

CLASS ACTION FAIRNESS ACT OF 2005

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On February 18, 2005, President Bush signed into law the Class Action Fairness Act of 2005 (“CAFA”). CAFA includes two major substantive provisions: (1) it heightens scrutiny and notice requirements for class action settlements (including attorney fees), and (2) it substantially broadens federal jurisdiction (both original and removal) for class actions.

While CAFA could provide an important weapon to defendants in some states by allowing removal, it could also create problems. First, CAFA will allow plaintiffs to originally file cases in federal court rather than state court – an important advantage in states where the state courts have been strict in scrutinizing class certifications (arguably Alabama).² Second, CAFA will create impediments to settling class actions in federal court. CAFA is only effective for cases “commenced” on or after February 18, 2005.³

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² See, e.g., Gregory C. Cook, “The Alabama Class Action: Does It Exist Any Longer? And Does It Matter?”, 66 *The Alabama Lawyer* 289 (2005).

³ There has already been litigation over what “commenced” means. The law appears settled that an action “commenced” when the action is originally filed in state court – not when it is removed. *Bush v. Cheaptickets, Inc.*, 2005 WL 2456926 at *3 (9th Cir. Oct. 6, 2005); *Knudsen v. Liberty Mutual Ins. Co.*, 411 F.3d 805 (7th Cir. 2005); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090 (10th Cir. 2005); *Natale v. Pfizer, Inc.*, 379 F.Supp.2d 161 (D.Mass. 2005) (collecting cases.)

The next fight will be over whether an amendment to the complaint “commenced” an action. Most courts appear to hold that state procedural law should be consulted to determine what “commenced” an action. E.g. *Boxdorfer v. Daimlerchrysler Corp.*, ___ F.Supp.2d ___, 2005 WL 2837554 at * 3 (C.D.Ill. 2005) (amendment which narrowed class did not “commence[.]” action). The courts appear split on whether an amendment to a complaint “commenced” an action and the cases appear factually specific. *Knudsen v. Liberty Mutual Ins. Co.*, 411 F.3d 805 (7th Cir. 2005) (finding that change to class definition did not “commence[.]” a new action – but stating in dicta that adding defendants or new causes of action might); *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748 (7th Cir. 2005) (holding that change in class definition was merely “work a day change” and did not commence a new matter); *Morgan v. Am. Intl’l Group, Inc.*, 2005 WL 2172001 at *3 (N.D.Cal. Sept. 8, 2005) (rejecting argument that new class representative and new claims commenced a new action); *Boxdorfer v. Daimlerchrysler Corp.*, ___ F.Supp.2d ___, 2005 WL 2837554 at * 3 (C.D.Ill. 2005) (amendment which narrowed class did not “commence[.]” action); *with Senterfitt v. Suntrust Mortgage, Inc.*, 2005 WL 2100594 (S.D.Ga. Aug. 31, 2005) (amendment which expanded class definition by sixteen years of additional claims did commence a new action); *Heaphy v. State Farm Mutual Auto. Ins. Co.*, 2005 WL 1950244 (W.D.Wash. 2005) (amendment after CAFA “commenced” new action

I. SETTLEMENT CHANGES

CAFA attempts to address inequities in class action settlements by creating a consumer class action bill of rights. The consumer class action bill of rights: (1) regulates coupon settlements; (2) protects against loss by class members; (3) protects against discrimination based on a geographic location; and (4) requires that notification of proposed class action settlements be sent to the appropriate federal and state officials. It is the notice requirement that will likely have the greatest impact for settlement.

A. COUPON 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 will 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.⁴

because it added new class of plaintiffs and new theories; unique procedural posture of completed arbitration of individual claim); *Plummer v. Farmers Group, Inc.*, 388 F.Supp.2d 1310 (E.D.Ok. 2005) (amendment filed months before CAFA adding class allegations (previously individual case) but motion for leave not granted until after CAFA; held "commenced" after CAFA). There is also debate over whether service issues and clerical mistakes change the result. Again, these cases appear factually specific. *E.g.*, *Dinkel v. General Motors Corp.*, ___ F.Supp.2d ___, 2005 WL 3006728 (D.Me. Nov. 9, 2005) (failure to serve defendants until after 90 day period provided under state law meant that originally filing complaint before CAFA did not commence action as to removing defendants); *Eufaula Drugs, Inc. v. Scripsolutions*, 2005 WL 2465746 (M.D.Ala. Oct. 6, 2005) (amendment to correct name did not commence new action; action commenced at filing even though summons not provided on that date); *Brown v. Kerkhoff*, 2005 WL 2671529 at *6 – 16 (S.D.Iowa Oct. 19, 2005) (correction of clerical mistake by submitting remainder of initial pleading did not "commence[]" action; adding unrelated new defendants after CAFA did allow removal but remand appropriate when those new defendants were dismissed; addition of new legal theories that arose out of same facts did not "commence[]" action);

