

## CLASS(LESS) ACTION REFORM

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### INTRODUCTION

Class actions provide an important mechanism for plaintiffs to obtain justice where they would otherwise have no recourse. Those willing to wield its power use class actions to aggregate their claims with other similarly situated individuals. This combined force is often the only way to fight large corporations that would otherwise be impervious to individual claims. One of the primary goals of the class action is to give an individual a realistic and economic opportunity to obtain redress.<sup>1</sup> Unfortunately, the nature of class action lawsuits is not as straightforward as many of its purported goals. As the Seventh Circuit Court of Appeals has stated, “the class action is an awkward device, requiring careful judicial supervision.”<sup>2</sup> Indeed, with recent changes in the legal landscape of class actions,<sup>3</sup> it has become particularly important for courts to operate with careful regard to the demands of class actions. The Seventh Circuit, a strong advocate of class action reform, has attempted to lead in this respect.<sup>4</sup>

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<sup>1</sup> S. REP. 109-14, at 83 (2005).

<sup>2</sup> *Culver v. City of Milwaukee*, 277 F.3d 908, 910 (7th Cir. 2002).

<sup>3</sup> 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005).

<sup>4</sup> See Iain D. Johnston, *Survey of Seventh Circuit Decisions: Class Actions*, 36 J. MARSHALL L. REV. 837 (2003).

As a general matter, the Seventh Circuit has exhibited a high level of distrust towards class action counsel operating on the state level.<sup>5</sup> Class action plaintiffs and their counsel, surely aware of this distrust, have taken specific steps to avoid removal of class actions filed in Illinois state courts.<sup>6</sup> Recent legislation, however, has further broadened federal jurisdiction over class actions with diverse parties, making it even more difficult for class action plaintiffs to avoid federal courts.<sup>7</sup> Notwithstanding the major changes initiated by the Class Action Fairness Act (“CAFA”),<sup>8</sup> the Seventh Circuit continues to express its distrust of class action counsel and the state level courts that adjudicate class action cases.<sup>9</sup>

In *Carol B. Oshana v. Coca-Cola Co.*, the Seventh Circuit recently affirmed a defendant’s removal of a class action, even though the plaintiff had expressly disclaimed damages over \$75,000.<sup>10</sup> The court found that the defendant’s “good faith belief” that the amount in controversy would exceed \$75,000 outweighed the plaintiff’s express disclaimer waiving damages of over \$75,000 in her complaint.<sup>11</sup> The court also affirmed the lower court’s decision not to certify a class.<sup>12</sup> It

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<sup>5</sup> *Id.* at 837.

<sup>6</sup> *E.g.*, *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 511 (7th Cir. 2006) (plaintiff disclaimed relief exceeding \$75,000 in order to avoid federal diversity jurisdiction).

<sup>7</sup> 28 U.S.C. § 1332(d)(2), as amended by the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005).

<sup>8</sup> *Id.* Prior to CAFA, class action plaintiffs could avoid federal diversity jurisdiction by disclaiming individual amounts in controversy exceeding \$75,000. 28 U.S.C. § 1332(a) (2005); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938). Now under CAFA, class action plaintiffs may still do so; however, federal courts may have jurisdiction in class actions where the *aggregate* amount in controversy exceeds \$5,000,000. 28 U.S.C. § 1332(d)(2), as amended by the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005).

<sup>9</sup> *See Oshana*, 472 F.3d 506; Johnston, *supra* note 4.

<sup>10</sup> *Oshana*, 472 F.3d at 510; *see* 28 U.S.C. § 1332(a) (2005) (a defendant can remove a civil action on the basis of diversity only if, among other things, the plaintiff’s amount in controversy exceeds \$75,000).

<sup>11</sup> *Oshana*, 472 F.3d at 512.

<sup>12</sup> *Id.* at 513. Class certification is a prerequisite to a class action. FED. R. CIV. P. 23(a).

did so using an unfamiliar rule,<sup>13</sup> potentially creating an impossible standard for certain future class action plaintiffs.

This Note is divided into four Sections. Section I provides a brief background on class action law. Section II will touch on the Seventh Circuit's treatment of class action cases. Section III outlines the Seventh Circuit's ruling in *Oshana v. Coca-Cola*. Section IV delves deeper into the Seventh Circuit's holding, analyzing where the court went wrong. Finally, this Note cautions that *Oshana v. Coca-Cola* will adversely affect plaintiff classes by unnecessarily narrowing the path to redress.

### I. A BRIEF LOOK AT CLASS ACTION LAW

The general concept of class actions was first codified in 1849 under the Field Code.<sup>14</sup> In 1938, Congress drafted and adopted Rule 23 of the Federal Rules of Civil Procedure, the first federal class action rule of its kind.<sup>15</sup> Originally, this rule was “to create a class action system which could deal with civil rights, and, explicitly, segregation.”<sup>16</sup> After substantial amendments to the rule, and after successful persuasion by attorneys, judges began to expand class actions to the area of mass torts.<sup>17</sup> Initially, judges were increasingly willing to certify these types of classes, believing that individual claims would cause serious inefficiencies in state judicial systems.<sup>18</sup> That reasoning continues to be a primary purpose of class actions.<sup>19</sup>

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<sup>13</sup> *Oshana*, 472 F.3d at 513-14.

<sup>14</sup> Coby Warren Logan, *Federal Class Action Reform Legislation: The “Unfair” Approach to Addressing the Issues of Modern Mass Tort Litigation*, 40 TORT TRIAL & INS. PRAC. L.J. 1145, 1149 n.34 (2005). The Field Code required that numerous parties have a common interest in law or fact. *Id.*

<sup>15</sup> *Id.* at 1149.

<sup>16</sup> *The Class Action Fairness Act of 2003: Hearing on S. 353 Before the Subcomm. on Admin. Oversight and the Courts, S. Comm. on the Judiciary*, 108th Cong. (1999) (statement of John P. Frank).

<sup>17</sup> S. REP. 109-14, at 7 (2005).

<sup>18</sup> *Id.*

<sup>19</sup> *See id.*; ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 1.1 (4th ed. 2006).

