No. 13-56310

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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JUDITH ROMO, *et al.*,

Plaintiffs-Appellees,

v.

TEVA PHARMACEUTICALS USA, INC.,

Defendant-Appellant.

==========

Appeal from the Judgment of the U.S. District Court
for the Central District of California
Honorable Philip S. Gutierrez, Case No. 5:12-cv-02036-PSG-E

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AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLEES JUDITH ROMO, ET AL.

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Amicus Curiae American Association for Justice ("AAJ") hereby certifies the following:

Amicus Curiae AAJ has no parent companies and there is no publicly held corporation holding 10% or more of its stock.

Dated: March 17, 2014

Respectfully submitted,

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CIRCUIT RULE 29-2(a) STATEMENT

This brief has been filed with the consent of Plaintiffs-Appellees. Counsel for Defendant-Appellant does not oppose the filing of the instant brief.

Dated: March 17, 2014

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STATEMENT OF INTEREST

The American Association for Justice ("AAJ") is a national bar association whose members practice in every state, including California. AAJ members primarily represent plaintiffs in personal injury, civil rights, employment rights, and consumer litigation. AAJ files this brief in support of the panel's decision, which respects the ability of individual plaintiffs in separately filed lawsuits to pursue their state-law claims in state court. It is AAJ's firm conviction that to sweep individual cases properly before state courts into federal court solely under an overly broad interpretation of the Class Action Fairness Act not only does violence to the plain meaning of the Act but more importantly undermines the role of state courts in applying the laws of the state, reverses the long-settled deference in favor of the plaintiff's choice of forum, and inhibits the ability of states to manage their own litigation. As this Court's resolution of this issue may well have a substantial impact far beyond the parties in this case, AAJ believes that its national perspective and experience will assist this Court in reaching a proper resolution.

AAJ is a non-profit organization of attorneys and is not a party to this action. Pursuant to Federal Rule of Appellate Procedure 29(c)(5)(A), AAJ hereby states that the brief was not authored, in whole or in part, by either party's counsel. Pursuant to Federal Rule of Appellate Procedure 29(c)(5)(B), AAJ hereby states that it knows of no party or party's counsel to have contributed money that was intended to fund preparing or submitting the brief.

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INTRODUCTION

Removal jurisdiction under 28. U.S.C. 1332 is, as a rule, extraordinarily limited. The removal of "mass actions" under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No.109-2, 119 Stat. 4 (2005)), buried as it is within the statute that by its very name is meant to address representative "class actions," is extraordinarily limited. This is reflected by the many predicate conditions and exemptions placed upon "mass action" removal in the statute.

Congress meant what it said when it imposed a baseline limit of 100 cases that will be jointly tried. While it is unknown precisely why Congress chose the number 100 *per se*, it is clear that Congress set that number as a threshold line of demarcation between what is removable and what should remain a state court action. Indeed, the Senate Report, No. 109-14, Feb. 28, 2005 ("Senate Report"), often criticized for unfairly re-writing the statute 10 days later in a way that favors federal court removal, at *48, defines "mass action" removal as when "100 or more persons' claims *will be tried jointly*." The within action does not meet that requirement.

The vast majority of litigation in this country is handled by state court systems. In dealing with litigation before it, state court systems, like California, have endeavored to create various mechanisms by which their own dockets are best managed. Given this reality, CAFA was designed to avoid interfering with the efficient docket management of state court systems – including the use of "bellwether" trials which inform but do not bind litigants whose cases are not being adjudicated. CAFA encourages this docket management by expressly exempting pre-trial coordination proceedings from the ambit of its "mass action" removal. Here, removal would not only do violence to California's purpose in enacting Section 404.1 for the efficient administration of its dockets but also render CAFA's exemption for cases consolidated for pre-trial proceedings meaningless. The uncertainties created by allowing such removal would severely hamper the ability of California to manages its own courts and laws.

