

The Class Action Fairness Act and the New Federal e-Discovery Rules: To Remove or Not to Remove?

By Michael R. Pennington and Robert J. Campbell

On Feb. 18, 2005, the Class Action Fairness Act (CAFA) (Pub. L. No. 109-2, 119 Stat. 4) was signed into law. The culmination of an extensive lobbying effort over several years by many business organizations, the aim of the law was to expand federal jurisdiction over class actions and to curb perceived abuses of the class action device. However, as often happens with tort reform legislation, passing CAFA required substantial compromise with organizations representing competing interests, including the American Trial Lawyers Association. The result was a statute that makes removal of class actions to federal court a somewhat more available option than it was before—but at the price of significant risks and burdens for the removing defendant. In addition, the competing demands of those who had a hand in stirring this legislative broth left the statute riddled with substantial ambiguity and left many important questions open for judicial interpretation.

Unlike the recent Securities Litigation Uniform Standards Act of 1998 (SLUSA), which gave federal courts essentially exclusive jurisdiction over securities class actions, CAFA does not eliminate state courts' jurisdiction over class actions. Instead, the law simply gives class action litigants the opportunity to litigate a broader range of class actions in federal court if either side desires to do so. Despite the prevailing mind-set of many large companies to litigate in federal court—rather than state court—whenever possible, the decision of whether to remove a class action to federal court should be made only after careful consideration of all the implications of successfully asserting that CAFA applies. In addition, these companies should consider other factors, such as the different opportunities for appellate review of class certification orders under the applicable state and federal rules. Finally, the new federal rules governing electronic discovery can make even the early phases of federal class litigation both dangerous and expensive for a corporate defendant, and the extent to which these burdens may be reduced if the action is litigated in state court must not be overlooked. Whatever the ultimate decision on CAFA removal may be, the litigants should make their decision on the basis of a comprehensive evaluation of the current pros and cons of litigating in each forum—not on the basis of outdated negative impressions of particular venues or a general bias favoring litigation in a federal forum.

Overview of CAFA

The provisions of CAFA are more complex and reticulated than they appear at first blush, but several of the key provisions are discussed below.

1. Minimal Diversity

"Complete diversity" of citizenship among all named plaintiffs and all named defendants was previously required in order to remove a class action to federal court or to file it in

federal court in the first instance. See *Strawbridge v. Curtiss*, 7 U.S. (1 Cranch) 267 (1806), *overruled on other grounds*, 43 U.S. (2 How.) 497 (1844). CAFA relaxes this diversity requirement for class actions involving alleged classes that include at least 100 members, as long as the amount in controversy exceeds \$5,000,000, by allowing such a class action to be filed in or removed to federal court if any member of the alleged class is a citizen of a state different from that of any defendant. In determining whether the suit meets the requirement that the amount in controversy is \$5,000,000 or more, CAFA expressly requires that the claims of all class members be aggregated.

Under prior law, class actions could be filed in or removed to federal court only if there was complete diversity among all named plaintiffs and defendants and the individual claims of the class representatives exceeded \$75,000; aggregation of all class members claims to meet the amount in controversy requirement was generally not permitted. See, for example, *Exxon-Mobil Corp. v. Allapattah Serv. Inc.*, 545 U.S. 546, 571–572 (2005); *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973) (superseded by statute). See also Gregory P. Joseph, *Federal Class Action Jurisdiction After CAFA: Exxon-Mobil and Grable*, 8 DEL. L. REV. 157 (2006). The traditional "complete diversity" remains as a separate and independent ground for removal when the named plaintiff's claim alone exceeds \$75,000, but that is no longer the exclusive basis for removal of the typical class action. See *Saab v. Home Depot U.S.A. Inc.*, 469 F.3d 758 (8th Cir. 2006).

In addition, actions that are not originally removable but later become removable under CAFA—for example, by virtue of an amended pleading changing purely individual claims to class claims—may be removed without regard to the one-year time limit applicable to normal diversity removals under 28 U.S.C. § 1446(b). See 28 U.S.C. § 1453. Similarly, CAFA permits removal even if one of the class action defendants is a resident of the forum state, even though 28 U.S.C. § 1441(b) would not permit removal under that scenario in an individual action. 28 U.S.C. § 1453. Finally, any defendant can remove an action under CAFA even if other defendants do not consent.

