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Alert

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Ninth Circuit Clarifies Scope of Mass Action Federal Jurisdiction and Removal

In *Corber v. Xanodyne Pharm., Inc.*, and *Romo v. Teva Pharmaceuticals USA, Inc.*, __ F.3d __ (Case No. 13-56306 and 13-56310), 2014 WL 6436154 (9th Cir. Nov. 18, 2014), the Ninth Circuit, sitting en banc, held that a petition to coordinate multiple actions under California Code of Civil Procedure § 404 constituted a proposal to try the cases "jointly," rendering them subject to federal jurisdiction and removal under the "mass action" provision of the Class Action Fairness Act (CAFA). 28 U.S.C. §1332(d)(11)(B)(i). This decision could impact all multi-plaintiff actions sought to be coordinated or consolidated in state courts.

CAFA provides federal district courts with original jurisdiction over "mass actions" if the actions meet all of the statutory requirements. 28 U.S.C. § 1332(d). CAFA defines a mass action as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." At issue in *Corber* and *Romo* was whether a petition to coordinate actions under California Code of Civil Procedure § 404 is a proposal that the cases be "tried jointly" for purposes of the mass action provision of CAFA. Focusing on the language of the coordination petition at issue in *Corber* and *Romo*, in which the plaintiffs sought coordination "for all purposes," to avoid "inconsistent judgments" and to avoid "different rulings on liability," the Ninth Circuit held that the proposal was for the cases to be tried jointly.

The *Corber* and *Romo* actions were two of 40 just-under-100-plaintiff cases filed throughout California, which alleged injuries in connection with the use of propoxyphene pain medications. Each of the 40 individual actions contained substantially similar allegations. The plaintiffs invoked a California state-law procedure, Cal. Code Civ. Proc. § 404, seeking to have all of the cases coordinated before a single trial

judge "for all purposes." In seeking coordination, the plaintiffs cited the danger of "inconsistent judgments" and "different rulings on liability" as grounds for their coordination petition. Consequently, the defendants in these actions removed the cases to federal court under the "mass action" provisions of CAFA, which allow defendants to remove to federal court certain cases raising "claims of 100 or more persons that are proposed to be tried jointly." 28 U.S.C. §1332(d)(11)(B)(i). At the time, the Ninth Circuit had yet to address whether a request for coordination under Cal. Code Civ. Proc. § 404 was a proposal to try claims "jointly." However, the Seventh Circuit in *In re Abbott Laboratories, Inc.*, 698 F.3d 568 (7th Cir. 2012) looked at an analogous consolidation request under Illinois law, and held that invocation of this procedure "implicitly" triggered CAFA's mass action provisions.

After the district court remanded the actions to state court, the Ninth Circuit granted petitions for permission to appeal in *Corber* and *Romo*. Following a split, three-judge panel decision affirming the remand order, a majority of the active Ninth Circuit judges voted to rehear the cases en banc, and reversed the decision of the divided panel. The en banc panel agreed with the Seventh Circuit that a proposal for a joint trial may be made implicitly as well as expressly. *Corber v. Xanodyne Pharm, Inc.*, 2014 WL 6436154 at *5; *see also Atwell v. Bos. Scientific Corp.*, 740 F.3d 1160, 1163 (8th Cir. 2013) (holding that proposals for joint trial may be made implicitly); *Bullard v. Burlington N. Santa Fe Ry.*, 535 F.3d 759, 762 (7th Cir. 2008) (same). The *Corber* court explained that, although a rule requiring an express invocation of a joint trial "would be easy to administer," it would "ignore the real substance" of plaintiffs' coordination proposals. *Corber v. Xanodyne Pharm, Inc.*, 2014 WL 6436154 at *5. As a practical matter, plaintiffs' request for coordination "for all purposes," to "avoid inconsistent judgments," amounted to a proposal to try the cases jointly. *Id.* The dissent, authored by Judge Johnnie Rawlinson and joined by Judge Marsha S. Berzon, opined that the plaintiffs' cases were not removable under the plain language of CAFA because the "petition for coordination stopped short of requesting a joint trial," given its ostensible focus on "pretrial proceedings, *i.e.*, discovery matters." *Id.* at *6-7 (J. Rawlinson, dissenting). The dissent also opined that the majority overlooked the purported differences between coordination, which plaintiffs had requested, and consolidation, which was the mechanism at issue in *In re Abbott Laboratories*. *Corber v. Xanodyne Pharm, Inc.*, 2014 WL 6436154 at *9.

Corber and *Romo* leave for another day whether a differently-worded coordination petition in California would give rise to removal under the mass action provisions. However, the decision notes that it is not clear whether the California Judicial Council even would grant a coordination petition that attempted to limit its request to coordination for pre-trial proceedings. *Id.* at *4.

Corber is a welcome decision for defendants facing mass action lawsuits in California. While the fight on the issue is not necessarily over, *Corber* is a major victory, and likely will deter plaintiffs from artificially splitting their cases in an effort to avoid federal jurisdiction.

This *GT Alert* was prepared by **Karin L. Bohmholdt**, **Benjamin S. Kurtz**, and **Ginger Pigott**. Questions about this information can be directed to:

- Karin L. Bohmholdt | +1 310.586.3819 | bohmholdtk@gtlaw.com
- Benjamin S. Kurtz | +1 310.586.3871 | kurtzb@gtlaw.com
- Ginger Pigott | +1 310.586.7760 | pigottg@gtlaw.com
- Or your Greenberg Traurig attorney

Albany
+1 518.689.1400

Amsterdam
+31 (0) 20 301 7300

Atlanta
+1 678.553.2100

Austin
+1 512.320.7200

Boca Raton
+1 561.955.7600

Boston
+1 617.310.6000

Chicago
+1 312.456.8400

Dallas
+1 214.665.3600

Delaware
+1 302.661.7000

Denver
+1 303.572.6500

Fort Lauderdale
+1 954.765.0500

Houston
+1 713.374.3500

Las Vegas
+1 702.792.3773

London*
+44 (0) 203 349 8700

Los Angeles
+1 310.586.7700

Mexico City+
+52 (1) 55 5029 0000

Miami
+1 305.579.0500

New Jersey
+1 973.360.7900

New York
+1 212.801.9200

Northern Virginia
703.749.1300

Orange County
+1 949.732.6500

Orlando
+1 407.420.1000

Philadelphia
+1 215.988.7800

Phoenix
+1 602.445.8000

Sacramento
+1 916.442.1111

San Francisco
+1 415.655.1300

Seoul∞
+82 (0) 2 369 1000

Shanghai
+86 (21) 6391.6633

Silicon Valley
+1 650.328.8500

Tallahassee
+1 850.222.6891

Tampa
+1 813.318.5700

Tel Aviv^
+972 (0) 3 636 6000

Warsaw~
+48 22 690 6100

Washington, D.C.
+1 202.331.3100

Westchester County
+1 914.286.2900

West Palm Beach
+1 561.650.7900