ARGUMENT

I. THE "MASS ACTION" PROVISION OF THE CLASS ACTION FAIRNESS ACT IS A NARROWLY DRAFTED PROVISION, WHICH WAS INSERTED INTO THE ACT IN ORDER TO ADDRESS VERY RARE INSTANCES WHERE A "MASS ACTION" MAY BE VIEWED AS THE EQUIVALENT OF A CLASS ACTION

The provisions of CAFA that are pertinent to removal of "mass actions" are extraordinarily limited. There are important reasons for this. After all, it is a removal statute and both the panel's majority and dissent agree that removal statutes should be strictly construed. *Romo v. Teva Pharmaceuticals USA, Inc.*, 731 F.3d 918, 922, 925 (9th Cir., 2013). The reason for this is not abstract. Federal courts are courts of limited jurisdiction, while removal usurps the ability of state courts to decide their own laws.

It is in the context of it being a removal statute that the extremely rigid limitations on removal of "mass actions" found in CAFA must be viewed. CAFA's main purpose is the removal of representative actions that may result in a state court determining the interests of the residents of multiple states whose cases would not otherwise be capable of adjudication in that specific state court forum. "Mass actions" are

quite different, as in these, as a general rule, the state court forum is ruling upon the application of the laws of its own state.

Given this divergence, it is not surprising that removal of "mass actions" are far more circumscribed. First, Section IV(11)(A) makes clear that before removal of a "mass action" may even be considered, there must be compliance with the entirety of Sections IV(2) through IV(10) governing class actions. Then, Section (B) sets forth further very specific limitations:

1) Section (B)(1) and (2) make clear that not only must there be an express limitation for cases "*proposed or to be tried jointly*" (which will be discussed further below), but even if a case qualifies for removal pursuant to the statute, every single individual case proposed to be removed must still on its own meet the Federal Court jurisdictional amount. For any individual case not meeting the jurisdictional amount, remand is required.

2) Then, even if everything described above is complied with, claims may *not* be removed nor even considered a "mass action" if those claims: a) arise from a single event or occurrence (B)(i)(I); 2)

the defendant proposes the joinder (B)(i)(II);[1] or 3) the claims have been consolidated or coordinated solely for pretrial proceedings (B)(ii)(IV) (which also will be discussed further below).

Thus, the "mass action" removal section of CAFA, buried as it is within a statute that by its very name is meant to address "class actions," is an extraordinarily limited procedure meant on its face to deal with a very limited number of special circumstances.

II. THE STATUTE MEANS WHAT IT SAYS; THERE IS A RATIONAL BASIS FOR LIMITING REMOVAL TO REAL SITUATIONS WHEN "MONETARY RELIEF CLAIMS OF 100 OR MORE PERSONS ARE PROPOSED TO BE TRIED JOINTLY"

The key provision of CAFA that was before the panel below was the provision limiting removal to "monetary relief claims of 100 or more [that] are proposed to be tried jointly." This provision is clear and unambiguous. The operative wording is "to be tried jointly." Trial is

[1] The fact that CAFA expressly states that Defendants may not seek joinder and then request removal should make it clear that CAFA was not designed to be read broadly as an attempt to prevent "inconsistent judgments" or preferring Federal court jurisdiction of larger actions.

not an ambiguous concept and the infinitive "to be" is not subject to another meaning.

While Congress does not express why the number 100 was chosen, it is clear why an actual "trial" is highlighted. It is, after all, only as a result of an actual trial that the rights of litigants can be determined. It can be inferred that the question before Congress when they addressed the number "100" was at what point do enough plaintiffs in one trial mean that that trial will operate in a way that would effectively bind non-litigants, *i.e.* become a surrogate for the representative actions CAFA was meant to address. Congress expressly chose the number 100.

This Court should not disturb that, despite the fact that *amici* for Appellants consistently argue that Congress could not have meant what it said. They argue that "100" is only advisory, stating that consolidated trials rarely have more then twenty plaintiffs. While this may be true, it is also true that cases involving twenty or fewer plaintiffs are routinely tried around the country. If Congress meant 20, it would have said 20. Congress chose the number of 100.