2. Securities Litigation and Class Actions Against Governmental Entities Exempted from CAFA's Expanded Jurisdiction

Class actions that involve securities or corporate governance exclusively as well as class actions against defendants that are primarily government entities are all exempted from the reach of CAFA's expanded federal jurisdiction and removal provisions. 28 U.S.C. §§ 1332(d)(9)(A) through (C), and 1332(d)(5); see also *Luther v. Countrywide Home Loans Serv. LP*, 533 F.3d 1031 (9th Cir. 2008) (affirming remand of action



removed under CAFA alleging claims under § 22(a) of the Securities Act of 1933). The exemption of securities litigation recognizes the complete pre-emption of state securities class actions that already exists under prior federal law, such as under SLUSA. Thus, for example, a state court class action involving variable annuities would not be removable under CAFA but would generally be removable under SLUSA. *See, for example, Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101 (2d Cir. 2001) (class action involving variable annuities removable under SLUSA); *Herndon v. Equitable Variable Life Ins. Co.*, 325 F.3d 1252 (11th Cir. 2003) (same issue with respect to variable life insurance).

3. “Mass Actions” Treated as Class Actions for Purposes of Jurisdiction

CAFA also makes “mass actions”—actions that are not filed as class actions but name 100 or more plaintiffs whose claims are proposed to be tried jointly in one state court action—removable to federal court if at least one plaintiff and one defendant are from different states and the aggregate amount in controversy exceeds \$5,000,000. However, CAFA’s definition of “mass action” is complicated by significant statutory ambiguity. Essentially, the definition of “mass action” under CAFA confers federal jurisdiction, “except that jurisdiction shall exist only over those plaintiffs in a mass action whose claims in a mass action satisfy the [\$75,000] jurisdictional amount requirements under [28 U.S.C. § 1332(a)].”

The statute provides no guidance on how the court is to apply both the requirement that the individual amount in controversy must be \$75,000 and the requirement that the aggregate amount in controversy must be \$5,000,000 at the same time, and the answer is not as simple as it might seem. The Ninth Circuit recently discussed the many perplexing questions created by this provision in *Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006). For example, if the claims of all named plaintiffs exceed \$5,000,000 in the aggregate, but the claims of only those whose individual claims exceed \$75,000 do not add up to \$5,000,000, is the action removable under CAFA in whole or in part? If so, are only the claims of those seeking more than \$75,000 removable, or is the entire action subject to removal, followed by a remand of those claims determined to be under \$75,000? The statute provides no material guidance on these questions and, at this time, the courts have not provided answers. Indeed, the Eleventh Circuit also recently noted that the proper application of this \$75,000 provision was an open issue, then promptly avoided addressing it. *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007).

4. The “Local Controversy” Exception to CAFA Jurisdiction

Even if a class action satisfies the “minimal diversity” requirement and the amount in controversy satisfies the requirement that the aggregate amount in controversy must be \$5,000,000, CAFA does not guarantee that the class action will remain in federal court. CAFA’s so-called “local controversy” exception provides that a district court “must” decline jurisdiction and remand the action if the following four conditions are met:

- more than two-thirds of the members of the putative class are residents of the state where the action was originally filed; and
- at least one defendant from whom “significant relief” is sought and whose conduct forms a “significant basis” for the claims of the class is also a resident of the forum state; and
- the “principal injuries” resulting from the conduct of “each defendant” were “incurred” in the forum state; and
- during the three-year period preceding the filing of the complaint, no other class action asserting the “same or similar factual allegations” has been filed against any of the defendants on behalf of the same or other persons.

See 28 U.S.C. § 1332(d)(4)(A).

Each of the quoted terms above is left open to substantial judicial interpretation and provides plenty of fodder for future legal wrangling. *See, for example,*

Preston v. Tenet Healthsystem Mem'l Med. Ctr. Inc., 485 F.3d 793 (5th Cir. 2007); *Evans v. Walter Industries Inc.*, 449 F.3d 1159 (11th Cir. 2006); cf. *Laws v. Priority Trustee Serv. of N.C. LLC*, No. 3:08-CV-103, 2008 WL 3539512 at *4-6 (W.D.N.C. Aug. 11, 2008) (noting that “[t]here is little case law that defines ‘significant relief’ or ‘significant basis’ under CAFA,” but collecting cases for the proposition that “[t]he local defendant must be a target from whom significant relief is sought by the class as well as being a defendant whose alleged conduct forms a significant basis for the claims asserted by the class. ... Additionally, the ‘significant relief’ requirement has been interpreted to mean those defendants from whom plaintiffs seek most of the relief.”) (citations omitted).

