

What a Tangled Web We Weave: Strategy Decisions From the Defense Perspective on CAFA

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Introduction

The Class Action Fairness Act of 2005 (“CAFA”)¹ has created enough procedural questions to keep law reviews full for many years to come. With those procedural uncertainties come multilayered strategy questions that both plaintiffs and defendants must consider in filing, removing, attempting to remand, consolidating, and settling class actions and mass actions. This article will touch briefly on some of the more important strategy questions from a defense perspective, will provide a chart on some of the leading CAFA issues, and will discuss “mass action” strategy issues.

Should a defendant remove – settlement evaluation: For a defendant, the first CAFA question is usually whether to remove. This decision is not as obvious as it may seem. First, most cases settle. If a quick settlement is anticipated, it weighs strongly in favor of staying in state court. Settlement will be much easier in state court. The cumbersome, expensive and risky settlement requirements added by CAFA apply only in federal court. Among other things, CAFA (1) likely excludes the realistic possibility of coupon settlements,² (2) requires additional notice to various state and federal officials

¹ Pub.L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

² Because CAFA sharply limits attorney fees for coupon settlements, it is likely that plaintiff counsel will rarely agree to such settlements. 28 U.S.C.A. § 1712 provides that if class members receive coupons in a class action settlement, the portion of attorney’s fees attributable to the coupons must be based on value to class members of coupons redeemed (as opposed to coupons issued), or else on the time counsel reasonably expended, in the court’s discretion (but may include use of the lodestar multiplier). If a proposed settlement agreement includes distributing coupons to charitable or governmental entities, these coupons are not included in the calculation of attorney’s fees.

Where a settlement includes both coupons and equitable relief, attorney’s fees may be based on a combination of recovery of coupons and time reasonably expended. Experts may testify as to the settlement value of coupon settlements, and the court must scrutinize the proposed settlement to assure the award is fair, reasonable, and adequate to class members.

(who might try to appear or begin their own proceedings as well as possibly generating negative press; if the process is not followed correctly, the release will not be effective)³, and (3) includes detailed requirements for notice to the class (again, if the process is not followed correctly, the release is at risk).⁴ State courts also tend to be somewhat less strict in their evaluation of settlement agreements, another plus for defendants.

Some state appellate courts favorable; appeal as of right: Second, while the state court litigation may be in an unfavorable forum, state appellate courts can sometimes be more favorable. Some states have statutes providing appeals of class certification as a matter of right – something not available in federal court.⁵ A close review of some state’s appellate record reveals a much more cautious approach to class actions than federal judges (this makes sense; state court trial judges often have heavy dockets and fewer resources such as law clerks to manage complex class action litigation).⁶

CAFA, of course, also allows plaintiffs to file originally in federal court class actions under the same standards as for removal. Some plaintiff’s counsel have argued that such a filing is preferable to filing in state court because of perceived hostility of state courts or laws.

Making a federal case out of it: Third, removing the case may inadvertently enhance its significance and spawn other lawsuits. Other plaintiff counsel may pick up notice in Pacer or other computerized services. A federal judge may take broader discovery requests more seriously.

Local prejudice, dispositive motions, Daubert: Other issues may also influence removal, such as whether there is a local prejudice against your client or whether the federal court might be willing to

CAFA does not define “coupon” and the legislative history indicates that equitable relief would not qualify as a “coupon.” Likewise, it would appear that “claims made” settlements would not qualify as “coupons” – provided that actual cash is distributed to those who make a claim. Compare *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 2004 U.S. Dist Lexis 23342 at *11 (W.D. Mo. April 20, 2004) (“This is not a ‘coupon’ settlement. Class members will not be required to purchase any additional services or items to receive a benefit or cash payment.”).

3 CAFA requires that within 10 days after filing a proposed settlement of a class action in court, each defendant participating in the settlement must notify the appropriate state officials of all states in which class members reside and the appropriate federal officials of the proposed settlement. 28 U.S.C.A § 1715. If proper notice is not provided, a class member may refuse to comply with and choose not to be bound by the settlement. Ninety days must pass between notice to all officials and final approval of a proposed settlement.

