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CAFA: RECENT DEVELOPMENTS ON THE JURISDICTIONAL AND SETTLEMENT FRONTS

By Michael L. Mallow[1]

Since Congress enacted the Class Action Fairness Act (CAFA) in 2005, the nation's class action litigation has increasingly migrated to the federal stage, with plaintiffs bringing more class actions directly to federal court and corporate defendants exercising the right of removal. Although the Supreme Court's class action jurisprudence has been relatively thin for many years, a handful of recent decisions have addressed class actions, including jurisdictional issues specific to CAFA. While these decisions—particularly in the arbitration realm—may be regarded as favoring defendants,[2] there have also been several unanimous decisions directed at achieving consistency in the federal courts' application of CAFA and preventing "artful pleading" by class plaintiffs to avoid CAFA jurisdiction.

A legislative response to a number of perceived problems and abuses in class action litigation, CAFA transformed the class action landscape in two important ways: expanding the diversity jurisdiction of federal courts over class actions, and providing a "Class Action Bill of Rights" that requires courts to engage in more exacting scrutiny of proposed settlements. While the Supreme Court's CAFA decisions have, so far, focused primarily on jurisdictional and class certification issues, there has been ample judicial activity at the settlement review stage, with district and circuit courts inspecting coupon settlements, *cy pres* allocations, and attorneys' fees through CAFA's remedial lens. This article examines developments at both ends of the class action "life-cycle." The first section discusses the Supreme Court's recent jurisdictional decisions—and some of the open issues that still surround removal and remand under CAFA. The second section looks at recent decisions considering the post-CAFA viability of coupon settlements and *cy pres* distributions, even in class actions outside of CAFA's jurisdictional reach.

I. CAFA'S JURISDICTIONAL PROVISIONS

CAFA's jurisdictional provisions lower the barriers to federal court jurisdiction over class actions by providing relief from conventional diversity jurisdiction rules governing class actions. CAFA also amended the traditional requirement that all class members must meet the amount-in-controversy requirement ($75,000). Under the statute, federal diversity jurisdiction exists as long as there is a putative class that includes at least 100 members, minimal diversity – at least one class member is from a different state than at least one defendant – and the total amount in controversy exceeds $5 million (exclusive

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2 *See, e.g.*, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (enforcing class action waivers in arbitration agreements, even where doing so would have the practical effect of precluding plaintiffs from bringing individual antitrust claims).

of interest and costs).[3] CAFA also affords defendants more opportunities for removal of actions filed in state court. Any defendant in a class action that meets CAFA's jurisdictional thresholds can move for removal, including defendants from the state where the state court action is filed, can seek removal without the consent of other defendants. Of course, CAFA does not alter the availability of federal court jurisdiction over claims arising under federal law (federal question jurisdiction), which remains available to defendants as a basis for removal.

CAFA does include several important exceptions. One, the so-called "Delaware carve out," exempts from CAFA cases that concern covered securities, as defined by certain federal laws, or that relate to corporate governance issues arising under the state laws of a company's state of incorporation, or that concern fiduciary duties created by securities laws.[4] CAFA also creates two mandatory exceptions (the federal court *must* decline jurisdiction) over "local controversy" and "home state" actions. The exceptions apply to class actions in which more than two thirds of the class members are from the forum state and *either* one of two conditions are met: (1) the primary defendant is from the forum state *or* (2) a significant defendant is from that state, the principal injuries occurred in the forum state, and no other class action on the issue has been filed in the preceding three years.[5]

The statute also provides a permissive exception (the court, in its discretion, *may* refuse jurisdiction over the case) that covers cases in which the primary defendants and between one third and two thirds of the class members are from the forum state.[6] In those situations, the court will look at six factors, the overall thrust of which is geared toward assessing whether the forum state has a particular interest in, and nexus with, the class and the claims being asserted.[7] Finally, federal courts must decline jurisdiction in cases implicating the sovereign immunity of states, state officials, or other entities against which the court may be foreclosed from ordering relief.[8]

Even with these exceptions, CAFA marks a clear expansion of the federal courts' jurisdiction over diversity-based class actions. While CAFA was expected to result in an increase of removals by class action defendants, less expected was the increase in class actions filed directly in federal court. And as CAFA has reduced the barriers to federal court jurisdiction over class actions, it also has resulted in federal courts grappling with significant questions including evidentiary issues related to removal and remand, as well as post-jurisdictional issues related to Rule 23 certification and settlements.