5. The “Home State Controversy” Exception to CAFA Jurisdiction

An exception that is similar to but separate from the “local controversy” exception to CAFA is the so-called home state controversy exception, which again requires the court to decline jurisdiction and remand a class action if “two-thirds or more” of all members of all putative classes in the aggregate are residents of the forum state and the “primary defendant” is also a resident of that state. See 28 U.S.C. § 1332(d)(4)(B). The differences between this exception and the “local controversy” exception should be noted. Under the “home state controversy” exception, the inquiry is not whether “significant relief” is sought from any defendant in a forum state, but whether the “primary defendant” is from the forum state. If the “primary defendant” is from the forum state, then under this exception the court is required to decline jurisdiction without regard to whether the “principal injuries” occurred in the forum state or whether a similar class action has been filed in the last three years, as long as two-thirds or more of the class are also citizens of the forum state.

Of course, the meaning of the term “primary defendant” also remains open to interpretation and debate in any given case. See, for example, *Frazier v. Pioneer Ams. LLC*, 455 F.3d 542 (5th Cir. 2006); *Serrano v. 180 Connect Inc.*, 478 F.3d 1018 (9th Cir. 2007) (declining to reach the “primary defendants” issue under the home state exception); cf. *Kearns v. Ford Motor Co.*, No. 05-CV-5644, 2005 WL 3967998, at *7 (C.D. Cal. Nov. 21, 2005) (noting that the phrase “primary defendants” is ambiguous, but adopting the reasoning of decisions addressing the same phrase under the Multiparty, Multiforum, Trial Jurisdiction Act of 2002 and concluding that “a ‘primary defendant’ is any defendant with direct liability to the plaintiffs”).

6. The “Interests of Justice” Exception to CAFA Jurisdiction

Another “out” for federal judges and plaintiffs wishing to punt CAFA removals back to state court is the highly subjective “interests of justice” exception that CAFA includes. This exception provides that a district court “may” decline to exercise jurisdiction or remand the action “in the interests of justice and looking to the totality of the circumstances,” provided more than one-third but less than two-thirds

of the proposed class and the “primary defendants” are all residents of the forum state. 28 U.S.C. § 1332(d)(3); see also *Preston*, 485 F.3d at 810 (in affirming remand of class action to state court, noting that the discretionary jurisdiction exception to CAFA gives “greater latitude to remand class actions to state court”). A number of factors that the trial court must consider are listed in the statute, but the statute gives the court no specific guidance as to how any of the factors are to be applied or what weight is to be given to the presence or absence of any of those factors. In other words, this exception leaves plenty of room for both reasoned and results-oriented interpretation.

Of course, CAFA’s jurisdictional exceptions are not one-sided. If the plaintiff chooses to file the class action in federal court in the first instance, this discretionary exception and the mandatory exceptions to CAFA’s expanded federal jurisdiction discussed above provide opportunities for the defendant to seek discretionary dismissal and to force the case into state court, just as those exceptions offer opportunities for the plaintiff to seek discretionary remand of a removed case. Moreover, since none of CAFA’s jurisdictional exceptions include any time limit on raising them, it remains to be seen whether and how these exceptions will be applied when their potential applicability becomes apparent only after months or even years of discovery—or only by virtue of subsequent amendments changing the claims, parties, or proposed class definition long after the original filing or removal of the case.

7. CAFA’S Discretionary Right of Appeal from Remand Orders

CAFA provides for discretionary appeals from grant or denial of any motion to remand a class action removed under CAFA. Although, according to 28 U.S.C. § 1453(c)(1), the statute unambiguously states that a petition for such an appeal must be filed “not less than 7 days” from the entry of the order. (The courts have concluded that this is a typographical error that in fact should be read as “no more than 7 days.” See, for example, *Miedeima v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006); *Morgan v. Gay*, 466 F.3d 276 (3d Cir. 2006).) CAFA states that the appellate court “may” accept an appeal if it is sought within that time; the foregoing cases have interpreted this statement to mean that the appellate court may also decline to accept the appeal as a matter of discretion.

If the appeal is accepted, CAFA places a 60-day time limit within which the appellate court must render its decision, with provisions for extensions if the parties consent. The intent of these time limits was to avoid unreasonable delay in resolving the issue of jurisdiction. One wonders, however, whether another potential effect may well be to provide an incentive for busy appellate courts to exercise their discretion to decline CAFA appeals more often than they otherwise would.

