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THE CLASS ACTION FAIRNESS ACT – SPRING 2006 UPDATE

The Ninth Circuit Addresses Burden on Remand in "Mass Action" But Avoids Other "Muddled" Jurisdictional Provisions

By John P. Phillips

Recent opinions from the Court of Appeals are starting to shed light on the scope and practical implications of the Class Action Fairness Act of 2005 (CAFA). Recently, the Ninth Circuit Court of Appeals joined the Seventh Circuit when it focused on the "mass action" jurisdictional provisions and sent defendants a simple message: if you remove a case to federal court, be prepared to prove that it belongs there when faced with a motion to remand. Plaintiffs do not bear the burden of proving that each individual plaintiff satisfies the amount in controversy requirement required to invoke diversity jurisdiction under CAFA. *Abrego v. The Dow Chemical Company,* – F.3d –, 06 Cal. Daily Op. Serv. 2795 (April 4, 2006).

CAFA's "Mass Action" Requirements

CAFA has been hailed as a long-awaited set of rules designed to improve the adjudication of class actions over allegedly improper business decisions or faulty products. After its enactment on February 18, 2005, CAFA enlarged jurisdiction over state law class actions by expanding the federal diversity provisions to grant jurisdiction over certain class actions, outlined the circumstances under which courts may decline jurisdiction, and created a "Consumer Class Action Bill of Rights" relating to coupon settlements and other class awards. *See* Paul Hastings, "Stay Current – The Class Action Fairness Act of 2005" (February 2005).

Generally, CAFA creates federal jurisdiction over a mass action if:

- the number of members of all proposed plaintiff classes is 100 or more;
- the *aggregate* amount in controversy exceeds $5,000,000;[1] and,
- the action satisfies CAFA's new minimal diversity requirement between plaintiffs and defendants.[2]

In addition to these general provisions, 28 U.S.C. section 1332(d)(11) provides for federal jurisdiction over "any civil action in which monetary claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist *only over those plaintiffs whose claims in a mass action satisfy the jurisdiction amount requirements under 1332(a).*" Section 1332(d)(11)(B)(i) (emphasis added). CAFA is silent, however, as to who bears the burden of proving that a case should stay in federal court once it is removed.

Bad Bananas

The Ninth Circuit followed the Seventh Circuit and resolved the "burden" issue in plaintiffs' favor. In *Abrego*, 1,106 banana plantation workers filed suit in state court claiming personal injury from exposure to defendants' product, applied at plantations in Panama. Plaintiffs sought an unspecified amount of special, general, and punitive damages, including interest and attorneys' fees. (The general nature of this allegation was an important factor for the Court, as discussed below.) Three weeks after filing suit, defendant removed the case to the Central District of California citing CAFA's "mass action" provisions. The district court remanded after it found that defendant failed to meet its burden of showing that the action constitutes a "mass action" as defined by the statute. Defendant appealed using CAFA's new expedited procedures,[3] and the Ninth Circuit agreed with the district court's analysis and affirmed following a de novo review.

Who Bears the Burden and Why?

The Court started its analysis by highlighting controlling removal principles that it found unaltered after CAFA's enactment. A removing defendant has historically borne the burden of establishing federal jurisdiction, including the amount in

controversy. The Court concluded that CAFA does not reverse this "long-standing law by requiring the plaintiffs, as the parties seeking remand, to refute the existence of jurisdiction.[4]

In particular, the Court was not swayed by passing commentary in the Senate Judiciary Committee Report, which suggests plaintiff should bear the burden on remand: "If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied.)" S. Rep. No. 109-14, at 42 (Feb. 28, 2005), as reprinted in 2005 U.S.C.C.A.N. 3, 40. Finding no ambiguity in the statute, the Court determined that "[t]he legal context in which the 109th Congress passed CAFA into law features a longstanding, near-canonical rule that the burden of removal rests with the removing defendant." Put in different terms, nothing about the Committee's statement changes the fact that the proponent of federal jurisdiction bears the burden of proving that the case belongs in federal court. "CAFA's silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction."

Based on this analysis, the Court remanded the case because the record lacked sufficient proof that the $75,000 requirement was met for any one plaintiff, as required by section 1332(a) and made applicable to mass actions by virtue of section 1332(d)(11)(B)(i). The Court was quick to note, however, that its ruling would not prejudice defendant's ability to remove the case again once it had an "opportunity to develop the record with regard to the amount in controversy by return to state court." Section 1332(d)(11)(A) (mass actions are treated as class actions under section 1453, which may be removed at any point during the pendency of the litigation once the complaint has become removable). The Court also provided some practical guidance to practitioners seeking to avoid remand of a "mass action" removed pursuant to CAFA.

Seek "Jurisdictional" Discovery in State Court Before Removal

When faced with a motion to remand in the future, the Ninth Circuit stressed that defendant should avail itself of the discovery tools routinely used to lock down the amount in controversy. Defendant should consider serving requests for admissions (which the Court indicated should be accepted post removal) or interrogatories focused on each plaintiff's claimed damages (either before removal or with the petition). In its removal petition, defendant should also consider summarizing jury verdict surveys of similar cases in relevant jurisdictions.

