THE CLASS ACTION FAIRNESS ACT OF 2005: PROVISIONAL ANSWERS TO TRANSITIONAL QUESTIONS

D. Matthew Allen*

Introduction

The Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.), or CAFA, as the Act has become known, has been heralded as "a practical way to begin restoring common sense and balance to America's legal system." Remarks of President Bush when signing the bill into law, quoted in *Natale v. Pfizer Inc.*, 2005 WL 1793451 (D. Mass. July 28, 2005). It also has been denounced as beginning an "assault on our Nation's civil justice system" and a limitation on "the right of individuals to seek redress for corporate wrongdoing in their state courts." Statements of Reps. Conyers and McGovern, quoted in *Natale*, 2005 WL 1793451. These varied opinions may be seen as endemic of the broader controversy over the validity of the class action device itself, which has been praised by some as a "knight in shining armor" and vilified by others as a "Frankenstein monster." *See* Arthur Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem," 92 HARV. L. REV. 664 (1979). So little did the late Judge Fred Friendly think of settlements extracted in class actions that he called them "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* (120 (1973).

While these policy debates are interesting, CAFA is the law of the land, and litigants and practitioners must live under it whether they agree with its policy basis or not. Congress stated in the preamble to CAFA that there have been "abuses of the class action device" that have harmed class members and defendants and undermined respect

for the judicial system. Pub. L. No. 109-2, 119 Stat. 4, § 2(a)(2). Among other things, CAFA amends the federal diversity jurisdiction statute 28 U.S.C. § 1332 to establish original subject matter jurisdiction (and allow removal from state courts) when: (a) the class consists of at least 100 proposed members; (b) the matter in controversy exceeds $5 million after aggregating the claimed damages of the proposed class members; and (c) any member of the proposed class is a citizen of a different state from any defendant.

If between 1/3 and 2/3 of putative class members are citizens of the forum state, however, the district court may decline to exercise diversity jurisdiction based on its consideration of several enumerated factors. 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 action was originally filed," the court is required to decline to exercise jurisdiction. 28 U.S.C. § 1332(d)(4)(B). In addition, CAFA does not apply to small class actions (less than 100 proposed members), cases where the primary defendant is a government agency, cases involving covered securities or fiduciary duties related to securities, and cases relating to the internal affairs of a corporation. These exceptions aside, Congress intended, by CAFA, to increase access to federal courts for class actions with national implications.

Yet many commentators have observed that the statute leaves unanswered a number of questions regarding its scope and applicability. In determining the aggregate amount in controversy, does CAFA abolish the plaintiff's view of valuing injunctive relief? How are putative class members to be counted for purposes of determining whether discretionary or mandatory remand is appropriate? What constitutes a "significant defendant" or "substantial relief" for purposes of mandatory remand? How

is the amount in controversy to be calculated, and how much evidence is necessary to do it?

We now have had almost a year of experience with CAFA, and most of these questions left open by the text of the statute, surprisingly, remain unanswered. Nonetheless, as of the close of January, 2006, there have been quite a few decisions interpreting CAFA, and these decisions give class action practitioners at least some provisional answers to some of the transitional questions raised upon the enactment of CAFA. This article describes those questions and the answers courts have provided in the first year of CAFA's life.

Burden of Proof

Who has the burden of proof on a remand motion? Before the enactment of CAFA, courts held that the removal statute is strictly construed against removal jurisdiction and doubt is resolved in favor of remand. The rule was that the party that invoked the federal court's removal jurisdiction had the burden of proof on a motion to remand to state court. After the enactment of CAFA, the courts are split as to whether this standard still holds true. The Seventh Circuit and several district courts hold that the party invoking the federal court's jurisdiction retains the burden of proof. *See Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005); *Sneddon v. Hotwire, Inc.*, 2005 WL 1593593 (N.D. Cal. June 29, 2005); *Schwartz v. Comcast Corp.*, 2005 WL 1799414 (E.D. Pa. July 28, 2005); *Ongstad v. Piper Jaffray & Co.*, -- F. Supp. 2d --, 2006 WL 14399 (D.N.D. Jan. 4, 2006). Several other courts to address the issue, however, have held that CAFA modifies the standard rules for removal. *Natale v. Pfizer Inc.*, 379 F. Supp. 2d 161 (D. Mass. July 28, 2005); *Heaphy v. State Farm Mutual Auto. Ins. Co.*,