8. CAFA’S New Rules for Approval and Enforcement of Settlements of Class Actions

Once federal jurisdiction is established over a class action, CAFA also imposes new substantive requirements for

the approval of settlements of class actions. Some of these rules have serious implications for both plaintiffs and defendants and make it more difficult to settle a class action under CAFA than was previously the case in either state or federal courts.

First, CAFA imposes substantial restrictions on so-called coupon settlements, whereby the primary relief provided to class members comes in the form of free or discounted future goods or services. See 28 U.S.C. § 1712. Specifically, such settlements must pass heightened judicial scrutiny, and any attorney's fees awarded to class counsel on the basis of such "coupon" relief must be calculated on the basis of the value of the "coupons" actually redeemed, not on the number of coupons made available. *Id.*; see also *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292 (S.D. Fla. 2007) (denying approval of class settlement offering \$19 per unit coupon to buyers of allegedly ineffective air purifiers based in part on reaction of class to the coupon offer). This provision, of course, makes it far less likely that plaintiffs' attorneys will agree to coupon settlements, which were often the most cost-effective way for a defendant to achieve settlement of a class action.

Second, whether the settlement involves coupon relief or not, under CAFA, within 10 days of filing any proposed settlement to a class action with the trial court, the settling defendants are required to send to each of their state and federal regulators a detailed written notice of the action, the proposed settlement, and proposed class notice, and, "if feasible," the identities and residences of all class members. 28 U.S.C. § 1715. For an insurance company, for example, such notice might have to be sent to the Securities and Exchange Commission, the National Association of Securities Dealers, the various state insurance commissioners for all 50 states, and state and federal attorneys general, among others, depending on the products and claims involved. If such notice is not given, any class member can choose not to be bound by the proposed settlement regardless of whether or not it is approved by the trial court. *Id.* at § 1715(e). Once this comprehensive notice and class roster are provided, of course, they both almost certainly become a public record, despite the privacy and trade secret interests involved in the class roster. Moreover, the regulators may then seek to intervene in the class action, lodge objections to the settlement, or pursue their own separate actions or investigations, as many regulators are increasingly prone to do in response to high-profile civil litigation. This possibility greatly complicates the settlement process and must be considered when debating the desirability of CAFA removal in a given case.

By its very nature, any class action in which class certification is granted is highly likely to be settled before trial, given the high stakes typically presented by a classwide liability and damages verdict. Moreover, because settlement of a class action often provides an opportunity for a defendant to resolve a known exposure more broadly and more efficiently than through piecemeal litigation, some defendants may actually desire to pursue an early settlement rather than fight class certification. If there is any significant possibility that the case will eventually be settled on a class

basis, state court forums typically offer the opportunity to do so without CAFA's restrictions on coupon settlements and without any requirement that all relevant state and federal regulators be notified in advance of the settlement. In addition, as long as due process requirements are met, a settlement of a state court class action generally has the same preclusive effect as a settlement of a federal class action. See, for example, *Matsushita Elec. Ind. Co. Ltd. v. Epstein*, 516 U.S. 367 (1996).

9. CAFA's Effective Date

CAFA was signed into law by President George W. Bush on Feb. 18, 2005, and applies to class actions or mass actions "commenced" on or after that date. See, for example, *Patterson v. Dean Morris LLP*, 444 F.3d 365 (5th Cir. 2006). However, there has been substantial disagreement over what constitutes "commencement" of a "new" action in the context of suits that were filed before that date but amended after that date in order to add new allegations or parties to the action.¹

The Burden of Proof on Issues Related to CAFA Removal

CAFA expresses a legislative intent to change prior federal jurisprudence by expanding federal jurisdiction over class actions. However, the statute is otherwise silent on who bears the burden of proof on each of the requirements for CAFA removal (such as the \$5,000,000 aggregate amount in controversy and minimal diversity requirements). CAFA also does not indicate who bears the burden of proof as to whether any of the various mandatory or discretionary exceptions to CAFA jurisdiction apply—for example, whether more than two-thirds of the members of the class reside outside the original forum state, whether individual plaintiffs in a removed mass action have individual claims exceeding \$75,000, and other exceptions.

The broad and expansive purposes of CAFA might suggest that doubts regarding federal jurisdiction were intended to be resolved in favor of the federal court retaining jurisdiction, and that the burden of proof should lie with those opposing federal jurisdiction. See, for example, H. Twiford III, A. Rollo, and J. Rouse, *CAFA'S New "Minimal Diversity" Standard for Interstate Class Actions Creates a Presumption That Jurisdiction Exists, With the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 Miss. C. L. REV. 7 (2006). Indeed, a Senate committee report concerning CAFA states just such an intent. See S. Rep. No. 109-14, at 42 (Feb. 28, 2005), reprinted in 2005 U.S.C.C.A.N. 3, 40, 44.