Today, the class action is commonly known as the weapon of choice for plaintiffs claiming mass personal injuries and products liability cases.<sup>20</sup> Its effectiveness is derived from the combined force of similarly situated plaintiffs that share common questions of law and fact, giving each a cost-efficient means to obtain redress.<sup>21</sup> Often, individual litigants' claims are "too small to justify legal action."<sup>22</sup> But when taken as a whole, numerous litigants can move with greater force with a single claim that warrants litigation.<sup>23</sup> Class actions are also capable of achieving tremendous economies of scale by consolidating similar claims.<sup>24</sup> Accordingly, class actions avoid multiple suits, concurrently producing uniform rulings and holdings across a multitude of similarly situated plaintiffs.<sup>25</sup>

Plaintiffs typically file class actions in state courts.<sup>26</sup> And defendants frequently remove these actions to federal courts through the basis of diversity.<sup>27</sup> Plaintiffs prefer state courts for several reasons. For one, plaintiffs win more often in state courts than in the federal forum.<sup>28</sup> Some have asserted that class action plaintiffs file in state courts because of their "perception of prejudice against corporate defendants, a relaxed approach to class certification, and jurors willing

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<sup>20</sup> See CONTE & NEWBERG, *supra* note 19, at § 1.1.

<sup>21</sup> 59 AM. JUR. 2D *Parties* § 56 (2007).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Glenn A. Danas, *The Interstate Class Action Jurisdiction Act of 1999: Another Congressional Attempt To Federalize State Law*, 49 EMORY L.J. 1305 (2000).

<sup>25</sup> 59 AM. JUR. 2D *Parties* § 56 (2007).

<sup>26</sup> Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1526 (2005).

<sup>27</sup> *Id.*

<sup>28</sup> Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998) (removal of civil cases from state to federal courts generally results in a dramatic "drop in the plaintiffs' win rate"); see also Helen Norton, *Reshaping Federal Jurisdiction: Congress's Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003, 1038-39 (2006).

to return large monetary verdicts against the defendant.”<sup>29</sup> Defendants are eager to remove class actions likely for the same reasons.<sup>30</sup>

With this in mind, class action reformists steadfastly believe that plaintiffs in class actions are unfairly advantaged in state courts, especially when their counsel has selectively chosen a forum that he or she believes will be lenient to the class.<sup>31</sup> These reformists claim that the resultant holdings and interpretations of laws are then inconsistently applied to parties that span multiple jurisdictions.<sup>32</sup> Also, reformists are concerned that the interests of class members are often overlooked, with counsel achieving tremendous settlement amounts, and consumers achieving little, if anything, in redress.<sup>33</sup>

To address these concerns, Congress recently passed CAFA, which made major changes to class action law, expanding federal courts’ diversity jurisdiction over class action cases.<sup>34</sup> Prior to CAFA, defendants to a class action could only remove the suit if it involved a federal question or if the requirements of diversity jurisdiction had been met.<sup>35</sup> Diversity requirements were often difficult to meet: each named class representative had to be diverse from all named defendants<sup>36</sup> and, until 2005, the Supreme Court held that each class member had to claim an amount in controversy exceeding the statutory minimum.<sup>37</sup> Now with CAFA, Congress has vastly expanded federal

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<sup>29</sup> L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 178 (2004); see also S. REP. 109-14 (2005).

<sup>30</sup> Norton, *supra* note 28, at 1038-39.

<sup>31</sup> See generally S. REP. 109-14. Class action reformists believe that the majority of class action counsel “game” the procedural rules of class actions, keeping multi-state class actions in “state courts whose judges have reputations for readily certifying classes and approving settlements.” *Id.* at 4.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005).

<sup>35</sup> 28 U.S.C. §§ 1331-32 (2005).

<sup>36</sup> 28 U.S.C. § 1332 (2005).

<sup>37</sup> *Exxon Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 558-59 (2005) (holding that a federal court could exercise supplemental jurisdiction over all plaintiffs in a

jurisdiction over diverse parties of a class action where: (1) any one plaintiff (named or unnamed) is diverse from any one defendant; (2) the amount in controversy can now be calculated as an *aggregate* amount in controversy (\$5,000,000); and (3) there are at least 100 members in the proposed class.<sup>38</sup>

Once a class action has reached its jurisdictional seat, the plaintiff moves to certify a class.<sup>39</sup> The majority of states, including Illinois,<sup>40</sup> have adopted Rule 23 of the Federal Rules of Civil Procedure, sometimes with minor revisions.<sup>41</sup> If a class action is tried in one of these states, or if it has been removed to a federal court, class certification will require a showing that: the class is sufficiently large, the claims are common, the claims of the class representative are typical of those of the class, the class is adequately represented, and questions of law or fact predominate over the class.<sup>42</sup>

Proponents of class action reform welcome pro-reform legislation like CAFA, particularly for its federalizing power.<sup>43</sup> Often with only a cursory analysis, reformists claim that state court judges are too “lax” when applying certification requirements.<sup>44</sup> They also believe that federal courts will “generally . . . pay closer attention to the procedural requirements for certifying a matter for class treatment.”<sup>45</sup> Reformists presumably reach this conclusion based on federal courts’ reluctance to certify a class.<sup>46</sup>

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class if only one such plaintiff had a claim exceeding the amount in controversy, \$75,000).

<sup>38</sup> 28 U.S.C. § 1332(d)(2), as amended by the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005).

<sup>39</sup> FED. R. CIV. P. 23.

<sup>40</sup> 735 ILL. COMP. STAT. ANN. 5/2-801 (1998).

<sup>41</sup> Five states still use rules modeled on the pre-1966 amended Federal Rule 23, four use Field Code-based action rules, and three states permit class actions at common law. Logan, *supra* note 14, at 1148.

<sup>42</sup> FED. R. CIV. P. 23.

<sup>43</sup> *See* S. REP. 109-14.

<sup>44</sup> *Id.* at 14.

<sup>45</sup> *Id.*

<sup>46</sup> James E. Pfander, *THE SUBSTANCE AND PROCEDURE OF CLASS ACTION REFORM: The Federal Class Action Fairness Act May Seem Limited, but Its Impact on Class-Action Litigation Is Anything But*, 93 ILL. B.J. 144 (2005).

