative of those that courts are currently facing, with often conflicting results.

1. Which party has the burden of proving removability*?* Several courts have adhered to the traditional rule that the party seeking to remove bears this burden of establishing that federal jurisdiction is proper.[16] However, a number of courts have latched onto language in CAFA's legislative history suggesting that the plaintiffs have the burden to prove that the case is not appropriate for removal.[17]

2. If a federal court denies class certification, does the court retain jurisdiction over the individual plaintiffs' claims? Federal district courts in Illinois, Ohio, Florida, and Washington have concluded that denial of certification does not deprive the court of jurisdiction under CAFA.[18] By contrast, federal district courts in Kansas, New York, and California have found that a denial of class certification does in fact deprive the court of jurisdiction under CAFA, and requires the class action be remanded to state court.[19]

3. In a federal diversity class action, what choice of law standard should court's apply? Because CAFA did not provide a choice of law rule, in determining what substantive law to apply in a diversity class action, courts have been faced with two options: the Klaxon standard and the Shutts approach. There is yet to be a clear answer as to which choice of law standard should be applied.

    - *Applying the Law of One State (the Shutts Approach)*: Under Shutts, the court must find "a significant contact or significant aggregation of contacts, creating state

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[14] *Id.*

[15] Agenda f-18 Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 8 (Sept. 2002), *available at* http://www.uscourts.gov/rules/jc09-2002/report.pdf.

[16] *See, e.g.*, Brill v. Countryside Home Loans, Inc., 427 F.2d 446 (2005).

[17] *See, e.g.*, Barry v. Am. Express Publ'g. Corp., 381 F. Supp. 2d 1118, 1122 (C.D. Cal. 2005).

[18] Genenbacher v. CenturyTel Fiber Co. II, LLC, 500 F. Supp. 2d 1014, 1017 (C.D. Ill. 2007); In re Welding Fume Prods. Liability Litig., 245 F.R.D. 279, 317 (N.D. Ohio 2007); Colomar v. Mercy Hosp., Inc., 2007 WL 2083562, *2–3 (S.D. Fla. 2007); Davis v. Homecomings Fin., 2007 WL 905939, *1 (W.D. Wash. 2007).

[19] Gonzalez v. Pepsico, Inc., 2007WL 1100204, *4 (D. Kan. 2007); McGaughey v. Treistman, 2007 WL 24935, *3 (S.D.N.Y. 2007); Arabian v. Sony Elecs. Inc., 2007 WL 2701340, *5 (S.D. Cal. 2007)

interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[20] The Eighth Circuit has held that Shutts is the proper test for choice of law analysis on the federal district court level.[21]

- *Applying Multiple State Laws (the Klaxon Standard)*: Under Klaxon, the federal court "must follow conflict of laws rules prevailing in the states in which they sit."[22] At least one court handling multidistrict litigation has employed the Klaxon analysis.[23]

## TAKE-AWAYS

1. Multi-state Class Actions Have Shifted Significantly to Federal Court—Rather than fueling class action removals, CAFA has sparked an increased number of original diversity class action filings in federal court. This shift may have the effect of shrinking the plaintiffs' bar, as more cases in multidistrict litigation go to top-tier plaintiffs' firms.[24]

2. Plaintiffs' Attorneys Have Started Circuit Shopping—By filing nationwide class actions in federal court, rather than risking removal, plaintiffs attorneys have retained the ability to seek a favorable forum for their claim. The result is significant increases in original class action filings in circuits considered more liberal.

3. Courts Must Closely Scrutinize Class Action Settlements—Both CAFA and the Rule 23 Amendments mandate greater judicial scrutiny of class action settlements, disfavoring coupon settlements and questioning large attorneys fee awards.

4. Finally, There Are Significant Unresolved Questions under CAFA—Burdens of proof, federal jurisdiction after the denial of class certification and choice of law questions are among the many issues currently lacking consensus among the courts.

