

The Class Action Fairness Act: What Is It All About?

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On Feb, 18, 2005, after the first bill signing ceremony of the year, President Bush approved the Class Action Fairness Act (CAFA) by signing it into law. CAFA is part of a goal to restore common sense and balance to America's legal system and end frivolous litigation which, President Bush stated, will include legislation to further reform tort law in the areas of asbestos and medical malpractice. "President Signs Class-Action Fairness Act of 2005," www.whitehouse.gov/news/releases/2005/02/20050218-11.html.

Prior to becoming law, it passed both the House and Senate by wide margins and is the second law to be passed in recent years to aid in the effort to prevent the abuse of state courts by plaintiffs' counsel. The first was the Securities Litigation Uniform Standards Act ("SLUSA"), which became law in 1998 and was designed to prevent plaintiffs' lawyers from dodging the Private Securities Litigation Reform

Act by filing securities fraud suits in state courts.

THE IMPETUS FOR CAFA

The Class Action Fairness Act is a response to abuses by plaintiffs' counsel that have harmed class members with legitimate claims. As a result of these abuses, class members often received little or no benefits, and have sometimes been harmed, especially when the counsel fees awarded are large in comparison with the class members' recovery; when class members are left with coupons or awards that are of little or no value; and when unjustified awards are made to certain class members at the expense of others. In addition, class counsel have been known to publish confusing notices that prevent class members from being able to understand and exercise their rights.

President Bush gave examples of these types of harms during the bill signing ceremony. One such example involved Marylou Rigat, a resident of Connecticut, who was involved in a class action concerning faulty roofing shingles. The class action that decided the outcome of her claim was decided in an Alabama court, however, and her award reflected only a fraction of

the cost of her new shingles and other damages. In addition, she had no idea that she was part of a class action until she called the manufacturer of the shingles regarding her warranty. Only then did she find out she was bound by the results of the class action.

President Bush also described the plight of Alita Ditkowsky, a class member in an action against a defendant that manufactured defective television sets. When the case was finally settled, the only one who made out was Ditkowsky's attorney. He took home \$22 million in fees while Ditkowsky received only a \$50 rebate toward another television from the same company that manufactured the first defective television set. In the end, Ditkowsky was left with a substandard television set that she essentially had to pay for twice.

Another driving force behind CAFA was the recognition of abuses of the system that had harmed even defendants that acted responsibly. One such abuse specifically recognized by Congress was forum shopping: the practice of filing claims in jurisdictions with the most beneficial legislation and bringing actions in jurisdictions that

have a history of large damage awards. One of the most widely abused forums, which has been shopped by many plaintiffs' Counsel in class action cases, is Madison County, IL. A notable case from this jurisdiction involved Phillip Morris, the cigarette manufacturer, which was ordered to pay \$10.1 billion in a suit that involved deceptive marketing of "light" cigarettes. As a result of judgments such as these, the number of class actions in Madison County rose from two in 1998 to 82 in 2004, even though the vast majority of the defendants named in those suits were not from Illinois. In fact, President Bush commented prior to signing CAFA that 24 class actions had already been filed in the first 6 weeks of 2005, including 20 during the week preceding the signing.

One effect of forum shopping on class actions is that it can sometimes cause responsible defendants, many whom have not acted improperly, to settle cases due to unfavorable state law provisions. For example, most states do not allow interlocutory appeals based on the certification of a class. When such appeal rights are unavailable, defendants are often forced to settle for fear of being faced with excessive verdicts.

CAFA's REFORMS

With these abuses in mind, Congress has attempted to reform the procedures used to bring and govern class actions through the passage of CAFA. The stated goals of CAFA are to:

- 1) Assure fair and prompt recoveries for class members; with legitimate claims;

- 2) Restore the intent of the framers of the U.S. Constitution by providing for federal court consideration of interstate cases of national importance through the use of diversity jurisdiction; and

- 3) Benefit society by encouraging innovation and lowering consumer prices.

In order to meet CAFA's goals, several changes were made to the Federal Rules of Civil Procedure. The most important of these changes is that CAFA provides increased access to federal courts through alteration of the requirements needed to satisfy diversity jurisdiction pursuant to 28 U.S.C. §1332. Prior to the enactment of CAFA, a class action could not be removed or filed in federal court on the basis of diversity jurisdiction unless the amount sought by each plaintiff was more than \$75,000 and each plaintiff was from a state different from every defendant. CAFA amends 28 U.S.C. §1332 to provide district courts with original jurisdiction of any class action in which the total amount in dispute amongst all class members

exceeds \$5 million, exclusive of interest and costs, and in which any one class member is a citizen of a state different from any defendant. Complete diversity is no longer necessary.