2005 WL 1950244 (W.D. Wash. Aug. 15, 2005); *Waitt v. Merck & Co.*, 2005 WL 1799740 (W.D. Wash. July 27, 2005); *In re Textainer Partnership Sec. Litig.*, 2005 WL 1791559 (N.D. Cal. July 27, 2005).

The District of Massachusetts, for example, has stated that "the burden of removal is on the party opposing removal to prove that remand is appropriate." *Natale*, 379 F. Supp. 2d at 168 (quoting *Berry v. American Express Publ'g Corp.*, SA CV 05-302 AHS at 6-7 (S.D. Cal. 2005) (unpublished opinion)). Its review of the legislative history led it to conclude that Congress "express[ed] a clear intention to place the burden of removal on the party opposing removal to demonstrate that an interstate class action should be remanded to state court" and, with respect to each of the exceptions to jurisdiction, "the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption." Id. *4. The Seventh Circuit responded, however, that "naked legislative history has no legal effect" and "[t]he rule that the proponent of federal jurisdiction bears the risk of non-persuasion has been around a long time." To change it, the court opined, Congress would have to affirmatively act, and it has not done so. *Brill*, 427 F.3d at 448. *See also Hangarter v. Paul Revere Life Ins. Co.*, 2006 WL 213834 (N.D. Cal. Jan. 26, 2006).

Exceptions to CAFA's Expansion of Jurisdiction

Surprisingly, only a few cases in the first year after CAFA discuss the substantive applicability of the minimal diversity requirement or the various exceptions to CAFA's expansion of diversity jurisdiction.

Moll v. Allstate Floridian Ins. Co., 2005 WL 2007104 (N.D. Fla. August 16, 2005). involves the applicability of the "minimal diversity" requirement. There, in an

insurance dispute related to residential hurricane windstorm damage claims, the putative class consisted entirely of Florida residents. The district court ruled that Allstate Floridian also was a Florida citizen because its principal place of business was in Florida. Accordingly, the case did not satisfy even CAFA's low threshold for diversity jurisdiction.

The issue in *In re Textainer Partnership Sec. Litig.* 2005 WL 1791559 (N.D. Cal. July 27, 2005 was whether a breach of fiduciary duty claim by limited partners against the general partners in a partnership fell outside the ambit of CAFA. The court held that it did because the case involved an issue of internal governance and affected securities. Similarly, *Indiana State Dist. Council of Laborers & Hod Carriers Pension Fund v. Renal Care Group, Inc.*, 2005 WL 2000658 (M.D. Tenn. Aug. 18, 2005) concerned whether a putative class action alleging breach of fiduciary duties and self-dealing in connection with a corporate merger fell outside the bounds of CAFA. The court held that it did under the unambiguous language of the "breach of fiduciary duty in connection with a security" "carve out" of the statute.

Finally, in *Hangarter v. Paul Revere Ins. Co.*, 2006 WL 213834 *2 a California district court ruled that CAFA did not apply to claims filed against insurance companies and the California insurance commissioner because the state official was a "primary defendant." This was the case even though the plaintiffs brought only one of multiple claims against the insurance commissioner, and none were for damages; it was sufficient that the plaintiffs requested that the commissioner revoke or rescind policies.

