

U.S. DEVELOPMENTS

Early Returns: Impact of the Class Action Fairness Act on Federal Jurisdiction Over State Law Class Actions

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THE CLASS ACTION FAIRNESS ACT (CAFA) became effective in February 2005.¹ In addition to other important changes in federal procedure and standards for settlements using coupons and cy pres relief, CAFA expanded federal diversity jurisdiction over state law class actions to promote removal and coordinated federal proceedings, particularly in the antitrust field for claims on behalf of indirect purchaser claims.

In a series of articles published in the Fall 2005 issue of *ANTITRUST*, the authors analyzed how CAFA may affect antitrust class actions.² Among the authors' predictions are: CAFA will cause class counsel to file more state law antitrust class actions in federal court³; CAFA will result in greater consolidation of related direct and indirect purchaser cases in one court⁴; the lack of a time limit for removal under CAFA may lead to eleventh-hour removal petitions⁵; and fewer coupon settlements would be proposed in federal courts.⁶

Federal courts have issued numerous decisions applying CAFA's provisions following publication of these articles, but more judicial experience and data are needed to fully assess these and other predictions. Many of these court decisions address how CAFA affects cases that were pending on

CAFA's effective date. Several courts have devised discovery and other procedures to adjudicate CAFA-related remand disputes but none of these decisions addresses an eleventh-hour removal petition based on CAFA.

Researchers have begun to analyze preliminary data on post-CAFA class actions in federal courts, but more data and study is warranted to evaluate how CAFA is affecting class counsels' selection of a state or federal forum for state law class actions and the use of coupons and cy pres relief in class settlements. Such analysis may be useful to the Antitrust Modernization Commission (AMC) as it continues to debate whether further statutory changes are warranted to reconcile antitrust claims of direct and indirect purchasers.⁷

Initial Court Decisions Addressing CAFA

There have been approximately 34 circuit court decisions and over 165 district court decisions construing the Act.⁸ Many of these decisions will have only benign effects on future class action litigation. Other decisions, as described below, address matters of continuing importance to CAFA's expanded federal diversity jurisdiction and the process for adjudicating jurisdictional disputes, including issues such as commencement, burden, jurisdictional discovery, and exceptions to CAFA's expanded federal diversity jurisdiction.

Commencement. Predictably, the most widely litigated issue to date has been CAFA's applicability to pending cases. Section 9 of the Act states that CAFA applies only to cases commenced after the Act's effective date. Defendants have based removal petitions on various developments in pending cases, and courts have provided differing interpretations as to the changes in the complaint or named parties that are deemed to commence a new suit to which CAFA applies. Over time, this issue will diminish in importance as class actions pending on CAFA's effective date are fully litigated, settled, or dismissed. For the present, however, this issue may arise in any previously pending state court class action in which class counsel amends the complaint, files a new complaint, or adds or removes class representatives.

Many courts have applied the relation-back doctrine and held that various amendments did not commence a new suit in state court because the amended complaint does not substantively alter—and thus relates back to—the original complaint.⁹ In applying this doctrine, the Seventh Circuit recently stated that “the criterion of relation back is whether the original complaint gave the defendant enough notice of the nature and scope of the plaintiff's claim that he shouldn't have been surprised by the amplification of the allegations of the original complaint in the amended one.”¹⁰

Several courts have addressed this issue in antitrust cases and applied the relation-back doctrine to hold that CAFA did not provide a basis for removal.

For example, in *Carpanelli v. American Standard Companies*, No. C 06-0004 WDB, 2006 WL 568307 (N.D. Cal. Mar. 3, 2006), an indirect purchaser price-fixing case, the court held that the relation-back doctrine applied to a con-

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solidated amended complaint because it did not substantively alter the nature of the plaintiffs' claims.¹¹ The court ruled that removal based on CAFA was improper because the case had commenced prior to CAFA's enactment and the Act does not apply to cases pending as of that date.¹²

Other courts have held that the addition of new parties commenced a new lawsuit. This occurs most often with the addition of new defendants. Courts reason that "a party brought into court by an amendment, and who has, for the first time, an opportunity to make defense to the action, has a right to treat the proceeding, as to him, as commenced by the process which brings him into court."¹³

Counsel who contemplate or are confronted with changes in the complaint or parties in pre-CAFA state court class actions should evaluate whether such changes may provide a basis for removal of the case to federal court, and whether such changes are warranted despite (or perhaps because of) the potential for removal.¹⁴

Burden. CAFA does not expressly state which party bears the burden of proving that, upon removal, the Act either does or does not provide a basis for federal jurisdiction. Courts have reached differing conclusions on this issue.

Several district courts have ruled that CAFA shifts the burden of proof to the plaintiff when removal is contested. The first court to reach this conclusion, *Berry v. American Express Publishing Corp.*, 381 F. Supp. 2d 1118 (C.D. Cal. 2005), reasoned that Congress intended to shift the burden to plaintiffs because CAFA "was clearly enacted with the purpose of expanding federal jurisdiction over class actions." *Id.* at 1122. The court noted that "determining legislative 'intent' is a process not without the potential for selective interpretation," but concluded that "where the statute does not squarely address the issue, legislative history is an essential tool for statutory interpretation" and that committee reports may be consulted to discern legislative intent. *Id.* at 1121 (internal citations omitted).

The court found that the report of the Senate Judiciary Committee expressed an unequivocal intention to place the burden on the party opposing removal to show that federal jurisdiction is lacking and thus that remand is required:

The Committee Report states that '[i]t is the Committee's intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption.' S. Rep. 109-14, p. 44; *see also* Sen. Rep. 109-14, p. 43 ('the named plaintiffs should bear the burden of demonstrating that a case should be remanded to state court . . .').

Id. at 1122.