## TRENDS IN THE TYPE OF CLASS ACTION FILINGS

Dramatic Increase in Labor Class Actions: According to the Federal Judicial Center, labor class actions (most brought under the Fair Labor Standards Act) have increased the most significantly of all class action claims in the past several years.[25]

- In straight numbers, labor class actions increased from 337 filed during July-December 2001 to 1,104 filed in January-June 2007, an increase of 228%.[26]
- Labor class actions also claim a larger portion of all class action activity. In July-December 2001, labor class actions comprised 24.6% of all identified class

[20] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985).
[21] In re St. Jude Med., Inc., 425 F.3d 1116, 1120 (8th Cir. 2005).
[22] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 821 (1941)
[23] In re Pharm. Indus. Average Wholesale Price Litig., 230 F.R.D. 61, 82-84 (D. Mass. 2005).
[24] Carter, *supra* note 6.
[25] FED. JUDICIAL CTR., *supra* note 3, at 3.
[26] *Id.*

actions. In January-June 2007, they comprised nearly one-half, 46.9%, of identified class actions.[27]

Increase in Consumer Protection/Fraud Class Actions: Though not at the level of labor class actions, there has also been an increase in consumer protection/fraud based class action activity.

- In absolute numbers, consumer protection/fraud class actions increased from 191 during July-December 2001, to 489 during January-June 2007, a 156% increase.[28]
- From July-December 2001, consumer protection/fraud class action claims accounted for 13.9% of all class actions. This category rose to 20.8% of all class actions during the January-June 2007 period.[29]

Increase in Securities Class Action Filings: According to the Stanford Law School Securities Class Action Clearinghouse, the number of securities class actions have significantly increased in the past year, following two years of decreased filings.[30]

- In the period from January-June 2008, there were 110 securities class action filings. In the preceding two years, the semiannual average was 63 filings.[31]
- Approximately half of the filings during the first 6 months of 2008 contained subprime mortgage/credit allegations.[32]

Declines in Several Class Action Areas:

- Civil Rights Class Action Claims: Declined from 195 filed in July-December 2001 to 162 during January-June 2007, a decline of 17%.[33]
- Torts/Personal Injury Class Action Claims: Decreased from 52 filed during July-December 2001 to 35 in January-June 2007, a 33% decrease.[34]

[27] *Id.* at 4.
[28] *Id.*
[29] *Id.*
[30] CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2008 MID-YEAR ASSESSMENT (2008).
[31] *Id.* at 2.
[32] *Id.*
[33] FED. JUDICIAL CTR., *supra* note 3, at 5.
[34] *Id.*

# PART TWO: CONSUMER FRAUD DEVELOPMENTS

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## PREDATORY LENDING

*Generally*

- Current federal law regarding predatory lending and banking regulation is not terribly plaintiff-friendly. Most statutes have no private right of action, and those that do, such as the Truth in Lending Act, place low limits on recovery or have a short statute of limitations (TILA, for example, only allows suits until one year after the origination of a loan).

- A new trend, then, is plaintiffs turning to state consumer protection laws to get a remedy for predatory lending. Most states' consumer protection laws allow a private right of action (only IA and ND have no private right), have relatively low burdens of proof compared to federal statutes, and provide for much better remedies (for example, treble damages).

- In addition to existing consumer protection laws, many states have enacted special predatory lending reform laws that provide a private cause of action, either under the new laws themselves or under existing consumer protection laws. In a *National Law Journal* article, one Greenberg Traurig partner who specializes in sub-prime mortgages says he expects these laws to result in a flurry of litigation similar to suits against securities brokers whose funds underperform.

- Recent Congressional legislation, the Housing and Economic Recovery Act of 2008, at one point contained an amendment specifically stating that new state predatory lending laws would not be preempted by federal legislation. It does not appear that that amendment survived to the final version of the bill, which was signed into law on June 30, 2008. Thus, the extent to which recent state legislation might be preempted appears to be undecided at this time.