II. CAFA MANIPULATOR OR MASTER OF THE COMPLAINT?

While plaintiffs increasingly have filed suit directly in federal courts, many plaintiffs (and their counsel) continue to regard state courts as more attractive and amenable forums

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3 28 U.S.C. § 1332(d)(2).

4 28 U.S.C. §1332(d)(9).

5 28 U.S.C. §1332(d)(4).

6 28 U.S.C. §1332(d)(3).

7 *See id.*

8 28 U.S.C. § 1332(d)(5)(A).

for large class action claims, leaving the work of removing cases to federal court to defendants. While CAFA has eased the requirements for the removal of state court cases to federal court, the practical application of the statute has also generated a number of removal-related questions, including the appropriate evidentiary standards and burdens of proof for removal and remand of CAFA cases. Over the years, courts have split as to the appropriate evidentiary standard, with the majority of circuit courts now taking the position that defendants seeking removal under CAFA must demonstrate diversity and aggregate amount-in-controversy by a preponderance of the evidence, while the party resisting removal or seeking is left to demonstrate that one of CAFA's exceptions applies.[9]

While the Supreme Court has not yet squarely decided the issue, its 2013 decision in *Standard Fire Insurance Co. v. Knowles*[10] supports a "preponderance of the evidence" approach (generally applicable outside the context of CAFA actions), while also making it clear that plaintiffs may not escape removal by stipulating to damages under the $5 million CAFA threshold. In *Standard Fire*, the class representative attempted to avoid removal by entering a stipulation that the class would seek less than $5 million in damages. The district court had found, by a preponderance of the evidence, that the damages would exceed that threshold, but for the stipulation, yet ultimately honored the terms of the stipulation and declined removal. The Eighth Circuit declined to hear an appeal, but the Supreme Court took the case and reversed.

In an 8-0 decision, the Court took aim at plaintiffs' counsel filing multiple, near-identical suits, each framed as falling slightly under the $5 million amount-in-controversy threshold for CAFA, and held the stipulation unenforceable, finding that the class representatives could not strategically evade removal through stipulation. The decision did not squarely address the burden on the removing party and may be read narrowly, framed in terms of whether class representatives possess the authority to bind class members prior to class certification. While it is often noted that a plaintiff is the "master of his complaint," the Court viewed the attempt to stipulate around CAFA as impermissible and "runn[ing] directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'"[11]

The Ninth Circuit, before *Standard Fire*, was among the minority of circuit courts that required that defendants must establish the $5 million amount in controversy as a matter of legal certainty. In *Lowdermilk v. U.S. Bank, N.A.*,[12] the Ninth Circuit based its adoption of the legal certainty test on the reasoning that plaintiffs are the masters of their complaint and therefore have the choice to seek damages below the jurisdictional threshold. In that case, the court also held that the four corners of the complaint must provide all of the information necessary to assess removal jurisdiction.

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9 *See, e.g, Rodriguez v. AT&T Mobility Services, LLC* , 728 F.3d 975 (9th Cir. 2013). The Third Circuit remains the notable outlier. In a recent decision, a Third Circuit panel denied plaintiff's remand request on the basis that plaintiff had not demonstrated "to a legal certainty" that the aggregate value of the putative class claims would fall under $5 million. *See Hoffman v. Nutraceutical Corp.*, No. 13-3482 (3d Cir. April 10, 2014).

10 133 S.Ct. 1345 (2013).

11 *Id. at 1350.*

12 479 F.3d 994 (9th Cir. 2007).

In *Standard Fire*, however, the Supreme Court held that that named plaintiffs—without the authority to bind the as-yet uncertified class—may not avoid CAFA jurisdiction by stipulating to an amount of damages below the jurisdictional amount.[13] The Court found that the district court must look beyond the complaint when determining the amount in controversy and "add[] up the value of the claim of each person who falls within the definition of [the] proposed class."[14] Recognizing that the foundation of the *Lowdermilk* legal certainty test had been eroded, the Ninth Circuit in *Rodriguez v. AT&T Mobility Services, LLC* held that *Standard Fire* had effectively overruled its previous decision and changed the evidentiary standard to bring it in line with the majority.[15]

The Supreme Court will once again examine removal issues under CAFA in the coming term, having agreed to hear an appeal from the Tenth Circuit, *Dart Cherokee Basin Operating Co. v. Owens*[16], that centers on whether a defendant seeking removal to federal court must include evidence supporting federal jurisdiction in its notice of removal, or whether it is sufficient to allege the required "short and plain statement of the grounds for removal." Again, the issue is fairly narrow, bearing on the notice of removal required under 28 U.S.C. § 1446(a). While there is no question that a court must consider evidence supporting a defendant's motion for removal, the Tenth Circuit, deviating from its sister circuits, took the position that the notice itself needed to be accompanied by evidence supporting CAFA jurisdiction.