In justifying its interpretation of legislative intent, the court stated: "[A]lthough the lack of any burden-shifting provisions may be an opaque means of preserving the status quo, as defendants suggest, it is equally possible that it was due to legislative oversight, the inability of the Legislature to foresee, or for statutes to address all circumstances." *Id.* The court found it is more plausible that "the failure to address the

burden of proof in the statute reflects the Legislature's expectation that the clear statements in the Senate Report would be sufficient to shift the burden of proof."¹⁵

Contrary to *Berry*, the majority of courts addressing the burden controversy, including the only two courts of appeals to analyze the issue,¹⁶ have applied the traditional rule that the removing party, as the proponent of federal jurisdiction, bears the burden of establishing that such jurisdiction exists. The Seventh Circuit, in *Brill*, was the first court of appeals to reach this conclusion with respect to a removal petition based on CAFA. The court rejected the report of the Senate Judiciary Committee as an expression of pertinent legislative intent:

When a law sensibly could be read in multiple ways, legislative history may help a court understand which of these received the political branches' imprimatur. But when the legislative history stands by itself, as a naked expression of 'intent' unconnected to any enacted text, it has no more force than an opinion poll of legislators—less, really, as it speaks for fewer. Thirteen Senators signed this report and five voted not to send the proposal to the floor. Another 82 Senators did not express themselves on the question; likewise 435 Members of the House and one President kept their silence.¹⁷

In *Abrego*, the Ninth Circuit analyzed the traditional burden rule and agreed with the Seventh Circuit, holding that: "CAFA's silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction." 443 F.3d at 686.

Jurisdictional Discovery. CAFA's legislative history suggests that "limited" jurisdictional discovery should be allowed in some instances, but that "these jurisdictional determinations should be made largely on the basis of readily available information." S. Rep. No. 109-14, at 44 (2005). The Senate Judiciary Committee explained that:

Allowing substantial, burdensome discovery on jurisdictional issues would be contrary to the intent of these provisions to encourage the exercise of federal jurisdiction over class actions. For example, in assessing citizenship of the various members of a proposed class, it would in most cases be improper for the named plaintiffs to request that the defendant produce a list of all class members (or detailed information that would allow the construction of such a list), in many instances a massive, burdensome undertaking that will not be necessary unless a proposed class is certified. Less burdensome means (e.g., factual stipulations) should be used in creating a record upon which the jurisdictional determinations can be made.

Id. at 42.

Thus far, although not relying solely on legislative history, courts have adhered to these recommendations and have only allowed discovery "sufficiently tailored" to lead to information concerning the jurisdictional issue.

For example, in *Rippee v. Boston Market Corp.*, 408 F. Supp. 2d 982 (S.D. Cal. 2005), the court held that jurisdic-

tional discovery is permissible “when the Court is unable to determine, on the existing record, whether it has jurisdiction.” *Id.* at 985. The court ordered the parties to engage in limited discovery over the course of ninety days on the issue of the amount in controversy. *Id.* at 985. The court did not permit the putative class representative to estimate potential damages via a class survey. The court instead cited the Senate Report and emphasized that, to determine whether federal diversity jurisdiction exists and whether remand is required, it is sufficient to determine the amount “in controversy” rather than to calculate exact damages. *Id.* at 986. The court concluded that it could glean sufficient evidence of the amount in controversy from the defendant’s records and the plaintiff’s complaint allegations.¹⁸ *Id.* at 987.

In *Schwartz v. Comcast Corp.*, No. Civ. A. 05-2340, 2005 WL 1799414 (E.D. Pa. July 28, 2005), the plaintiff argued that the court should decline to exercise jurisdiction because more than two thirds of putative class members were Pennsylvania citizens, and thus, the matter fell within CAFA’s “home state controversy,” “local controversy” or “interest of justice” exceptions. *Id.* at 2. The court allowed the plaintiff to conduct limited discovery on the jurisdictional question, noting that the defendant had “control over the information that would establish the citizenship of the various members of [the plaintiff]’s proposed class.” *Id.* at *7.

Local Controversy and Home State Exceptions. CAFA’s expansion of federal diversity jurisdiction is circumscribed by statutory exceptions for cases that are truly local in nature. 28 U.S.C. § 1332(d)(4)(A). To determine whether an action falls within the “local controversy” or “home state” exception, the Act directs courts to look at a variety of factors, including the percentage of class members who are citizens of the same state; whether significant relief is sought from one particular defendant; and whether the principal injuries resulting from challenged conduct occurred in a particular state.¹⁹

Application of these exceptions has not been widely litigated to date but courts that have done so have ruled in favor of federal jurisdiction, reasoning that once a defendant shows that the action meets CAFA’s basic removal, requirements, the plaintiff has the burden of proving that a statutory exception applies.²⁰

Courts have been reluctant to find that plaintiffs have satisfied this burden. For example, in *Evans v. Walter Industries, Inc.*, 449 F.3d 1159 (11th Cir. 2006), the court held that attorney affidavits were insufficient to prove that more than two-thirds of the plaintiff class were citizens of the same state, or that a given defendant is one from whom “significant relief” was sought. The court emphasized that the local controversy exception should be used only for cases that are of a truly local nature and acknowledged that plaintiffs may have difficulty producing sufficient evidence of class citizenship. *Id.* at 1166.

In *Robinson v. Cheetah*, No. Civ. A. 06-0005, 2006 WL 468820 (W.D. La. Feb. 27, 2006), the putative class con-

sisted of all persons affected by closure of a bridge after a truck accidentally struck the bridge. *Id.* at *3. The plaintiff named the driver, his employer, and an insurance company as defendants. *Id.* at *4. The defendants removed the case and the plaintiff sought remand based on the local controversy and home state exceptions, arguing that the putative class sought “significant relief” from the driver, who was a citizen of the state in which the action was filed. *Id.* at *3. The court disagreed, holding that the driver was “just small change” compared to the relief sought from the other defendants. *Id.* at *4.