4 CAFA’s requirements for the content of the notice are both difficult and unclear. 28 U.S.C. § 1715(b). A notice of the proposed settlement must contain:

- (1) a copy of the complaint, any amended complaints, and any materials filed with the complaint;
- (2) notice of any judicial hearing scheduled;
- (3) proposed or final notice to class members of members’ rights to ask for exclusion from the class action (if no right of exclusion, then a statement that no right exists) or final notification of a proposed settlement of a class action;
- (4) the proposed or final class action settlement;
- (5) settlements or agreements created contemporaneously between class counsel and defense counsel;
- (6) notice of dismissal or final judgment;
- (7) if feasible, the appropriate state officials are to be given the names of class members residing in the state and the estimated proportionate share of the claims, and if not feasible to provide names, the appropriate state officials are to be given a reasonable estimate of the number of class members residing in each state and the estimated proportionate share to the entire settlement; and
- (8) all written judicial opinions relating to the contents mentioned in 3 through 6.

5 *E.g.*, Ala. Code § 6-5-642 (interlocutory appeal as of right for class certification).

6 Gregory C. Cook, “The Alabama Class Action: Does it Exist Any Longer? And Does It Matter?”, 66 *The Alabama Lawyer* 289 (2005) (Alabama Supreme Court had ruled against class certification in 39 out of last 45 decisions in previous 7 years).

consider your dispositive motion at an earlier time. Further, federal courts sometimes treat dispositive motions more seriously and will apply the *Daubert* rather than the *Frye* standard to expert testimony.

Costs in federal litigation: Removing the case may also cost your client money. Federal courts typically move their dockets faster and normally require more hearings, more detailed pleadings and penalize failure to comply with complex orders.

Can a defendant meet the jurisdictional prerequisites for removal? Costs for procedural fights over removal: Removing the case may also cost money because of the procedural battles that may occur. The fight over whether you can satisfy the jurisdictional requirements of CAFA can be intense, can involve discovery,⁷ and can involve interlocutory appeals.

The litigation over the jurisdictional prerequisites and exceptions has been substantial. Despite clear legislative history,⁸ most courts have placed the burden on the removing party of showing (1) minimal diversion, (2) 100 putative class members and (3) \$5 Million amount in controversy.⁹ Some decisions have made this burden so high that may be very difficult to meet.¹⁰ Likewise most courts have placed the burden of proving exceptions (such as proving the percent of home state plaintiffs) upon the party resisting CAFA jurisdiction (again, some decisions have made this burden so high that it is very difficult to meet).¹¹

Multiple state class actions: If the defendant faces multiple class actions in several states, the decision becomes more complex. If no removal occurs, some commentators have discussed the benefits to defendants of a “reverse auction” settlement negotiating strategy. For instance, settlements could arguably be made on a classwide basis which exclude from the class persons who are named plaintiffs in other putative classes, leaving their individual cases unaffected but providing them no right to object to the first settlement.

⁷ Compare *Lowery v. AL Power Co.*, 2007 WL 1062769 (11th Cir. April 11, 2007) (appearing to indicate that no discovery should occur) with *Schwartz v. Comcast Corp.*, 2005 WL 1799414 (E.D.Pa. July 28, 2005) (ordering discovery on citizenship issue under CAFA).

⁸ A number of courts have discussed this unambiguous legislative history and noted that it was written after passage of the Act and that placing the burden on the party moving for remand would reverse long standing law. No Circuit has agreed with this portion of the legislative history; however, the Eleventh Circuit recently wrote approvingly of other portions of the legislative history and followed it on an unrelated point. *Lowery v. AL Power Co.*, 2007 WL 1062769 (11th Cir. April 11, 2007).

