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February 2, 2009

Congressional Research Service

Report RL33507

Class Action Fairness Act of 2005: Early Judicial Interpretations

Paul Starett Wallace, Jr., American Law Division

July 3, 2006

Abstract. The Class Action Fairness Act (CAFA) was passed by Congress in February of 2005 to address what Congress considered problems and abuses in class action cases. CAFA was intended to (1) expand federal diversity jurisdiction over class actions asserting state law claims, (2) make it easier for defendants to remove class actions to federal court, (3) limit the ability of federal courts to remand removed cases, and (4) protect class action participants from unfair settlement practices. Congress's overall intent was to alter fundamentally the way class actions were handled by making more of them subject to federal law.

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Class Action Fairness Act of 2005: Early Judicial Interpretations

Summary

On February 18, 2005, President Bush signed into law the Class Action Fairness Act (CAFA), P.L. 109-2, amending Title 28 of the U.S. Code. The Act extends the reach of federal diversity jurisdiction over state law class actions. Congress wanted to correct a provision in federal jurisdiction law that prevented many class actions that were national in scope from being litigated in federal courts by making it more difficult for plaintiffs' counsel to defeat diversity jurisdiction. Second, CAFA imposes new requirements on the settlement of class actions.

CAFA applies to class actions commenced on or after the date of enactment. Much of the early CAFA case law has held that actions are "commenced" when filed rather than when removed. The courts agree that the simple addition of new members to the class or a change in class representative is insufficient; the courts are divided over whether the inclusion of additional defendants will satisfy the requirements for CAFA coverage. The Seventh Circuit in *Schorsch v. Hewlett-Packard, Co.* 417 F.3d 748, 751 (7th Cir. 2005), and the Tenth Circuit in *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090 (10th Cir. 2005), stated that amendments to class definitions do not necessarily commence a new action under or trigger CAFA.

In a second area of early construction, the courts appear to be split over the question of burden of proof, although the trend, at least in the Seventh and Ninth Circuits, seems to favor imposing the burden upon the moving party; that is, the party seeking to remove a class action case from state court to federal court under CAFA (ordinarily the defendant) bears the initial burden and thereafter the burden falls to the party seeking remand back to state court under the CAFA exception (ordinarily the plaintiff).

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Class Action Fairness Act of 2005: Early Judicial Interpretations

Introduction

The Class Action Fairness Act (CAFA) was passed by Congress in February of 2005 to address what Congress considered problems and abuses in class action cases. CAFA was intended to (1) expand federal diversity jurisdiction over class actions asserting state law claims, (2) make it easier for defendants to remove class actions to federal court, (3) limit the ability of federal courts to remand removed cases, and (4) protect class action participants from unfair settlement practices. Congress's overall intent was to alter fundamentally the way class actions were handled by making more of them subject to federal law.

CAFA became effective on February 18, 2005. Since its enactment, a number of court of appeals and district court cases applying CAFA have been decided, and it appears that cases that formerly could not be filed in or removed to federal court will now be removable, at the election of defendants. Whether the extended federal jurisdiction over state law-based class actions will have the effect that Congress intended relative to limiting the types and number of cases that once proceeded as class actions in state courts will have to be determined as more cases make their way through the federal court system.

Legislative Background and Purpose

The Senate began consideration of the Class Action Fairness Act in the 105th Congress when the Senate Judiciary Subcommittee on Administrative Oversight and the Courts convened a hearing on October 30, 1997.¹ On September 28, 1998, the Subcommittee on Administrative Oversight and the Courts approved S. 2083, the Class Action Fairness Act of 1997, which was introduced by Senators Charles Grassley and Herb Kohl, with an amendment in the nature of a substitute.² The Senate took no further action on S. 2083 in the 105th Congress. On the House side, the Judiciary Subcommittee on Courts and Intellectual Property convened a hearing on similar issues,³ and the full Committee approved H.R. 3789, the Class Action Jurisdiction Act of 1998, which was introduced by Representative Henry Hyde for

¹ Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary, 105th Cong., 1st Sess. (1997).

² 144 Cong. Rec. D956 (daily ed. Sept. 10, 1998).

³ Mass Torts and Class Action Lawsuits: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong., 2d Sess. (1998).

himself and several other Committee members.⁴ As in the case of the Senate, adjournment occurred before final action could be taken.

On February 3, 1999, S. 353, Class Action Fairness Act of 1999, was introduced in the 106th Congress by Senators Charles Grassley, Herb Kohl, and Strom Thurmond and referred to the Senate Committee on the Judiciary.⁵ On May 4, 1999, the Judiciary Subcommittee on Administrative Oversight and the Courts held hearings on S. 353.⁶ On June 29, 2000, the Judiciary Committee approved S. 353 with an amendment in the nature of a substitute, offered by Chairman Orrin G. Hatch and Senators Charles Grassley and Herb Kohl, by a roll call vote of 11 yeas and 7 nays.⁷ Continuing the work begun in the prior Congress, the committee conducted hearings⁸ and approved H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999, which had been introduced by Representative Hyde.⁹ On September 23, 1999, by a vote of 222 to 207, the House passed H.R. 1875, as amended, which would have expanded federal class action diversity jurisdiction.¹⁰ Neither House took any further action on either bill.