These early rulings suggest that courts will narrowly construe CAFA’s exceptions to federal jurisdiction.²¹

Comity and Abstention. Several courts have considered whether to refrain from asserting federal jurisdiction based on comity or abstention principles, but no court has relied on these principles to remand a case that was removed based on CAFA’s expanded federal diversity jurisdiction.

In *In re Hydrogen Peroxide Antitrust Litigation*, No. 05-666, MDL No. 1682, 2006 WL 999955 (E.D. Pa. Apr. 11, 2006), the court declined to abstain from exercising jurisdiction over a state law indirect purchaser action even though the court would have to examine issues under state law and a parallel state court action was pending. The court cited to the Spiva and Tycko article in ANTITRUST (Fall 2005) for the proposition that, “[u]nder CAFA, plaintiffs attorneys must now bring most indirect purchaser class actions under state antitrust law in federal court,” *id.* at *1, and remarked:

[A]bstention cannot be justified merely because a case arises entirely under state law. [T]hat California law will ultimately govern our substantive inquiry has little, if any, bearing. This is particularly so now that Congress has put its thumb heavily on the federal side of the scales in class actions like these. Hence, this last factor, like all of the others, does not weigh in favor of abstention. CAFA itself weighs against it. *Id.* at *5.

The result was the same in *Steinberg v. Nationwide Mutual Insurance Co.*, 418 F. Supp. 2d 215 (E.D.N.Y. 2006). The court declined to abstain from exercising jurisdiction over a state law class action alleging breach of an insurance contract, finding that “there exists [sic] no ‘exceptional’ circumstances that warrant the Court’s dismissal of this case under *Colorado River*.” *Id.* at 224. Likewise, in *Massey v. Shelter Life Insurance Co.*, No. 05-4106-CV-C-NKL, 2005 WL 1950028 (W.D. Mo. Aug. 15, 2005), the court declined to dismiss a breach of contract case on the basis of comity principles. The court reasoned that CAFA’s plain language shows that Congress intended to have class actions that fall within CAFA’s jurisdictional requirements litigated in federal court. *Id.* at *2.

These rulings suggest that, due to Congressional intent that CAFA should result in more state law class actions being litigated in federal courts, the court may deny motions to remand that are based on discretionary abstention or comity even though such cases necessarily require application of

state law, and some may relate to other actions that are pending in state courts.

Other Issues. Courts have ruled on a number of other CAFA-related issues that may have continuing importance to both pre- and post-CAFA cases:

SEVEN-DAY RULE: CAFA's seven-day rule, 28 U.S.C. § 1453(c)(1), provides that:

Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

In *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, 435 F.3d 1140 (9th Cir. 2006), the court noted that “the statute as written creates a waiting period of seven days before which an appeal is *too early*, with no upper limit to when an appeal ultimately may be filed.” *Id.* at 1145. The court was “somewhat troubled that, in contrast to most statutory construction cases where we are usually asked to construe the meaning of an ambiguous phrase or word, we are here faced with the task of striking a word passed on by both Houses of Congress and approved by the President, and replacing it with a word of the exact opposite meaning.” Nevertheless, the court ruled that “not less than” actually means “not more than,” citing authority holding that when expressed legislative intent is clearly contrary to the plain language of a statute, the strong presumption that Congress means what it says can be overcome.²²

SIXTY-DAY RULE: Courts also have clarified CAFA's 60-day rule, 28 U.S.C. § 1453(c)(2), which provides that, if a court of appeals accepts an appeal from a ruling on a motion to remand under CAFA, “the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed.” Both courts of appeals to address the issue directly held that the period commences when the appeal is granted, not when the petition for interlocutory appeal is filed.²³

AMOUNT IN CONTROVERSY: Courts appear to have settled on the rule that the burden of proving federal jurisdiction includes “any applicable amount in controversy requirement,”²⁴ and have ruled on a number of issues concerning the amount in controversy, holding that: (1) the cost of class notice may not be used to satisfy this requirement;²⁵ (2) the amount in controversy may be satisfied based either on the aggregate value of the claims to class members or the cost to the defendants;²⁶ (3) it is improper to use jurisdictional discovery, even for a limited 90-day period, to discern the actual damages suffered by putative class members, because jurisdictional discovery on a motion to remand a case removed under CAFA is to be limited to the least burdensome means possible;²⁷ (4) failure to plead the amount in controversy deprives the court of subject matter jurisdiction based on diversity;²⁸ and (5) the amount in controversy is deemed to

be satisfied where the party opposing federal jurisdiction does not dispute the amount, reasoning that CAFA expanded federal diversity jurisdiction.²⁹

ATTORNEY'S FEES: Although many courts have remanded cases that were removed based on CAFA, the courts have not awarded attorney's fees to the plaintiffs despite a presumption in some circuits favoring such an award. Courts in some of these cases found that the defendants raised novel issues under CAFA and thus had a good faith basis for removal.³⁰

Courts will continue to address a range of issues about CAFA's impact on federal jurisdiction and related pretrial procedures. To date, there have been few surprises and no direct circuit conflicts, although many circuit courts have not yet ruled on these issues. Thus, counsel in antitrust class actions may confront CAFA-related issues of first impression in many federal courts for some time to come.

CAFA's Impact on Class Counsel's Choice of Forum

An important question looking forward is whether CAFA is causing class counsel to concede state courts that they may prefer as a forum for state law class actions in order to avoid potential delay inherent in removal and remand disputes or for other reasons.

There are no early answers to this question and further data gathering and analysis are warranted. The staff of the Federal Judicial Center (FJC) have commenced such work, and the staff's initial reports, based on several years of pre-CAFA data and some limited post-CAFA data, provide preliminary insights about CAFA's possible impact on class counsel's choice of forum for state law class actions. The FJC staff also have reported survey results that address whether the forum preferences of attorneys in class actions are consistent with litigated outcomes and settlements.