⁴ Note that this appears to be the first federal statute which expressly recognizes (and therefore legitimizes) *cy pres* awards. *Cy pres* awards have been the subject of academic debate but have often been approved in settlements by District Courts. While this provision recognizes *cy pres*, its bar on including them in fee calculations for coupon settlements could cause a reduction in their use for coupon settlements. It is possible that attorneys will use this recognition of *cy pres* to argue for such settlements outside of the coupon arena.

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.

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.").

B. LOSS BY CLASS MEMBERS

Section 1713 provides that the court may only approve a class settlement that results in a net loss to the class member if the nonmonetary benefits substantially outweigh the loss. Such a settlement would appear unlikely to even be proposed in federal court.

C. DISCRIMINATION BASED ON GEOGRAPHIC LOCATION

28 U.S.C.A. § 1714 protects against unjustified awards to certain plaintiffs based on a geographic location. Section 1714 provides that the court may not approve a class settlement in which some class members receive a larger award solely because they live geographically closer to the court. Again, such a settlement would appear unlikely to even be proposed in federal court.

D. MANDATORY NOTICE TO APPROPRIATE FEDERAL AND STATE OFFICIALS

The notice provisions of CAFA are unclear, have short time requirements, and have potentially dangerous consequences for failure to comply. Moreover, it is unclear exactly what

the state and federal officials should do with the notices they receive. There is no provision in CAFA providing standing for such officials to object to settlements. 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.

i. NOTICE TO APPROPRIATE FEDERAL OFFICIALS (§ 1715(c)(1))

The appropriate federal official is the Attorney General of the United States; or in a case in which the defendant is a depository institution, the person with federal supervisory or regulatory power over the defendant (at least some of the alleged matters in the class action should be related to this regulation or supervision).

ii. NOTICE TO APPROPRIATE STATE OFFICIALS (§ 1715(a)(2),(c)(2))

The appropriate state official is the individual in the state with the primary supervisory or regulatory power over the defendant, or the person who authorizes the defendant to conduct business in the state (at least some of the alleged matters in the class action should be related to the regulation or supervision). If there is not an individual that regulates, supervises, or licenses the business of the defendant, or the alleged matters in the class action do not relate to this supervision, then the state attorney general is the appropriate state official. CAFA includes a safe harbor provision that protects defendants if they notified the appropriate federal official and either the state attorney general or the appropriate state official. 28 U.S.C.A. § 1715(e)(2).

Thus, a defendant should always notify the state attorney general in addition to any other state officials.

If the defendant is a state depository institution, notice should be served upon the bank supervisor of the state where the defendant is chartered or incorporated (at least some of the alleged matters in the class action should be related to this person's supervision), and upon the appropriate federal official.

iii. CONTENTS OF NOTICE (§ 1715(b))

CAFA's requirements for the content of the notice are difficult. 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;⁵
- (6) notice of dismissal or final judgment;⁶
- (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;⁷ and

⁵ It is not clear how item 4 and item 5 differ. Perhaps item 4 refers to a term sheet before the actual full settlement agreement.

⁶ Item 6 appears to require mailing of the proposed final judgment.

⁷ Item 7 would appear to be the most difficult requirement. Presumably experts will be required to provide a "reasonable estimate." At the very least, the parties should create some record to support the estimate.

- (8) all written judicial opinions relating to the contents mentioned in 3 through 6.

