

BB REVIEW

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CLASS ACTION FAIRNESS ACT OF 2005

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 for defendants. First, CAFA will allow plaintiffs to originally file cases in federal court rather than state court – an important advantage in states where the courts have been hostile to class certifications. 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.

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 (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 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 a "coupon" – provided that cash is distributed to those who make a claim.

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. CAFA requires that within 10 days after filing a proposed settlement of a

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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. (§ 1715). If proper notice is not provided, a class member may 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. 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; (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; and (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

a. ALL DEFENDANTS FROM HOME STATE AND LESS THAN ONE-THIRD OF CLASS ARE FROM HOME STATE – MANDATORY JURISDICTION

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 all of the defendants are from the "home state", and between one-third and two-

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thirds of the proposed plaintiff class are citizens of the state in which the action was filed, a district 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 an exception from CAFA’s broad jurisdiction. A district court must decline jurisdiction in a class action if: (1) more than two-thirds of the proposed plaintiff class are 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 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) there are securities claims, and (3) there

are state law claims involving internal corporate affairs.

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

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; (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; or (4) the reason for the claims consolidation was for pretrial proceedings.

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 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. However, the legislative history is clear that the burden is upon the party resisting jurisdiction. Further, the legislative history is clear that there is a presumption in favor of jurisdiction (including determining the amount in controversy).

Likewise the case law is not yet clear about how to value injunctive or declaratory relief in determining jurisdiction. Again, the legislative history is clear that it should be valued through whichever is higher (defendant's or plaintiff's perspective).

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.

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