However, the federal courts have not accepted these arguments. Finding no express language in CAFA that expressly allocates the burden of proof, thus far all the appellate courts addressing the issue have declared that established jurisprudence for other types of removals is controlling and that therefore the burden of establishing CAFA jurisdiction is on the party claiming jurisdiction.² On the other hand, the appellate courts have largely held that a party that opposes federal jurisdiction bears the burden of establishing the applicability of one of CAFA's jurisdictional exceptions.³

What level of proof must a removing defendant provide

in order to establish CAFA jurisdiction, and what level of proof must a plaintiff offer to establish the applicability of one of CAFA's jurisdictional exceptions? These issues are the subject of considerable and continuing controversy. As a general rule, the consensus standard of proof for both a defendant seeking to invoke CAFA jurisdiction and a plaintiff seeking to invoke one of CAFA's jurisdictional exceptions is by a preponderance of the evidence. *See*, for example, *Abrego Abrego*, 443 F.3d at 683 (party seeking to invoke federal jurisdiction under CAFA "must prove by a preponderance of the evidence that the amount in controversy requirement has been met"); *Frederico v. Home Depot*, 507 F.3d 188, 197–198 (3d Cir. 2007) (same); *cf. Blockbuster Blockbuster v. Galeno*, 472 F.3d 57 (2d Cir. 2006) (stating that the proponent of jurisdiction must prove the amount in controversy to a "reasonable probability").

However, one exception to that rule applies to determinations of the requisite jurisdictional amount, where a plaintiff specifically alleges damages less than the jurisdictional threshold. In such cases, several courts have held that a removing defendant must show "to a legal certainty that the amount in controversy exceeds the statutory minimum." *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006); *see also Lowdermilk v. U.S. Bank Nat'l Assoc.*, 479 F.3d 994, 999 (9th Cir. 2007); *Brill v. Countrywide Home Loans Inc.*, 427 F.3d 446, 448–449 (7th Cir. 2005).

Cases such as *Morgan*, *Brill*, and *Lowdermilk* illustrate

numerous witnesses and documents that the plaintiff might not otherwise have asked for or focused upon in the normal course of discovery. This can be a heavy price to pay for an uncertain chance at a federal forum.

Attorneys who think that they can avoid this dilemma by making a less detailed showing of the amount in controversy, and then ask for remand-related discovery from the plaintiffs and putative class members if a motion to remand is filed, may want to read the Eleventh Circuit's recent opinion in *Lowery v. Alabama Power Co*, 483 F.3d 1184 (11th Cir. 2007). In a 77-page opinion, the reasoning of which expressly applies to both CAFA and non-CAFA removals, the Eleventh Circuit has now outlawed remand-related discovery altogether. Joining the rationale of the *Morgan*, *Lowdermilk*, and *Brill* decisions cited above, the court ruled that, if there is no plea for a specific amount of damages, the removing defendant only needs to prove by a "preponderance of the evidence" that the amount in controversy exceeds \$5,000,000; if the plaintiff specifically pleads that the amount is less than \$5,000,000, however, the amount must be proved to a legal certainty. After ruling that the "preponderance of the evidence" standard applied to Lowery's complaint, the court then dropped this bombshell: the determination of whether the defendant has met the applicable standard of proof as to the amount in controversy must be made from the pleadings, the notice of removal, and the accompanying documents alone, and that

another danger for defendants in attempting CAFA removals, particularly when the "legal certainty" test applies. In picking apart the defendant's proof and finding it wanting under the "legal certainty" test, the reasoning of each of these courts essentially required the defendant to affirmatively prove the plaintiff's damages in excruciating detail with virtually unassailable proof in order for the case to remain in federal court. To attempt this type of evidentiary showing based on one's own client's affidavits and documents results in providing the plaintiff with substantial "free discovery" at the beginning of the case; in risking admissions as to the amount of damages and their ease of calculation that may be used against the defendant at the summary judgment stage, at the class certification stage, or at trial; and in identifying through affidavits and exhibits

resorting to remand-related discovery was not permitted in deciding any motion to remand, under CAFA or otherwise. Because the defendant's notice of removal and accompanying exhibits contained no document clearly indicating that the aggregate value of the plaintiffs' claims exceeded \$5,000,000, the court declared that defendant had failed to satisfy even the "preponderance of the evidence" standard. Proof of verdicts in similar mass tort actions that had exceeded \$5,000,000 was contained in the defendant's removal papers but was deemed insufficient. Moreover, the court went out of its way to prohibit any form of speculation or assumptions in calculating whether the amount in controversy had been met.