Of course, a removing defendant's satisfaction of CAFA eligibility thresholds—diversity, amount-in-controversy and class action status—does not necessarily mean that a case is safe from remand. This stage, again, raises questions as to the evidentiary burden the party (usually class representatives) bears in showing that the matter is a "local controversy" or subject to CAFA's "home state" exceptions. While the Supreme Court has yet to squarely address the burden of proof for parties resisting removal and seeking remand, courts typically place the burden on the remanding party to demonstrate the applicability of one of CAFA's exceptions. Where remand is sought under CAFA's permissive exception for controversies with particularly strong ties to a particular state, the district court exercises fairly broad discretion weighing the various factors.

For example, courts have tangled with the question of where a defendant corporation's principal place of business may be. The Ninth Circuit, in *Davis v. HSBC BANK NEVADA, N.A.* (2009),[17] reversed a district court's decision to remand a consumer class action based on CAFA's "local controversy" exception. The suit involved fraud claims against, among other defendants, Best Buy stores, and the plaintiffs contended that Best Buy was a "citizen" of California. The Ninth Circuit disagreed, maintaining that the corporation's "nerve center" was outside of California, despite the predominance of stores and employees in California. The panel took the view that the corporation's substantial retail activities in California merely reflected the state's larger population: "If

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13 *See 133 S.Ct.* at 1350.

14 *Id*. at 1348.

15 728 F.3d 975 (9th Cir. 2013).

16 730 F.3d 1234 (10th Cir. 2013).

17 557 F.3d 1026 (9th Cir. 2009).

a corporation may be deemed a citizen of California on this basis, nearly every national retailer—no matter how far flung its operations—will be deemed a citizen of California for diversity purposes. Such a result is untenable."[18]

Separate from CAFA's class action requirements, the statute provides for "mass actions," defined as non-class actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the [$75,000] jurisdictional amount requirements under subsection (a)."[19] The Supreme Court, once again entering the CAFA fray, recently rejected a case brought on behalf of the state of Mississippi, *Mississippi ex rel. Hood*, concluding that because the state was the only named plaintiff, the suit did not constitute a mass action under CAFA.[20] Although the suit was brought on behalf of a larger class of allegedly injured parties, the Court concluded that CAFA's "100 or more persons" phrase does not encompass unnamed persons who are real parties in interest to claims brought by named plaintiffs. Even if the named plaintiff was suing on behalf of a larger group of aggrieved parties of interest, the Court construed the language of CAFA strictly. Just as a class representative could not legally bind an as-yet-uncertified class in *Standard Fire*, the Court would not allow a state "proxy" to satisfy CAFA's jurisdictional requirements. To the extent a state seeks to bring a *parens patriae* suit on behalf of its citizens, the Court indicated, it cannot merely aggregate claims without conforming to CAFA's class action standards. While the Court may generally favor allowing the vindication of large claims in federal court, recent decisions suggest the Court's commitment to giving full force to both the words and intent of CAFA.

Along similar lines, the Ninth Circuit recently declined to allow CAFA jurisdiction over a wage-and-hour claim brought under California's Private Attorney General Act (PAGA). In *Baumann v. Chase Investment Services, Corp.*,[21], a Ninth Circuit panel held that the claim brought under PAGA was not similar enough to a class action, as contemplated by Federal Rule 23, to be considered a class action for CAFA purposes. In an earlier decision, the Ninth Circuit had held that PAGA damages cannot be aggregated to meet general federal "amount in controversy" requirement. The *Baumann* court essentially considered the separate question of whether a PAGA claim may be deemed a "class action" subject to CAFA. "Unlike Rule 23(c)(2)," the panel noted, "PAGA has no notice requirements for unnamed aggrieved employees, nor may such employees opt out of a PAGA action. In a PAGA action, the court does not inquire into the named plaintiff's and class counsel's ability to fairly and adequately represent unnamed employees."[22] This is so despite the fact that a resolution of a PAGA claim serves as a bar to subsequent PAGA claims on the same issue as to the same defendant.

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18 *Id*. at 1029-30.

19 28 U.S.C. § 1332(d)(11)(B)(i).