CAFA's Enactment Date

By far, most of the cases construing CAFA to date involve attempts by defendants to invoke CAFA and remove cases to federal court under its auspices when those cases were first filed before the enactment date of the statute. Section 9 of CAFA provides that the statute applies only to suits "commenced on or after the date of enactment of this Act." When was CAFA enacted? A number of courts have noted without substantial comment that the enactment date is February 18, 2005. *See Knudsen v. Liberty Mutual Ins. Co.*, 411 F.3d 805 (7th Cir. June 7, 2005); *Pritchett v. Office Depot, Inc.*, 404 F.3d 1232 (10th Cir. 2005), *subs. op.*, -- F.3d --, 2005 WL 1994020 (10th Cir. Aug. 18, 2005); *Trevino v. Credit Collection Services*, 2005 WL 1607500 (S.D. Tex. July 6, 2005). Although one defendant tried to argue that the enactment date was February 17, 2005, the date CAFA was passed by Congress, a Missouri district court ruled that the enactment date is "the day when it was signed into law by the president," which is February 18. *Lander and Berkowitz v. Transfirst Health Services, Inc.*, 374 F. Supp. 2d 776 (E.D. Mo. May 19, 2005).

Commencement of a Case

The first wave of CAFA cases all involved the question of when a case commences under the statute. As Judge Easterbrook of the Seventh Circuit noted, "Ever since Congress enacted [CAFA], defendants have been trying to remove suits that were pending in state court on February 18, 2005, although the statute applies only to suits 'commenced' after that date." *Schorsh v. Hewlett-Packard Co.*, 417 F.3d 748 (7th Cir. Aug. 8, 2005). The term "commencement" is not defined in the statute.

The first district court to address this question called the term ambiguous and noted that the legislative history of CAFA provides no guidance on the question of when

an action commences. *Pritchett v. Office Depot, Inc.*, 360 F. Supp. 2d 1176 (D. Colo. 2005), *aff'd*, 404 F.3d 1232 (10th Cir. 2005). Yet the question of commencement seems relatively straightforward, and most courts have treated it so. The Seventh and Tenth Circuits have concluded that, as a general rule, "a civil action is 'commenced' for purposes of § 9 when it is filed in state court and not when some later step occurs in its prosecution." *Knudsen*, 411 F.3d at 806; *Pritchett*, 2005 WL 1994020 *2. "Equating filing with commencement is the norm in civil practice." *Knudsen*, 411 F.3d at 806. Thus, in most instances, class cases filed in state court before February 18, 2005 will not be removable under CAFA – even if they were filed only a single day before the enactment of the statute. As Judge Posner of the Seventh Circuit wryly commented in rejecting Pfizer's argument that a case filed less than 30 days before the enactment date of CAFA should permit its removal:

> Pharmaceutical and other companies that pressed for the enactment of the Class Action Fairness Act were doubtlessly aware, as the bill that became the statute was wending its way through Congress en route to enactment, that the prospect of its enactment would spur the class action bar to accelerate the filing of state-law class actions in state courts. Doubtless the companies made their concerns known to Congress. The fact that Congress did not respond by writing 'removed' (or 'removed after the date of enactment but within 30 days of the original filing') instead of 'commenced' is telling. *Pfizer, Inc. v. Lott*, 417 F.3d 725 (7th Cir. Aug. 4, 2005).

There are, however, exceptions to the general rule. These exceptions are borne of the fact that the "commencement" date of an action is governed by state law. *See Natale v. Pfizer, Inc.*, 424 F.3d 43, 44 (1st Cir. 2005; *Plubell v. Merck & Co.*, -- F.3d --, 2006 WL 141661 (8th Cir. Jan. 20, 2006); *Schorsch*, 417 F.3d at 751; *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 686 (9th Cir. 2005); *In re Expedia Hotel Taxes and Fees Litig.*, 2005 WL 1706920 (W.D. Wash. April 15, 2005). The earliest CAFA appellate decisions,

Pritchett and *Knudsen I*, appeared to forget this, basing their decisions on some semblance of federal common law. However, at least the Seventh Circuit quickly corrected its error: In *Pfizer*, the court cited Illinois law for the proposition that the filing of the complaint had "commenced" the suit, and in *Schorsch*, Judge Easterbrook (who wrote *Knudsen I*) noted that "state rather than federal practice must supply the rule of decision." *Pfizer*, 417 F.3d at 725.