## II. SEVENTH CIRCUIT ON CLASS ACTIONS

The Seventh Circuit has consistently expressed its disdain for class actions by adjudicating cases, often unfairly, in favor of defendants. For example, in 1995, the Seventh Circuit decided a case that has now become an oft-cited example of the federal judiciary's disdain for certifying class actions.<sup>47</sup> From 1996 to 2005, the Seventh Circuit led a pro-defendant stance in a circuit split regarding diversity jurisdiction as it applied to class actions.<sup>48</sup> After CAFA was enacted in 2005, the Seventh Circuit chose to interpret the statute and the legislative history in favor of defendants attempting to remove class action cases commenced prior to the effective date of CAFA.<sup>49</sup> Finally, even with the expansive reach of CAFA's federal diversity jurisdiction laws, the Seventh Circuit continues to federalize class actions that should be adjudicated on the state level.<sup>50</sup>

In 1973, the Supreme Court ruled that in class actions, each class member's claims had to independently satisfy the amount in controversy requirement in order to qualify for diversity jurisdiction.<sup>51</sup> In 1990, Congress passed the Judicial Improvements Act, conferring supplemental jurisdiction on federal courts.<sup>52</sup> The Seventh Circuit was the first of four circuits to interpret the act in favor of class action defendants: federal district courts would now have the authority to exercise supplemental jurisdiction over all class action plaintiffs if just

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Of course, a reluctance to certify alone is no indication that federal courts are necessarily correct, or that the federal forum is superior to the state forum. In fact, many view federal courts as hostile towards class actions, where some courts are taking unusual measure to federalize, then reject certification. *See Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006); Johnston, *supra* note 4, at 837.

<sup>47</sup> *In re Rhone-Poulenc River, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

<sup>48</sup> *In re Brand Name Prescription Drugs*, 123 F.3d 599, 607 (7th Cir. 1997); *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928 (7th Cir. 1996); *see also S. REP.* 109-14, at nn.28 & 29.

<sup>49</sup> *Knudsen v. Liberty Mut. Ins. Co.*, 435 F.3d 755 (7th Cir. 2006).

<sup>50</sup> *Oshana*, 472 F.3d 506.

<sup>51</sup> *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973).

<sup>52</sup> 28 U.S.C. § 1367 (1988).

one plaintiff satisfied the amount in controversy.<sup>53</sup> The Seventh Circuit was steadfast in its stance up and through 2005, when the Supreme Court finally held that a federal district court could exercise supplemental jurisdiction over a putative class where only one plaintiff satisfied the amount in controversy.<sup>54</sup>

In 1995, the Seventh Circuit wrote a heavily criticized opinion regarding a class action<sup>55</sup> that has now become an example of one federal court's express disdain for class actions.<sup>56</sup> In *In re Rhone-Poulenc Rorer Inc.*, Judge Posner issued a writ of mandamus against the trial judge, decertifying a class "[w]ithout attempting to demonstrate that the putative plaintiff class did not meet the requirements of Federal Rule 23."<sup>57</sup> Instead, Posner relied on two primary arguments, each ignoring the analysis required in Rule 23.<sup>58</sup> First, Posner stated that the case had "demonstrated [a] great likelihood that the plaintiffs' claims, despite their human appeal, lack[ed] legal merit."<sup>59</sup> He drew this from an "inference from the defendants having won 92.3 percent (12/13) of the cases to have gone to judgment."<sup>60</sup> The court stated that it was "concern[ed] with forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they had no legal liability."<sup>61</sup> The Seventh Circuit's analysis of the twelve of thirteen cases that had gone to judgment has been characterized as nothing more than a "merits assessment in thin

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<sup>53</sup> *Stromberg*, 77 F.3d 928; see also *Exxon Corp. v. Allapattah Servs.*, 545 U.S. 546, 550 (2005); *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003); *Rosmer v. Pfizer, Inc.*, 263 F.3d 110 (4th Cir. 2001).

<sup>54</sup> *Exxon Corp.*, 545 U.S. at 550.

<sup>55</sup> *In re Rhone-Poulenc River, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

<sup>56</sup> *Danas*, *supra* note 24, at 1315. Class action reformists, on the other hand, "consistently embrace[] these opinions." *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Rhone-Poulenc*, 51 F.3d at 1299.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

disguise.”<sup>62</sup> Such an assessment flies in the face of the “fundamental tenet of federal class action law that a court should not evaluate the merits of a claim at the certification stage.”<sup>63</sup> In her dissent, Judge Rovner questioned the majority’s comment that the defendants had too much at stake for a single jury to decide on.<sup>64</sup> Rovner focused on Federal Rule 23, stating that the majority’s contentions were at odds with Rule 23; certification of a class was to be based on the requirements of Rule 23, “regardless of the magnitude of potential liability.”<sup>65</sup>

Since February 2005, the Seventh Circuit has been busy interpreting and applying CAFA.<sup>66</sup> In *Knudsen v. Liberty Mutual Insurance Co.*, the Seventh Circuit held that CAFA applied to a class action that was filed in state court prior to CAFA’s effective date.<sup>67</sup> After the state court entered a default judgment on the merits against defendant insurance company for its “egregious” behavior, the representative plaintiff requested that the state court certify a class that would hold the defendant responsible for all policies issued by any of its subsidiaries or affiliates.<sup>68</sup> On an interlocutory appeal, the Seventh Circuit held that such a request constituted a claim that did not relate back to the original complaint, where the original complaint did not

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<sup>62</sup> Danas, *supra* note 24, at 1315 (quoting *Mass Torts and Class Action Lawsuits: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. (1998) (testimony of Elizabeth Cabraser, Esq., Lief, Cabraser, Heimann & Bernstein, LLP)).

<sup>63</sup> Danas, *supra* note 24, at 1315 (citing *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177-78 (1974); *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975)).

<sup>64</sup> *Rhone-Poulenc*, 51 F.3d at 1307 (Rovner, J., dissenting).

<sup>65</sup> *Id.* at 1308 (Rovner, J., dissenting).

<sup>66</sup> CAFA states that defendants can remove only those cases that have been “commenced” on or after February 18, 2005. 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005). The exact meaning of the term “commenced” has been substantially litigated since the adoption of CAFA. SIMONETTI, LISA. STROOCK SPECIAL BULLETIN, WHEN IS AN ACTION “COMMENCED” UNDER THE CLASS ACTION FAIRNESS ACT OF 2005 (2006) <http://www.stroock.com/SiteFiles/Pub434.pdf>.

<sup>67</sup> 435 F.3d 755 (7th Cir. 2006).

<sup>68</sup> *Id.* at 756.

include *all* of the defendants' allegedly unfair policies.<sup>69</sup> Notwithstanding that the class action had commenced prior to CAFA, the Seventh Circuit held that such a request was considered a "novel claim," one which would bring the class action within the scope of CAFA.<sup>70</sup>

### III. *OSHANA v. COCA-COLA*

In one of its most recent class action cases, the Seventh Circuit affirmed the removal of a plaintiff's class action despite her expressly disclaiming damages above \$75,000.<sup>71</sup> The court then held that class certification was properly denied.<sup>72</sup> In *Oshana v. Coca-Cola*, the plaintiff, Oshana, filed a putative class action against Coke in an Illinois state court alleging that Coke had violated the Illinois Consumer Fraud and Deceptive Practices Act ("ICFA") and had also been unjustly enriched.<sup>73</sup> Oshana alleged that Coke tricked consumers into believing that fountain Diet Coke and bottled Diet Coke contained the same ingredients.<sup>74</sup> Specifically, Oshana claimed, in relevant part, that Coke advertised that Diet Coke was sweetened with 100% aspartame, when in fact, fountain Diet Coke contained a mixture of both aspartame and saccharin.<sup>75</sup> Despite Oshana disclaiming individual damages over \$75,000, Coke removed the class action to federal court and defeated Oshana's motion for class certification.<sup>76</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 758.