Amicus, the Washington Legal Foundation ("WLF"), cited by the dissent, argues correctly that there were two situations that initiated the need for the "mass action" provision. These are described as liberal joinder provisions that allowed a large number of cases to be venued in Jefferson County, Mississippi and trial consolidations in West Virginia. Brief of WLF at 15-18. However, the WLF fails to note that by the time CAFA was passed, the Mississippi situation was no longer an issue; Mississippi had already changed its permissive venue rules. Miss. Code Ann. § 11-11-3(1)(a)(i) (Rev. 2004). This left West Virginia where Congress was cognizant of mass trials and due process concerns occurring, particularly with regard to one trial in which 8,000 asbestos claims went to trial and 4,500 claims were actually tried together.[2] Clearly, Congress felt there was a reason to create a limit as to how many cases brought to trial together were too many, as such mass trials would result in the waiving of an individual's due process right to

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[2] *See* Legg, M., Stengel, J., *West Virginia Asbestos Mass Trial: Efficient Innovation or Constitutional Violation? Aside from Denying Due Process, the Concept Has Unintended Consequences by Attracting More Cases and Draining Court and Damage Resources,* Defense Counsel Journal , Vol. 71, No. 3 (Jul. 2004).

fully present his or her case in exchange for the benefit to the whole. The number set by Congress was 100.

While *Amici* for Appellants argue that Congress did not mean what it said and instead wished for an expansive interpretation of what "100 or more are proposed to be tried jointly" means, none of them cite to anything other than general hyperbole found in various non-germane sections of the Senate Report. *See* Brief of Products Liability Advisory Council at 4; Brief of Chamber of Commerce of the United States and PhRMA at 7-8 ; and Brief of Washington Legal Foundation at 2-3, 10-11.[3] However, it is notable that they uniformly ignore *48, which expressly addresses the very provision at issue before this Court[4]:

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[3] The only real instance of a proposal truly being implicit is where a single complaint joins more than 100 plaintiffs' claims. *Bullard v. Burlington Northern Santa Fe Ry.*, 535 F.3d 759,762 (7th Cir. 2008). As held by Judge Posner in *Koral v. Boeing Co.*, 628 F.3d 945, 947 (7th Cir. 2010), "for the assumption would be that a single trial was intended—one complaint, one trial, is the norm."

[4] It is to be noted that this Court thought that the Senate Judiciary Committee Report was "of minimal, if any, value in discerning congressional intent" because it was issued ten days after CAFA's enactment, *Tanoh v. Dow Chem. Corp.*, 561 F.3d 945, 954 n.5 (9th Cir. 2009). *See also*, *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 177 (4th Cir. 2011) ("Senate Report 109-14, however, was issued 10 days after CAFA was signed into law, and for that reason

(continued...)

> The final exception would apply to claims that are consolidated or coordinated solely for pretrial proceedings. If a number of individually filed cases are consolidated solely for pretrial proceedings–and not for trial–those cases have not truly been merged in a way that makes them mass actions warranting removal to federal court. On the other hand, if those same cases **are consolidated exclusively for trial**, or for pretrial and trial purposes, **and the result is that 100 or more persons' claims *will* be tried jointly**, those cases have been sufficiently merged to warrant removal of such a mass action to federal court.

(emphasis supplied.) Thus, the Senate Report, which each of the *Amici* cites to, clearly reiterates that the number is 100 and it will only be operative where cases "*will* be tried jointly."

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[4](...continued)
alone, it is a questionable source of congressional intent); *Coll. of Dental Surgeons v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 38 n. 2 (1st Cir. 2009); and *Weinberger v. Rossi*, 456 U.S. 25, 35, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982) ("[P]ost hoc statements of a congressional Committee are not entitled to much weight"). *Although see* Brief of the Chamber of Commerce and PhRMA at 7, n. 1 for Courts that have held to the contrary.