20 *See* 134 S. Ct. 736 (2014).

21 747 F.3d 1117 (9th Cir. 2014).

22 *Id*. at 1122.

The Supreme Court's recent rulings in *Mississippi ex rel Hood* and the Ninth Circuit's ruling in *Baumann* reflect the courts' inclination to scrutinize the nature of quasi-class action mechanisms—such as private attorney general suits—in determining CAFA eligibility.

III. SETTLEMENTS AND ATTORNEYS' FEES

While the Supreme Court has signaled its intent to apply CAFA's jurisdictional elements rigorously, lower courts have been invoking the remedial goals of CAFA's Bill of Rights and applying exacting standards to review proposed settlement agreements.

As background, in its avowed effort to deter class action abuses, Congress enacted a Consumer Class Action Bill of Rights—CAFA's substantive core. The Bill of Rights explicitly addressed the concern that coupon settlements have the potential to provide only meager relief to the affected class and to leave defendants relatively unaffected monetarily, while affording class action counsel substantial fees. The Congressional findings noted: "Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—(A) counsel are awarded large fees while leaving class members with coupons or other awards of little or no value[.]"[23] CAFA instituted a variety of substantive mandates concerning how attorneys' fees should be determined in class actions resulting in "coupon settlements," as well as a variety of procedural safeguards designed to bring enhanced oversight of proposed settlements. Specifically, the act requires that in any proposed settlement in which class members would be awarded coupons, the court may approve the settlement only after a hearing to determine that the settlement is "fair, reasonable, and adequate for class members."[24] The Court must also issue an order in writing setting forth its findings. That section also contemplated the award of *cy pres* distributions, as agreed to by the parties, but warned that the distribution and redemption of coupon proceeds not be used to calculate attorneys' fees.[25]

Although the "fair, reasonable, and adequate" language was not new— it mirrors identical language in FRCP Rule 23(e)(2)—a number of courts have construed CAFA as imposing an elevated level of scrutiny for coupon settlements, given Congressional findings aimed at eliminating "abuses" in these settlements. [26]

One recent Ninth Circuit decision, *In re HP Inkjet Printer Litigation*,[27] exemplifies a court's strict enforcement of CAFA's coupon settlement protections. The case involved claims against Hewlett-Packard (HP) asserting that various disclosures made to consumers about its printers were false and misleading. The proposed settlement provided "e-credits"—a euphemism for coupons, according to the Ninth Circuit —for

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23 *See Class Action Fairness Act 01 2005, Pub. L. No.* 109-2, 119 Stat. 4 (Feb. 18, 2005).

24 28 U.S.C. § 1712(e).

25 *See* 28 U.S.C. § 1712.

26 *See, e.g.*, *True v. American Honda Motor Co.*, 749 F. Supp. 2d 1052 (C.D. Cal. 2010 (rejecting the proposed settlement, which would have provided for cash rebates, and noting that coupon settlements "are generally disfavored"); *Figueroa v. Sharper Image Co.*, 517 F. Supp. 2d 1292 (S.D. Fla. 2007) (rejecting proposed settlement and applying a heightened level of scrutiny in evaluating a settlement's fairness).

27 716 F.3d 1173 (9th Cir. 2013).

class members to apply toward HP printers and other products. While the district court had registered concerns about the settlement – and reduced the attorneys' fee award from that proposed by the parties—it ultimately approved the settlement. On appeal, the Ninth Circuit accepted the objectors' argument that the proposed settlement violated CAFA's terms and reversed the district court's decision. The panel majority expressly relied on CAFA's language concerning the award of attorneys' fees: "When a settlement provides for coupon relief, either in whole or in part, any attorney's fee 'that is attributable to the award of coupons' must be calculated using the redemption value of the coupons."[28]

The panel was troubled by the dichotomy in coupon settlements, "where class counsel is paid in cash, and the class is paid in some other way[.]"[29] Although the panel majority acknowledged the difficulty in quantifying the true redemption value of coupon settlements (where coupons bear restriction and, often, will never be redeemed by class members), the panel insisted that the statutory language be strictly enforced. In a mixed case, such as it was, a court may consider the redemption value of the coupons in determining fees "attributable to" the coupons, and also apply the lodestar method in determining fees associated with non-coupon recovery (such as injunctive relief). The panel concluded that the district court abused its discretion when it made a rough estimate of the ultimate value of settlement, and "awarded fees in exchange for obtaining coupon relief without considering the redemption value of the coupons."[30]