⁹ *Lowery v. AL Power Co.*, 2007 WL 1062769 (11th Cir. April 11, 2007) (holding that party seeking federal venue must establish the venue’s jurisdictional requirements and that CAFA does not shift burden of proof in removal actions to establish jurisdiction, which remains on defendant); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328 (11th Cir. 2006) (removing party bears the jurisdictional burden of proof); *Evans v. Walter Indus., Inc.* 449 F.3d 1159, 1164 (11th Cir. 2006) (“CAFA does not change the traditional rule that the party seeking to remove the case to federal court bears the burden of establishing federal jurisdiction); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006) (refusing to shift from such a “longstanding, near-canonical rule”); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) (recognizing the “long-standing judicial rules placing the burden on the defendant” to establish jurisdiction in removal cases”); *Morgan v. Gay*, 471 F.3d 469, 473 (3d Cir. 2006) (“Under CAFA, the party seeking to remove the case to federal court bears the burden to establish that the amount in controversy requirement is satisfied.”); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (“The rule that the proponent of federal jurisdiction bears the risk of non-persuasion has been around for a long time. To change such a rule, Congress must enact a statute with the President’s signature (or by a two-thirds majority to override a veto).”).

¹⁰ *Lowery v. AL Power Co.*, 2007 WL 1062769 (11th Cir. April 11, 2007) (finding the burden of showing \$5 Million not met despite express allegation in earlier complaint, despite 400 named plaintiffs claiming environmental damage and despite the citation of similar cases with settlements and verdicts).

¹¹ E.g., *Evans v. Walter Indus.*, 449 F.3d 1159, 1164 (11th Cir. 2006) (finding the local controversy exception not met despite detailed evidence; appellate court conducted searching review of proffered evidence).

MDL: If the case is removed, the defendant could seek consolidation through the MDL¹² panel or could seek coordinated discovery among the federal district courts – leading to substantial cost savings if the litigation is complex and concerns a large scale problem. It will be very difficult to coordinate deposition schedules with multiple actions in multiple jurisdictions. Courts will have different timelines and scheduling requirements. Judges could disagree over discovery decisions. Producing witnesses once for deposition, for a discrete period of time, having a hearing once not 10 times, and complying with one protocol for document production can be a massive cost savings. *E.g.* Manual for Complex Litigation 3d (Federal Judicial Center, 2000) (after consolidation, court can appoint lead and liaison counsel, require shared discovery, and case management plans, etc.)

Factors for MDL Consolidation: The MDL statute has three statutory requirements governing whether an action will be transferred: (1) the pending civil actions must involve "one or more common questions of fact;" (2) the transfer must result in "convenience of parties and witnesses"; and (3) the transfer must "promote the just and efficient conduct of such actions." The panel often broadly interprets "common questions of fact," and has transferred cases on the basis of important questions of law, as well as factually similar cases.¹³ Typically the panel accords the convenience requirement less weight than the other two factors (thus, the panel often looks at the overall savings and convenience rather than individual savings and convenience). *See* Charles Alan Wright, Arthur R. Miller, & Edward Cooper, *Federal Practice and Procedure 3d*, § 3863 (2007). The third requirement is often most important. It is essential to show that pretrial consolidation before a single tribunal will promote the efficient use of party and judicial resources (such as showing that separate actions will lead to redundant discovery). *E.g., In re Food Lion, Inc.*, 73 F.3d 528, 532 (4th Cir. 1996); *In re Haven Indus., Inc. Sec. Litig.*, 415 F. Supp. 396, 398 (J.P.M.L. 1976).

Argue For a Specific Transferee Forum or Judge: The decision on **which** court or judge handles the consolidated case can often drive the decision to request consolidation or even remove. The Panel may transfer an action to "any" district; it is not limited to a district in which an action is currently pending. 28 U.S.C. § 1407(a); *see also In re New York City Mun. Sec. Litig.*, 572 F.2d 49, 51 (2d Cir. 1978). The MDL Panel considers a number of factors in making this decision, and usually weighs heavily judicial efficiencies.¹⁴

¹² *See* 28 U.S.C. §1407(a) (2006) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.").

¹³ For instance, pending cases do not need to have a virtual identity of parties of facts; rather, only "common" questions must be involved. *See In re General Motors Class E Stock Buyout Sec. Litig.*, 696 F. Supp. 1546, 1546-47 (J.P.M.L. 1988); *In re Mut. Fund Sales Antitrust Litig.*, 361 F. Supp. 638, 640 (J.P.M.L. 1973). The complexity of questions of fact (or law), however, becomes important if the transfer request involves a small number of cases. *See, e.g., In re Distribution of Scotch Whiskey*, 299 F. Supp. 543 (J.P.M.L. 1969).