<sup>71</sup> *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006), *reh'g en banc denied*.

<sup>72</sup> *Id.* at 513.

<sup>73</sup> The originally named plaintiff was David Hahn. *Id.* at 509, n.1. Carol Oshana substituted Hahn after he voluntarily withdrew. *Id.* For the purposes of this Note, plaintiff will be referred to as Oshana.

<sup>74</sup> *Id.* at 509.

<sup>75</sup> Aspartame and saccharin are artificial sweeteners. They are distinguishable both chemically and by preference. Leticia M. Diaz, *Sucralose: The Sugar of the New Millennium—FDA's Role: A Hindrance or a Help?*, 34 NEW ENG. L. REV. 363, 374-77 (2000).

<sup>76</sup> *Oshana*, 472 F.3d at 509-10.

Coke made an offer of judgment for \$650 plus reasonable attorneys' fees and costs, and Oshana accepted, reserving the right to appeal the issues of jurisdiction and the denial of class certification.<sup>77</sup> The Seventh Circuit affirmed both rulings of the district court.<sup>78</sup> A motion for rehearing en banc was denied.<sup>79</sup>

Oshana brought this class action on behalf of “[a]ll individuals who purchased for consumption and not resale fountain Diet Coke in . . . Illinois from March 12, 1999, through the date of entry of an order certifying the class.”<sup>80</sup> On behalf of this class, she complained that “Coke began advertising in 1984 that Diet Coke would be sweetened with 100% NutraSweet® brand aspartame, leading consumers to believe that all forms of Diet Coke would follow that formula, even though fountain Diet Coke continued to use saccharin.”<sup>81</sup> She sought compensatory damages, disgorgement of Coke’s profits from the sale of fountain Diet Coke in Illinois, attorneys’ fees and costs, and any other relief the court saw fit to grant.<sup>82</sup>

Oshana disclaimed individual damages over \$75,000.<sup>83</sup> Specifically, the complaint contained an express *ad damnum*<sup>84</sup> stating that “[p]laintiff seeks no relief, cause of action, remedy, or damages that confer federal jurisdiction upon the claims asserted herein, and expressly disclaims individual damages in excess of \$75,000.”<sup>85</sup> Coke thought the disclaimer was “unclear.”<sup>86</sup> Coke then requested that Oshana admit that in the event that the class was not certified, she

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<sup>77</sup> *Id.* at 510.

<sup>78</sup> *Id.* at 510, 513.

<sup>79</sup> *See id.*

<sup>80</sup> *Id.* at 510.

<sup>81</sup> *Id.* at 509.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> An *ad damnum* is “[a] clause in a prayer for relief stating the amount of damages claimed.” BLACK’S LAW DICTIONARY 31 (7th ed. 2000).

<sup>85</sup> *Oshana*, 472 F.3d at 511; Br. of Pet’r-Appellant at 6, 9, *Oshana v. Coca-Cola Co.*, No. 05-3640 (7th Cir. 2005).

<sup>86</sup> *Oshana*, 472 F.3d at 509.

would not personally seek relief greater than \$75,000.<sup>87</sup> Despite Oshana's express disavowal of any relief that would confer federal jurisdiction, Coke removed the case to federal court claiming a good-faith belief that the amount in controversy exceeded \$75,000.<sup>88</sup> The district court denied Oshana's motion to remand, concluding that Coke may have reasonably believed that Oshana's damages could plausibly exceed \$75,000.<sup>89</sup> The district court denied class certification, holding that Oshana could not meet the requirements of Rule 23 of the Federal Rules of Civil Procedure.<sup>90</sup>

The Seventh Circuit analyzed removal and certification separately.<sup>91</sup> As a preliminary matter, the court indicated that Oshana's case was not within the scope of CAFA because it had been filed before CAFA was enacted.<sup>92</sup> Although the court admitted that disclaimers of damages have been a "long approved [] way of staying out of federal court," it concluded that in Illinois, such disclaimers in complaints do not bind plaintiffs.<sup>93</sup> As such, the court held that Oshana's disclaimer had no legal effect.<sup>94</sup> The court then stated that because Oshana refused to formally disclaim damages in the event that the class was not certified, Coke had a good-faith belief that the amount in controversy exceeded \$75,000, notwithstanding Oshana's express *ad damnum* disclaimer.<sup>95</sup>

With respect to certification, the Seventh Circuit agreed with the district court's analysis, that Oshana failed to meet the requirements of Rule 23(a) and (b) of the Federal Rules of Civil Procedure.<sup>96</sup> The district court determined that the proposed class was "not sufficiently

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 510.

<sup>91</sup> The court reviewed the propriety of removal de novo. *Id.*

<sup>92</sup> *Id.* at 511.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 512.

<sup>96</sup> *Id.* at 513. The court reviewed the district court's analysis with an abuse of discretion standard of review. *Id.*

definite to warrant a class certification.”<sup>97</sup> Specifically, the district court stated that the class could “potentially include millions of customers,” some of which may not have been deceived by Coke’s marketing, because “at least some of Coke’s ads contained a disclaimer.”<sup>98</sup> Accordingly, the district court held that part of the class could not show any damage proximately caused by Coke’s alleged deception, a requirement in a claim for damages under the ICFA.<sup>99</sup> For the same reasons, the district court held that Oshana’s claims were not typical of the putative class.<sup>100</sup> The court elaborated further, stating that some of the proposed class members may have consumed Diet Coke knowing that it contained saccharin, whereas Oshana had claimed she was deceived.<sup>101</sup> With respect to typicality,<sup>102</sup> the Seventh Circuit stated that Oshana’s claim was subject to certain specific factual defenses, which undermined the typicality requirement.<sup>103</sup>

Finally, the Seventh Circuit held that Oshana failed to state a claim for unjust enrichment on behalf of a class.<sup>104</sup> The court explained that Oshana needed to “show[] that Coke benefitted to her detriment, and that Coke’s retention of the profits would violate the fundamental principles of justice, equity, and good conscience.”<sup>105</sup> The Court further held that “in this case Coke cannot have been unjustly enriched without proof of deception.”<sup>106</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 510.

