



Class Action Alert

Recent developments in class action law

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Once jurisdiction, always jurisdiction: Seventh Circuit weighs in on CAFA issue

By Barbara Lukeman

The Seventh Circuit recently weighed in on the issue of how to proceed once a matter properly removed under the Class Action Fairness Act of 2005 (“CAFA”) is denied class certification. In *Cunningham Charter Corporation v. Learjet*,¹ the Seventh Circuit held that the district court’s denial of class certification does not divest jurisdiction in federal court. This decision is of particular import to product liability litigators, given the frequency with which mass tort actions are removed on the basis of CAFA.

CAFA, one of the most significant expansions of federal subject matter jurisdiction in decades, alters class action practice in both state and federal courts.² CAFA lowers the diversity threshold for federal court jurisdiction and, in theory, allows more litigants access to federal courts by granting district courts original jurisdiction over any lawsuit involving citizens of different states, even if there is not complete diversity among all parties.³ Specifically, CAFA creates federal jurisdiction for classes with more than 100 class members if “[a]t least one class member is diverse from at least one defendant; and more than 5 million in total is in controversy, exclusive of interests and costs.”⁴ Additionally, any defendant, including in-state defendants, can file for removal. Consent from all of the defendants is not required. Also, there is not a one-year limit on the timing of removal, and district court decisions to remand are reviewable if review is sought within seven days.

CAFA does not, however, change the scheme for certifying a class action under the Federal Rules of Civil Procedure. In order for a class to be certified once removed, a court must still determine whether the class meets the certification requirements of Rule 23 of the Federal Rules of Procedure.⁵

¹ No. 09-8042 (7th Cir., Jan. 22, 2010).

² Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77 (2007).

³ Class Action Fairness Act of 2005, P. L. 109-2, 119 Stat. 4 (2005) (as codified in scattered sections of 28 U.S.C.)

⁴ Class Action Fairness Statute of 2005, Pub. L. No. 109-2.

⁵ A court must conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class. *See General Tel. Co. v. Falcon*, 457 U.S. 147 (1982).

The plaintiff must show the following prerequisites pursuant to Rule 23(a): (1) sufficient numerosity of class members such that joinder is impracticable; (2) commonality of factual and legal issues; (3) typicality of the named plaintiff's claims;⁶ and (4) adequacy of representation.

Frequently, for class-certification decisions involving mass tort actions, Rule 23(b)(3) is also invoked. To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites. Namely, common questions must “predominate over any questions affecting only individual members,” and class resolution must be “superior to other available methods for the fair and efficient adjudication of the controversy.” Individual issues often predominate in mass tort actions, making class certification very difficult and the reason why many federal courts faced with the decision to certify mass classes have refused.

This disconnect between enlarging subject matter jurisdiction by means of a class action statute and allowing these types of cases to proceed as a class, has given rise to several interesting issues, including the issue squarely addressed by the Seventh Circuit; that is, can a federal court retain subject matter jurisdiction of a matter properly removed under CAFA despite its failure to certify the class? According to the holding of *Cunningham Charter Corp.*, subject-matter jurisdiction is retained in federal court despite a court's denial of class certification.

In *Cunningham Charter Corp.*, the plaintiff brought an action against Learjet in an Illinois state court asserting claims of breach of warranty and products liability on behalf of itself and all other buyers of Learjets who had received the same warranty from the manufacturer that plaintiff had received. The defendant removed the case to federal district court under CAFA. Eventually, the district judge denied the motion on the ground that neither proposed class satisfied the criteria for certification set forth in Rule 23. The judge then ruled that the denial of class certification eliminated subject matter jurisdiction under the Act, and remanded the case to state court.

The Seventh Circuit reversed. The court noted, in an opinion written by Judge Posner, that jurisdiction attaches when a suit is filed as a class action which will “invariably precede certification.” The court invoked the long-standing principle that “jurisdiction once properly invoked is not lost by developments after a suit is filed, such as a change in the state of which a party is a citizen that destroys diversity.”⁷ Such a principle is grounded on the intent to minimize expense and delay. The court stressed that a matter once properly removed “should not be shunted between courts systems; litigation is not ping-pong.”

In refusing to divest jurisdiction, the court also observed the divergent requirements for class certification between state and federal courts. If courts were divested of jurisdiction because of the failure to certify a class, the result of remand could be that the action proceeds as a class if the state in which the matter is remanded has different criteria for class certification. The result would be contrary to the purpose of CAFA, which is to litigate class actions in federal court. In finding that federal court jurisdiction under CAFA does not depend upon certification, the court joined the

⁶ Rule 23(a)(3).

⁷ Citing *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 293-95 (1938); *In re Shell Oil Co.*, 970 F.2d 355 (7th Cir. 1992).

Eleventh Circuit, who, in *Vega v. T-Mobile USA, Inc.*,⁸ had earlier held that federal jurisdiction does not depend on the certification of a class.

This decision inures to the benefit of defendants who often view the federal courts as more defense-friendly jurisdiction. Defendants will undoubtedly want to include the Seventh Circuit's decision when opposing a motion to remand after class certification has been denied.

If you would like more information about the topics covered in this alert, please contact your Nixon Peabody attorney or:

- Paul Hall at 415-984-8266 or phall@nixonpeabody.com
- Barbara Lukeman at 212-940-3104 or blukeman@nixonpeabody.com
- Christopher Mason at 212-940-3017 or cmason@nixonpeabody.com
- Scott O'Connell at 617-345-1150 or soconnell@nixonpeabody.com
- Joseph Ortego at 212-940-3045 or jortego@nixonpeabody.com
- Vivian Quinn at 716-853-8134 or vquinn@nixonpeabody.com

⁸ 564 F.3d 1256, 1268 n. 12 (11th Cir. 2009).