Prior to *Lowery*, defendants routinely asked for remand-related discovery if plaintiffs sought remand on the

grounds that the amount was in controversy, and many courts routinely granted their request. Since *Lowery*, at least one federal district court has already recognized that its prohibition on remand-related discovery is equally applicable to non-CAFA removals of even individual actions. See *Constant v. International House of Pancakes*, 487 F. Supp. 2d 1308 (N.D. Ala. 2007). The *Constant* court further issued a broad warning that all future removals in that court based on speculative calculations of the amount in controversy would be sanctioned.

Although it does not squarely address the other jurisdictional prerequisites of CAFA, the *Lowery* view of permissible evidence on remand would seem to apply with equal force to any effort to establish or rebut the applicability of the “home state,” “local controversy,” and “interests of justice” exceptions to CAFA jurisdiction. Whether two-thirds or more of the putative class members reside in the forum state as of the date of removal, for example, arguably must now be decided on the face of the pleadings, the notice of removal, and the accompanying affidavits and exhibits. Cf. *Preston*, 485 F.3d at 798–803 (reversing remand after concluding that patients’ billing addresses offered by class counsel were insufficient to establish the two-thirds citizenship requirement of CAFA’s “local controversy” exception). The option of resorting to discovery to ascertain this often elusive information appears foreclosed in cases in which the *Lowery* ruling stands as the controlling law.

The *Lowery* decision’s prohibition of remand-related discovery may not apply when dealing with cases in other jurisdictions. See S. Rep. 109-14 at 44 (in making jurisdictional determinations, noting that “a federal court may have to engage in some fact-finding, not unlike what is necessitated by the existing jurisdictional statutes”); see also *Abrego Abrego*, 443 F.3d at 691 (noting, in the CAFA context, that jurisdictional discovery is within the discretion of district courts); *Martin v. Lafon Nursing Facility of the Holy Family Inc.*, 244 F.R.D. 352 (E.D. La. 2007) (compelling production of documents necessary for CAFA jurisdiction determination); *Rippee v. Boston Market Corp.*, 408 F. Supp. 2d 982, 985 (S.D. Cal. 2005) (noting that jurisdictionally related discovery is appropriate in CAFA cases, at least when such discovery is “sufficiently tailored” to lead to information concerning the jurisdictional issue”).

Lowery arguably conflicts with well-established practice in other federal courts as well as with decisions of the U.S. Supreme Court—all of which have treated remand-related discovery as an appropriate consideration in determining federal jurisdiction. See, for example, *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 n.13 (1978) (“where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues”); *U.S. Catholic Conference v. Abortion Rights Mobilization*, 487 U.S. 72, 79–80 (1988) (“Nothing we have said puts in question the inherent and legitimate authority of the court to issue process and other binding orders, including orders of discovery directed to nonparty witnesses, as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter.”). See also 8 Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2009, at 124 &

n.2 (1994) (“Although there was once doubt on this point, it has long been clear that discovery on jurisdictional issues is proper.”); 16 MOORE’S FEDERAL PRACTICE 3D § 107.14[2][g][i][A] (2006) (“A defendant seeking removal can usually determine an appropriate range of damages through discovery.”).

More Potential Pitfalls of Removal Under CAFA

As this discussion has shown, removing cases under CAFA presents some significant drawbacks for the class action defendant. The defendant must attempt to prove the amount in controversy exceeds \$5,000,000 with detailed evidence that primarily comes from the defendant’s own records. This requirement provides abundant free discovery to the plaintiff, along with the identities of possible deponents, information as to various records to request in subsequent discovery, a road map to proving damages, and possible admissions that can be used against the defendant during class certification, summary judgment, or trial stages of the litigation, whether or not remand is granted. The more the defendant tries to hedge its statements as to the amount in controversy in an effort to avoid such admissions and consequences, the less likely it is that the defendant’s burden of proving that the amount in controversy exceeds \$5,000,000 will be found to be satisfied.