The Senate continued consideration of the Class Action Fairness Act in the 107th Congress when Senator Charles Grassley introduced S. 1712 on November 15, 2001, with Senators Kohl, Hatch, Carper, Thurmond, Chafee, and Specter.¹¹ Although S. 1712 was similar to its predecessors, S. 1712 included some new provisions. On July 30, 2002, the Senate Judiciary Committee, which was then chaired by Senator Leahy, held a hearing to discuss class actions generally, during which time S. 1712 was considered.¹² In the House, Representative Goodlatte introduced H.R. 2341, the Class Action Fairness Act, for himself and a number of other Members, including several members of the Judiciary Committee. Hearings were held.¹³ The Committee

⁴ H.Rept. 105-702 (1998).

⁵ 145 Cong. Rec. S1166-1167 (daily ed. Feb. 3, 1999).

⁶ The Class Action Fairness Act of 1999: Hearings before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary, 106th Cong., 1st Sess. (1999).

⁷ S.Rept. 106-420 at 8 (2000).

⁸ Interstate Class Action Jurisdiction Act of 1999 and Workplace Goods Job Growth and Competitiveness Act of 1999: Hearing Before the House Comm. on the Judiciary, 106th Cong., 1st Sess. (1999).

⁹ H.Rept. 106-320 (1999).

¹⁰ 145 Cong. Rec. H8567-568 (daily ed. Sept. 23, 1999).

¹¹ 147 Cong. Rec. S11940 (daily ed. Nov. 15, 2001).

¹² Class Action Litigation: Hearing Before the Senate Comm. on the Judiciary, 107th Cong. 2d Sess. (2002).

¹³ Class Action Fairness Act of 2001: Hearing Before the House Comm. on the Judiciary, 107th Cong., 2d Sess. (2002).

approved an amended bill,¹⁴ which the House further amended and passed.¹⁵ As passed by the House, H.R. 2341 had many of the general features that ultimately found their way into law: protection of class members, expanded diversity jurisdiction for large class actions, and more generous removal procedures to allow certain class actions filed in state court to be removed to federal court for trial. Nevertheless, the 107th Congress adjourned before the final action could be taken.

Early in the 108th Congress, on February 4, 2003, Senator Grassley introduced S. 274, the Class Action Fairness Act of 2003.¹⁶ On April 11, 2003, the Judiciary Committee reported S. 274 favorably, with amendments.¹⁷ On October 16, 2003, Senator Grassley introduced S. 1751, the Class Action Fairness Act of 2003, a compromise version of the bill.¹⁸ Pursuant to Rule XXIV of the Standing Rules of the Senate, a Motion to Proceed to consideration of S. 1751 was filed.¹⁹ On October 22, 2003, the Senate failed to invoke cloture by a vote of 59-39.²⁰ Senators Grassley, Kohl, Hatch, and Carper subsequently negotiated key provisions of the bill with Senators Landrieu, Schumer, and Dodd;²¹ the compromise bill, S. 2062, the Class Action Fairness Act of 2004, was introduced on February 10, 2004.²² The House passed a class action bill (H.R. 1115, Class Action Fairness Act of 2003);²³ however, due to a last-minute attempt to attach non-germane amendments such as drug reimportation and the minimum wage to the companion bill (S. 2062) in the Senate, it was withdrawn from further consideration in the 108th Congress.²⁴

Senator Grassley reintroduced in the 109th Congress, on January 25, 2005, the stalled Senate class-action bill (S. 2062) from the 108th Congress as S. 5, which was referred to the Senate Judiciary Committee.²⁵ On February 3, 2005, the Senate Judiciary Committee approved the overall bill on a 13-5 vote, without amendment, and referred it to the Senate.²⁶ On February 10, 2005, S. 5 passed the Senate without

¹⁴ H.Rept. 107-370 (2002).

¹⁵ 148 Cong. Rec. H857-86 (daily ed. Mar. 13, 2002).

¹⁶ 149 Cong. Rec. S1870 (daily ed. Feb. 4, 2003).

¹⁷ 149 Cong. Rec. D401 (daily ed. April 11, 2003).

¹⁸ S.Rept. 108-123 at 5 (2003).

¹⁹ 149 Cong. Rec. S12853 (daily ed. Oct. 17, 2003).

²⁰ 149 Cong. Rec. S13008 (daily ed. Oct. 22, 2003).

²¹ 149 Cong. Rec. S16217 (daily ed. Oct. 15, 2003).

²² 150 Cong. Rec. S792, S953 (daily ed. Feb. 10, 2004).

²³ 149 Cong. Rec. H5306-H5307 (daily ed. June 12, 2003); the bill had previously been approved by the Judiciary Committee, H.Rept. 108-144 (2003).

²⁴ 150 Cong. Rec. S7818 (daily ed. July 8, 2004)(remarks of Sen. Hatch).

²⁵ 151 Cong. Rec. S450 (daily ed. Jan. 25, 2005).