¹⁴ Typically the MDL panel will send cases to locations near the defendant's headquarters or near the main concentration of plaintiffs or witnesses. *E.g., In re Factor VIII or IX Concentrate Blood Prods.*, 853 F. Supp. 454, 455 (J.P.M.L. 1993) (parties' principal place of business); *In re Air Crash Disaster Near Coolidge*, 362 F. Supp. 572, 573 (J.P.M.L. 1973) (location of documents necessary to action); *In re Rio Hair Naturalizer Prods. Liab. Litig.*, 904 F. Supp. 1407-08 (J.P.M.L. 1995) (centrally located between the parties and the witnesses); *In re Regents of the Univ. of Cal.*, 964 F.2d 1128, 1136 (Fed. Cir. 1992) (district in which the earliest actions were filed); *In re Republic National-Realty Equities Sec. Litig.*, 382 F. Supp. 1403, 1406-07 (J.P.M.L. 1974) (district in which the largest number of cases are pending or the most comprehensive case); *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 130 F.R.D. 475, 476 (J.P.M.L. 1990) (district in which a bankruptcy action involving the defendant is

MDL consolidations can be a great advantage to defendants. However, filing an MDL motion risks losing control of the litigation. Oral arguments are sharply curtailed and the Panel often grants parties as short as three minutes to make their presentations; decisions are highly discretionary. Moreover, simply removing multiple cases under CAFA creates the very real risk that one of the plaintiffs will file such a consolidation motion. Further, many commentators believe that the MDL panel tends to favor consolidation.

Mass Actions:

CAFA created an entirely new category of actions – “mass actions.” From a defense perspective, most of the very same strategy issues identified earlier apply to mass actions (settlement, removal, coordination, MDL, etc.). There have been far fewer mass action decisions under CAFA, and some commentators have opined that “mass actions” will rarely if ever occur because plaintiffs will not file cases joining 100 plaintiffs.

Under CAFA, a “mass action” is defined as any civil action (1) in which monetary relief claims of 100 or more persons (2) are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact, and (3) where the claims in the mass action satisfy the \$5 million jurisdictional amount requirement.¹⁵ CAFA treats “mass actions” the same as class actions for the purposes of diversity jurisdiction and removal.¹⁶ For instance, neither class actions nor mass actions are subject to the one-year limit on removal.¹⁷

The mass action provisions appear designed to expand federal diversity jurisdiction over mass injury tort actions, such as those involving claims of various product defects, environmental torts, or other disasters that typically involve individual plaintiffs with relatively large claims but whose individualized factual and legal issues might otherwise preclude class certification. CAFA leaves many questions open to interpretation by the federal courts, thanks to the ambiguous, and perhaps “clumsy,” wording of the statute.¹⁸

pending). Administrative concerns are also relevant. For example, docket conditions are important. (*In re Nat'l Student Mktg. Litig.*, 368 F. Supp. 1311 (J.P.M.L. 1973)), as is whether venue would be proper (perhaps allowing final transfer). *E.g., In re Yart Processing Patent Validity Litig.*, 341 F. Supp. 376 (J.P.M.L. 1972).

The “availability of an experienced and capable judge familiar with the litigation is one of the more important factors in selecting a transferee forum.” *Federal Practice and Procedure*, § 3864. Typically, the MDL Panel transfers cases to a judge that is already involved in one of the cases to be transferred. *See In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 405 F. Supp. 316, 319 (J.P.M.L. 1975). However, the panel has sent cases to particularly experienced judges who had no currently pending cases. *See, e.g., In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 990 F. Supp. 834 (J.P.M.L. 1998); *see also In re Silicone Gel Breast Implants Prods. Lia. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992).

15 28 U.S.C. § 1332(d)(11)(B)(i).

16 28 U.S.C. § 1332(d)(11).

17 § 1453(b).