<sup>99</sup> *Id.* at 514.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> “Typicality” is one of the requirements for class certification. FED. R. CIV. P. 23 (a)(3). “One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . the claims or defenses of the representative parties are *typical* of the claims or defenses of the class.” *Id.*

<sup>103</sup> *Oshana*, 472 F.3d at 514.

<sup>104</sup> *Id.* at 515.

<sup>105</sup> *Id.* (citing *HPI Healthcare Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. App. 1998)).

<sup>106</sup> *Oshana*, 472 F.3d at 515.

#### IV. PROBLEMS WITH THE SEVENTH CIRCUIT'S HOLDING IN *OSHANA V. COCA-COLA*

The holding in *Oshana v. Coca-Cola* exemplifies the Seventh Circuit's continued distrust of class action counsel, particularly those operating on the state level. In light of CAFA's expansion of federal jurisdiction in class actions, federal courts must now be particularly careful in drawing distinctions between cases that qualify for federal jurisdiction, and those that do not. CAFA creates a necessary balance between injured plaintiffs and diverse defendants.<sup>107</sup> Federal courts must acknowledge this change, and refrain from further expanding federal jurisdiction, upsetting the balance that Congress has struggled to achieve.<sup>108</sup>

Unfortunately, the Seventh Circuit fails in this regard. In its opinion in *Oshana v. Coca-Cola*, the court makes clear that, notwithstanding the federalizing power of CAFA, it will continue to affirm removals even when plaintiffs have disclaimed an amount in controversy exceeding the statutory minimum. Further, this case demonstrates that the Seventh Circuit is taking unusual measure to keep plaintiff classes from certifying. The Seventh Circuit's holding in *Oshana v. Coca-Cola* affirms its hostility towards class actions, one that does not seem to be assuaged by the passage of CAFA. Ironically, it is this type of federal hostility towards class actions that has prompted many plaintiffs to seek redress in state courts in the first place.<sup>109</sup>

##### A. Removal

In *Oshana v. Coca-Cola*, the Seventh Circuit rejected an express disclaimer of damages stated within Oshana's complaint.<sup>110</sup> First, the court looked to the Supreme Court holding in *St. Paul Mercury*

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<sup>107</sup> See S. REP. 109-14 (2005).

<sup>108</sup> 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005).

<sup>109</sup> Danas, *supra* note 24, at 1307.

<sup>110</sup> *Oshana*, 472 F.3d at 511.

*Indemnity Co. v. Red Cab Co.* to establish a framework for its analysis of removal.<sup>111</sup> The Seventh Circuit stated that “[o]nce the defendant . . . has established the requisite amount in controversy, the plaintiff can defeat jurisdiction only if ‘it appears to a legal certainty that the claim is really for less than the jurisdictional amount.’”<sup>112</sup> The court’s interpretation of the Supreme Court’s holding was incorrect.

The Supreme Court in *Mercury* held that when a plaintiff claims an amount in controversy above the statutory minimum in order to bring the case in federal court, the defendant must prove “to a *legal certainty* that the claim is really for less than the [statutory minimum] to justify dismissal.”<sup>113</sup> In dicta, the Court confirmed the natural corollary to the rule: if the plaintiff “does *not* desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.”<sup>114</sup> The Court went no further, choosing not to expound on the burden of proof in such a case.<sup>115</sup> Circuit courts, however, agree that it is the defendant’s burden to demonstrate that the amount in controversy exceeds the statutory minimum if the plaintiff claims otherwise.<sup>116</sup> The Third and Ninth

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)).

<sup>113</sup> *Mercury*, 303 U.S. at 289 (stating that it would need to be “apparent, to a legal certainty . . . from the proofs” that the plaintiff’s claim was for less than the statutory minimum) (emphasis added).

<sup>114</sup> *Id.* at 294 (emphasis added).

<sup>115</sup> *Id.*

<sup>116</sup> *Oshana*, 472 F.3d at 511 (stating that “[b]ecause [the defendant] is the proponent of jurisdiction, it has the burden of showing by a preponderance of the evidence facts that suggest the amount-in-controversy requirement is met”); *see also* *Williamson v. Aetna Life Ins. Co.*, 481 F.3d 369, 375 (6th Cir. 2007); *In re Hot-Hed Inc.*, 477 F.3d 320, 323 (5th Cir. 2007); *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006); *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005); *Altimore v. Mount Mercy Coll.*, 420 F.3d 763, 768 (8th Cir. 2005); *Friedman v. N.Y. Life Ins. Co.*, 410 F.3d 1350, 1353 (11th Cir. 2005); *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004); *Cal. Pub. Employees’ Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 100 (2d Cir. 2004); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290

Circuits have specifically held that when a plaintiff claims an amount in controversy less than the statutory minimum (to avoid federal court), the *defendant* must prove to a *legal certainty* that the amount in controversy is greater than the statutory minimum.<sup>117</sup> Such a rule is in accord with the Supreme Court’s rule in *Mercury*. In *Mercury*, the defendant needed to prove to a legal certainty that the amount in controversy was *less* than the statutory minimum in order to avoid federal court.<sup>118</sup> In the Third and Ninth Circuit cases, the defendant needed to prove to a legal certainty that the amount in controversy was *greater* than the statutory minimum in order to avoid state court.<sup>119</sup>

The Seventh Circuit, however, completely modified the Supreme Court’s rule; this modification required the plaintiff, for the first time, to prove to a *legal certainty* that her claim was for less than the statutory minimum.<sup>120</sup> Specifically, the court held that “[o]nce the defendant in a removal case has established the requisite amount in controversy, the plaintiff can defeat jurisdiction if ‘it appears to a *legal certainty* that the claim is really for less than the jurisdictional amount.’”<sup>121</sup> Indeed, the court recognized that the defendant initially bore the burden of establishing that the amount in controversy exceeded the statutory minimum. However, it then took the legal certainty standard in *Mercury* and flipped it into a plaintiff’s burden.<sup>122</sup>

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(10th Cir. 2001); *Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1, 4 (1st Cir. 1999).

<sup>117</sup> *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 996 (9th Cir. 2007) (“[T]he party seeking removal must prove with ‘legal certainty’ that the amount in controversy is satisfied, notwithstanding the prayer for relief in the complaint”); *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006) (“The party wishing to establish subject matter jurisdiction has the burden to prove to a legal certainty that the amount in controversy exceeds the statutory threshold”).