Even if the removing defendant carries that burden, the plaintiff no longer has any incentive to limit the damages of the class, and an amendment eliminating any prior damage limitations is very likely. Regardless, the defendant is placed in a venue where any appeal from class certification is solely within the discretion of the appellate court. See Fed. R. Civ. P. 23(f). The federal courts have made clear that such interlocutory appeals will be granted only sparingly and only in the most compelling circumstances. See, for example, *Asher v. Baxter Intern Inc.*, 505 F.3d 736, 741 (7th Cir. 2007) (“The final-decision rule of § 1291 is the norm, and Rule 23(f) is an exception that, like § 1292(b), must be used sparingly lest interlocutory review increase the time and expense required for litigation.”); *Prado-Steiroman ex rel. Prado v. Bush*, 221 F.3d 1266, 1273–1274 (11th Cir. 2000) (same).

By contrast, some states allow appeals as of right from any grant or denial of class certification. See, for example, ALA CODE § 6-5-642; 12 OKLA. STAT. ANN. § 993(A)(6); TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(3); FLA. R. APP. P. 9.130(a)(3)(c)(vi) and (a)(6). In other states, petitions for mandamus or discretionary interlocutory appeals from class certification may be granted much more often than in the relevant federal court. An appeal as of right (or its functional equivalent) can be monumentally important, because class certification and denial of a discretionary interlocutory appeal often force the defendant to settle rather than take a chance on the outcome of a classwide trial and the deleterious effects of an adverse classwide verdict on publicly traded stock. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298–1302 (7th Cir. 1995). Worse yet, after class certification has already been granted and interlocutory review has been denied, the defendant is forced to negotiate with class counsel at a time when class counsel’s leverage is at its most effective.

Moreover, if a defendant in a class action is successful

in removing a class action under CAFA, the defendant will now find it more difficult to settle the action on a class basis under CAFA than would be the case in most state courts. CAFA makes even legitimate coupon settlements much less feasible and requires that all relevant state and federal regulators of the defendant be provided with detailed notice of *any* proposed settlement and disclose the identities of the class members affected by the settlement before it is approved. This requirement can make the terms of a settlement much more expensive for the defendant, and abiding by this rule can easily generate both adverse publicity and additional collateral individual litigation—at the hands of class members who opt out of the action as well as regulators who choose to pursue their own separate investigations or lawsuits. Moreover, the potential for intervention or objection by such regulators—some of whom may be elected officials—may derail or greatly complicate the settlement process. The ability of class members to reject the settlement for failure to provide proper notice to state and federal regulators is another significant concern, particularly to companies regulated by more than one state or federal agency. The risk of making the wrong guess about which regulators need to be notified rests squarely on the defendant, forcing over-inclusive notice to the regulators as the safest recourse. Moreover, as part of this rigorous notice process, settling defendants may be forced to put their customer lists into what may well amount to the public domain.

These are only a few of the potential downsides that must be considered before deciding to remove a class action under CAFA; other potential pitfalls abound. Federal courts in a given circuit may be more prone to certify classes than the state forum in which the class action was originally filed, even when the state forum has developed a reputation as a “judicial hellhole” in the past. *See, for example, In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004), *cert. denied*, 543 U.S. 870 (2004) (reversing denial of class certification regarding “race-distinct premium” claims and remanding for further proceedings, and in the process finding that 23(b)(2) certification is permissible even where class members seek substantial individual monetary awards, thus negating class counsel’s need to prove predominance and superiority); *Klay v. Humana*, 382 F.3d 1241 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005) (upholding 23(b)(3) certification of RICO claims of classes of physicians against various health maintenance organizations); *cf. G. Cook, The Alabama Class Action: Does It Exist Any Longer? Does It Matter?* ALA. LAW. (July 2005) (discussing the paucity of Alabama Supreme Court decisions upholding class certification and the abundance of Alabama Supreme Court decisions rejecting class certification that have been handed down since 1998).

Indeed, some expect federal courts to become even more prone to certify classes under CAFA. For example, prior to CAFA, the fact that the laws of many different states would have to be applied was considered a major reason for not certifying class actions in federal court. *See, for example, Castano v. American Tobacco Co.*, 84 F.3d 734, 740–743 (5th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at

1299–1302; *Andrews v. AT&T*, 95 F.3d 1014, 1023 (11th Cir. 1996). However, the express intent of CAFA is to funnel more multistate class actions into federal court. Some think this could lead federal judges to give the “varying state laws” defense to class certification significantly less weight in CAFA class actions. *See, for example, A. McGuinness and R. Gottlieb, Class Action Fairness Act 2005: Potential Pitfalls for Defendants* 13 ANDREWS CLASS ACTION LITIG. REP., no. 9 at 16.