²⁶ S.Rept. 109-14 at 3-4 (2005).

amendment by a vote of 72-26.²⁷ On February 15, 2005, S. 5 was referred from the House Rules Committee to the full House of Representatives by voice vote.²⁸ On February 17, 2005, the House,²⁹ as in the Senate, passed S. 5 without amendment, 279-149.³⁰ On February 18, 2005, the President signed into law the Class Action Fairness Act of 2005 (CAFA).³¹

The general concept of class actions was first codified in 1849, when 36 states adopted the Field Code.³² In order to successfully plead and prosecute class actions in accordance with the Field Code, it required that numerous parties demonstrate a common interest in law and fact.³³

Before CAFA was enacted, Title 28, Section 1332 of the U.S. Code, provided that in cases when at least one plaintiff and one defendant both had “citizenship” ties in the same state, the case would remain in state court. This was referred to as the “complete diversity requirement,” whereby counselors for the plaintiffs would join non-diverse defendants in order to defeat removal to federal court.

The Class Action Fairness Act amends Title 28 of the U.S. Code and makes substantial changes in two areas where Congress perceived abuses to be occurring. First, the Act extends the reach of federal diversity jurisdiction over state law class actions.³⁴ Congress wanted to correct a provision in federal jurisdiction law that prevented many class actions that were national in scope from being litigated in federal courts by making it more difficult for plaintiffs’ counsel to “game the system” in an effort to defeat diversity jurisdiction.³⁵ Second, the Act imposes new requirements on the settlement of class actions to prevent some perceived abuses. It was observed that plaintiffs’ counsel at times recovered large fees in settlements; however, the class members received awards of little or no value, such as coupons for the purchase of additional products from the defendant.³⁶ The Act requires that judicial scrutiny be increased for settlements involving coupons which constitute all

²⁷ 151 Cong. Rec. S1259 (daily ed. Feb. 10, 2005).

²⁸ H.Rept. 109-7; 151 Cong. Rec. D93-D94, H603 (daily ed. Feb. 15, 2005).

²⁹ 151 Cong. Rec. H723-H755 (daily ed. Feb. 17, 2005).

³⁰ P.L. 109-2, 119 Stat. 4 (2005) (codified in various sections of 28 U.S.C).

³¹ Washington Post, February 18, 2005, at 1, col.1.

³² See Newberg on Class Actions 3d §§ 13-14 to 13-17 (1992). In 1849, the state of New York enacted a code of civil procedure which was drafted by David Dudley Field, an American lawyer and law reformer. The Field Code became the basis for the reform of civil law procedure which was adopted by 36 states and the federal government.

³³ S.Rept. 109-14 at 5 (2005).

³⁴ 28 U.S.C. §1332(d).

³⁵ *Id.*

³⁶ *Supra* note 33, at 5.

or part of the relief afforded to claimants.³⁷ The Act also requires that federal and state government agencies be notified of proposed class action settlements and be given an opportunity to object to them.³⁸

What Is A Class Action?

The basic definition for the term “class action,” for purposes of original and removal jurisdiction, is “any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.”³⁹

CAFA provides that a “mass action shall [also] be deemed to be a class action.”⁴⁰ And “the term ‘mass action’ [is considered any civil action other than a class action] in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the plaintiffs’ claims involve common questions of law and fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements [\$5,000,000] under subsection (a).”⁴¹ The Senate Report states that

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). The Committee notes that the intent of this proviso is as follows. If a mass action satisfies the criteria set forth in the section (that is, it involves the monetary relief claims of 100 or more persons that are proposed to be tried jointly on the ground that the claims involve common questions of law or fact and it meets the tests for federal diversity jurisdiction otherwise established by the legislation), it may be removed to a federal court, which is authorized to exercise jurisdiction over the action. Under the proviso, however, it is the Committee’s intent that any claims that are included in the mass action that standing alone do not do not satisfy the jurisdictional amount requirements of Section 1332(a) (currently \$75,000), would be remanded to state court. Subsequent 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 aggregated jurisdictional amount requirement. However, so long as the mass action met the various jurisdictional requirements at the time of removal, it is the Committee’s view that those subsequent remands should not extinguish federal diversity jurisdiction[] over the action.

³⁷ 28 U.S.C. § 1712.

³⁸ 28 U.S.C. § 1715.

³⁹ 28 U.S.C. § 1332 (d)(1)(B).

⁴⁰ 28 U.S.C. § 1332(d)(11)(A).

⁴¹ 28 U.S.C. § 1332(d)(11)(B)(i).

The Committee find[s] that mass actions are simply class action in disguise. They involve a lot of people who want their claims adjudicated together and they often result in the same abuses as class actions.”⁴²

Other significant limitations or restrictions regarding federal jurisdiction over “mass actions” are (1) the statute would not permit jurisdiction over “mass actions” involving an event or occurrence that took place within the state and is considered a truly local single event with no substantial interstate effects;⁴³ (2) there would be no jurisdiction over “mass actions” if the claims for joinder are the results of a defendant’s motion; thus, a defendant would not be able to get individual claims filed against it in state court and then moved into federal court by having the state court consolidate them and subsequently removing the case as a “mass action”;⁴⁴ (3) a “mass action” would not include private attorney general actions or claims “...asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action”;⁴⁵ and (4) “mass actions” would not include claims that are consolidated or coordinated solely for pretrial purposes.⁴⁶

CAFA’s Provisions

Effective Date.