Some states may deem an action commenced "when the filing fee is paid, or when the clerk finds the complaint procedurally sufficient...or when the first (or last) defendant is served with process." *Schorsch*, 417 F.3d at 750; *see also In re Expedia Hotel Taxes and Fees Litig.*, 2005 WL 1706920 (stating that, in Washington, commencement occurs upon filing of a complaint or service of a summons). In still other states, commencement does not occur until service of process if that happens more than 90 days after filing. *Dinkel v. General Motors Corp.*, 400 F. Supp. 2d 289 (D. Maine, 2005) In yet other states, a case is not commenced when filed if, objectively viewed, the plaintiff lacks a bona fide intention of having the complaint immediately served. Alabama is one of these states. *See Ward v. Saben Appliance Co.*, 391 So. 2d 1030, 1032 (Ala. 1080); *Freer v. Potter*, 413 So. 2d 1079 (Ala. 1982). For example, in Alabama, if a plaintiff filed a complaint before February 18, 2005 but failed to provide the clerk with a summons and the envelopes, the case will not have commenced until after these things were done to permit the effectuation of service. *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 2005 WL 3440636 (M.D. Ala. Dec. 14, 2005). In still other states, when a litigant seeks to proceed *in forma pauperis*, the case does not commence until the judge accepts the

complaint and authorizes service on the defendants. *Knudsen*, 411 F.3d at 806 (citing *Williams-Guice v. Bd. Of Education of City of Chicago*, 45 F.3d 161 (7th Cir. 1995).

These exceptions to the general rule of commencement upon filing likely will have limited application only to those cases filed in the days (or at most weeks) before the enactment date of CAFA.

Changes in the Litigation As a Basis for "Recommencement" of the Action

Another line of cases addressing the commencement question deal with whether changes in the course of litigation will "recommence" the action. Courts have generally been less than receptive to arguments that "routine" or "evolutionary" changes in the course of litigation operate to "recommence" the litigation. For example, Judge Easterbrook in *Schorsch* commented that "creative lawyering will not be allowed to smudge the line drawn by the 2005 Act: class actions 'commenced' in state court on or before February 18, 2005, remain in state court." *Schorsch*, 417 F.3d at 751.

In *Pritchett v. Office Depot, Inc.*, 404 F.3d 1232 (10th Cir. 2005) the first CAFA removal case to reach a federal appellate court, the Tenth Circuit held that the act of removal to federal court does not constitute a "commencement" of the case for purposes of section 9 of CAFA. There, the plaintiff and Office Depot had been litigating in state court for almost two years before the enactment of CAFA. A class had been certified, and the case was two weeks away from trial when Office Depot attempted to remove the case to federal court. Relying on a split of authority regarding the meaning of the term "commencement" under earlier jurisdictional statutes, Office Depot contended that the case "commenced" on March 1, 2005, the date of the removal, even though this so-called "commencement" date was on the eve of trial. The Colorado district court emphatically

rejected this argument and remanded the case to state court. *Pritchett*, 360 F. Supp. 2d at 1181. The Tenth Circuit agreed that a case does not "commence" for CAFA purposes on the date of removal, refusing to indulge the fiction that a certified class case that had been heavily litigated for several years and was on the eve of trial had never "commenced." The Seventh Circuit in *Pfizer*, *See Pfizer*, 417 F.3d at 726 the Ninth Circuit in *Bush*, *Bush v. Cheaptickets, Inc.*, 425 F.3d 683 (9th Cir. 2005) and a spate of district courts, *Natale*, 379 F. Supp. 2d at 169-70; *Sneddon v. Hotwire, Inc.*, 2005 WL 1706908 (N.D. Cal. June 29, 2005); *Zuleski v. Hartford Accident & Indem. Co.*, 2005 WL 2739076 (S.D.W. Va. Oct. 24, 2005) agreed with the Tenth Circuit that removal of a case from state court to federal court is not an act that rises to the level of recommencing an action.