*Selected States*

- *Minnesota*: Minnesota has not enacted any legislation in this field since 2002, according to the Center for Responsible Lending. Suits have, however, been filed under the state's existing consumer protection laws, which are not terribly plaintiff-friendly. Minnesota's private attorney general statute, Minn. Stat. § 8.31(3a), allows private suits to enforce consumer protection laws, but only if they benefit the public. A single borrower alleging fraudulent action usually cannot meet this standard, as "litigation over an alleged misrepresentation that was made only to one person 'does not advance state interests and enforcement

has no public benefit.'" *Davis v. US Bancorp*, 383 F.3d 761 (8th Cir. 2004) (quoting *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn.2000)).

- *Washington*: Washington has been a plaintiff-friendly jurisdiction in this field. Washington's Consumer Protection Act (CPA), Wash. Rev. Code §§ 19.86 *et. seq.*, provides that violations of the federal Truth in Lending Act (TILA), the federal Real Estate Settlement Procedures Act (RESPA), and the Washington Mortgage Broker Practices Act (MBPA) are violations of the CPA that give rise to a private cause of action. In *Anderson v. Wells Fargo Home Mortgage*, 259 F. Supp. 2d 1143 (W.D. Wash 2003), the court held that Wells Fargo's failure to make disclosures required by RESPA within three days of a borrower's application was a deceptive act for purposes of a CPA claim. More recently, in *Pierce v. NovaStar Mortgage*, the defendant settled a class action alleging failure to disclose yield spread premiums as required by law. *See* 2007 WL 3052639 (discussing the settlement).

- *California*: Predatory lending legislation enacted in California in 2002 specifically provides a private right of action against those who engage in prohibited acts. Cal. Stat. ch. 732-33 (2001). Plaintiffs can recover costs and punitive damages, and the law specifically preserves the common-law option of double damages. *Id.* Additionally, California courts are loath to find that federal law preempts the application of the state's general consumer protection laws (e.g., the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et. seq.*) to banks and lenders. *See Gibson v. World Savings & Loan Assn.*, 103 Cal. App. 4th 1291, 1303-04 (Cal. Ct. App. 2004).

- *New York*: In 2002, New York amended its banking law to cover "high-cost home loans." N.Y. Laws ch. 626 (2002). In addition to the Attorney General, the law provides that any party to a high-cost home loan can bring suit to recover for violations. The law allows recovery of actual damages and statutory damages (either interest or $5,000 per violation depending on the nature of the violation), in addition to allowing rescission and equitable relief, and it specifically provides that the remedies listed are not meant to be exclusive.

- *Colorado*: Colorado has also recently amended its laws to cover predatory lending. Colo. Sess. Laws ch 323 (2002). While the new law provides a private cause of action, it is limited to the scope provided by federal legislation, specifically TILA and the Home Ownership and Equity Protection Act (HOEPA) and regulations adopted pursuant thereto. The law seems to have been narrowly written in an attempt to avoid preemption, as the sections on preemption and interpretation take pains to note that the law was designed so as not to conflict with any federal laws that might preempt it. Additionally, despite searching on Westlaw, I was unable to find any Colorado cases that dealt with predatory lending in the context of Colorado's existing consumer protection laws.

**PERSONAL INJURY**

*Generally*

- Personal injury class actions have become much more difficult to file of late, as courts routinely refuse to certify classes because the exact injury claims involved are too dissimilar. Plaintiff's lawyers have come up with a novel work-around that allows them to get class certification: treating personal injury as a type of consumer fraud.

- The claims are usually one of two kinds: (1) the consumer would not have purchased the product if he knew he would be injured by it, or (2) the consumer would not have purchased the product if he knew there was a *risk* of injury. The latter is swiftly becoming more common than the former, with many of these new "personal injury fraud" cases not alleging a single injury whatsoever. (Based on my research, I think this is deliberately done to make certification easier. Plaintiff's lawyers seem to fear that courts won't certify a class if it even looks like it might be a personal injury case.)

- There are costs and benefits to plaintiffs who pursue this type of action. The most obvious cost is that each member of the class gets less money than he or she would in a personal injury action: instead of getting medical costs, pain and suffering, and the like, recovery is effectively capped at the amount each plaintiff spent buying a product. This individual cost, however, is balanced by the comparative ease of class certification, which allows the class to get a potentially massive award from a defendant company. In addition, because consumer fraud, unlike personal injury, is an ongoing act, plaintiffs can get injunctive relief against defendants.