CAFA does not apply retroactively.⁴⁷ Section 9 of CAFA provides that “[t]he amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.”⁴⁸ The date of enactment of CAFA is February 18, 2005, and thus, according to judicial interpretations, CAFA applies to any civil action commenced on or after that date, and does not apply to actions already pending in state courts on that date unless there is a post-CAFA development that constitutes recommencement. Circuit Courts of Appeals have uniformly held that a state court action is “commenced” on the date that the plaintiff originated the action in state court, and not the date when the defendant removes it. For example, in *Pritchett v. Office Depot, Inc.*,⁴⁹ the issue, one of first impression, was whether the removal provisions of CAFA apply to pending state court cases that were removed after the effective date of the Act. In *Pritchett*, a class action was filed on April 2, 2003, in Colorado state court on behalf of a class consisting of assistant store managers seeking unpaid overtime payments. The state court certified the class on June 21, 2004, and scheduled trial to begin on March 14, 2005.

⁴² S. Rept.109-14 at 46-47 (2005).

⁴³ 28 U.S.C. § 1332(d)(11)(B)(ii)(I). The existing conditions under which there is federal jurisdiction over these “mass actions” claims are set forth in 28 U.S.C. § 1369.

⁴⁴ 28 U.S.C. § 1332(d)(11)(B)(ii)(II).

⁴⁵ 28 U.S.C. § 1332(d)(11)(B)(ii)(III).

⁴⁶ 28 U.S.C. § 1332(d)(11)(B)(ii)(IV).

⁴⁷ *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S.Ct. 2611, 2628 (2005).

⁴⁸ 28 U.S.C. § 1332(d).

⁴⁹ 420 F.3d 1090 (10th Cir. 2005).

On March 1, 2005, the defendant, citing the newly enacted CAFA, removed the case to federal court. The plaintiff moved to remand, arguing that CAFA did not apply to pending actions. The district court agreed and remanded the case. On appeal, the defendant argued that the case was commenced within the meaning of CAFA § 9 on the date it was removed, not the date it was first filed in state court.

The U.S. Court of Appeals for the Tenth Circuit disagreed. After noting that removal of an action is not “traditionally viewed” as a recommencement of the case, it relied on the principle that statutes conferring jurisdiction on the federal courts are to be construed narrowly and any ambiguity is to be resolved against the exercise of jurisdiction.⁵⁰ The Tenth Circuit also reviewed CAFA’s legislative history. It noted that an earlier version of CAFA would have applied CAFA not only to cases commenced after its effective date but also to cases in which the class-certification order was issued after the effective date; this provision was deleted from the final bill. This change, the court said, “...signaled an intent to narrow the removal provisions of CAFA to exclude currently pending suits.”⁵¹

The court also looked to public policy. It said the defendant’s interpretation of CAFA

would allow cases to be plucked from state court on the eve of trial. Such practices are disruptive to federal-state comity and the settled expectations of the litigants. Permitting removal of this case would effectively apply new rules to a game in the final minutes of the last quarter, and we find it ironic that Defendant seeks countenance for its position from a statute that was designed, in the first place, to curtail jurisdictional gaming and forum-shopping.⁵²

A similar interpretation may be gleaned from other cases involving class actions where the courts have held an action is “commenced” for purposes of the Act when it is first filed in state court, not when it is removed to federal court.⁵³

Although an action does not “commence” with the occurrence of certain events such as filing a notice of removal, some courts have recognized that while a routine amendment of a complaint may not render a state court action subject to CAFA, the addition of a new claim or new defendant may. A leading case on point is *Knudsen v. Liberty Mutual Ins. Co.*, where the Seventh Circuit addressed a second attempt at removal to the district court. Liberty Mutual removed the case after the enactment of CAFA, but the court remanded because the case “commenced” in state court

⁵⁰ *Id.* at 1094.

⁵¹ *Id.* at 1095.

⁵² *Id.* at 1097.

⁵³ See *Pfizer, Inc. v. Lott*, 417 F.3d 725 (7th Cir. 2005); *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748 (7th Cir. 2005); *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 687-88 (9th Cir. 2005). Federal district courts have recorded similar results. See, e.g. *Natale v. Pfizer, Inc.*, 379 F.Supp.2d 161, 171-76 (D.Mass. 2005); *In re Expedia Hotel Taxes and Fees Litigation*, 377 F.Supp.2d 904, 906 (W.D.Wash. 2005); *Smith v. Pfizer, Inc.*, 2005 WL 3618319 (S.D.Ill. Mar. 24, 2005)* (cases marked with an * are unreported).

before CAFA became effective.⁵⁴ Subsequent to the remand, the state court certified a class. The plaintiffs then asserted new claims for relief, and Liberty Mutual removed a second time. Under Illinois law, a new claim relates back to the original complaint when the original pleading furnishes the defendant with notice of the facts underlying the new contention. The court held that because the claims first raised in the second half of 2005 did not demonstrate that Liberty Mutual had notice of the new claims before February 18, 2005, the case was properly removed.⁵⁵ The court said, “A novel claim tacked on to an existing case commences new litigation for purposes of [CAFA].”⁵⁶

Courts of Appeals have generally held that plaintiffs amending an earlier complaint to add additional members to the class, to change the definition of the class or to designate a new class representative have not “commenced” a new action within the meaning of CAFA.⁵⁷ However, one federal district court in the Ninth Circuit recently held that it may obtain jurisdiction over a class action when a fully adjudicated complaint is amended.⁵⁸ Some courts have held that amending a complaint to include additional defendants likewise constitutes commencement of a new action for CAFA purposes.⁵⁹

Jurisdictional Provisions.