Meanwhile, the Seventh Circuit has expanded the logic of *Pritchett* into a governing principle In *Knudsen I*, the court ruled that a "substantial change" to the class definition does not recommence a case. This ruling was reiterated in *Schorsch*, where the court emphasized that "workaday changes routine in class suits do not" kick off "wholly distinct claims" sufficient to recommence a case. *Schorsh*, 417 F.3d at 751 In *Phillips v. Ford Motor Co.*, F.3d --, 2006 WL 217942 (7th Cir. Jan. 30, 2006) and *Plubell v. Merck & Co.*, 2006 WL 141661 (8th Cir. Jan. 20, 2006) the Seventh and Eighth Circuits applied this principle to hold that the substitution of one named plaintiff for another does not re-commence a case. In *In re Expedia Hotel Taxes and Fees Litig.*, 2005 WL 1706920 (W.D. Wash. April 15, 2005) a Washington district court rejected the argument that a case was re-commenced when it was consolidated with other similar cases.

In sum, the normal ebbs and flows of litigation do not serve to re-commence an already-filed case. Indeed, this issue is sufficiently settled that the Seventh Circuit in

Schorsh warned defendants that district courts should start awarding attorneys' fees to plaintiffs who obtained remand of cases where defendants argued that removal equated to a new commencement of the action.

The Revolutionary Change Exception

In *Natale*, the District of Massachusetts noted that the commencement-upon-removal question "is not the only question that will arise as a result of the passage of the Act." It observed:

> "A similar intriguing question is how to deal with an action filed before February 18, 2005, but dismissed without prejudice, so that a wholly new, amended complaint is filed after February 18, 2005? As they say, stay tuned to see how courts will handle these transitional questions." *Natale*, 379 F. Supp. 2d at 168 n.9 (citing Robert E. Bartkus, "Back to the Future? Federal Class Action Reforms Leave Many Questions Unanswered," 180 *N.J.L.J.* 284 (April 25, 2005)).

An answer to this question was suggested by the Seventh Circuit in *Knudsen I*. As discussed above, the defendant in that case contended that "any substantial change to the class definition 'commences' a new case," and the court rejected this "significant change" test for determining whether a new case had been commenced. *Knudsen*, 411 F.3d at 806. In doing so, however, the court drew a distinction between evolutionary changes of the kind made by the plaintiffs in that case (changing the class definition) and revolutionary changes that could in fact constitute a new case. It suggested:

> A new claim for relief (a new "cause of action" in state court practice) ... could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes. *Id.* at 807

The court further suggested that the analysis for whether a claim was a "new claim for relief" should be modeled after Fed. R. Civ. P. 15(c), which "specifies when a claim relates back to the original complaint (and hence is treated as part of the original suit) and

when it is sufficiently independent of the original contentions that it must be treated as fresh litigation." *Id.* In *Schorsch*, Judge Easterbrook (who wrote *Knudsen I*) corrected the reference to Federal Rule of Civil Procedure 15(c), because "state rather than federal practice must supply the rule of decision." *Schorsh*, 417 F.3d at 750 Nonetheless, in *Knudsen I*, because the defendant did not rely on such a change as the date of commencement, the court had no occasion to apply its logic to the facts before it.

Ironically, the defendant in *Knudsen* was successful in removing the case the second time around because the plaintiffs, back in state court, overreached in expanding the scope of the class to such a degree that the defendant was, in fact, "faced with new claims for relief." *Knudsen II*, -- F.3d --, 2006 WL 197133 (7th Cir. Jan. 27, 2006). The plaintiffs had persuaded the state court to enter a default against the defendant for an "arguable error" in discovery, to ignore the laws of 50 states and certify a nationwide class, and to rule that the defendant was responsible even for claims against its 35 subsidiaries. In *Knudsen II*, the Seventh Circuit reversed a remand decision and ordered the district court, in managing the case going forward, to give no weight to the state court's order of default or the class certification decision. The plaintiffs' and state court's conduct "illustrate[d] why Congress enacted the Class Action Fairness Act."