District courts have discretion, however, to decline jurisdiction in some instances. Specifically, the district Court, in the interests of justice and after consideration of the totality of the circumstances, may decline to exercise jurisdiction over a class action under the following circumstance: when greater than one-third but less than two-thirds of the members of all proposed plaintiff classes, in the aggregate, and the primary defendants are citizens of the state in which the action was originally filed. The district court may make its determination based on consideration of several factors, which include:

- 1) Whether the claims asserted involve matters of national or interstate interest;

- 2) Whether the claims asserted will be governed by laws of the state in which the action was originally filed or by laws of other states;

- 3) Whether the class action has been pleaded in a manner to avoid federal jurisdiction;

- 4) Whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

- 5) Whether the number of

citizens of the state in which the action was originally filed in all proposed plaintiff classes in the aggregate 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; and

6) Whether, during the 3-year period preceding the filing of that class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

In addition, CAFA also *requires* the district court to decline jurisdiction under some circumstances. Jurisdiction must be declined if there is a class in which the principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the state in which the action was originally filed; and greater than two-thirds of members of all proposed plaintiff classes are citizens of the state in which the action was originally filed and at least one defendant is a defendant from whom significant relief is sought 1) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class, and 2) who is a citizen of the state in which the action was originally filed. For this provision to come

into force, however, there must not have been another class action filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons during the 3-year period preceding the class action. Jurisdiction must also be declined if two-thirds or more of the members of all proposed plaintiff classes, in the aggregate, and the primary defendants are citizens of the state in which the action was originally filed.

The removal statute was also amended to help meet the goals of CAFA. Section 1453 provides that a class action may be removed to a district court in accordance with §1446, without regard to whether any defendant is a citizen of the state in which the action is brought. This new removal provision is not subject to the 1-year limitation under §1446(b). Consent of other defendants is not required prior to filing for removal.

Moreover, CAFA provides review of decisions regarding remand orders. Generally, §1447 applies to the review of removal orders, but pursuant to CAFA, the appellate court may accept an appeal of a remand order within 7 days of the entry of the order. If the appellate court accepts an appeal, the court must render a judgment no later than 60 days after the date the appeal was filed, unless an extension is

granted. If no decision is rendered within the appropriate time limit, the appeal is deemed denied.

CAPA made several changes to the Federal Rules of Civil Procedure (§§1712 through 1715 of Title 28 of the U.S. Code) aimed at assuring fair and prompt recoveries for class members with legitimate claims. The most important of these changes was made in §1712, which governs coupon settlements. Under the terms of this section, if a proposed settlement in a class action provides for a recovery of coupons, the portion of any attorneys' fee going to class counsel that is attributable to the award of the coupons shall be based on the value to the class members of the coupons redeemed. However, if the action is not prosecuted on a contingent basis, attorneys' fees shall be based on the amount of time class counsel reasonably expended on the action. If a proposed settlement provides for the award of coupons and equitable relief, the portion of attorneys' fees based on the coupons shall be determined on a contingency basis and the fees relating to the equitable relief shall be determined by the amount of time reasonably expended. Most importantly, all these settlements are subject to judicial approval, which requires notice, a hearing and written approval to ensure that any settlement is fair,

reasonable, and adequate for the class members. If the settlement is one that involves the award of coupons, the district court, upon motion, may choose to receive expert testimony regarding the actual value to the class members of the coupons redeemed. Finally, the court may require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to one or more charitable or governmental organizations, as agreed to by the parties.

Section 1715 is another important provision that helps to assure fair and prompt recoveries. This section requires that when federal and state agencies and institutions are involved in the action, notifications must be made to such agencies prior to final approval of a proposed settlement. The burden is placed on the defendants, and they must serve the appropriate officials, 10 days after the proposed settlement is filed, with: 1) a copy of the complaint and any materials filed with the court; 2) notice of any scheduled judicial hearings; 3) any proposed or final notification to class members of the members rights to request exclusion from the action (or if no right exists, a statement that no such right exists), and a proposed settlement of class action; 4)

any proposed or final class action settlement; 5) any settlement or other agreement contemporaneously made between the class counsel and counsel for defendants; 6) any final judgment or notice of dismissal; 7) if feasible, the names of class members who reside in each state and their estimated share of recovery in relation to the entire settlement (and if such is not possible, an estimation of same); and 8) any written judicial opinion relating to enumerated requirements three through six, above.