Under CAFA, federal courts have original jurisdiction over any class action lawsuit in which there exists diversity between any class member and any defendant and the amount in controversy exceeds \$5 million, exclusive of interest and cost.⁶⁰ It is also permissible for individual class members’ claims to be aggregated in order

⁵⁴ 411 F.3d 805, 807 (7th Cir. 2005).

⁵⁵ *Knudsen v. Liberty Mutual Ins. Co.*, 435 F.3d 755, 757 (7th Cir. 2006).

⁵⁶ *Id.* at 758; *see also Plummer v. Framers Group, Inc.*, 388 F.Supp.2d 1310, 1314 (E.D. Okla. 2005).

⁵⁷ *Schillinger v. Union Pac. R.R. Co.*, 425 F.3d 330, 332 (7th Cir. 2005); *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 751 (7th Cir. 2005); *Kundsen v. Liberty Mutual Ins. Co.*, 411 F.3d 805, 807 (7th Cir. 2005); *Plubell v. Merck & Co., Inc.*, 434 F.3d 1070, 1072 (8th Cir. 2006).

⁵⁸ *Cf. Heaphy v. State Farm Mutual Auto. Ins.*, 2005 WL1950244 (W.D. Wash. Aug. 15, 2005)* (the district court, concluding that removal under CAFA was appropriate, held that the revived pleading that sought to assert new claims was a new action and it did not relate back to the originally, fully adjudicated complaint; these claims were “in fact separate from the claims originally asserted” and should therefore be “treated as fresh litigation” for purposes of CAFA. *Id.* at 4-5.

⁵⁹ *Knudsen v. Liberty Mutual Ins. Co.*, 435 F.3d 755, 757-58 (7th Cir.2006); *Brand v. Transport Service Co.*, 445 F.3d 801, 804 (5th Cir. 2006); *Werner v. KPMG*, 415 F.Supp.2d 688, 700-701 (S.D.Tex. 2006); *contra, Prime Care v. Humana Ins.Co.*, __ F.3d __, __ (10th Cir. May 12, 2006)(2006 WL 1305229)(an amended complaint that substitutes additional defendants does not constitute the commencement of a new action in the absence of a new claim that does not relate back to the earlier complaint).

⁶⁰ 28 U.S.C. § 1332(d)(2)(A) and § 1332(d)(6).

to determine if the amount in controversy requirement is satisfied.⁶¹ This modification in the law reflects an expansion of federal diversity jurisdiction to include most class actions. More specifically, Section 3 of CAFA modified 28 U.S.C. § 1332 (“Diversity of citizenship; amount in controversy; costs”) to add the following provision, which gives federal courts jurisdiction over, for all practical purposes, all class actions of significant size as long as any class member is diverse from at least one defendant:

The 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, exclusive of interest and costs, and is a class action in which —

- (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
- (B) any member of a class of plaintiffs is a foreign state or citizen or a subject of a foreign state and any defendant is a citizen of a State; or
- (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.⁶²

The \$5,000,000 determinate for federal class action jurisdiction — which is determined by the aggregated damages assertedly suffered by the class⁶³ — is also a significant departure from the requirements of the preceding statute. Prior to the current Act (CAFA), courts interpreted Section 1332 as requiring that each plaintiff must affirmatively have sustained damages totaling at least the jurisdictional minimum of \$75,000 in order to engage diversity jurisdiction.⁶⁴

A number of important exceptions have been carved out of the expanded federal jurisdiction in class action cases under 28 U.S.C. § 1332(d)(2). These exceptions to federal jurisdiction are (1) when more than two-thirds of the members of the proposed class reside in a single state, at least one defendant from whom significant relief is sought and whose “conduct forms a significant basis for the claims” resides in the state, the principal injuries incurred in the state, and no other class action regarding the same or similar or similar factual allegations have been filed during the three-year period preceding the filing;⁶⁵ (2) when “the primary defendants are States, State officials, or other governmental entities against whom the district court may be

⁶¹ 28 U.S.C. § 1332(d)(6). See *Berry v. American Express Publishing*, 2005 U.S. Dist. LEXIS 15514 (C.D. Cal. June 15, 2005) (held that the amount in controversy requirement may be satisfied by determining the aggregate value of the claims from the perspective of either the class members or defendants).

⁶² 28 U.S.C. § 1332(d)(2).

⁶³ 28 U.S.C. § 1332(d)(6).

⁶⁴ The U.S. Supreme Court overturned *Zahn v. International Paper, Inc.*, 414 U.S. 291 (1973), whereby the Court previously held that the monetary requirements for diversity jurisdiction must be met by all plaintiffs. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S.Ct. 2611, 2635-36 (2005).