18 *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006). The Ninth Circuit described CAFA’s wording with respect to mass actions as being “clumsy.”

\$75,000 per Plaintiff: Jurisdiction over mass action plaintiffs exists “only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a),” meaning only over those plaintiffs’ claims for which the amount in controversy exceeds \$75,000. Federal courts of appeals have not yet ruled as to whether the \$75,000 provision creates an additional threshold requirement in addition to the four primary requirements – (1) \$5 million aggregate amount in controversy; (2) minimal diversity; (3) commonality; (4) numerosity.¹⁹

One potential issue could arise if the court determines it has jurisdiction initially and then begins remanding the plaintiffs whose claims are for less than \$75,000, thus resulting in a total number of plaintiffs under 100. The remand of these plaintiffs could also result in an amount in controversy that is less than \$5 million aggregate. Congress addressed this issue and clarified that it did not intend for the remand of such claims resulting in a number of plaintiffs that is less than 100 or an amount in controversy of less than \$5 million to divest the court of jurisdiction.²⁰

Burden of Proof on \$75,000: The Ninth Circuit affirmed a remand order on the grounds that the defendant did not show that at least one plaintiff had a claim in excess of \$75,000.²¹ The Eleventh Circuit declined to address the issue in a recent opinion but noted that shifting the burden of proving exceptions to jurisdiction under CAFA to the plaintiff implied that the burden of showing the \$75,000 “exception” should shift to plaintiffs as well.²²

Exceptions to Jurisdiction over Mass Actions (Events all in one state; defendant caused joinder; claims asserted on behalf of general public; pretrial consolidation): Mass actions are subject to more exceptions to jurisdiction than class actions. A case will not be deemed a “mass action” when: (1) all of the actionable events occurred in the state where the action was filed, and injuries occurred in the forum state and in contiguous states; (2) the claims were joined on motion of the defendant(s); (3) all of the claims are asserted solely on behalf of the general public under state law; or (4) the claims have been consolidated or coordinated solely for pretrial proceedings.

In addition to the four exceptions applicable specifically to mass actions, claims that might otherwise qualify as mass actions will remain in state court if one of the generally applicable CAFA exceptions

19 *Lowery v. AL Power Co.*, 2007 WL 1062769 (11th Cir. April 11, 2007) (“Because we hold . . . that defendants have not established the \$5,000,000 aggregate amount in controversy, we need not decide today whether the \$75,000 provision might yet create an additional threshold requirement that the party bearing the burden of establishing the court’s jurisdiction must establish at the outset, i.e., that the claims of at least one of the plaintiffs exceed \$75,000.”).

20 “Subsection 1332(d)(11)(B)(i) includes a statement indicating that jurisdiction exists only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under section 1332(a). It is the Sponsors’ intent that although remands of individual claims not meeting the section 1332 jurisdictional amount requirement may take the action below the 100-plaintiff jurisdictional threshold or the \$5 million jurisdictional amount requirement, those subsequent remands should not extinguish Federal diversity jurisdiction over the action as long as the mass action met the various jurisdictional requirements at the time of removal.” 151 Cong. Rec. H729.

21 *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 689 (9th Cir. 2006).

22 *Lowery v. AL Power Co.*, 2007 WL 1062769, n.55 (11th Cir. April 11, 2007) (“The defendants urge us to read *Evans* as shifting the burden onto the plaintiffs to prove which, if any, of the plaintiffs do not have claims exceeding the \$75,000 amount in controversy included in 28 U.S.C. § 1332(d)(11)(B)(i). Although we find the argument quite compelling, we decline to address it here.”).

applies. The five exceptions are: (1) the home state,²³ (2) the local controversy,²⁴ (3) the state action,²⁵ (4) the limited scope,²⁶ and (5) the securities and corporate governance exceptions.²⁷

No MDL: One limitation on mass actions that is not placed on class actions under CAFA is that mass actions cannot be transferred to another court by a MDL panel without the consent of a majority of the plaintiffs unless the class is certified or proposed by plaintiffs to be certified under Rule 23 of the Federal Rules of Civil Procedure.²⁸ Thus, plaintiffs maintain some control over the forum of mass actions.