Section 1715 also requires final approval of proposed settlements, which may not be issued until 90 days after the appropriate state or federal official receives notice of the proposed settlement. Finally, a class member may refuse to comply with, and may choose not to be bound by, a settlement or consent decree if the particular class member demonstrates that notice, as described above, was not provided. However, a class member may not refuse to comply with or be bound by a settlement or consent decree if the notice required is duly executed.

Section 1713 allows judges to use discretion to approve settlements in which class members may suffer a net loss, after paying counsel fees, if the court makes a written finding that

nonmonetary benefits substantially outweigh the monetary loss. Section 1714 prevents judges from approving settlements that provide for the payment of greater sums to class members located in closer proximity to the court.

The last important pieces of CAFA are 28 U.S.C. §1453 and §2071. Section 1453 requires the Judicial Conference of the United States, together with the assistance of the Director of the Federal Judicial Center, and the Director of the Administrative Office of the United States Courts to prepare a report and transmit it to the Committees of the Judiciary and Senate and the House of Representatives. This report will contain recommendations on the best practices to ensure that proposed settlements are fair. Additionally, §2071 gives the Judicial Conference and Supreme Court authority to prescribe general rules of practice and procedure applicable to CAFA.

POTENTIAL PROBLEMS WITH CAFA

While the changes to the Federal Rules of Civil Procedure listed above may help to achieve the goals of CAFA, they will also cause some problems that its drafters failed to recognize. For one, creative plaintiffs' counsel will be able to draft their complaints around the provisions of CAFA.

Specifically, counsel could stipulate damages at \$4,999,999, which would put them just below the threshold limit required. Counsel could also ensure that just over two-thirds of all plaintiffs and one defendant are from the filing state. This can be achieved by filing duplicate actions in several states. However, even if these actions were filed together in one class action in federal court, problems could arise if there are material differences between the governing state laws. Current law prevents federal courts from hearing class actions in which there are material differences in governing state laws. A sympathetic test case in which the class members have suffered injury but have no remedy other than a multi-state class action in federal court may affect case law regarding class actions that involve different state laws.

Federal judges may discover they have new issues to deal with once these actions are filed or removed to federal court. One major problem is application of the *Erie* doctrine (*Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)), which requires federal courts in diversity actions to apply the substantive law of the state in which they sit. While it is clear that there is no general federal common law, judges will still struggle in

interpreting state law and determining whether state or federal rules of procedure apply. This has particularly angered those who opposed CAFA as well as state court judges who feel that because states have been applying their law for the past 200 years, they should continue to do so. There is a general feeling that states and state court judges are being made to look as though they are incapable of effectively adjudicating class actions even when some states, such as Texas and New Jersey, have created legislation regarding class actions.

Another potential problem arises from the change to removal procedures as they apply to class actions. While the 30-day deadline for removal still applies, there is no 1-year time limit for removal. Therefore, an action may proceed in state court for several years and then later be removed to federal court. Any defendant may choose to make an application for removal whether or not the other defendants consent. The fact that the act is not retroactive, in any of its aspects, is a problem for defendants, as illustrated by the more than 20 actions filed in plaintiff-friendly Madison County, IL the week before CAFA was signed into law. Defendants' hands are tied regarding such actions.

A STEP IN THE RIGHT DIRECTION

The provisions of CAFA are a start in the current government's goal to reform tort law. While the act does take class actions away from states like Texas and New Jersey, which have legislated to reform class actions by enacting rules to protect plaintiffs and defendants, CAFA may work, over time, to improve things nationwide. States may in fact be encouraged to model their rules after CAFA.

In addition, although commentators predict that the number of class actions filed will drop, the cost of litigation will remain high, as issues created by CAFA will be vigorously litigated. It is true that the act has some weaknesses, as we have discussed, but the Supreme Court and the Judicial Conference may be able to remedy most of the problems that arise through their rule-making ability. At this point, it's hard to say whether CAFA will be effective or not. Only time will tell.

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