⁶⁵ 28 U.S.C. §1332(d)(4)(A)(I-III).

foreclosed from ordering relief”,⁶⁶ (3) when the number of all proposed plaintiff class members in the aggregate is less than 100;⁶⁷ (4) when the action concerns certain securities class actions as defined under 15 U.S.C. § 78p(f)(3) or 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. § 78bb(f)(5)(E));⁶⁸ and (5) when the action relates to the internal affairs or governance of a corporation or other form of business enterprise arising under or by virtue of the laws of the state in which such corporation or business enterprise is incorporated or organized.⁶⁹ In these cases, the Act *requires* the federal district court to decline to exercise jurisdiction.

District courts have *discretion* to decline to exercise jurisdiction under CAFA in cases where greater than one-third but less than two-thirds of the members of the plaintiff class are citizens of the state in which the action was originally filed.⁷⁰ Factors to be considered in exercising this discretion are (1) matters of national or interstate interest;⁷¹ (2) whether the claims will be governed by laws of the state in which the action was originally filed or by the laws of other states;⁷² (3) whether the class action has been pleaded in a manner that seeks to avoid federal jurisdiction;⁷³ (4) whether the action was brought in a forum that has a “distinct nexus” with the class members, the alleged harm, or the defendants;⁷⁴ (5) whether the number of citizens of the state in which the action was originally filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members of the proposed class is dispersed among a substantial number of states;⁷⁵ and (6) whether during the three-year period preceding the filing of the class, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.⁷⁶

The statute prior to CAFA provided that when a federal district court determines that removal is not proper and remands to the state court, the remand order cannot be reviewed on appeal.⁷⁷ CAFA, however, provides that a court of appeals “may” rather than “must” accept an appeal of an order either granting or denying a motion to remand, if an application for permission to appeal is filed within seven days of the

⁶⁶ 28 U.S.C. § 1332(d)(5)(A).

⁶⁷ 28 U.S.C. § 1332(d)(5)(B).

⁶⁸ 28 U.S.C. § 1332(d)(9)(A).

⁶⁹ 28 U.S.C. § 1332(d)(9)(B).

⁷⁰ 28 U.S.C. § 1332(d)(3).

⁷¹ 28 U.S.C. § 1332(d)(3)(A).

⁷² 28 U.S.C. § 1332(d)(3)(B).

⁷³ 28 U.S.C. § 1332(d)(3)(C).

⁷⁴ 28 U.S.C. § 1332(d)(3)(D).

⁷⁵ 28 U.S.C. § 1332(d)(3)(E).

⁷⁶ 28 U.S.C. § 1332(d)(3)(F).

⁷⁷ 28 U.S.C. § 1447(d).

order.⁷⁸ If the court of appeals accepts the appeal, it “must” decide it within 60 days, unless all parties agree to an extension of no more than 10 days.⁷⁹ If the court of appeals does not decide the case within the time limit, the appeal is denied and the case will be deemed to have been affirmed.⁸⁰

Burden of Proof.

Following the enactment of CAFA, federal courts are faced with new issues. One such issue is that of determining who has the burden of proof in demonstrating whether an interstate class action qualifies for removal from state court to federal court and thereafter who bears the burden with respect to state court. CAFA’s legislative history suggests that the burden is placed on the remanding party, and the party seeking remand consequently will be required to disprove either the amount in controversy or minimal diversity, or affirmatively demonstrate that an exception to CAFA applies. The courts appear to be split on this issue, although the trend seems to favor imposing the burden upon the moving party; that is, the party seeking to remove a class action case from state court to federal court under CAFA (ordinarily the defendant) bears the initial burden⁸¹ and thereafter the burden falls to the party seeking remand back to state court under the CAFA exception (ordinarily the plaintiff).⁸²

Amount in Controversy and Complete Diversity.

The amended statute (CAFA) explicitly addresses the amount-in-controversy requirement for class actions. Previously, class actions raising federal claims may be brought in or removed to federal court by virtue of the broad grant of federal question jurisdiction in 28 U.S.C. § 1331. However, most class actions raising only state-law claims could reach federal court only if the requirements for diversity jurisdiction were satisfied under 28 U.S.C. § 1332. Section 1332 placed two

⁷⁸ 28 U.S.C. § 1453(c)(1). Although the statute states that the appellate courts may review a lower court decision concerning the return of a class action case to state court as long as the application for appeal is filed “not less” than seven days thereafter, the courts have held that an appeal may be had if the application is filed “not more” than seven days after the lower court decision. *Leslie Miedema v. Maytag Corp.*, ___ F.3d ___, ___ (11th Cir. June 5, 2006); *Amalgamated Transit Union v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n2. (10th Cir. 2005).

⁷⁹ 28 U.S.C. § 1453(c)(3). The 60 day time period begins to run when the appeal is granted, *Leslie Miedema v. Maytag Corp.*, ___ F.3d ___, ___ (11th Cir. June 5, 2006); *Amalgamated Transit Union v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1145 (9th Cir. 2006); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 (10th Cir. 2005).

⁸⁰ 28 U.S.C. §1453(c)(4).