Only Monetary Claims: It appears that mass actions are limited to actions seeking monetary relief.²⁹ Section 1332(d)(11)(B)(i) defines “mass action” as a “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”³⁰ The definition does not appear to apply to actions seeking **solely** equitable relief. The CAFA provision applicable to class actions does not contain the same sort of limitation. It states that “[t]he district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000”³¹ and defines a “class action” as “any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.”³²

Can plaintiff make an initial mass action filing in federal court: While it is clear that a proposed or certified class of plaintiffs could file a class action in federal court under CAFA, it is not clear whether a group of plaintiffs who choose not to certify as a class could file a mass action in federal

23 § 1332(d)(4)(B); S. Rep. No. 109-14, at 36. The home state exception applies only in cases in which all of the defendants are citizens of the state where the suit is filed. If two-thirds or more of the class members are from the defendants’ home state, the case would remain in state court. Conversely, if less than one-third of the class members are citizens of that home state, the case would be subject to federal jurisdiction. For the “middle category of class actions in which more than one-third but fewer than two-thirds of the members of the plaintiff class and the primary defendants are all citizens of the state in which the action is filed,” federal diversity jurisdiction will exist over the case. However, CAFA gives federal courts the discretion to decline to exercise that jurisdiction based on consideration of six specified factors that analyze the interstate implications of the action and the relationship between the case and the state in which it is brought.

24 § 1332(d)(4)(A). The local controversy exception applies when actions arise out of truly local controversies in which more than two-thirds of the proposed class members are citizens of the state in which the action is filed. Under this exception, actions should remain in state court if (1) the plaintiffs have sued at least one in-state defendant whose conduct forms a significant basis of their claims and from whom significant relief is sought; (2) the principal injuries occurred in the state where the suit is brought; and (3) no class action has been filed alleging the same claims against any of the defendants in the last three years.

25 § 1332(d)(5)(A). The state action exception removes from the grant of diversity jurisdiction those cases in which class claims are asserted against primary defendants who are states, state officials, or other governmental entities for whom a federal court may be unable to grant relief. The purpose of this exception is to prohibit state defendants from removing cases to federal court and then arguing that the Eleventh Amendment precludes the court from granting the requested relief. In order to avoid these Eleventh Amendment concerns, the case will proceed in state court when these governmental entities are the primary targets of the suit.

26 § 1332(d)(5)(B). The limited scope exception requires that a putative class consist of at least 100 plaintiffs. Despite the fact that the “class action” exceptions appear to apply to “mass actions,” mass actions are already subject to a minimum requirement of 100 plaintiffs at the time of removal.

27 § 1332(d)(9). The corporate governance exception exempts from federal diversity jurisdiction class claims regarding a covered security, internal corporate affairs, or those that relate to fiduciary or other duties resulting from any security.

28 § 1332(d)(11)(C).

29 *See Lowery v. AL Power Co.*, 2007 WL 1062769, FN 45 (11th Cir. April 11, 2007).

30 § 1332(d)(11)(B)(i) (emphasis added).

31 § 1332(d)(2).

32 § 1332(d)(1)(B).

court under CAFA.³³ Section 1332(d)(11)(A) provides that “a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.” Based on Congress’s use of the word “removable” without any reference to original jurisdiction in the “mass action” portion of CAFA, one might conclude that federal courts have removal jurisdiction over mass actions but not original jurisdiction. On the other hand, mass actions are clearly subject to the requirements of § 1332(d)(2) to (10),³⁴ and § 1332(d)(2) grants the district courts “original jurisdiction of any civil action which [meets CAFA’s diversity and amount in controversy requirements.]”

Conclusion: CAFA has created many new procedural choices for defense counsel, both for class actions and mass actions. These decisions often must be made very quickly, within 30 days of service, but defendants will be well served to invest the time early in mapping strategy to maximize the outcome.

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33 See *Lowery v. AL Power Co.*, 2007 WL 1062769, FN 41 (11th Cir. April 11, 2007).

34 § 1332(d)(11)(A).