*Specific Cases*

- *Carpenters and Joiners Welfare Fund v. SmithKline Beecham*, 2008 WL 4435734 (D. Minn. 2008), and *Hoorman v. SmithKline Beecham*, unreported (Ill. Cir. Ct. 2006): These cases focused on the allegedly deceptive marketing practices for the antidepressant Paxil, which studies linked with suicidal thoughts in children and teenagers who had been prescribed the drug. *Carpenters and Joiners* was a class action launched by insurers, while *Hoorman* was a class action launched on behalf of Paxil users. Neither case alleged that a single child or teen had actually attempted or committed suicide due to Paxil. SmithKline Beecham settled *Carpenters and Joiners* for $40 million and *Hoorman* for $64 million. No wrongdoing was admitted in either case. According to a *National Law Journal* article, "personal injury fraud" claims against drug makers are expected to increase because of the aggressive marketing tactics used by drug manufacturers.

- *In re Bausch & Lomb Contact Lens Solution Products Liability Litigation*, No. 2:06-MN-77777 (D.S.C.), and *Degelmann v. Advanced Medical Optics*, No. 3:07-cv-03107 (N.D. Cal.): These cases, still ongoing, concern the increased likelihood of keratitis associated with ReNu (*Bausch & Lomb*) and Complete MoisturePlus (*Advanced Medical Optics*) contact solution. Keratitis causes corneal scarring and loss of vision. In both cases, the plaintiffs allege that the companies knew their products were associated with an increased risk of keratitis, yet they marketed their products as "safe" anyway. (The FDA has since recalled the whole class of contact solutions associated with keratitis.)

- *Birdsong v. Apple Inc.*, No. 5:06-cv-02280 (N.D. Cal.): The plaintiffs allege that Apple violated several CA consumer protection laws by failing to provide sufficient warning that listening to an iPod with the volume turned all the way up could cause hearing loss. Apple's 12(b)(6) motion was granted. While Apple marketed iPods as safe for normal use, the court found that the plaintiffs did not make sufficient allegations to support a cause of action for use at the "extreme end of the spectrum." The dismissal is currently being appealed. The question of class certification was never reached.

- *In re Bluetooth Headset Products Liability Litigation*, No. 2-07-ml-01822 (C.D. Cal.): Similar to the Apple case, the plaintiffs allege violation of CA consumer protection laws for failure to warn of a risk of hearing loss. No plaintiff has actually suffered hearing loss; the only remedy they seek is a refund of purchase price. The case is currently pending.

- *Gonzalez v. In-Zone Brands, Inc.*, No. 2:06-cv-02163 (D. Kan.): PepsiCo and several other soft manufacturers faced a consumer fraud lawsuit based on the risk of benzene contamination from drinking, among other things, Diet Wild Cherry Pepsi. After the plaintiffs survived a motion to dismiss, the defendants agreed to change their product formulas and pay out millions in refunds, according to a *National Law Journal* article.

**PUFFERY AND FALSE ADVERTISING**

*Generally*

- Although longstanding precedent protects "mere puffery," product advertising is increasingly under attack in consumer fraud actions. Usually, these new claims do not allege that an advertisement is false. Rather, they claim that advertising makes a product too appealing to resist. Although courts still consistently hold that material falsity must be shown for these actions to succeed, suits based on puffery are becoming more popular regardless.

*Specific Cases*

- *Goodwin v. Anheuser-Busch*, 2005 WL 280330 (Cal. Super. Ct. 2005): Plaintiffs claimed, among other things, that beer advertisements allegedly targeted at teenagers violated California's Consumer Legal Remedies Act, specifically Cal. Civ. Code § 1770(a)(5), which prohibits advertising that claims specific characteristics a product does not have. The court dismissed the case on the pleadings, noting that the plaintiffs only alleged that the advertisements used images of "fun, sexiness, popularity, social acceptance, athleticism, etc.," none of which was a material falsity. *Id.* at *5.