⁸¹ *Leslie Miedema v. Maytag Corp.*, ___ F.3d ___, ___ (11th Cir. June 5, 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005); *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676, 686 (9th Cir. 2006); *Plummer v. Farmers Group, Inc.*, 388 F.Supp.2d 1310, 1317-318 (E.D.Okla. 2005); but see, *Natale v. Pfizer.*, 379 F.Supp.2d 161, 168 (D.Mass. 2005)(party opposing removal bears the burden).

⁸² *Evans v. Walter Industries, Inc.*, ___ F.3d ___, ___ (11th Cir. May 22, 2006); *Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749, 752 (D. N.J. 2005).

prominent hurdles to federal jurisdiction over these class actions: the “complete diversity” rule and the amount-in-controversy requirement.

In preparation for a class action, the “complete diversity” requirement, as enacted and refined in judicial decisions, was that all “named” class representatives and all defendants had to be citizens of different states. If any named plaintiff and any named defendant were from the same state, the action could not be filed in or removed to federal court.⁸³ Regarding the amount-in-controversy requirement, in most cases, the claims of class members could not be aggregated to satisfy the \$75,000 jurisdictional amount in diversity cases.⁸⁴ Therefore, at least one class member was required to have a claim for more than \$75,000; however, according to the Supreme Court decision in *Zahn v. International Paper Co.*,⁸⁵ “all” class members had to have claims exceeding \$75,000.⁸⁶

With the enactment of CAFA, changes were made in these requirements. CAFA amended the diversity statute (28 U.S.C. § 1332) and the removal provisions (28 U.S.C. §§ 1441 *et seq.*) to provide for federal jurisdiction, at the election of either the plaintiff or the defendant, over class actions that do not satisfy the traditional “complete diversity” and “amount-in-controversy” requirements. The basic changes in the new law (subject to certain exceptions) are (1) it establishes federal jurisdiction over any action in which “any one member of the class” — named or not — has diverse citizenship from “any one defendant” and (2) where the “aggregate” amount in controversy exceeds \$5 million.⁸⁷

Settlement Provisions

Coupon Settlements.

At this time, there appear to be no reported cases dealing with the issue of class-action settlements under CAFA. However, CAFA requires that certain types of settlements, perceived by Congress to have particular potential for abuse, be subject

⁸³ See *Strawbridge v. Curtiss*, 7 U.S. 267 (1806); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).

⁸⁴ See *Snyder v. Harris*, 394 U.S. 332 (1969).

⁸⁵ 414 U.S. 291 (1973).

⁸⁶ The Supreme Court resolved the split in the circuits over whether *Zahn* was still valid in light of the supplemental jurisdictional statute, 28 U.S.C. § 1367, when the Court decided in *Exxon Mobil Corp. v. Allapattah Services*, 125 S.Ct. 2611, 2620-21 (2005) that the supplemental jurisdiction statute permits the exercise of diversity jurisdiction over additional plaintiffs who fail to satisfy the minimum amount-in-controversy requirement, as long as other elements of diversity jurisdiction are present and at least one named plaintiff satisfies the amount-in-controversy requirement. The *Exxon* decision also provides additional alternatives for federal courts (based upon the supplemental jurisdiction statute) to exercise jurisdiction over claims of class members even though they do not satisfy the CAFA requirements. See *id.* at 2627-28

⁸⁷ 28 U.S.C. § 1332(d)(2).

to increased scrutiny by the court.⁸⁸ These settlements include “coupon settlements,”⁸⁹ net loss settlements,⁹⁰ and geographically discriminatory settlements.⁹¹

CAFA (Section 1712 of 28 U.S.C.) addresses two aspects of coupon settlements: its overall fairness and the award of attorneys’ fees in coupon settlements.

Regarding fairness of coupon settlements, CAFA provides that a “...court may approve [a class action] settlement [involving coupons] only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members.”⁹²

The award of attorneys’ fees in coupon cases provides another significant change in the law. The new section 1712(a) of 28 U.S.C. provides that in a coupon settlement, “...the portion of any attorney’s fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.” Therefore, attorneys will no longer be able to receive fees based on the gross amount of coupons awarded, nor upon predictions of how many coupons will be redeemed. Any percentage-based fee will be allowed only on the basis of the value of coupons actually redeemed.⁹³

Notification to Appropriate Federal and State Officials.

CAFA requires defendants to notify various federal and state officials, including the state Attorney General as well as reasonably pertinent state regulators and licensing authorities, of the settlement of a class action within 10 days after a

⁸⁸ 28 U.S.C. § 1712 (e). *See also* S.Rept. 109-14, *supra* note 33 at 5.

⁸⁹ 28 U.S.C. § 1712(a).

⁹⁰ 28 U.S.C. § 1713.

⁹¹ 28 U.S.C. § 1714.

⁹² 28 U.S.C. § 1712(e). Rule 23 of the Federal Rules of Civil Procedure had already provided for the same identical standard. However, section 1712(e) goes beyond Rule 23 in one respect: It provides that a court has discretion to require that in a coupon settlement, some portion of the value of unclaimed coupons be distributed to charity and it forbids an award of attorneys’ fees based on the value of the contribution of unclaimed coupons.