Class Counsel's Tactical Options. Class counsel often prefer to assert antitrust claims under federal law, or at least do not have a compelling reason to eschew such claims in favor of similar claims under state law.³¹ CAFA's expanded diversity jurisdiction does not have an impact on such cases because federal courts have exclusive subject matter jurisdiction over claims under federal antitrust law. In this respect, federal antitrust claims differ from some federal question claims (like RICO) for which state courts have concurrent subject matter jurisdiction.³²

Class counsel may file multiple related federal actions in different courts, and the parties either separately or jointly may seek to have the Judicial Panel on Multidistrict Litigation (JPML) transfer the cases to a single federal district court for coordinated pretrial proceedings.³³ CAFA's expanded federal diversity jurisdiction has no direct effect on such proceedings because these cases all originate in federal court based on federal question jurisdiction.

In some cases, however, class counsel may prefer or may be compelled to assert antitrust claims only under state law.

This is particularly true for claims on behalf of indirect purchasers because such claims largely are foreclosed under federal antitrust standing principles. By substantially expanding the scope of federal diversity jurisdiction over such claims, CAFA will afford class counsel in some disputes broader tactical choices for filing claims under the antitrust laws of multiple states in a single federal court, and may afford a broader choice of federal courts in which to do so.³⁴

Class counsel who file such claims in federal court bear the burden of proving that the court has subject matter jurisdiction,³⁵ and may face a latent jurisdictional risk.³⁶ If the defendant does not file a motion to dismiss and instead asserts the lack of subject matter jurisdiction as an affirmative defense (thereby deferring a ruling until summary judgment or trial), facts developed during discovery or rulings on class certification may show that the case does not satisfy CAFA's requirements for diversity jurisdiction. The court may have no choice but to dismiss at that point for lack of subject matter jurisdiction. In fact, because the parties' consent does not waive a lack of subject matter jurisdiction, dismissal may be required even if the defendant acquiesces to a federal forum.³⁷ In cases for which such a risk may arise, counsel may need to use scheduling orders and other procedural mechanisms to obtain discovery and a court ruling on potential jurisdictional defects early in federal court proceedings.

Federal Judicial Center CAFA Study. Researchers have begun to gather and analyze data on whether CAFA has caused class counsel to have changed their forum selection tactics for state law class actions.

The staff of the FJC's Research Division issued Progress Reports in May and September 2006 as part of the FJC's Class Action Fairness Act Study. These reports analyze trends in class action filings, initially in four and then in 85 federal district courts during a five-year period from July 2001 through June 2005.³⁸ The May Report shows a large increase in class actions compared to a study covering 1992–94, and a smaller increase during the first six months of 2005 compared to the immediately prior time period.³⁹ The report also shows that most of the class actions filed during the study period were original actions based on federal question jurisdiction, rather than cases removed from state court. The staff predicted that future reports will show a large increase in class action filings post-CAFA, particularly for claims based entirely on state law. May Report at 4.

The reports disaggregate case filings to some extent based on the nature of the claims asserted, but cases with federal antitrust claims are grouped with other federal statutory claims (RICO, Fair Debt Collection Practices Act, Truth in Lending Act). Overall, the percentage of class action filings of this type increased only by slightly more than one percent during the first six months of 2005.⁴⁰ It should be noted, however, that this category may not include antitrust cases in which claims are asserted solely under state antitrust statutes. The September Report notes a post-CAFA increase in federal court filings for state law contract and property damage

claims, but it is not clear that this category covers state law antitrust claims. September Report at 4–6.

The data used for these reports are not sufficiently defined or disaggregated to show whether CAFA has caused class counsel to file more state law antitrust class actions in federal courts. A review of complaints and other pleadings may be necessary to identify antitrust class actions based exclusively on state law that were filed in or removed to federal courts both before and after CAFA.⁴¹

Federal Judicial Center Survey on Class Action Forum Selection. The FJC staff recently published another CAFA-related report that uses pre-CAFA data to study several facets of counsels' perceptions and tactical decisions on the choice of a state versus federal forum. This report also compares outcomes achieved in cases that remained in federal court versus cases that were remanded to state court following removal.⁴²

The FJC staff described numerous detailed findings and a number of general conclusions that warrant closer review and consideration by attorneys facing class action forum selection decisions may wish to consider, including the following:

- Removed cases in the database (438 total, of which 292 were closed by the time of the survey (pp. 630, 633)) largely were contract and state statutory actions. Approximately 50 percent of the total cases (42 percent of the closed cases) were remanded to state court (pp. 605, 630).
- In the removed cases that were closed as of the survey date, federal and state courts certified classes with approximately the same frequency (20 and 22 percent, respectively). Although federal judges denied class certification more often (27 percent versus 12 percent), and state judges were more likely to take no action on class certification before the case was closed for other reasons (67 percent versus 51 percent), the staff saw little practical difference between these outcomes (p. 605).
- In the removed cases for which a class was not certified in federal court or in state court following remand, federal and state courts dismissed cases and entered summary judgment with the same frequency (22 percent dismissed; 8 percent summary judgment) (p. 637).
- In the removed cases for which classes were certified, federal and state courts approved class settlements with approximately the same frequency (88 and 82 percent, respectively) (p. 638). Although larger overall settlements were achieved in state court (the median in federal and state courts were \$300,000 and \$850,000, respectively), the median recovery per class member was higher in federal court (\$517) versus state court (\$350) (p. 639).
- For closed cases, courts granted class certification in 24 percent, denied class certification in 19 percent, and took no action on certification in 57 percent of the cases (p. 645). An earlier FJC staff study of federal class actions that were terminated in 1992–94 in four district courts showed that the courts certified classes in 39 percent of the cases (pp. 606, 645–46). Of these, 39 percent were certified for

settlement purposes only, compared to 58 percent in the 2006 report. The FJC staff acknowledged differences in methodology and case populations, but noted that these data suggests an overall decline in class certification rates, and an increasing proportion of certifications for settlement purposes only (p. 646).

