

Tips for Civil Litigators  
In Bankruptcy Court

Speaking as a general practice federal civil litigator who by luck became a bankruptcy judge sixteen years ago, my experience is that competent federal civil litigators are fully competitive with bankruptcy specialists when it comes to bankruptcy litigation. They have the key skills for effective bankruptcy litigation, but at times tend to overlook significant litigation strategies opened up by the bankruptcy law and process. Nonetheless, civil litigators need not automatically abdicate to bankruptcy lawyers. Indeed, if I were organizing a law firm's litigation department, I would expect (after a hard-headed review of the overall economics of the situation) litigators to retain primary responsibility over matters that migrate into bankruptcy court and require that they coordinate with bankruptcy specialists as to bankruptcy-specific issues.



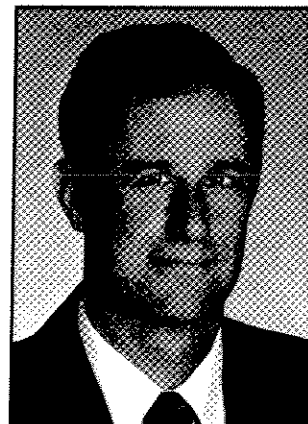
Hon. Christopher M. Klein

The reason for keeping the litigator on board is that bankruptcy does not necessarily change the dispute that underlies the litigation. The basic rights of the parties are determined by the same substantive law that governs non-bankruptcy cases. The methods

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Class Action Fairness Act of 2005:  
The Defendant's View

The Class Action Fairness Act of 2005 (CAFA), which applies to civil actions commenced on or after February 18, 2005, introduced two significant changes to class action practice. One set of CAFA's provisions substantially expands the federal courts' diversity jurisdiction over state-law based class actions. The other set covers procedural and substantive changes to class action settlements. Although the first set of provisions protects defendants against forum shopping by plaintiffs in state courts and makes available various other benefits associated with federal court litigation (including the opportunity to coordinate proceedings under the MDL rules), other provisions of CAFA may make settlements more difficult by limiting the ability of class attorneys to earn fees (often the primary driver of such litigation), expanding the courts' oversight over settlements, and providing government regulators the opportunity to weigh in on class settlements.



Jeff E. Scott

Although generally considered a pro-defense statute, in fact CAFA may be more accurately described as an anti-plaintiffs' attorney statute. A side effect of CAFA's changes should benefit many potential defendants by limiting the number and type of class actions that are brought, as many cases will be more difficult to settle and less likely to generate substantial attorney's fees awards.

CAFA's provisions that now play an important role in the class action removal process are discussed below.

The Jurisdiction  
and Removal Provisions

The provisions related to original jurisdiction and removal jurisdiction over multi-state class actions are undoubtedly CAFA's most significant features. These provisions allow defendants the ability to defend many large class actions arising under state law in federal court. Before CAFA, class actions raising exclusively state law claims could be removed only if they satisfied the traditional diversity jurisdiction requirements of 28 U.S.C. § 1332.

Under the pre-CAFA complete diversity rule, all named class representatives and all defendants had to be citizens of different states. If at least one named plaintiff and one defendant were citizens of the same state, the defendants were precluded from re-

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moving the action to federal court. To satisfy the amount in controversy requirement in diversity cases, the claims of class members could not be aggregated to reach the jurisdictional amount of \$75,000. At least one class member (and, under some federal decisions, each and every class member) had to have a claim for more than \$75,000.

By amending both the diversity statute, 28 U.S.C. § 1332, and the removal laws, 28 U.S.C. § 1441 *et seq.*, CAFA made it significantly easier for defendants to remove class actions involving over 100 putative class members to federal court. The biggest impact of the new law is that, subject to certain exceptions, it establishes federal jurisdiction over any class action in which any one class member, whether named or not, is a citizen of a different



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state than any defendant, and where the amount of controversy, which can be reached by combining the claims of the class members, exceeds \$5 million.

CAFA includes certain exceptions to the expansion of original jurisdiction. Under one of them, a district court *must* decline jurisdiction if (a) more than two-thirds of the proposed class members are citizens of the state in which the action was originally filed; (b) at least one defendant is (i) a citizen of the state in which the action was originally filed, (ii) is a defendant from whom significant relief is sought, and (iii) is a defendant

whose alleged conduct forms a significant basis for the claims asserted by the proposed class; and (c) 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. The district court *must* also decline jurisdiction if two-thirds or more of the proposed class members and the primary defendants are citizens of the state in which the action was originally filed. Under yet another exception, the district court *may*, after consideration of certain factors, decline jurisdiction over a proposed class action in which greater than one-third but less than two-thirds of the members and the primary defendants are citizens of the state in which the action was originally filed. Several other exceptions exclude from CAFA's jurisdictional provisions cases (a) in which the primary defendants are states, state officials or other governmental entities against whom the district court cannot order relief; (b) which solely involve covered securities as defined under the Securities Act of 1933 or the Securities Act of 1934; or (c) which relate to the rights, duties or obligations relating to any security as defined in the Securities Act of 1933. Additionally, CAFA does not apply to cases involving corporate governance issues and corporate internal affairs issues arising under the laws of the state of incorporation.