- *Avery v. State Farm Mut. Auto Ins. Co.*, 835 N.E.2d 801 (Ill. 2005): The plaintiffs alleged that advertising that claimed certain car parts were "high quality replacement parts" that met the defendant's "very high performance criteria" violated the Illinois Consumer Fraud Act. The Illinois Supreme Court disagreed, holding that the statements were "meaningless superlatives that no reasonable person would take seriously, and [thus] not actionable as fraud." *Id.* at 841.

- *Adamson v. Ortho-McNeil Pharmaceutical*, 463 F. Supp. 2d 496 (D.N.J. 2006): The plaintiff sued under New Jersey's Consumer Fraud Act, alleging that she bought name-brand birth control because the manufacturer failed to disclose that a generic version of the product was chemically identical. She focused on two statements in the advertisement: first, that "not all birth control pills contain the same type of hormones," and second, "Isn't it's great to find one [kind of birth control] that's right for you?" The court held that the first statement was undeniably true and thus not actionable, regardless of whether there existed *a* generic medication that was chemically identical. As to the second statement, the court held that it was mere puffery rather than a representation that the defendant's drug was the only one like it on the market.

## PART THREE: JOINT AND SEVERAL LIABILITY DEFINED

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The traditional rule of joint and several liability makes each defendant who has contributed to a tort individually liable but also jointly responsible for the entire harm suffered by the plaintiff. If all defendants are solvent, each would pay in proportion to his percentage of fault. However, if any of the defendants cannot pay, the remaining defendants would be liable for the entire amount of damages. The paying defendants would then be entitled to contributions from the insolvent defendants in order to achieve a fair allocation of damages.

# Minnesota Specifically

Formerly, joint liability was the general rule in Minnesota. The last three major modifications of the rule occurred in 1978, 1988, and 2003:

1978: The rule of joint and several liability was modified to include a loss reallocation provision that reallocated any uncollectible share of a judgment among all the remaining parties to the litigation, including the plaintiff. The reallocation rule was a middle position between full retention of the rule of joint and several liability and complete abolition of the rule in favor of several liability only.[35] This provision remains in the statute today, but reallocation is now limited to cases where there is joint liability.[36]

1988: "[A] person whose fault is 15% or less is liable for a percentage of the whole award no greater than four times the percentage of fault, including any amount reallocated to that person under subdivision 2."[37]

2003: Most recent statutory reform

Statutory reform in 2003: Minn. Stat. § 604.02, subd. 1 (2003).

New Provisions:

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[35] Michael K. Steenson, *Joint and Several Liability in Minnesota: The 2003 Model*, 30 Wm. Mitchell L. Rev. 845, 850-52 (2004).

[36] Minn. Stat. § 604.02, subd. 2; Steenson, *supra* note 1, at 884-85; *see also Eid v. Hodson*, 521 N.W.2d 862, 864 (Minn. Ct. App. 1994) (pre-amendment case stating that without joint liability, "Minn. Stat. § 604.02, subd. 2 does not apply and there is no basis for reallocating any uncollectible amount of a judgment to another party.").

[37] Minn. Stat. § 604.02, subd. 1 (2002).

"When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:
(1) a person whose fault is greater than 50 percent;
(2) two or more persons who act in a common scheme or plan that results in injury;
(3) a person who commits an intentional tort; or
(4) a person whose liability arises under chapters 18B - pesticide control, 115 - water pollution control, 115A - waste management, 115B - environmental response and liability, 115C - leaking underground storage tanks, and 299J - pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01."

"This section applies to claims arising from events that occur on or after August 1, 2003."

Illustration:

To illustrate the new statute, assume that there are two defendants whose fault combined to cause the plaintiff an indivisible injury, and that the trier of fact assigns 51% of the fault to Defendant 1 and 49% of the fault to Defendant 2. If Defendant 2 is unable to pay its share of the judgment, Defendant 2's share is reallocated to Defendant 1, who is liable to the plaintiff for 100% of the damages because of the rule of joint and several liability. On the other hand, if Defendant 1 is unable to pay, Defendant 2 is liable for only 49% of the plaintiff's damages because Defendant 2's liability is several only. In that case, the plaintiff would bear the entire burden of the uncollectibility of Defendant 1's share of the judgment.[38]

Unchanged Provisions:

The amendment leaves subdivisions 2 (loss reallocation) and 3 (reallocation in products liability cases) of Minn. Stat. § 604.02 unaffected.