<sup>118</sup> *Mercury*, 303 U.S. at 289.

<sup>119</sup> *Lowdermilk*, 479 F.3d at 996; *Morgan*, 471 F.3d at 474.

<sup>120</sup> *Oshana*, 472, F.3d at 511.

<sup>121</sup> *Id.* (citing *Mercury*, 303 U.S. at 289) (emphasis added).

<sup>122</sup> To my knowledge, the Seventh Circuit is the only circuit court to have made such a drastic modification of the legal certainty standard. The Fifth Circuit has even stated that the “legal certainty” standard is “limited in utility to cases in which the plaintiff himself has placed the requisite jurisdictional amount in controversy by

In *Oshana v. Coca-Cola*, Oshana disclaimed damages exceeding the statutory minimum.<sup>123</sup> The court found that her refusal to admit to Coke's requests amounted in Coke meeting its burden of establishing that the amount in controversy exceeded the statutory minimum.<sup>124</sup> The court then went back to the disclaimers and erroneously applied the legal certainty standard, questioning if the disclaimers proved to a legal certainty that Oshana's claims for damages did not exceed the statutory minimum.<sup>125</sup> The court then cleverly stated that disclaimers in Illinois "had no legal effect."<sup>126</sup> Thus, the Seventh Circuit's modified rule forced Oshana's disclaimers to hold up to an impossible legal certainty standard.

The court then carried on, explaining why disclaimers had no legal effect in Illinois. In its scant analysis, the court cited to two of its own cases: *BEM I L.L.C. v. Anthropologie, Inc.* and *The Barbers, Hairstyling for Men & Women, Inc. v. Lela Bishop*.<sup>127</sup> The majority in *Barbers*, though discussing a similar issue, never ruled on the matter of disclaimers.<sup>128</sup> In *Barbers*, the court held that a *binding* cap on damages prevents removal.<sup>129</sup> The court remarked, however, that pleadings in Illinois are non-binding.<sup>130</sup> When it posed the question of what "effect to give to non-binding pleadings" with respect to removal, the court stated that "this circuit has not yet come to rest," and that "the standard is hazy."<sup>131</sup> The court ultimately held that such an issue need not be decided for that case.<sup>132</sup> In *BEM I*, the plaintiff had filed a motion to increase its damages from \$48,000 to \$88,000

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requesting damages in *excess* of the jurisdictional amount." *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1409 (5th Cir. 1995) (emphasis added).

<sup>123</sup> *Oshana*, 472 F.3d at 511.

<sup>124</sup> *Id.* at 512-13.

<sup>125</sup> *Id.* at 511-12.

<sup>126</sup> *Id.* at 511.

<sup>127</sup> *Id.* at 511.

<sup>128</sup> *Barbers, Hairstyling for Men & Women, Inc. v. Bishop*, 132 F.3d 1203, 1205 (7th Cir. 1997).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

while the case was still in state court.<sup>133</sup> When the plaintiff discovered that the defendant intended to remove the case, “it immediately withdrew the motion” before the state court judge acted on it, in order to prevent removal.<sup>134</sup> The court stated that such conduct was “egregious,” because “even while withdrawing its motion for the additional [damages] it continued to claim that the additional [damages] was owed it.”<sup>135</sup> Knowing this, the court stated that rescinding the enlarged claim for damages had “no effect on the actual stakes in the case.”<sup>136</sup> Because the court knew from the plaintiff’s actions that more than \$75,000 was at stake, the court affirmed the removal of the case.<sup>137</sup> Indeed, *BEM I* exemplified that prayers of damages in Illinois are non-binding, especially when the plaintiff affirmatively claims additional damages. But, without any discussion or analysis of the effect of disclaimers, this case provided no insight into the Oshana’s case.<sup>138</sup>

The court focused most of its efforts on analyzing Oshana’s disclaimers and whether they proved, to a legal certainty, that her claims were less than the statutory minimum.<sup>139</sup> However, in applying its newfound rule, the court initially asked whether Coke had established that Oshana’s amount in controversy exceeded the statutory minimum.<sup>140</sup> The court’s analysis was even sparser here than before. The court began by stating that “[b]ecause Coke is the proponent of jurisdiction, it has the burden of showing by a preponderance of the evidence facts that suggest the amount-in-controversy is met.”<sup>141</sup> The court then held that Coke’s “inference,” that Oshana’s claim may be worth more than the statutory minimum, satisfied this burden.<sup>142</sup> The court did not refer again to the

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<sup>133</sup> *BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 551 (7th Cir. 2002).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 552.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 554.

<sup>138</sup> *See id.*

<sup>139</sup> *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 510-13 (7th Cir. 2006).

<sup>140</sup> *Id.* at 512.

<sup>141</sup> *Id.* at 511.

<sup>142</sup> *Id.* at 512.

preponderance of the evidence standard. Instead, it focused on the effect of Oshana's refusal to respond to certain of Coke's requests for admissions.<sup>143</sup> In an *ad damnum* to her complaint, Oshana expressly stated: "Plaintiff seeks no relief, cause of action, remedy or damages that would confer federal jurisdiction upon the claims asserted herein, and expressly disclaims individual damages in excess of \$75,000."<sup>144</sup> Nevertheless, Coke requested that Oshana admit that in the event that the class was not certified, she would not personally seek relief amounting to more than \$75,000.<sup>145</sup> The court seemingly ignored Oshana's reason for refusing to make such admissions to Coke.<sup>146</sup> She stated that the defendant's requests amounted to requests to reveal her future litigation strategy.<sup>147</sup> Specifically, she stated:

Defendant's state law requests for admission did not ask for admissions regarding the allegations of the Complaint, but asked for admissions regarding what Plaintiff's future litigation strategy would be if class certification was denied. For example: 'Admit that you will not seek to disgorge the profit Coca-Cola made from the conduct alleged in this lawsuit in the event that the class is not certified. . .'. (R.1, App. B-26).<sup>148</sup>

Oshana further explained that she believed such an admission called for privileged attorney work product.<sup>149</sup> She then made the compelling

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* Coke asked Oshana to admit in formal Requests for Admission that in the event the class was not certified, she would not personally seek "(1) disgorgement of Coke's profits; (2) punitive damages in excess of \$75,000; (3) attorneys' fees in excess of \$75,000; (4) an award of compensatory and punitive damages and attorneys' fees in excess of \$75,000; or (5) an award of disgorgement, punitive damages, and attorneys' fees in excess of \$75,000." *Id.*