Although these steps could just as easily have been taken in federal court once the case was removed (as defendant appropriately argued), the Ninth Circuit did not remand *Abrego* with instructions to permit "jurisdictional discovery" in federal court since there would be ample time to develop in state court the facts needed to support federal jurisdiction. The Court noted what it referred to as district court's "disinclination to entertain substantial, burdensome discovery on jurisdictional issues." "The district court's refusal to accept the proposal that 1,160 plaintiffs located in and around Panama answer contention interrogatories while the case is otherwise put on hold was not an abuse of discretion."

Given this holding, the Ninth Circuit has sent practitioners a clear message: if the complaint is silent as to damages (either by design or because state law precludes a plaintiff from pleading damages) and there's doubt about federal jurisdiction, serve discovery in state court, do not remove too quickly, and be prepared to prove that the case belongs in federal court when faced with a motion to remand.

Avoiding Muddy Waters

The Ninth Circuit's holding on the "burden" issue develops the nascent case law analyzing CAFA's jurisdictional provisions. It joins the Seventh Circuit in holding that the defendant bears the burden to justify federal court jurisdiction when faced with a motion to remand. The opinion is significant for reasons that go beyond this holding, however, because of the issues it identified but failed to resolve. Of particular interest was the interplay of the general jurisdictional provisions in section 1331(a) and CAFA's mass action provisions.

The statutory language was dubbed "muddled" and "clumsy" because the Ninth Circuit felt that Congress failed to explain the interplay between the $75,000 jurisdictional provision in section 1331(a) and CAFA's provision that states "a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provision of those paragraphs." To "otherwise meet" these provisions, the Court explained, the amount in controversy – when *aggregated* – shall exceed $5,000,000. "The statute does not explain the relationship between the…$5,000,000 aggregate amount in controversy requirement on the one hand, and the limitation in the original jurisdiction grant in section 1332(a) to 'those plaintiffs whose claims in a mass action satisfy [in excess of $75,000] jurisdictional amount requirement,' on the other." This is particularly true since jurisdiction "shall exist only over" those plaintiffs who satisfy the jurisdictional requirement. Section 1332(11)(B)(i).

In other words, if defendant proves that the individual plaintiff's damages do not exceed $75,000, but the total *aggregated* damages

exceed $5 million, does the case belong in federal court? "The confusion revolves around the definition of a 'mass action' and the relationship of the individual jurisdictional requirement of s 1332(a) [$75,000] to that definition." And since resolving that question was "far from straightforward," it (and related issues) was saved for another day:

- What happens if individual remands under the 1332(a) proviso bring the aggregate amount in controversy below $5,000,000?
- What happens if individual remands bring the number of plaintiffs below 100?
- If either of these situations arise, does that destroy CAFA's minimal diversity and require remand?
- Since Congress did not insert language about original jurisdiction in CAFA as it did in the diversity statute 1332(a) ("the district courts shall have original jurisdiction"), what is the scope of CAFA's jurisdiction, and what guidance can be drawn from related statutes (e.g., section 1367 granting supplemental jurisdiction over related claims) that assume original jurisdiction as the starting point?

However future courts resolve these questions, the analysis will unfold against a backdrop that presumes Congress was aware of existing law when it chose to alter – and broaden – the jurisdictional terrain of CAFA. Future courts will also have to reconcile CAFA's broad language with the Supreme Court's admonition to strictly construe statutory procedures for the removal of actions to federal court. *Syngenta Crop Prot. v. Henson,* 537 U.S. 28, 32 (2002). For now, however, the Ninth Circuit has made clear that a defendant must prove a case belongs in federal court if it is arrives courtesy of CAFA.

Notes

1. The $5,000,000 requirement also altered the general rule that precluded aggregation of damages to satisfy the requirement for diversity jurisdiction. This is another example of CAFA's relaxation of jurisdictional requirements. *See also Yeroushalmi v. Blockbuster,* 2005 U.S. Dist. Lexis 39931 (C.D. Cal. Jul. 11, 2005) ("[I]f a federal court is uncertain whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value of $5 million,' the court should err in favor of exercising jurisdiction over the case.")
2. The new minimal diversity requirement is met where *any* member of the plaintiff class (named or unnamed) is a citizen of a different state from *any* defendant, or where *any* member of the plaintiff class is a citizen of a state and *any* defendant is a foreign state or corporation.
3. CAFA permits a court of appeals to accept an appeal from an order granting or denying a motion to remand if application is made within seven days after entry of the order. Section 1453(c)(1). If the appeal is not ruled upon in 60 days, it is deemed denied.
4. The Seventh Circuit reached a similar conclusion, noting that none of CAFA's language "is even arguably relevant" to this burden shifting argument. *Brill v. Countrywide Home Loans, Inc.,* 427 F.3d 446, 448 (7th Cir. 2005).

John Phillips is Co-chair of the Litigation Department's Products Liability and Toxic Torts Practice Group. If you have any questions about CAFA and how it pertains to your business, please do not hesitate to contact your local Paul Hastings attorney or John Phillips, at 415-856-7027 or johnphillips@paulhastings.com.