- Of the cases in which classes were certified, only six went to trial on the merits, resulting in three verdicts for plaintiffs and three for defendants (p. 647). Coupons and some form of injunctive relief each were approved in 29 cases, or approximately 9 percent of those in which class-wide relief was awarded. Only three cases involved non-transferable coupons and no monetary relief, and cy pres relief was approved in only 4 cases (1 percent) (p. 650).
- Attorney fee awards average 29 percent of the total recovery, roughly tracking the results from the FJC's 1996 study (pp. 651–52).

The FJC staff interpret these data as contradicting conventional wisdom that plaintiff classes and defendants fare better in state and federal courts, respectively. The staff noted that the data show little difference in rulings by state and federal courts on class certification and merits issues, and that federal courts approved 50 percent higher monetary relief per class member in removed cases, compared to the relief that state courts approved following remand (the state courts approved larger total awards per case for attorney fees and expenses, but not disproportionate to the larger average class sizes in the remanded cases) (pp. 653–54).⁴³

These data appear to support the FJC staff's prediction in the May Report that "the breadth of the statute gives ample reason to anticipate that CAFA will ultimately achieve its goal of facilitating the removal of class actions from state to federal courts."⁴⁴ The data also may encourage class counsel to file more state law class actions in federal court based on CAFA's expanded diversity jurisdiction.

The Jury's Still Out

CAFA jurisprudence still is in its infancy, and antitrust class action attorneys undoubtedly would benefit from further data and analysis of post-CAFA class actions. In particular, data is needed that disaggregates state law antitrust cases filed in or removed to federal courts, to show whether CAFA is affecting forum selection by class counsel and the outcomes of litigated and settled cases in federal and state courts.

Despite the large number of CAFA-related court decisions to date, many predictions of CAFA commentators remain unsettled. For example, one commentator predicted that CAFA's provision on attorneys' fee awards for coupon settlements will cause more class counsel to rely on the lodestar method and thus to delay settlement to generate a higher fee award under that method.⁴⁵ To date, however, no court has issued a published decision on a post-CAFA fee petition for a coupon settlement.⁴⁶

Other issues that remain unanswered include: (1) whether the open-ended time period for removal will lead to eleventh-

hour removal petitions; (2) whether application of federal rules of evidence and standards for admission of expert testimony will lead to greater exclusion of plaintiffs' expert evidence; (3) what impact CAFA's restrictions on coupons and cy pres relief will have on the type and scope of relief that class counsel seek and achieve in class actions; and (4) what impact CAFA will have in promoting coordinated proceeding in a single court for related direct and indirect purchaser cases.

Further data on this last issue also may benefit the Antitrust Modernization Commission as it considers whether to recommend new legislation to change federal antitrust standing principles and/or to preempt state indirect purchaser statutes.

Courts have provided important early guidance on a range of issues affecting CAFA's expanded federal diversity jurisdiction, but many federal courts still are confronting these issues as a matter of first impression and may do so for some time to come. Although courts have remanded a number of pre-CAFA class actions that were deemed to have commenced prior to the Act's effective date, rulings on important forward-looking issues largely have supported and furthered CAFA's expansion of federal diversity jurisdiction. Coupled with data and insights from the FJC staff calling into question the common assumptions about the benefits to plaintiff classes of litigating in a state versus federal forum, the early returns in CAFA jurisprudence give parties and counsel increasing opportunities and reasons to litigate state law antitrust class actions in federal courts. ■

¹ Class Action Fairness Act of 2005, Pub. L. No. 109-002 (codified at 28 U.S.C. §§ 1332, 1453, 1711–1715).

² Mark D. Whitener, *Editor's Note: Exporting Antitrust*, ANTITRUST, Fall 2005, at 6; D. Jarrett Arp, *Be Careful What You Ask for: Unintended Consequences and Unfinished Business Under the Class Action Fairness Act*, ANTITRUST, Fall 2005, at 8; Bruce V. Spiva & Jonathan K. Tycko, *Indirect Purchaser Litigation on Behalf of Consumers After CAFA*, ANTITRUST, Fall 2005, at 12; Ian Simmons & Charles E. Borden, *The Defense Perspective: The Class Action Fairness Act of 2005 and State Law Antitrust Actions*, ANTITRUST, Fall 2005, at 19; Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, ANTITRUST, Fall 2005, at 26; Roger D. Blair & Christine A. Piette, *Coupons and Settlements in Antitrust Class Actions*, ANTITRUST, Fall 2005, at 32; Christian G. Vergonis & Edwin L. Fountain, *Supplemental Jurisdiction in Diversity-Only Class Actions After Exxon Mobil Corp. v. Allapattah Services, Inc.*, ANTITRUST, Fall 2005, at 38.

³ Spiva & Tycko, *supra* note 2, at 12.

⁴ Simmons & Borden, *supra* note 2, at 19.

⁵ Arp, *supra* note 2, at 9.

⁶ Casper, *supra* note 2, at 28.