Although two districts have rejected the Seventh Circuit's "relation back" analysis, *See Weekley v. Guidant Corp.*, 392 F. Supp. 2d 1066 (E.D. Ark. 2005); *Comes v. Microsoft Corp.*, -- F. Supp. 2d --, 2005 WL 3454427 (S.D. Iowa Nov. 22, 2005). several other courts have applied the *Knudsen I* logic to re-commencement cases. For example, in *Adams v. Federal Materials Co.*, the plaintiffs had filed a class action against a ready-mix concrete business on March 11, 2004, before the enactment date of CAFA.

They amended their complaint, however, to add a defendant on April 1, 2005, after the enactment of CAFA. In that context, the Kentucky district court rejected plaintiffs' argument that the case was "commenced" for CAFA purposes when it was filed, holding instead that "[p]laintiffs' decision to add [another party] as a defendant presents precisely the situation in which it can and should be said that a new action has 'commenced' for purposes of removal pursuant to the CAFA." Indeed, the court declared that "[t]his is both a logical extension of pre-existing removal practice and in keeping with the general intent of Congress in passing the CAFA – that is, extending the privilege of removal to federal district courts to defendants in large class actions on the basis of minimal diversity." 2005 WL 1862378 (W.D. Ky. July 28, 2005).

Similarly, in *Heaphy v. State Farm Mutual Auto. Ins. Co.*, 2005 WL 1950244 (W.D. Wash. Aug. 15, 2005) the plaintiff filed the original complaint in Washington state court in 2001, alleged that State Farm breached its insurance contract with the plaintiff by failing to disclose certain uninsured motorist rights. The parties ultimately arbitrated plaintiff's claims. After State Farm prevailed in the arbitration and filed a motion to confirm the arbitration award, the plaintiff filed an amended class action complaint adding another named plaintiff and three new causes of action – including a consumer fraud claim. State Farm promptly removed the case to federal court, and the district court refused to remand the case to state court. First, the court ruled that the amended complaint stated a "new action" because the plaintiff already had lost on her contract claim in arbitration: "As of the date of the arbitration award, [plaintiff] had no claims remaining, and the theoretical existence of a class which did have viable claims does not

resurrect her claims." *Id.* *3. Second, the court held that the amended complaint commenced a new action because it added a new plaintiff and new claims:

> Finally, the FAC adds causes of action to the 'plain vanilla' of contract claims originally asserted by [plaintiff] on behalf of the class. Indeed, because [plaintiff] lost on all of her original contract claims, Plaintiffs must necessarily assert new and different claims in an effort to defeat the preclusive effect of that adverse arbitration decision. While the extra-contractual claims do arise out of the same conduct, they are in fact separate from the claims originally asserted.

Citing *Knudsen I*, the court concluded that the amended complaint "was 'sufficiently independent of the original contentions that it must be treated as fresh litigation." It was a "new piece of litigation under CAFA," and therefore, the removal was appropriate.

The Time for Appeal

CAFA provides that a losing litigant can appeal a decision granting or denying remand "if application is made to the court of appeals not less than 7 days after entry of the order." 28 U.S.C. § 1453(c)(1). The Ninth Circuit clarified that Congress intended to mirror the procedures for taking an appeal pursuant to § 1292(b), that an appealing party must comply with the requirements of FRAP 5, and that the appeal must be filed no *more* than 7 days after entry of the order. *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services, Inc.*, -- F.3d --, 2006 WL 177250 (9th Cir. Jan. 26, 2006); *see also Pritchett*, 420F.3d at 1093 n.2 (noting that the statute contains a typographical error).

Conclusion

The first year's worth of CAFA cases has provided answers to some of the questions left open by the text of the statute. But a larger number of questions regarding the scope and applicability of the Act remain unanswered. These questions must await development during the next year or more of CAFA decisional law.

* D. Matthew Allen is a shareholder in the Tampa, Florida office of Carlton Fields, P.A. and the chair of the firm's Class Action Task Force. He is a 1990 graduate of Vanderbilt University School of Law.