

OUTSIDE COUNSEL

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CAFA 2005: Rise in Employment Class-Action Litigation

Seeking to “restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction,” Congress enacted the Class Action Fairness Act of 2005 (CAFA), which President George W. Bush signed into law on Feb. 18, 2005. 28 U.S.C. §1711 (note).

Through CAFA, Congress substantially increased the subject matter jurisdiction of federal courts over class-action claims, resulting in an enormous increase in the number of class actions filed in, or subsequently removed to, federal court. For many defendants, this newly available federal forum has been viewed positively, as many prefer federal courts to state courts because of federal courts’ generally more strict application of discovery rules, among other reasons.

Of course, employment litigation claims have not been immune to the trend toward class actions. In fact, according to a recent report from the Federal Judicial Center concerning the impact of CAFA, a rise in labor and employment class actions has been at the forefront of the overall increase in such actions.

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CAFA redefined the requirements for diversity jurisdiction in class actions. Diversity jurisdiction in all cases formerly was premised on the concept of complete diversity between all parties, with the result that if even one plaintiff was a citizen of the same state as any defendant, federal courts would have no diversity jurisdiction.

CAFA has created a new standard requiring only minimal diversity for certain class actions. In cases where the amount in controversy exceeds \$5 million, not including interest and costs, federal courts now have diversity jurisdiction in any class action where:

- (1) any single member of the plaintiff class is a citizen of a U.S. state different from any defendant named in the action;
- (2) any single member of the plaintiff class is a foreign state or a citizen thereof and any named defendant is a citizen of a U.S. state; or
- (3) any single member of the plaintiff class is a citizen of a U.S. state and any named defendant is a foreign state.

There are exceptions where a federal court is permitted, or even is required, to decline jurisdiction over class actions

in certain circumstances, such as where a large percentage of the class members are citizens of the same state as the primary defendants and/or a defendant from whom significant relief is sought. Moreover, certain types of class actions, such as securities class actions and state-law corporate governance class actions, are excluded from CAFA altogether.

However, there can be no doubt that CAFA has thrown the doors of the federal courthouses open to many claims for which no federal forum previously was available.

In addition to expanding the basis for federal subject matter jurisdiction, CAFA amended the removal procedures to allow class-action defendants greater opportunity to pursue a federal forum for the claims asserted against them. Under the general rule, a defendant seeking to remove on the basis of diversity jurisdiction may not do so more than one year after the initial complaint was filed (even if the initial complaint did not reveal the presence of diversity jurisdiction when it was filed). Under CAFA, this one-year limitation does not apply. If the basis for diversity jurisdiction does not become ascertainable until more than a year has passed from the filing of the initial complaint, a defendant still may remove the case to federal court (however, the defendant still would be required to remove the case within 30 days after the basis for federal jurisdiction became known). CAFA also creates a right to appeal an order remanding a case to state court, offering defendants further opportunity to keep claims in a federal

forum. (In general, remand decisions cannot be appealed).

The April Report

Following CAFA's enactment, the Judicial Conference's Advisory Committee on Civil Rules requested that the Federal Judicial Center (FJC) study CAFA's impact on the federal courts. In April 2008, the FJC issued its Fourth Interim Report to the Judicial Conference on Civil Rules on the Impact of the Class Action Fairness Act of 2005 on the Federal Courts.

For this interim report, the FJC analyzed class-action filings and removals in federal courts over a six-year period, from July 1, 2001 to June 30, 2007. Not surprisingly, the FJC's report found that the statistical data is "consistent with the hypothesis that CAFA has caused an increased number of class actions based on diversity of citizen jurisdiction to be filed in the federal courts." Federal Judicial Center, "The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules" (FJC Report), at 1 (2008).

In total, the FJC's statistical analysis revealed a 72 percent increase in class-action cases pending in the federal district courts. In particular, when comparing the pre-CAFA and post-CAFA data, the FJC noted a "dramatic increase" in the post-CAFA period in the total number of class actions originally filed in federal courts based on diversity jurisdiction, strongly suggesting that CAFA has had an impact on plaintiffs' forum choices. FJC Report at 1-2.

Interestingly, although the FJC found a spike in class-action removals on the basis of diversity jurisdiction in the immediate post-CAFA period, the removal trend has since reversed, and the number of diversity removals currently is at a level consistent with pre-CAFA levels (although this likely is

impacted in large degree by the increase in original filings in the federal courts, which makes removal unnecessary). FJC Report at 2

Of the total increase in class action cases, the FJC's report in particular noted an increase in labor class actions, both in overall numbers and as a percentage of the federal class action docket. In raw numbers, labor class actions increased by 228 percent during the period that the FJC reviewed (from 337 cases to 1,104). Expressed as a percentage of the overall number of class actions filed in federal courts, labor class actions have increased from approximately 25 percent in 2001 to nearly 50 percent in 2007. FJC Report at 3-4.

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While the FJC found that most of the increase in labor class actions was based on cases filed in, or removed to, federal court under federal question jurisdiction (most often the opt-in collective actions filed under the federal Fair Labor Standards Act), the impact of CAFA should not be underestimated.

Indeed, CAFA has opened the federal courthouses to many class-action claims seeking relief only under state laws. For example, claims seeking relief under state wage and hour laws, a burgeoning field, now may be removed to federal court under CAFA if the appropriate conditions are met. Say, for example,

a plaintiff files an action on behalf of a putative class of Massachusetts employees under the Massachusetts wage and hour laws. If a corporate defendant has a state of incorporation and a principal place of business (the two touchstones for corporate "citizenship" for diversity jurisdiction purposes) in a state other than Massachusetts, and if the amount in controversy exceeds \$5 million, the case may be removed to federal court under CAFA. Even if the plaintiff moves to remand the case, arguing that one of the exceptions to federal jurisdiction under CAFA applies, and even if the federal district court agrees with the plaintiff, the defendant still would be able to appeal that decision, keeping the possibility of a federal forum alive.

Conclusion

It appears that CAFA is fulfilling its mission of channeling more class-action cases from state to federal courts. Many companies faced with large class-action lawsuits no longer are bound virtually entirely by the plaintiffs' choice of a state court forum, but rather can seek out a federal, and more friendly, forum in which to defend themselves.