⁷ See generally Antitrust Modernization Commission—Meetings, available at http://www.amc.gov/commission_meetings.htm. The Commission held deliberative meetings in late July 2006 to discuss, among other things, indirect purchaser reform. The Commission has debated a number of suggestions on this topic, including new federal legislation to preempt state indirect purchaser laws and/or to change federal jurisprudence on the standing of indirect purchasers to recover damages under federal antitrust law, but has not yet reached a consensus or adopted a formal recommendation on these issues. Antitrust Modernization Commission, *Supplemental Civil Remedies—Indirect Purchaser Discussion Outline* (July 20, 2006), available

at <http://www.amc.gov/pdf/meetings/CivRem-IndPSupplOutline060720circ.pdf> (providing present commissioner positions on indirect purchaser reform proposals). Numerous entities including the ABA Section of Antitrust Law and the American Antitrust Institute have submitted comments to the Commission regarding its proposed reform. See, e.g., Letter from Donald C. Klawiter, Chair, ABA Section of Antitrust Law, to the AMC (July 19, 2006), available at http://www.amc.gov/public_studies_fr28902/remedies_pdf/060719-ABA_civil_remedies.pdf; Comments of the American Antitrust Institute Working Group on Civil Remedies to the AMC (July 10, 2006), available at http://www.amc.gov/public_studies_fr28902/remedies_pdf/060710-AAI%20Civil%20Rem.pdf.

⁸ As of October 7, 2006, approximately 86 of these decisions involved a ruling on a remand motion; remand was denied and the federal court retained jurisdiction in 15 of those cases. These findings are drawn from commencement-related cases listed on the CAFA Law Blog and Class Action Law Web sites, <http://www.cafalawblog.com> and http://www.classactionprofessor.com/blog/CAFA_Cases.html, respectively. The findings were based on decisions on remand motions in published decisions only, including appellate decisions, but not accounting for any appeals that may have been pending as of the date of review.

⁹ See, e.g., *Boxdorfer v. DaimlerChrysler Corp.*, 396 F. Supp. 2d 946 (C.D. Ill. 2005) (holding amended complaint adding new plaintiffs related back to the original complaint, such that the suit commenced pre-CAFA); *Phillips v. Ford Motor Co.*, 435 F.3d 785 (7th Cir. 2006) (same); *Plubell v. Merck & Co.*, 434 F.3d 1070 (8th Cir. 2006) (holding replacement of class representative does not commence a new suit for the purposes of CAFA).

¹⁰ *Santamarina v. Sears, Roebuck & Co.*, No. 06-3054, 2006 WL 2979396, *3 (7th Cir. Oct. 19, 2006) (an amended class action complaint related-back to the original complaint because the defendant was the same in both complaints, the plaintiffs were from the same class, the claim was essentially the same, and plaintiff class alleged the same general set of facts).

¹¹ *Carpanelli v. American Standard Co.*, No. C 06-0004 WDB, 2006 WL 568307, at *5 (N.D. Cal. Mar. 3, 2006).

¹² *Id.* Similarly, in *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 370 F. Supp. 2d 320 (D. Me. 2005), a *parens patriae* and class action lawsuit that was pending in federal court prior to CAFA's effective date, the court held that CAFA's notice requirements do not apply because the lawsuit commenced prior to CAFA's enactment. The case was filed in federal court based on federal question jurisdiction and thus there was no basis for the defendant to assert that CAFA applied due to an amendment to the complaint or a change in parties.

¹³ *Braud v. Transport Service Co. of Ill.*, 445 F.3d 801, 805 (5th Cir. 2006). See also *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 807 (7th Cir. 2005) (dicta stating: "a new claim for relief (a new 'cause of action' in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes"); *Schillinger v. 360Networks USA, Inc.*, No. 06-138-GPM, 2006 WL 1388876 (S.D. Ill. May 18, 2006) (holding that the addition of a new defendant after CAFA's effective date "commenced" the litigation and that removal pursuant to CAFA was proper). *But see* *Prime Care of Northeast Kansas, LLC v. Blue Cross and Blue Shield of Kansas City, Inc.*, No. 05-2227-KHV, 2006 WL 2734469 (D. Kan. Sept. 25, 2006) (holding that amendment adding new defendants related back because plaintiffs' prior omission of these parties was the result of mistake). These decisions do not address whether an existing defendant has the right to remove a case in which the addition of a new defendant is deemed to commence a new action to which CAFA applies. Note that any one defendant can remove under CAFA, 28 U.S.C. § 1453(b), unlike the general removal provision which requires the consent of all defendants. 14A CHARLES WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3731, at 504 (2d ed. 1985) (citing numerous cases, including *Chicago, R.I. & P.R. Co. v. Martin*, 178 U.S. 245 (1900), for the proposition that removal generally requires consent of all defendants).

¹⁴ Class counsel in a pre-CAFA state court class action may acquiesce to a federal forum by amending the state court complaint to add parties or claims in a manner that may permit removal by the defendant, rather than dismissing the state court case and filing a new action in federal court based

on CAFA's expanded diversity jurisdiction. Note, however, that if the relation-back doctrine applies to determine whether CAFA provides a basis for federal diversity jurisdiction, and such jurisdiction exists only if the amendment is deemed to commence a new action, the amended complaint may be subject to a new limitations period that commences from the date of amendment. See, e.g., *Mayle v. Felix*, 545 U.S. 2562 (2005) (holding that amended complaint was barred by statute of limitations because it did not sufficiently relate back to the original complaint).

¹⁵ *Id.* See also *In re Textainer Partnership Securities Litigation*, No. C05-0969MMC, 2005 WL 1791559 (N.D. Cal. July 27, 2005) (holding that CAFA shifts the burden of proof when removal is contested); *Waitt v. Merck & Co.*, No. C05-0759L, 2005 WL 1799740 (W. D. Wash. July 27, 2005) (same).

¹⁶ *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005); *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006).

¹⁷ *Brill*, 427 F.3d at 448. Judge Easterbrook also cited *Pierce v. Underwood*, 487 U.S. 552 (1988), in which the Supreme Court held that if a declaration in a report of a congressional committee does not correspond to any new statutory language, then it is ineffectual. *Id.* at 566–68.