II. JURISDICTION CHANGES

A. ORIGINAL JURISDICTION – \$5 MILLION AGGREGATE, MINIMAL DIVERSITY, 100 CLASS MEMBERS

CAFA establishes original jurisdiction for federal district courts over any class action if (1) the matter in controversy exceeds \$5 million, exclusive of costs and interest, (2) the class will be 100 or more, and (3) if minimal diversity exists (that is, *any* class member is a citizen of a state different from any defendant). Damages are aggregated to determine if the \$5 million is met. For purposes of determining citizenship, CAFA retains existing law with the exception that unincorporated associations are treated like corporations. 28 U.S.C.A. § 1332(d)(10).

i. “HOME STATE” EXCEPTION – ALL DEFENDANTS FROM HOME STATE

a. ALL DEFENDANTS FROM HOME STATE AND LESS THAN ONE-THIRD OF PLAINTIFFS ARE FROM HOME STATE – MANDATORY JURISDICTION (§1332(d)(2))

Even if all of the defendants are from the “home state,” there is still mandatory jurisdiction if less than one-third of the plaintiff class is from the “home state” (assuming all requirements are met – 100 members, minimal diversity).

b. ALL DEFENDANTS FROM HOME STATE AND MORE THAN ONE-THIRD BUT LESS THAN TWO-THIRDS FROM HOME STATE – DISCRETIONARY JURISDICTION (§1332(d)(3))

If all⁸ of the defendants are from the “home state”, and between one-third and two-thirds of the proposed plaintiff class are citizens of the state in which the action was filed, a district

⁸ The statute actually provides that the court may decline jurisdiction if the “**primary defendants**” are from the home state (and the other requirements met). There has been some debate over whether “primary defendants” means “all” defendants, “all” primary defendants, or any primary defendant. Most commentators believe it means all primary defendants and that this will normally mean all defendants. *See Adams v. Federal Materials Co., Inc.*, 2005 WL 1862378 at * 5 (W.D.Ky. July 28, 2005) (determining that defendant that entered case as third party

court may, in its discretion, decline to exercise jurisdiction. In making this determination, factors for the district court to consider include:

- (1) whether the claims asserted involve matters of national or interstate interest;
- (2) whether the governing laws are that of the forum state or another state;
- (3) whether the action was pleaded in order to avoid federal jurisdiction;
- (4) whether there is a distinct connection between the forum and the class members or defendants;
- (5) whether the number of citizens from the forum state is substantially larger than the number from other states and the citizenship of class members from other states is evenly dispersed; and
- (6) whether during the three years prior to filing the class action, any class actions asserting similar claims on behalf of the same or different persons were filed.

c. ALL DEFENDANTS FROM HOME STATE AND MORE THAN TWO-THIRDS OF CLASS FROM HOME STATE – MANDATORY ABSTENTION (1332(d)(4)(B))

The district court must not exercise discretion if all of the defendants and two-thirds of the class are citizens of the state in which the action was originally filed.

ii. “LOCAL CONTROVERSY” EXCEPTION

For controversies that are truly local in content, Congress provided another exception from CAFA’s broad jurisdiction. 28 U.S.C.A. § 1332(d)(4). A district court must decline jurisdiction in a class action if: (1) more than two-thirds of the proposed plaintiff class are

defendant was to be considered because there was now one count against them and there was a “lack of principled distinction between the positions” of the defendants).

There has been debate over what “primary” means. CAFA does not define the term. Some commentary argues that “primary” should only mean those defendants who are likely to incur the most loss if found liable (such as the employer rather than the employee). John Beisner & Jessica Miller, “Litigating in the New Class Action World: A Guide to CAFA’s Legislative History,” 6 *Class Action Litigation*, 403, 409, n.66 (June 10, 2005), *citing* H.R.Rep. No. 108-144 at 38 (2003) (“Beisner & Miller”) (insightful analysis of CAFA). Other than the *Adams* case, there are no cases yet on what “primary” defendants mean. Note that there are strategic considerations that a defendant will need to consider when making arguments regarding remand. If a defendant asserts that they are a “primary” defendant in arguing against remand, they may be providing statements that will be cited back against them later in settlement negotiations, possibly during a trial, or in litigation regarding indemnity or contribution.

citizens of the state in which the action was originally filed and (2) at least one defendant (a) is a defendant from whom “significant relief”⁹ is sought, (b) is a defendant whose alleged conduct forms a “significant basis” for the claims asserted, and (c) is a defendant who is a citizen of the state in which the action was originally filed. This exception does not apply if there have been any similar class actions filed against any of the defendants during the preceding three years.

iii. OTHER EXCEPTIONS

There are other listed exceptions to CAFA’s jurisdiction. These include cases where (1) primary defendants are states, state officials, or other government entities, (2) plaintiff classes are less than 100, (3) there are securities claims, and (4) there are state law claims involving internal corporate affairs. 28 U.S.C.A. § 1332(d)(5).