<sup>146</sup> Br. of Pet'r -Appellant at 22, *Oshana v. Coca-Cola Co.*, No. 05-3640 (7th Cir. 2005).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

argument that if the defendant conferred with her counsel first, as was required by Illinois Supreme Court Rule 201(k), she would have been willing to resolve the issue, admitting only to the relief sought and not to any possible litigation strategy.<sup>150</sup> Unfortunately, the court was silent on this issue.<sup>151</sup> Oshana's refusal to admit future litigation strategy, apparently gave Coke an "inference" that trumped Oshana's express disclaimer that she would seek no relief that would confer federal jurisdiction.<sup>152</sup> The court, thus, implied that a class action plaintiff's failure admit to future litigation strategy (should certification be denied), would render a plaintiff's express disclaimer not only devoid of "legal effect," but completely meaningless.<sup>153</sup>

Finally, the court stressed that Oshana's disclaimer was silent on attorney's fees and punitive damages, both of which could escalate the total amount in controversy over the statutory minimum.<sup>154</sup> Conveniently, the court focused only on the second half of Oshana's disclaimer, which limited personal damages to \$75,000.<sup>155</sup> The court completely ignored the most vital part of Oshana's disclaimer, namely, that she "seeks no relief, cause of action, remedy or damages *that would confer federal jurisdiction.*"<sup>156</sup> This was Oshana's catch-all. No matter what combination of values the defendant calculated, by the plain language in the disclaimer, the total value was not to exceed the statutory minimum.<sup>157</sup> The court summarily dismissed Oshana's disclaimer of relief sought, ignoring the plain language of her complaint.<sup>158</sup> Even if Oshana's disclaimer of specific damages had no

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<sup>150</sup> *Id.*

<sup>151</sup> *See Oshana*, 472 F.3d 506.

<sup>152</sup> The court in *Oshana v. Coca-Cola* never attempted to explain why Oshana would have to limit her relief in possible future litigation. *See Oshana*, 472 F.3d 506. Indeed, if Oshana's class certification had been denied and her case dismissed without prejudice, she may well have filed a new individual complaint against Coke seeking a new set of damages.

<sup>153</sup> *Id.* at 511-12.

<sup>154</sup> *Id.* at 511.

<sup>155</sup> *Id.* at 511-13.

<sup>156</sup> *Id.* at 511.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 511-13.

legal effect or consequence, the plain language of her complaint stated that she sought no action that would confer federal jurisdiction in any way.<sup>159</sup> The court's refusal to give credence to her disclaimer is a clear indication that it ruled with an eye towards a particular finding, that removal in Oshana's case was proper.

The court's actions reveal its known distrust of class action counsel. The court continues to fear that plaintiffs may game the system by disclaiming relief sought, then amend their complaint to seek greater relief once the defendant's opportunity to remove has passed.<sup>160</sup> Indeed, the gaming of the class action system is a valid concern, but protections do exist against such "antics"<sup>161</sup>; for example, the recent enactment of CAFA.<sup>162</sup> Aggregate claims for damages can now automatically trigger federal jurisdiction.<sup>163</sup> Further, courts can prevent such antics by exercising varying degrees of judicial control.<sup>164</sup> A case from the Northern District of Illinois recently discussed such preventative measures in *Hahn v. PepsiCo, Inc.*<sup>165</sup> In a case virtually identical to *Oshana v. Coca-Cola*, the court acknowledged the concerns discussed by the Seventh Circuit, concerns that defendants to class actions undoubtedly share.<sup>166</sup> The district court stated that it does not share the defendant's "mistrust of the state court—a belief that [the state court] will allow plaintiffs to game the system."<sup>167</sup> It went on to state that "[p]laintiffs do not have an absolute right to amend their pleadings [citation omitted]. The decision to grant

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<sup>159</sup> *Id.* at 511.

<sup>160</sup> *Id.* at 512-13.

<sup>161</sup> *Hahn v. PepsiCo, Inc.*, 350 F. Supp. 2d 758, 765 (N.D. Ill. 2004).

<sup>162</sup> 28 U.S.C. § 1332(d)(2), as amended by the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005).

<sup>163</sup> *Id.*

<sup>164</sup> *PepsiCo*, 350 F. Supp. 2d 758.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 764. The plaintiffs in this case had a near identical disclaimer as that found in *Oshana v. Coca-Cola*. *Id.* at 761. The defendant in *PepsiCo* also requested that the plaintiffs admit that they would not seek various damages in excess of \$75,000 in the event that a class was not certified. *Id.* When the plaintiffs refused to do so, the defendant removed the suit to federal court on the basis of diversity jurisdiction. *Id.*

<sup>167</sup> *Id.*

leave to amend rests with the Illinois courts.”<sup>168</sup> The court expounded upon the considerations a state court may make in granting leave to amend:

(1) [W]hether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified. The court's primary consideration is whether allowing the amendment would further the ends of justice.<sup>169</sup>

The court was confident that state courts are prepared to prevent unacceptable gaming by plaintiffs attempting to avoid federal jurisdiction.<sup>170</sup> As such, it granted the plaintiff's motion to remand.<sup>171</sup>

CAFA also quashes many concerns shared by the Seventh Circuit and defendants to class actions.<sup>172</sup> In class actions where the *aggregate* amount in controversy is over \$5,000,000, disclaimers relating to the statutory minimum of \$75,000 are indeed meaningless.<sup>173</sup> Nevertheless, the Seventh Circuit should not invalidate disclaimers of damages and force class action plaintiffs to legally bind their future litigation strategy as it did in *Oshana v. Coca-Cola*; circumstances still do exist where disclaimers of damages in class actions are relevant. Take for example a class action with a proposed class membership of less than one hundred; CAFA does not apply to such a class.<sup>174</sup> Plaintiffs should have the flexibility to disclaim damages exceeding \$75,000 without having to legally bind themselves to future litigation

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 765 (quoting *Hayes Mech., Inc. v. First Indus., L.P.*, 351 Ill. App. 3d 1, 7 (2004)).

<sup>170</sup> *PepsiCo*, 350 F. Supp. 2d 765.

<sup>171</sup> *Id.*

<sup>172</sup> 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005).

<sup>173</sup> *Id.* at § 1332(d)(2).