¹⁸ See also *Sweeney v. Federated Retail Holdings, Inc.*, No. 06-10887, 2006 WL 2521410, *2 (E.D. Mich. Aug. 30, 2006) (after court raised jurisdictional issue *sua sponte*, plaintiffs argued that the class would have more than 100 members with aggregate damages in excess of \$5 million; the court found a sufficient basis for jurisdiction based on pleadings alone, but stated that defendants could challenge jurisdiction if appropriate as discovery progressed).

¹⁹ "(4) A district court shall decline to exercise jurisdiction under paragraph (2)-(A)(i) over a class action in which—(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed; (II) at least 1 defendant is a defendant—(aa) from whom significant relief is sought by members of the plaintiff class; (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and (cc) who is a citizen of the State in which the action was originally filed; and (III) 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 asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or (B) 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." 28 U.S.C. § 1332(d)(4)(A)–(B) (2005).

²⁰ See, e.g., *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006); *Seat v. Farmers Group, Inc.*, No. CIV-06-0309-F, 2006 WL 1285084, at *2 (W.D. Okla. May 5, 2006).

²¹ See *Spiva & Tycko*, *supra* note 2, at 12 (predicting that state antitrust laws will almost always be interpreted by federal courts and that state courts will have diminished ability to enforce their own antitrust laws).

²² *Id.* at 1146. A lengthy dissent from the Ninth Circuit's denial of rehearing en banc questioned the panel's reasoning as a misuse of judicial prerogative: "The Republic will certainly survive this modest, but dramatic, emendation of the *United States Code*; I am not so sanguine that in the long term it can stand this kind of abuse of our judicial power." *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Serv., Inc.*, 448 F.3d 1092, 1095 (9th Cir. 2006) (Bybee, J., dissenting).

²³ See *Evans*, 449 F.3d at 1162; *Patterson v. Dean Morris, L.L.P.*, 444 F.3d 365 (5th Cir. 2006).

²⁴ See, e.g., *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 682–83 (9th Cir. 2006); *Rippee v. Boston Market Corp.*, 408 F. Supp. 2d 982, 984–85 (S.D. Cal. 2005).

²⁵ *Bryant v. General Motors Corp.*, No. 05-4028 (W.D. Ark. Sept. 12, 2005), available at <http://www.cafalawblog.com>.

²⁶ *Berry v. American Express Publ'g Corp.*, 381 F. Supp. 2d 1118, 1123 (C.D. Cal. 2005).

²⁷ *Rippee*, 408 F. Supp. 2d at 985.

²⁸ *Holland v. Cole Nat'l Corp.*, No. 04-CV-246, 2005 WL 1242349, at *14 (W.D. Va. May 24, 2005). See also *Morgan v. Gay*, No. Cv-6-1371, 2006 WL 2265302 (D.N.J. Aug. 7, 2006) (court lacked removal jurisdiction where the plaintiffs' complaint specifically capped damages at \$5 million).