B. REMOVAL JURISDICTION – UNANIMITY NOT REQUIRED, RESIDENT MAY REMOVE, ONE YEAR LIMITATION ELIMINATED

Assuming the requirements above are met, a class action may be removed to a district court whether or not any defendant is a citizen of the state in which the action is brought. 28 U.S.C.A. § 1453(b).

The action may be removed by any defendant without the consent of any other defendant.

Id.

The one year limitation provided in 28 U.S.C.A. § 1446(b) does not apply to removal of class actions or mass actions (although there remains a 30 day limit for removing from when the action first becomes removable). *Id.*

⁹ Like the term “primary defendants”, the terms “significant relief” and “significant basis” are not defined. One commentary has opined that a retailer who sold the product to only some members of the class would not qualify. Beisner & Miller at 410.

i. NEW VEHICLE – “MASS ACTION” JURISDICTION (§ 1332(d)(11))

In addition to granting jurisdiction to class actions, CAFA provides jurisdiction for “mass actions.” According to CAFA, a “mass action” is a civil action that joins monetary relief claims of 100 or more plaintiffs who have claims involving common questions of law or fact.

If a “mass action” is removed, CAFA only provides jurisdiction over those plaintiffs who satisfy the \$75,000 threshold set forth in 28 U.S.C.A. § 1332(a). Thus, the district court would presumably retain the action and would have the authority to remand certain plaintiff’s actions. On the other hand, 28 U.S.C. § 1367 could provide discretionary jurisdiction to retain such claims.

Mass actions do not include any civil action in which: (1) all of the claims arise from an event in the forum state and the alleged injuries occurred in the forum state or its contiguous states;¹⁰ (2) the claims are joined due to a defendant’s motion; (3) all claims are asserted on behalf of the public, pursuant to a state statute;¹¹ or (4) the reason for the claims consolidation was for pretrial proceedings. 28 U.S.C.A. § 1332(d)(11)(B)(ii).

The multidistrict litigation transfer procedure, 28 U.S.C.A. § 1407, is not available for mass actions unless a majority of the plaintiffs request transfer under this section.

C. APPEAL (7 DAY DEADLINE), BURDEN OF PROOF, DISCOVERY, INJUNCTIVE/DECLARATORY RELIEF

Remand orders are appealable, although the appeal language is discretionary. A defendant must appeal within seven *days* of a remand order, and the appellate court must issue a

¹⁰ The first mass action exception is intended to apply to truly local, single events or occurrences with no substantial interstate effects – such as a single, discrete chemical spill. The Legislative history is clear that separate sales of the same product would not qualify. S.Rep.No. 109-14 at 47.

¹¹ The third mass action exception applies to only one situation – the California Unfair Competition Law. No other state appears to have a general public provision parallel to this California law. S.Rep.No. 109-14 at 47.

final judgment within sixty days of the appeal (with a possible extension of ten days on its own motion or extension by joint agreement of the parties). If there is no final judgment on the appeal within the set time period, then the appeal is deemed denied.

The limited case law disagrees about whether the burden of proof for jurisdiction is upon the removing party or upon the party resisting jurisdiction. CAFA is silent on this point (as are the traditional statutes governing removal and diversity jurisdiction). While CAFA is silent, the legislative history is clear that the burden is upon the party resisting jurisdiction. Further, the legislative history expressly states that there is a presumption in favor of jurisdiction (including determining the amount in controversy). S.Rep.No. 109-14, at 39 & 42. Some courts cite this legislative history – as well as Congress’ clear intent to alter class action jurisdiction – as justification for placing the burden upon the party making the remand motion. Other courts, however, reason that because CAFA’s statutory terms did not expressly state that the burden was altered, that burden remains, as it has historically been, on the party invoking federal jurisdiction. *Compare Berry v. American Express Publishing Corp.*, 2005 WL 1941151 (C.D.Cal. June 15, 2005) (burden on party making remand motion, but granting remand); *Waite v. Merck & Co.*, 2005 WL 1799740 (W.D.Wash. July 27, 2005) (burden on party making remand motion); *Harvey v. Blockbuster, Inc.*, 2005 WL 1868936 at *2 (D.N.J. Aug. 8, 2005) (same) *Heaphy v. State Farm Mutual Auto. Ins. Co.*, 2005 WL 1950244 at * 2 (W.D.Wash. Aug. 15, 2005) (stating in dicta that party making remand motion “appears” to have burden); *with Brill v. Countrywide Home Loans*, 427 F.3d 446, 448 - 9 (7th Cir. 2005) (burden on removing party because that is traditional rule and legislative history does not alter statutes, but holding that defendant had satisfied the burden of showing \$5 Million “in controversy”); *Plummer v. Farmers Group, Inc.*, 388 F.Supp.2d 1310, 1317 - 18 (E.D.Ok. 2005) (stating that Congress likely intended to reverse