Some courts, including the Ninth Circuit, have also expressed their skepticism at the use of *cy pres* awards.[31] The drafters of CAFA acknowledged that *cy pres* distributions might be appropriate to supplement coupon settlements, and the statute indeed authorizes courts to "require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to [one] or more charitable or governmental organizations, as agreed to by the parties."[32]

Although the theory is that *cy pres* may be used to distribute unclaimed or unredeemed funds, or to provide a remedy (or punitive measure, some have said) where providing meaningful monetary relief to class members would be impracticable, concerns exist about the fairness and adequacy to class members—particularly if the *cy pres* award influences the calculation of attorneys' fees. Under CAFA, while *cy pres* awards cannot *technically* be used to calculate attorneys' fees, they can indirectly influence judicial determinations as to a settlement's benefit to the class.

In *Dennis v. Kellogg Co.,* the Ninth Circuit struck down a settlement on the basis that the proposed *cy pres* award failed to benefit class members and that the proposed

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28 *Id*. at 1175-76.

29 *Id*. at 1179.

30 *Id*. at 1175-76.

31 *See, e.g., In re Baby Prods. Antitrust Litig.,* 708 F.3d 163, 169 (3d Cir. 2013) ("*Cy pres* distributions, while in our view permissible, are inferior to direct distributions to the class because they only imperfectly serve the purpose of the underlying causes of action—to compensate class members."); *In re Groupon, Inc.*, 2012 U.S. Dist. LEXIS 185750 (S.D. Cal. Sept. 28, 2012) (noting the lack of "nexus" between the claims alleged in the case and the cy pres beneficiary).

32 28 U.S.C. § 1712(e).

attorneys' fees for class counsel were excessive.[33] In reversing the district court, the Ninth Circuit noted that it was obliged to pay "special attention" to the risk that the agreement "favor[ed]" class counsel's "pursuit of [their own] self interests rather than the class's interests." In the court's words, "[c]*y pres* distributions present a particular danger in this regard" because "the selection process may answer to the whims and self interests of the parties, their counsel, or the court."[34]

Cy pres remedies are hardly on their way to extinction, however. In *Lane v. Facebook, Inc.*, a divided panel of the Ninth Circuit ultimately approved a proposed settlement in litigation brought against Facebook, concerning a program that plaintiffs claimed violated various state and federal privacy statutes.[35] The settlement provided that Facebook would end the program and provided for a $9.5 million recovery, consisting of attorneys' fees and a *cy pres* remedy – $6.5 million distribution to a new charity organization. Objectors had claimed that the settlement amount was too low, and further, that it was an abuse of discretion for the district court to approve the *cy pres* remedy, because the funds would be disbursed to a new foundation with Facebook affiliations. A divided Ninth Circuit panel rejected these arguments, maintaining that the beneficiary of the funds did not have to be the charity that most class members might choose. The foundation's mission was consistent with the underlying goals of plaintiffs' suit, and the panel did not view any purported conflict of interest as undermining the settlement.

Objectors then petitioned for an *en banc* hearing, which was denied.[36] Six judges, however, dissented to the denial, and objectors sought Supreme Court review. Although the Court denied certiorari, Chief Justice Roberts wrote an intriguing opinion concerning the decision to pass on that particular case:

> Granting review of this case might not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of such [*cy pres*] remedies in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on. This Court has not previously addressed any of these issues. *Cy pres remedies, however, are a growing feature of class action settlements. In a suitable case, this Court may need to clarify the limits on the use of such remedies.*[37]

These comments, quite clearly, emphasize the Roberts Court's attention to class actions, and suggest that the Court's consideration of CAFA settlement issues is all but inevitable.

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33 697 F.3d 858 (9th Cir. 2012).

34 *Id.* at 867 (quoting *Nachshin v. AOL, LLC,* 663 F.3d 1034, 1039 (9th Cir. 2011).

35 696 F.3d 811 (9th Cir. 2012).

36 709 F.3d 791(9th Cir. 2013).

37 *Marek v. Lane*, 134 S.Ct. 8 (2013) (citations omitted; emphasis added).

IV. CONCLUSION

Overall, it is clear that CAFA has expanded the authority of federal courts to hear class actions, and recent rulings by the Supreme Court have reiterated that CAFA was intended, in part, to prevent parties from engaging in forum-shopping gamesmanship. Moreover, the Chief Justice's comments in the *Facebook* case quite clearly demonstrate the Court's increased attention to class actions, suggesting that a judicial foray into CAFA settlement issues is all but inevitable.