- ²⁹ Schemmer v. ChartONE, Inc., No. 1:05-CV-02923, 2 (N.D. Ohio Feb. 1, 2006), available at <http://www.cafalawblog.com>.
- ³⁰ See Lussier v. Dollar Tree Stores, Inc., No. CV 05-768-BR, 2005 WL 2211094, at *1 (D. Or. Sept. 8, 2005); Phillips v. Ford Motor Co., No. 05-CV-503, 2005 WL 3263905, at *1 (S.D. Ill. Nov. 30, 2005).
- ³¹ See, e.g., Reed v. Advocate Health Care, No. 06C 3337 (N.D. Ill. filed June 20, 2006); Unger v. Albany Med. Center, No. 06-cv-00765 (N.D.N.Y. filed June 20, 2006); Maderazo v. Hospital Corp. of Am., Inc., No. 06-cv-00535 (W.D. Tex. filed June 20, 2006); Clarke v. Baptist Mem. HealthCare Corp., 06-cv-02377 (W.D. Tenn. filed June 20, 2006). In each complaint, filed by the same plaintiffs' attorneys, the putative class representative challenges an alleged conspiracy among hospitals in the area to fix and stabilize nurse compensation.
- ³² Tafflin v. Levitt, 493 U.S. 455, 458 (1990) (holding that state courts have concurrent jurisdiction over civil RICO claims).
- ³³ "Proceedings for the transfer of an action under this section may be initiated by . . . (ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending." 28 U.S.C. § 1407 (c)(ii).
- ³⁴ Consider, for example, a state law indirect purchaser case in which the defendant and one of the named plaintiffs both are citizens of California. Previously, due to the limitations in 28 U.S.C. § 1332(a), such a case could be filed only in state court regardless of the citizenship of the remaining class members; under CAFA, by virtue of 28 U.S.C. § 1332(d)(2), federal diversity jurisdiction may exist (ignoring CAFA's exceptions) if any one member of the putative resides outside California.
- ³⁵ See, e.g., Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 447 (7th Cir. 2005) ("whichever side chooses federal court must establish jurisdiction").
- ³⁶ This concept was recently addressed by the Seventh Circuit in *Santamarina*, No. 06-3054, 2006 WL 2979396, at *1. The plaintiff class in that case originally filed its complaint in a California state court. *Id.* After the plaintiffs amended the complaint, the defendant, Sears, removed the case to a California federal district court. *Id.* The district court judge denied plaintiffs' motion to remand and the multidistrict litigation panel transferred the case to the Northern District of Illinois. *Id.* Once there, the plaintiffs filed a motion with the Northern District to reconsider the California district court's remand ruling. *Id.* The court heard the motion and held that the suit had been improperly removed. *Id.* On appeal, Sears questioned the court's ability to reconsider the initial ruling, but the Seventh Circuit held that: "Not to reconsider in such circumstances would condemn the parties to the unedifying prospect of continued litigation when they knew that a possibly critical ruling was in error, and unless it became moot in the course of proceedings, would compel a reversal of the final judgment at the end of the case." *Id.*
- ³⁷ See, e.g., *Louisville and Nashville R.R. v. Motley*, 211 U.S. 149 (1908) (Court on its own motion ruled that federal courts lacked subject matter jurisdiction over case). A parallel risk also may arise if the defendant removes a state law class action, but in such a case class counsel may be more likely to raise the jurisdictional issue for immediate ruling via a motion to remand, and the district court's ruling may be reviewed on an interlocutory basis. 28 U.S.C. § 1453(c)(1).
- ³⁸ Memorandum from Thomas Willging & Emery Lee of the Federal Judicial Center Research Division, to the Advisory Committee on Civil Rules (May 22, 2006), available at http://www.fjc.gov/library/fjc_catalog.nsf (search for "Interim Progress Report on Class Action Fairness Act Study") [hereinafter cited as *May Report*]; Memorandum from Thomas Willging & Emery Lee of the Federal Judicial Center Research Division, to the Advisory Committee on Civil Rules (Sept. 7, 2006), available at http://www.fjc.gov/library/fjc_catalog.nsf (search for "The Impact of the Class Action Fairness Act of 2005") [hereinafter cited as *September Report*]. The FJC staff plans to issue another report in the spring of 2007 as part of this project, analyzing data for class actions filed in or removed to federal district courts between July 1, 2005 and June 30, 2006. *September Report*, *supra*, at 1.
- ³⁹ *May Report*, *supra* note 38, at 1–2. The data show a substantial increase in the later study period (1,875 class actions in the four jurisdictions examined in 2001–2005) compared to the earlier study period (407 class actions in the same four jurisdictions in 1992–1994), but only a small portion of the later study period post-dates CAFA. *Id.* Further analysis of data for a longer post-CAFA time period is warranted to better discern whether any increase in class actions that occurred during 2005 or that may occur thereafter is attributable to CAFA or to other factors. In a recent interview, FJC staff member Thomas E. Willging stated that the staff has done additional analysis suggesting that CAFA is causing additional class actions to be filed in federal courts at a rate that is "larger than anyone anticipated." Marcia Coyle, *Class Action Changes Bring Quick Impact*, 29 NAT'L L.J. 6 (Oct. 2, 2006). This analysis is scheduled for release in the Spring 2007.
- ⁴⁰ *September Report*, *supra* note 38, at 7. The *September Report* notes a significant increase in removed cases and federal class actions based on diversity. Specifically, the report states that cases removed from state courts increased from 18% to 23% of all federal court class actions (from approximately 210 cases from July–December 2004 to 310 cases from January–June 2005), and that federal court class actions based on diversity of citizenship increased from 13% to 19% of all federal court class actions (from approximately 120 cases from July–December 2004 to 280 cases from January–June 2005). *Id.* at 2, 11, 12. (It is unclear from the Report whether the staff used a multi-year weighted average or data from a date certain in determining pre-CAFA percentages.) The staff suggest that these increases are due at least in part to CAFA. *Id.* at 11, 12.
- ⁴¹ Summary data are not available on the number of state law antitrust cases that have been removed to federal courts either before or after CAFA. Some data bearing on this point may be gleaned from a review of case files of the Judicial Panel on Multidistrict Litigation, but consolidation through the Panel may not be sought for some (and perhaps many) state law antitrust class actions that are removed to federal court. Data also may be obtained through a review of district court files for removed actions that are designated as antitrust cases on the civil cover sheet. See also Letter from Patrick E. Cafferty to the AMC (June 2, 2006), available at http://www.amc.gov/public_studies_fr28902/remedies_pdf/060602_Cafferty_Persky_Gustafson_Remedies.pdf (providing information about indirect purchaser class action settlements gleaned from public sources, cases in which the authors participated, and information received from practitioners). Ideally, such data also would control for the number of state law class actions filed in and litigated in state courts both before and after CAFA, but summary data on state law class actions (antitrust or otherwise) do not appear to be readily available.
- ⁴² Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591 (2006). The report is based on responses by 728 attorneys in 628 cases to a questionnaire sent to over 2,000 attorneys in 1,235 class actions filed in or removed to federal courts between 1994 and 2001, and terminated between July 1999 and December 2002. The report does not disaggregate data on antitrust class actions and the staff did not gather data on class actions filed in state court that were not removed to federal court. *Id.* at 600–01.
- ⁴³ The survey does not disaggregate data by specific jurisdiction and thus does not address whether federal district courts in a particular state may be more favorable for defendants in class action litigation than certain "plaintiff-friendly" state courts in that jurisdiction, such as Madison County, Illinois, or Mississippi's 22nd Judicial Circuit.
- ⁴⁴ *May Report*, *supra* note 38, at 3. See also Shruti Daté Singh, *Madison County Goes Quiet*, 29 CRAIN'S CHI. BUS. 37, Sept. 11, 2006, at 37 (noting a sudden drop in the number of class actions filed in Madison County, Illinois, from 106 in 2003 to one thus far in 2006, and suggesting that the drop is due at least in part to CAFA).
- ⁴⁵ See Casper, *supra* note 2, at 28 (predicting such an effect).
- ⁴⁶ Note, however, that the Seventh Circuit recently cited CAFA's call for heightened judicial scrutiny of coupon-based settlements in rejecting a class action settlement involving compensation via pre-paid mailing envelopes, even though the case was initiated pre-CAFA. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, Nos. 05-1450, 05-1596, 05-2914, 05-3022, 2006 WL 2588925, *7 (7th Cir. Sept. 11, 2006). In ruling that the lower court abused its discretion in approving the settlement, the Seventh Circuit's decision suggests that courts applying CAFA's provisions on coupon settlements are likely to scrutinize such settlements carefully.