In *Girsh v. Jepson*, 521 F.3d 153, 157 (3d Cir. 1975), the court articulated nine factors a district court should consider when determining whether a proposed settlement is fair, reasonable, and adequate. The factors are (1) the complexity, expense, and likely duration of the class action suit; (2) class reaction to the settlement; (3) the stage of the proceedings and the amount of the discovery completed; (4) the risk of establishing liability; (5) the risk of establishing damages; (6) the risk of maintaining the class action through trial; (7) the defendant’s ability to withstand a greater judgment; (8) the reasonableness of the settlement fund in light of the best possible recovery; and (9) the reasonableness of the settlement in light of all the risks of litigation.

⁹³ The legislation evidenced the congressional desire to reform the tort system and limit any exorbitant attorneys’ fees that provide little benefit to the plaintiffs. *See* 151 Cong. Rec. H723, H725 (2005)(daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner); 151 Cong. Rec. H723, H727 (2005)(daily ed. Feb. 17, 2005) (statement of Rep. Boucher).

proposed class action settlement is filed with the district court.⁹⁴ The notice must contain a number of items regarding the proposed settlement.⁹⁵ This notice must be sent to the appropriate state official of each state in which a class member resides.⁹⁶

Federal courts cannot approve any proposed settlement until 90 days after the last “appropriate” federal or state official receives the required notice.⁹⁷ A class member may refuse to be bound by any settlement if the required notices are not given.⁹⁸

Other Settlement Protections

CAFA⁹⁹ provides that a court may approve a settlement in which class members incur out-of-pocket losses to compensate class counsel “...only if the court makes a written finding that nonmonetary benefits to the class members substantially outweigh the monetary loss.”

CAFA¹⁰⁰ prohibits class settlements that provide for the payment of greater amounts to some class members “...solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.”

Original Federal Jurisdiction for Mass Actions

CAFA’s expansion of federal diversity also encompasses certain cases that are not deemed class actions. CAFA defines “class action” to include certain “mass actions” where (1) numerous plaintiffs are joined in a single case without relying on the class action mechanism; (2) original jurisdiction exists for any civil action seeking monetary relief where the claims of 100 or more named plaintiffs involving

⁹⁴ 28 U.S.C. § 1715(b).

⁹⁵ 28 U.S.C. § 1715(b). The notice must consist of (1) a copy of the complaint and any materials filed with the complaint and amended complaints (with exceptions for electronically served documents); (2) notice of any scheduled judicial hearing in the class action; (3) any proposed or final notification to class members of a) the members’ rights to request exclusion from the class action or if no right to request exclusion exists, a statement that no such right exist; and b) a proposed settlement of a class action; (4) any proposed or final class action settlement; (5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants; (6) any final judgment or notice of dismissal; (7) if feasible, the names of class members residing in each state and the estimated proportionate share of their claims to the entire settlement, or if not feasible, a reasonable estimate of such information; and (8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

⁹⁶ *Id.*

⁹⁷ 28 U.S.C. § 1715(d).

⁹⁸ 28 U.S.C. § 1715(e).

⁹⁹ 28 U.S.C. § 1713.

¹⁰⁰ 28 U.S.C. § 1714.

common questions of law or fact are proposed to be tried jointly; and (3) “the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and cost.”¹⁰¹

The term “mass action” does not include the following types of civil actions:¹⁰² (1) claims that arise out of an event or occurrence that happened in the state where the action was filed and that resulted in injuries in that state or in states contiguous to it (this exception would allow for example cases involving environmental torts, such as toxic chemical spills, to remain in state courts); (2) claims that were joined on the motion of the defendant; (3) claims that were asserted on behalf of the general public without class certification pursuant to a state statute authorizing such a private action (for example, California’s Unfair Competition Statute); or (4) claims that have been consolidated or coordinated solely for pretrial purposes (cases consolidated by a multi-district litigation panel do not qualify as a mass action; also, a mass action removed to federal court cannot be transferred to another federal court under the multi-district litigation statute, unless a majority of the plaintiffs request such a transfer).

Report on Class Action Settlements

Section 6 of CAFA requires the Judicial Conference, within one year of CAFA’s passage, to report to Congress on class action settlements and on best practices to ensure their fairness and to award appropriate fees to class counsel.¹⁰³ This section also provides that it does not in any way alter the authority of the federal courts to supervise attorneys’ fees.

Enactment of Judicial Conference Recommendations

Section 7 of CAFA provides that the changes to Rule 23 of the Federal Rules of Civil Procedure, promulgated by the U.S. Supreme Court on March 27, 2003, shall go into effect upon passage of CAFA or December 1, 2003, whichever comes sooner (this is a vestige of the 2003 version of CAFA that has no effect because the amended Rule 23 had already gone into effect on December 1, 2003).

Rulemaking Authority of the Supreme Court and Judicial Conference

Section 8 of CAFA preserves the authority of the Judicial Conference and the Supreme Court to propose and prescribe rules of practice and civil procedure governing class actions pursuant to chapter 131 of title 28, U.S. Code

¹⁰¹ 28 U.S.C. § 1332(a)(B)(i).

¹⁰² 28 U.S.C. § 1232(a)(B)(ii).

¹⁰³ On May 22, 2006, the Advisory Committee on Civil Rules published an Interim Progress Report on its “Class Action Fairness Act Study” and expect to present a follow-up report in September 2006.