III. THE "MASS TORT" PROVISIONS SHOULD NOT BE READ TO INTERFERE WITH THE ABILITY OF STATE COURTS TO MANAGE THEIR PRETRIAL PROCEEDINGS

A. CAFA Was Designed Not to Interfere With the Efficient Docket Management of State Court Systems

Amicus herein submits that both the district court and the panel were correct when they found that Plaintiffs' petition for coordination was not a proposal to try the cases jointly. To state otherwise would lead to an unwarranted incursion into the ability of state and local jurisdictions to manage their own dockets. First, if the mere filing of a motion for consolidation or coordination could be read to trigger removal, it would impede mechanisms designed by the various states and local courts to attempt to manage their own dockets through such consolidation. Secondly, it would lead to a situation where the tail effectively wags the dog, as just one isolated plaintiff could push all other properly venued plaintiffs into federal court by filing such a petition.

Preliminarily, in California a motion for consolidation or coordination cannot on its own propose to try cases jointly, as the motion is not made to a court that could oversee a trial or order a joint

trial. *See Koral v. Boeing Co.*, 628 F.3d at 947 ("The proposal must be to the court in which the suits are pending.").[5] Rather, California Code of Civil Procedure, Section 404 provides that "when civil actions sharing a common question of fact or law are pending in different courts, a petition for coordination may be submitted to the Chairperson of the Judicial Council," and not to the court where an action may be tried. Further:

> On receipt of a petition for coordination, the Chairperson of the Judicial Council may assign a judge to determine whether the actions are complex, and if so, whether coordination of the actions is appropriate, or the Chairperson of the Judicial Council may authorize the presiding judge of a court to assign the matter to judicial officers of the court to make the determination in the same manner as assignments are made in other civil cases.

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[5] While *Amicus* herein believes that *In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012) was wrongly decided by the 7th Circuit, that decision does not help Appellants here. There it was found that the Supreme Court of Illinois to whom the proposal for coordination was directed did have the power "to consolidate Plaintiffs cases through trial." *Id.* at 573. Here, the Judicial Council only has the power of assignment.

Moreover, the coordination could be denied, rendering any such joint trial an impossibility. Even when coordination is granted, the assignment does not constrain the assigned court in any way.

Removal under the circumstances here would do violence to California's purpose in enacting Section 404.1, which California has designed for its own efficient administration of litigation:

> Coordination of civil actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and, the likelihood of settlement of the actions without further litigation should coordination be denied.

In response, *Amici* for Appellants exalt the potential dismantling of state court rules designed for the efficient handling of state court proceedings. The Brief of the United States Chamber of Commerce and PHRMA, at 20, actually goes so far as to state that every coordinated proceeding in California with more than 100 plaintiffs should

automatically confer Federal jurisdiction under CAFA. If so, should every plaintiff do a count of all pending actions before unwittingly moving an individual action into Federal court? Should actions with fewer than 100 plaintiffs which may proceed for years before the coordinating court find themselves subject to removal when that 100th plaintiff gets added on? Should one plaintiff that files a coordination proposal that uses the wrong words result in cases across the state being removed? One would think these questions rhetorical if it were not precisely what *Amici* supporting Appellants are requesting.

There can be no question that the vast majority of litigation in this country is handled by state courts. In dealing with that litigation, state courts, like those in California, have endeavored to create various mechanisms in order to manage their own dockets. CAFA in fact goes out of its way to expressly preserve these mechanisms, as 4(B)(ii)(IV) intentionally excludes from the "mass action" definition state and local coordination or consolidation proceedings – no matter how large – from being defined as a "mass action" within the context of the statute. To state that the mere possibility of a trial effectuates a removal would

render this express exemption meaningless. All coordinations or consolidations of pretrial proceedings have the potential for some trial.

