

The Class Action Fairness Act of 2005

On February 18, 2005, President Bush signed the Class Action Fairness Act of 2005 ("CAFA"). CAFA is available at <http://www.theorator.com/bills108/s1751.html>. The primary purpose of CAFA is to make it harder for class action and mass action plaintiffs to proceed in state courts. Thus, CAFA newly defined "mass actions," expands federal diversity jurisdiction over class actions and mass actions and makes it easier for defendants to remove class actions and mass actions from state court to federal court. CAFA also establishes a Consumer Class Action Bill of Rights, especially with respect to settlements that involve "coupons," and institutes a requirement that class action defendants give notice of settlements to specified state and federal officials before the settlement is approved by a Court. The legislation does not place caps on damages or legal fees and makes no substantive changes to securities or tort law.

Many of the terms in CAFA are not defined and we can reasonably expect a rash of litigation over their meanings as lawsuits under CAFA proceed. Thus, this advisory gives only a broad overview of the key parts of the statute.

New Standards for Federal Court Diversity Jurisdiction in Interstate Class Actions

Prior to CAFA, there were no special rules governing federal diversity jurisdiction for class actions or mass actions. In general, for federal diversity jurisdiction to exist, there had to be complete diver-

sity of citizenship between all plaintiffs and all the defendants. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806). Furthermore, each individual plaintiff's claim for damages had to exceed the jurisdictional minimum of \$75,000. Zahn v. International Paper Co., 414 U.S. 291, 94 S. Ct. 505 (1973). This made it very difficult to have federal court diversity jurisdiction in class actions and mass actions. Under CAFA, therefore, in order to make it easier to have federal diversity jurisdiction, the requirement of complete diversity is done away with and each plaintiff's individual claims - in class actions but not mass actions - may be aggregated to meet the new CAFA jurisdictional minimum of \$5,000,000 for class actions. See CAFA at § 4(6). In addition, under CAFA, unincorporated associations are treated like corporations for diversity purposes in that they will only be deemed citizens of the state where they are organized and where they have their principal place of business. See CAFA at § 4(10).

Mass Actions

CAFA also addresses a newly defined action - the "mass action." A mass action is any civil action (except those filed under Rule 23 of the Federal Rules of Civil Procedure and several other limited restrictions) where 100 or more plaintiffs seek monetary relief and whose claims involve common questions of law or fact. See CAFA at § 4(11)(B)(i). For the most part, all of the provisions of CAFA

apply to mass actions. Unlike class actions under CAFA, however, the jurisdictional minimum remains \$75,000 and the claim of each individual plaintiff in a mass action must exceed the \$75,000 threshold necessary for diversity jurisdiction to attach. *See id.* CAFA tolls the statute of limitations for any claim asserted in a mass action upon removal to federal court. *See* CAFA at § 4(11)(D). After a mass action is removed to federal court, it cannot be consolidated with other mass actions in a multi-district litigation unless class action is sought.

CAFA does not Apply to All Class Actions

CAFA does not apply to class actions which solely involve: (1) a securities claim; (2) a claim related to corporate internal affairs or governance that arise under the law of the state of incorporation; or (3) a claim related to any rights, obligations and duties (including fiduciary duties) that relate to any "security" as defined in Section 2(a)(1) of the '33 Act. *See* CAFA at § 4(9).

Nor does CAFA apply to class actions in which there are fewer than 100 members of the proposed class or in which the primary defendants are states, state officials or other government bodies against which a federal court may not order relief. *See* CAFA at § 4(5).

Limits on the New Rules for Diversity Jurisdiction (i.e., Declining Jurisdiction)

A federal court, in its discretion, may decline jurisdiction under CAFA when (1) more than one-third but less than two-thirds of the proposed plaintiff class and (2) the "primary defendants" are citizens of the state in which

the action was originally filed (the "original forum state"). In exercising this discretion, the court must analyze the relationship between the action and the original forum state and consider whether: (1) the claims asserted concern matters of national or interstate interest; (2) the claims asserted will be governed by laws other than those of the original forum state; (3) the action was pleaded so as to avoid federal jurisdiction; (4) the action was originally brought in a state with a "distinct nexus" with the class members, the alleged harm or the defendants; (5) the number of class members from the forum state compared to the number from other states; and (6) one or more other class actions that asserted the same or similar claims were filed during the three year period preceding the class action. *See* CAFA at § 4(3).

A "district court shall decline to exercise jurisdiction" over a class action where (1) more than two-thirds of the proposed plaintiff class; and (2) the "primary defendants" are citizens of the original forum state. *See* CAFA at § 4(B). A federal court also must decline jurisdiction over a class action when: (1) more than two-thirds of the proposed plaintiff class are citizens of the original forum state; (2) at least one defendant is a citizen of the original forum state from whom the class seeks "significant relief" and whose alleged conduct forms "a significant basis for the claims" asserted by the class; (3) the "principal injuries" that result from the alleged conduct of each defendant were incurred in the original forum state; and (4) no other class actions have been brought against any of the defendants based on similar factual allegations within the previous three years. *See* CAFA at §§ 4(A)(i), 4(A)(ii).

Removal Process for Class Actions or Mass Actions

CAFA also expands the federal court's removal jurisdiction. Before CAFA, a case could not be removed more than one year after the action was started even if the grounds for removal did not appear until after the one year period had run. CAFA does away with that one year period. CAFA also now allows any defendant to remove a class action or a mass action "without the consent of all defendants." See CAFA at § 5(b). Unlike former practice, an appeal may be taken from the grant or denial of a motion to remand.

The Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions

CAFA also provides a "Consumer Class Action Bills of Rights and Improved Procedures for Interstate Class Actions." In any case where the settlement involves a "coupon," attorneys contingent fees will be based on the value of the coupons which are redeemed by class members. Expert testimony may be received as to that value. See CAFA at §§ 3(a), 3(d).

The statute also prohibits approval of any settlement that would result in a net monetary loss to a class member unless there is a written finding that the non-monetary benefits to the class substantially outweigh the monetary loss. Finally, no settlement will be approved if it provides for larger payments to

class members solely because they live closer to the court. See CAFA at § 3.

Notice of Proposed Settlements Must Be Given to Appropriate Federal and State Officers

Generally, CAFA provides that defendants must serve notice of a proposed settlement, including any notification to class members of rights to request exclusion and the proposed settlement, on the state attorney general or state official with primary regulatory or supervisory authority with respect to the defendant, for each state in which a class member resides, and the Attorney General of the United States or the federal official who has primary regulatory or supervisory responsibility with respect to a defendant, who is a depository institution, depository institution holding company, foreign bank or non-depository institution subsidiary thereof. If the notice requirements are not met, a class member may refuse to comply with or choose not to be bound by the settlement. See *id.*

CAFA is Effective Immediately

CAFA applies to any civil actions commenced on or after February 18, 2005. See CAFA at § 9.

Judicial Conference Must Report to Congress by February 17, 2006

The Judicial Conference of the United States must report to the Senate and House Judiciary Committees on the fairness of class action settlements no later than February 17, 2006. See CAFA at § 7.

For more information about CAFA, or if you have any questions regarding the statute, or would like a copy of CAFA, please contact Kelley Drye Litigation Partners:

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