The removal provisions of CAFA are co-extensive with its original jurisdiction provisions, and thus, any class action satisfying the new diversity provisions can be removed to federal court. CAFA's removal procedures also eliminate several important exceptions to the existing removal requirements. For example, before CAFA, where removal was based on diversity jurisdiction, removal was not an option if any defendant was a citizen of the forum state. CAFA eliminated this obstacle by allowing for removal (subject to the limited exceptions discussed above) without regard to whether any defendant is a citizen of the State

discussed below, defendant could no longer remove the case to federal court. CAFA also liberalizes removal jurisdiction by providing that the action "may be removed by any defendant without the consent of all defendants."

Also, 28 U.S.C. § 1446 generally states that defendant cannot petition to remove a case more than a year after the commencement of the lawsuit, regardless of whether defendant discovered the facts allowing the removal after the end of the one-year period. CAFA disposed of that rule by adding a new Section 1453(b) which provides that a defendant may file a removal petition within 30 days of the first pleading or paper from which the defendant may conclude that the action satisfies the removal requirements, even if it occurs outside of the one-year period.

Additionally, CAFA allows for accelerated appellate review of decisions granting or denying remand. Before CAFA, under 28 U.S.C. § 1447(d), remand orders could not be reviewed on appeal. CAFA added Section 1453(c), which states that a court of appeals may accept an appeal of an order of a district court granting or denying a remand motion if application is made to the court of appeals not more than seven days after entry of the order. If a court of appeals accepts such an appeal, it must decide it not later than 60 days (unless all parties agree to an extension of no more than 10 days).

Thus, CAFA substantially expands class action defendants' opportunity to defend these cases in federal court. In such cases, defendants should benefit from litigating in federal court. Federal courts often are more conservative in construing state law claims (especially in the consumer protection area), more receptive than state courts to defenses such as federal preemption, have greater resources than state courts (*i.e.*, clerks and libraries) to assist in considering and disposing of cases and may be more hostile to certification of classes. Also, whereas a defendant sued on the same issues in several state courts is unable to coordinate or consolidate these copycat lawsuits, access to the federal courts opens the doors to multidistrict litigation consolidation pursuant to 28 U.S.C. § 1407.

### **The Settlement and Attorneys' Fees Provisions**

CAFA also establishes a number of requirements related to the settlement of class actions in federal courts. This was prompted by a concern that a disproportionate share of settlement proceeds often are received by plaintiffs' lawyers and that the plaintiff often receives little benefit from such settlements.

Sections 1712 and 1715 are likely to have the biggest impact on the ability of parties to resolve class actions. Section 1712 deals with so-called "coupon settlements," which the Senate Report described as the settlements "in which class members receive nothing more than promotional coupons to purchase more products from the defendants." Section 1712 reaffirms the old rule that coupon settlements may be approved only after a fairness hearing in court, and only if the court's reasons are explained in writing. Additionally, a court has discretion to require that some portion of the value of unclaimed coupons be distributed to charity, something courts were not empowered to do before CAFA.

Section 1712 also addresses attorney's fees in coupon cases. It states that "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." (*Emphasis added.*) The court may consider expert testimony about the actual value to the class members of the coupons that are redeemed. Prior to CAFA, plaintiffs' attorneys were able to seek fees calculated as a percentage of the gross amount of coupons awarded. Again, because so many of these cases are lawyer-driven, we should expect to see a substantial

## ***Class Action Fairness Act of 2005***

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In addition to the changes introduced in Section 1712, CAFA also requires in Section 1715 that notice of any settlement of a class action in federal court be served upon the "appropriate" federal and state officials. CAFA defines "appropriate federal official" as the Attorney General of the United States or, where regulated financial institutions are involved, the federal officials who have primary regulatory authority over the institutions at issue. "Appropriate state official" includes either a state official who has regulatory authority over matters at issue in the case, or the attorney general of any state in which any class member lives. CAFA does not explain, even in general terms, what, if anything, such government officials should do once notified of a settlement. However, CAFA provides that an order giving final approval of a proposed settlement may not be issued earlier than 90 days after defendant served the government officials with the settlement papers. It is safe to assume that the involvement of government officials may complicate and, at the very least, delay and increase the costs of settlement. A side effect of Section 1715's requirement to lodge settlement papers with government officials also may be that private watchdog groups will have greater access to the terms of settlements and the opportunity to rally class members to opt out of or object to settlements.

In sum, CAFA makes it much more difficult for plaintiffs' lawyers to orchestrate prompt fee-driven settlements of class actions. The attorney's fee limitations imposed in Section 1712 and the government notification provisions of Section 1715 are likely to make cases more difficult to settle. Although that is not a positive feature for defendants, a beneficial side effect may be to limit the number of cases brought by plaintiffs' attorneys for the purpose of extracting a quick settlement.

— **Jeff E. Scott and Andrew Eliseev**

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## ***Waiver of Objections Revisited***

*Continued from page 8*

more than it will help. Remember that a trial judge rules on numerous motions every day: Smart, focused objections on only the critical issues will serve the client better than a shotgun approach. Request a ruling and make sure there is a reporter at the hearing to record the request. At the very least, this may persuade the court of appeal to excuse any failure to obtain a ruling — which may be as important to the prevailing party as to the losing party. Finally, if you cannot get rulings at the hearing on the motion, try to incorporate rulings in any written order.

— **Carolyn Oill**

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