Minnesota is still a modified comparative fault jurisdiction. It permits the plaintiff to recover only if the plaintiff's contributory fault was not greater than the fault of the person against whom recovery was sought.[39] In other words, the plaintiff must be no more than 50% at fault in order to recover.

Effect of the New Statute:

It reduces the number of cases in which joint and several liability apply.

[38] Steenson, *supra* note 1, at 862-63.

[39] *See* Minn. Stat. § 604.01.

"The norm is several liability, and joint and several liability becomes the exception."[40]

Since the statute only applies to claims arising from events that occurred on or after August 1, 2003, only a handful of cases have cited the new version, and even fewer have interpreted it.

"Common scheme or plan" provision

Defendants can be found jointly and severally liable if they acted in a "common scheme or plan that results in injury."[41]

In the recent *Jones v. Boerger* case, two police officers were on patrol together when one of the officers got into an altercation with the plaintiff. The court held that there was no "common scheme or plan" between the two officers that would support the application of joint and several liability. The fact that the officers were on patrol together at the time of the incident was not enough to show a common scheme or plan.[42]

Although there is no clear definition of "common scheme or plan" in Minnesota case law, one source notes that it appears to correspond to the concept of "concerted action" in a criminal context.[43]

## National Trends

There is a national trend toward abolishing joint and several liability in favor of proportionate (several) liability.

38 states have modified the traditional rule of joint and several liability.[44]

Many states are now basing the amount for which a defendant can be held liable on his proportion of fault, but the formulas for determining liability vary substantially from state to state.

In addition, most of these reforms apply to specific types of torts or have other restrictions.

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[40] Steenson, *supra* note 1, at 861.

[41] Minn. Stat. § 604.02, subd. 1.

[42] *Jones v. Boerger*, 2008 U.S. Dist LEXIS 72415 (D. Minn. Sept. 22, 2008).

[43] 4 MICHAEL K. STEENSON & PETER B. KNAPP, MINNESOTA PRACTICE SERIES: JURY INSTRUCTION GUIDES – CIVIL 212 (5th ed. 2006).

[44] Congressional Budget Office, The Effects of Tort Reform: Evidence from the States (June 2004), http://www.cbo.gov/doc.cfm?index=5549&type=0&sequence=1.

## PART FOUR: OVERVIEW OF TORT REFORM: PUNITIVE DAMAGES

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## *Exxon Shipping Company v. Baker*

### A. Factual Background

- This is the most recent U.S. Supreme Court decision on punitive damages. Minneapolis-based Faegre & Benson helped represent the plaintiff class of commercial fishermen in the case.

- The litigation began in 1989, after the Exxon Valdez oil tanker crashed into Bligh Reef in Prince William Sound, Alaska and discharged 11 million gallons of crude oil into the ocean. To date, it is considered one of the largest environmental disasters in U.S. history. The accident disrupted commercial fishing operations, irreparably harmed the ecosystem, and devastated the local community.

- Punitive damages arose in this case because Exxon Corporation (the owner of the tanker) was aware that the ship's captain was a relapsed alcoholic. Exxon also knew that he had been drinking alcohol while in command at sea. When the ship ran aground, the captain's blood alcohol level was estimated to be three times the legal driving limit.

### B. Punitive Damages Procedural History

- Initially, a federal jury awarded the plaintiff class $5 billion in punitive damages (in addition to $507.5 million in compensatory damages). Over the next nineteen years, the award would be repeatedly challenged..

- Upon appeal and remand, the amount of punitive damages fluctuated from $5 billion to $4 billion to $4.5 billion. In 2006, the Court of Appeals for the Ninth Circuit reduced the punitive damages award to $2.5 billion, reasoning that any punitive-to-compensatory damages ration greater than 5-to-1 violated Exxon's due process rights.