burden but unwilling to change existing law without change in statutory language, but finding burden met); *Schwartz v. Comcast Corp.*, 2005 WL 1799414 (E.D.Pa. July 28, 2005).

The burden of proof issue would apply when uncertainty arises relating to (1) the percentage of citizens from the home state and (2) the amount in controversy. If such uncertainty occurs because of the vagueness of the class definition, it appears logical that the plaintiff should bear the burden of proving remand is appropriate – because they created the vagueness. This is consistent with the default practice of placing the burden on a party making a motion. The contrary argument is that the defendant is more likely to be in possession of class member information and so they should bear the burden. This is not necessarily correct and determining the class members may be very difficult, expensive or impossible, particularly if the class is poorly defined. For instance, corporations rarely know with certainty the dispersion of their shareholders; consumers buy through intermediaries; former employees move. In some cases, the count issue will likely involve costly experts and could involve creative class definitions (since the denominator and numerator would be important in the count).

Likewise the case law is not yet clear about how to value injunctive or declaratory relief in determining the \$5 Million amount in controversy requirement. See *Berry v. American Express Publishing Corp.*, 2005 WL 1941151 (C.D.Cal. June 15, 2005) (stating that amount in controversy could be determined from either the perspective of the aggregate value to the class or the cost to comply for the defendant, but finding amount not met on facts); compare *Snyder v. Harris*, 394 U.S. 332 (1969). Again, the legislative history is clear that it should be valued through whichever is higher (defendant's or plaintiff's perspective). S.Rep.No. 109-14 at 42 - 43 (jurisdiction exists if “the value of the matter in litigation exceeds \$5,000,000 either from the viewpoint of the plaintiff or the viewpoint of the defendant”).

Finally, it would appear that a large amount of discovery could be done on these jurisdictional tests. The legislative history states that courts should limit such discovery; however, case law thus far has allowed discovery on jurisdictional issues. S.Rep. No. 109-14 at 77 (“allowing substantial, burdensome discovery on jurisdictional issues would be contrary to the intent of these provisions to encourage the exercise of federal jurisdiction”), *citing Coury v. Prot*, 85 F.3d 244, 249 (5th Cir. 1996); *Kanzelberger v. Kanzelberger*, 782 F.2d 774, 776 (7th Cir. 1986). In *Schwartz v. Comcast Corp.*, 2005 WL 1799414 (E.D.Pa. July 28, 2005), the plaintiff’s complaint described the class as “residents” rather than “citizens.” The plaintiff attempted to amend after removal, but the court held that the complaint at the time of removal controlled and ordered limited discovery to determine the percentage of class members (which included corporations) were citizens of other states.

Congress also noted that it would be improper for a plaintiff to file a case and then serve discovery seeking the names of all putative class members to meet a particular exception and should instead seek less burdensome means – such as stipulations. S.Rep.No. 109-14 at 44.

III. CONCLUSION

In sum, CAFA has greatly expanded federal jurisdiction over class actions – both for removal and original jurisdiction. Avoiding federal jurisdiction will not be easy and will likely be available only for those cases pleading narrowly defined class with only one state’s citizens as members. However, there remain difficult legal questions for certain key terms in the statute that will likely take years to resolve – probably with the last word by the Supreme Court. Plaintiffs should think through these issues carefully before pleading the complaint to avoid immersing themselves into a morass of complex jurisdictional discovery that may not be productive.