<sup>174</sup> *Id.* at § 1332(d)(5)(B).

strategy should their proposed class not be certified. Likewise, disclaimers are also useful in cases where CAFA does apply. Class action plaintiffs have already begun disclaiming *aggregate* damages exceeding the \$5,000,000 statutory minimum set forth in CAFA.<sup>175</sup>

### *B. Certification*

The Seventh Circuit also affirmed the lower court's decision not to certify a class in *Oshana v. Coca-Cola*.<sup>176</sup> In order to certify a class of plaintiffs, the putative class must satisfy all four requirements of Federal Rules of Civil Procedure 23(a)—numerosity, commonality, typicality, and adequacy of representation—and any one of the conditions of Rule 23(b).<sup>177</sup> The Seventh Circuit, however, has added an additional component to the rule, requiring that the class be “identifiable.”<sup>178</sup> In *Oshana v. Coca-Cola*, the court explained that “[t]he plaintiff must also show [citation omitted] that the class is indeed identifiable as a class.” It remarked that the class must “exist” for the purposes of a class action.<sup>179</sup> Requiring, from the outset, that the Oshana meet this “identifiable” class requirement added an inappropriate burden on Oshana.<sup>180</sup> And the manner in which the court applied the rule made it nearly impossible for Oshana to certify her class.

The court elaborated on its requirement, stating that a class is “identifiable” if it is not overly difficult to ascertain which individuals

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<sup>175</sup> See *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994 (9th Cir. 2007); *Morgan v. Gay*, 471 F.3d 469 (3d Cir. 2006).

<sup>176</sup> *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006).

<sup>177</sup> FED. R. CIV. P. 23; *Oshana*, 472 F.3d at 513.

<sup>178</sup> *Oshana*, 472 F.3d at 513 (citing *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981)).

<sup>179</sup> *Oshana*, 472 F.3d at 513 (quoting *Simer*, 661 F.2d at 669).

<sup>180</sup> See CONTE & NEWBERG, *supra* note 19, at § 2.3:

[A] rule for the existence of a class at the outset of litigation reveals that [courts] are actually concerned about ambiguous pleadings . . . and difficulties with identifying individual members of the class. . . . It is now settled law that amorphous, vague, and indeterminate classes are implicitly authorized under new Rule 23.

belong in the class.<sup>181</sup> In other words, the court took on the additional task of gauging the difficulty of identifying common and typical class members.<sup>182</sup> Using its concept of “identifiable” classes, the court constructed yet another standard: if a class is not sufficiently definite, certification will not be granted.<sup>183</sup> The court then applied the facts of the case to the new standard.<sup>184</sup> The court explained that for a damages claim under the ICFA, the plaintiff must show that she was deceived in some manner and damaged by the deception.<sup>185</sup> It went on to state that because Oshana’s proposed class included some consumers that *were* aware of the ingredients in Diet Coke, that those individuals would not be able to show any damage from any of Coke’s actions.<sup>186</sup> In other words, the court held that the proposed class was over-inclusive. But the court cited to no authority that required a formula for gauging over-inclusivity.<sup>187</sup> Indeed, asserting a proposed class that is overly broad could be counter-productive to the class action.<sup>188</sup> But, class actions were created to benefit the individual plaintiff that had no other form of redress. For a court to require that a plaintiff propose a class exceedingly narrow would create the obvious the risk of closing out those that were indeed harmed. It seems to go against the very idea of class actions for a court to deny certification and perhaps deny redress to numerous plaintiffs because a handful of plaintiffs in a proposed a class *might* include individuals that were not actually harmed. In some cases, courts are even willing to help re-define the class<sup>189</sup> at least in an attempt to help plaintiffs gain redress.<sup>190</sup>

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<sup>181</sup> *Oshana*, 472 F.3d at 513-14.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 513.

<sup>184</sup> *Id.* at 514.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Alistair Dawson & Geoff Gannaway, *House Bill 4, Class-Certification Requirements, and Res Judicata*, 46 S. TEX. L. REV. 913, 935 (2005).

<sup>189</sup> James H. Geary, *Federal Opinion Notes – Western District*, 77 MICH. B. J. 978 (1998).

In *Oshana v. Coca-Cola*, it was imperative that Oshana cast a broad net to capture as many potential plaintiffs as she could in her proposed class. The court incorrectly burdened Oshana, essentially demanding that she produce a means of then discovering which of the potential millions of plaintiffs were aware of the ingredients in Diet Coke.<sup>191</sup> Such a determination could have been made at the individual notice requirement stage.<sup>192</sup> If Oshana, after reasonable efforts, was not able to identify all members of the proposed class, she could have used any number of methods to properly identify her proposed class, such as, but not limited to newspaper publications, television broadcasts, or even radio broadcasts.<sup>193</sup> “Publication in newspapers or journals may be advisable as a supplement; it is necessary if class members are not *identifiable* after reasonable effort.”<sup>194</sup> Publication is utilized widely in mass tort and product liability class suits “in an effort to inform more potential class members, and principally to notify and inform affected persons.”<sup>195</sup> Denying class certification from the outset because it is not identifiable is not part of the federal rules, and should not be imposed upon class action plaintiffs. The Seventh Circuit’s choice to do so is yet another example of its express disdain and distrust of the class action system.

## CONCLUSION

Prior to CAFA, plaintiff classes and their counsel had what some called the power to “game” the system.<sup>196</sup> CAFA was specifically drafted to address these types of concerns, namely, the concerns that plaintiffs could disclaim individual damages, no matter how large the

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<sup>190</sup> See CONTE & NEWBERG, *supra* note 19, at § 2.3. “[T]he court has full power under Rule 23 to resolve the ambiguity by redefining the class or affording the representative plaintiff an opportunity to do so.” *Id.*

<sup>191</sup> *Oshana*, 472 F.3d at 514.

<sup>192</sup> FED. R. CIV. P. 23(c).

<sup>193</sup> See CONTE & NEWBERG, *supra* note 19, at § 8.3.

<sup>194</sup> Manual for Complex Litigation (3d ed.) § 30.211(emphasis added).

<sup>195</sup> See CONTE & NEWBERG, *supra* note 19, at § 8.3.

<sup>196</sup> S. REP. 109-14, at 9.

aggregate amount was, in order to stay out of federal court.<sup>197</sup> Under CAFA, plaintiff classes are now severely restricted in their ability to keep cases in state courts.<sup>198</sup> If plaintiffs are to maintain the power and flexibility to move as a class, the Seventh Circuit must allow class action plaintiffs to disclaim their damages in order to stay out of federal court. Furthermore, the Seventh Circuit must acknowledge the balancing effect of CAFA, and refrain from overly burdening plaintiffs when moving to certify their class.

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<sup>197</sup> *Id.*

<sup>198</sup> 28 U.S.C. § 1332(d)(2), as amended by the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005).