### C. The Supreme Court's Decision

- On June 25, 2008, the Supreme Court held that the maximum award of punitive damages allowed in this case was $507.5 million, finding that the ratio of punitive-to-compensatory damages should be set at 1-to-1.

- In doing so, the Court placed a firm ceiling on punitive damages, noting that the unpredictability and unfairness of punitive damages required a standard.

- Interestingly, even thought this case arose under maritime law, many scholars believe that the precedent will still apply to state law punitive damages verdicts.

## *Minnesota Developments in Punitive Damages*

### A. Statutory Limits: Minn. Stat. 549.20

- Minnesota has not yet enacted an explicit punitive damages cap, as some other states have.
- State law requires a plaintiff to prove punitive damages by “clear and convincing evidence,” a standard higher than the typical “preponderance of evidence” level of proof used in civil trials.
- Minnesota also requires the determination of punitive damages to be made in a separate proceeding.
- Finally, trial and appellate courts in the state have the power to review all punitive damages awards.

### B. Recent Developments in Case Law

- Company’s failure to give a sales representative proper notice of termination, when it made an effort to comply with the law, did not qualify for punitive damages. *Wingert & Assocs v. Paramount Apparel Int’l*
- Because punitive damages are considered in a second proceeding, a trier of fact may consider facts that occur after the initial proceeding (such as a defendant’s attempt to conceal post-trial earnings in a fraud case). *Markegard v. Von Ruden*
- In a defamation action, punitive damages can be ordered against not only an editor but also the publishing company. *Workman v. Serrano*
- An award of $50,000 in punitive damages is not excessive when the plaintiff was awarded $204,500 in compensatory damages. *Markegard v. Von Ruden*
- Punitive damages cannot be based on a defendant’s improper conduct by entering into a mediation agreement in bad faith. *Soucie v. Hess*
- Punitive damages are not available in private plaintiff actions based on the Consumer Fraud Act. *Evangelical Lutheran Church in America Board of Pensions v. Spherion*

## *National Trends in Punitive Damages*

### A. A Sampling of State Legislation

- Texas bars punitive damages in medical malpractice cases without jury unanimity.

- Ohio limits punitive damages to not more than two times the compensatory damages or 10 percent of a defendant's net worth, not to exceed $350,000.

- Arizona, Colorado, Ohio, Oregon, Utah, North Dakota, and New Jersey provide pharmaceutical companies with immunity from punitive damages from FDA-approved products (unless plaintiff can establish fraud in obtaining approval).

- Nevada limits punitive damages to $300,000, or three times the amount of compensatory damages.

- Colorado requires a plaintiff to prove punitive damages beyond a reasonable doubt.

- Connecticut limits punitive damages in product liability actions to two times the award of compensatory damages.

- Georgia limits punitive damages to $250,000; Idaho allows the greater of $250,000 or three times the compensatory damages; North Dakota holds damages at $250,00 or two times the compensatory damages.

- Montana limits punitive damages to $10 million or 3 percent of a defendant's net worth, whichever is less. The limit does not apply to class actions.

- New Hampshire prohibits the award of punitive damages.

## B. Recent Cases

- The Oregon state supreme court held that a punitive damages award is unconstitutionally excessive if it exceeds four times the amount of compensatory damages. *Goddard v Farmers Ins. Co.*

- In 2007, the Ohio supreme court upheld the state law limiting punitive damages *Arbino v. Johnson & Johnson*.

## *Conclusion*

- In *Exxon,* the Supreme Court unmistakably limited the amount of punitive damages available to plaintiffs. Even though the specific case addressed maritime law, it is likely that the ruling will trickle down to state courts because the Court relied heavily on due process precedent. If the Court is willing to reduce damages in one of the worst ecological disasters in history, it will not hesitate to continue to place limits on punitive damages.

- Thus far, Minnesota has not adopted the same restrictive approach to punitive damages, as have other states in the country. Recent decisions uphold the state's legislative restrictions, but the state has not jumped on the complete tort reform bandwagon quite yet.

As statutory limits on punitive damages crop up across the country, the number of cases testing those limits will also rise. Time will determine whether the punitive caps will be a success or a failure.