B. "Bellwether" Trials Are Not Trials of More Than 100 and Do Not Require Removal Under CAFA

The inference of the dissent that "bellwether" trials share the representative qualities of the trial of a class action" is incorrect. *Romo*, *supra.* at 925. Preliminarily, by definition "bellwether" trials do not include the necessary 100 plaintiffs being tried together jointly which is expressly stated in CAFA. They merely constitute a frequently used technique for docket management.

Moreover, the dissent is wrong in claiming that at as a result of a "bellwether" trial, "the claims or issues of a larger group are precluded or otherwise decided by the results." *Id.* It is well settled that test cases or "bellwether" trials are "not formally binding on other claimants or respondents," though they can serve to "inform both the court and other potential litigants on critical questions." *See* ALI, Principles of the Law of Aggregate Litigation § 2.02 (comment) (2010). Thus, to the extent that the dissent was suggesting that the results of a bellwether trial could preclude the claims of non-parties without their explicit

consent or the certification of a class action, that suggestion is in error and does not support a finding that the plaintiffs in this case had proposed a joint trial of their claims. In fact, the Fifth Circuit held in *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998), that any proposal to bind non-parties in this manner would violate the Seventh Amendment. *Id.* at 319-21.

No federal court has held otherwise, and, a decade later, the Supreme Court itself adopted this position in *Taylor v. Sturgell*, 553 U.S. 880 (2008). Justice Ginsberg, writing for a unanimous Court, emphasized the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party." *Id.* at 884 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). For this reason, "application of claim and issue preclusion to non-parties thus runs up against the "deep-rooted historic tradition that everyone should have his own day in court." *Taylor*, 553 U.S. at 892-93. (internal quotation omitted).[6]

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[6] Exceptions to this principle are few and narrowly construed, including, irrelevant to this case, where the non-parties belong to a class that has been certified under Federal Rules of Civil Procedure

(continued...)

The Supreme Court even later reiterated its position in *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2381 (2011), holding that non-parties cannot be bound by the judgment in a case not certified as a class action, again rejecting the notion that identity of interests and adequacy of representation can form the basis for preclusion of non-parties' claims.

Thus, the purpose of a "bellwether" trial neither is nor can be to bind claimants whose cases are not being tried together. It is merely a docket management tool to encourage settlement by giving guidance to the parties of the potential result and value of the tried claims.

IV. THE FACT THAT THERE IS AN MDL PROCEEDING SHOULD NOT WEIGH ON THIS COURT'S EVALUATION

While there is a multi-district litigation pending on propoxyphene cases in the Eastern District of Kentucky, it is clear from 28 U.S.C.A. § 1332(d)(11)(C)(i) that Congress intended that no weight be given to this fact in evaluating the remand decision:

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[6](...continued)
Rule 23, or where a non-party "agrees to be bound by the determination of issues in an action between others [and] is bound in accordance with the terms of his agreement." *Id.* at 893 (quoting 1 Restatement (Second) of Judgments § 40, p. 390 (1980)).

> Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, **unless a majority of the plaintiffs in the action request transfer pursuant to section 1407**.

If Congress meant for such removed cases to be automatically transferred to an MDL proceeding for the purpose of judicial efficiency, it would not have given plaintiffs the right to vote on the location of their own federal venue. *See also* Senate Report, *supra*. at *47.

CONCLUSION

For all of the foregoing reasons, AAJ urges this Court to affirm the majority decision affirming the district court's order of remand.

Dated: March 17, 2014

Respectfully submitted,

SMOGER & ASSOCIATES

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for *Amicus Curiae*, American Association for Justice, hereby certifies that:

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B)(ii). As measured by the word-processing system used to prepare this brief, there are 3409 words in the brief.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally-spaced typeface at least 14-point or larger (Century Schoolbook, 14-point) using WordPerfect Version X4.

/s/ *Gerson H. Smoger*
Gerson H. Smoger

Attorney for Amicus Curiae,
American Association for Justice

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I, David M. Arbogast, hereby certify that on March 17, 2014, I electronically filed the BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES.

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/s/ *David M. Arbogast*
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