Finally, there is the problem of the new Federal Rules of Civil Procedure that deal with electronic discovery. Essentially, these rules make electronic discovery a mandatory subject of the required initial discovery and scheduling conference and initial evidentiary disclosures that each side is required to provide at the beginning of a case; explicitly provide for sanctions for failure to preserve electronic data and documents when litigation is filed or reasonably anticipated; and make a defendant’s entire computer system, computer archives, e-mail systems, hard drives, backup tapes, and databases potentially subject to forensic colonoscopy in the normal course of discovery. Even the laptop computers of officers and employees used for both business and personal purposes are potentially fair game.

Naturally, the burdens of electronic discovery typically fall primarily on corporate defendants, because they rely heavily on electronic data systems to conduct business. Although it is extremely difficult to know what potentially relevant data may be lurking in the bowels of a complex computer system at the very beginning of unanticipated litigation, failure to exercise exacting diligence to preserve potentially relevant electronic data can lead to severe sanctions and large verdicts. *See, for example, United States v. Phillip Morris USA Inc.*, 327 F. Supp. 2d 21 (D.D.C. 2004) (awarding \$2,995,000 in monetary sanctions and precluding key defense witnesses from testifying based on failure to preserve electronically stored data); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (willful destruction of relevant e-mail, late production of relevant e-mail, and other failures to preserve and produce electronic evidence results in jury instruction that they were entitled to infer that e-mails that had been deliberately destroyed and would have been harmful to the defendant’s case; the jury later returned a verdict of \$29.3 million).

Even though electronic discovery is also fair game in most state courts, and diligent attention to litigation holds designed to preserve electronic data in the face of litigation is certainly equally necessary in state court, few state discovery regimes place as much mandatory emphasis on electronic discovery as the federal rules now do. Indeed, as a matter of day-to-day practice, substantial electronic discovery in many state court systems is still the exception rather than the rule; and, to the extent such discovery occurs, it is generally less onerous and proceeds at a slower pace. State trial judges typically have wide discretion to disallow expensive and intrusive electronic fishing expeditions on grounds that such efforts are burdensome and expensive, for example; in some cases, state court judges may be more likely to exercise that discretion than their federal counterparts do. Some state courts will be more accom-

modating than others to plaintiffs' attorneys seeking broad electronic discovery, and all state court systems are likely to become more experienced with electronic discovery issues in the coming years; for the time being, however, state courts are viewed as the forum where electronic discovery tends to be less extensive and less burdensome.

Conclusion

The foregoing discussion is not intended to suggest that removing a class action under the Class Action Fairness Act is never the best choice. Often it will be. However, even in traditionally bad venues, the decision as to whether to attempt a CAFA removal—or any removal to federal court for that matter—should be made with careful consideration of all the pros and cons of each venue as well as the unique facts of the case at hand, using the most current information possible. Litigants should take answers to the following questions into account when determining the forum to choose:

- Who are the potential trial judges in the federal venue, and how do their track records on class certification and electronic discovery compare with the track records of state court judges?
- Does class counsel have a string of favorable results when appearing before any of the potential judges?
- Which venue tends to set the case for class certification hearing and trial sooner?
- Does the state appellate system offer appeals as of right from class certification orders, or does the system regularly entertain mandamus petitions or interlocutory appeals on class certification?
- Which appellate system has a better track record on class certification?
- How often does each appellate system grant discretionary appeals from class certification orders?
- In which forum is electronic discovery more expensive and more likely to be used as an offensive weapon in its own right by class counsel?
- Which forum has a better precedent for denying class certification in this particular kind of case?
- What regulators will have to be notified of any settlement if the case is successfully removed under CAFA, and how many of them are likely to launch their own investigations or lawsuits as a result?
- Is the case a good candidate for a settlement involving “coupon” relief, and might that be the most cost-effective way for the defendant to settle the case if settlement proves necessary or desirable at any point?
- What evidence will have to be adduced to establish the amount in controversy required for CAFA removal, and what will have to be given away to the plaintiffs' counsel by putting it in the record voluntarily at the very beginning of the case?
- Can the evidence that needs to be adduced and the statements made about it come back to haunt the defendant in the discovery process, at the class certification stage, at the summary judgment stage, or at trial?
- Is the plaintiff likely to abandon any current damage limitations in the complaint altogether if the case is success-

fully removed under CAFA and can those damage limitations be enforced if the case remained in state court?

- Would there be a new opportunity to remove under the law of this federal circuit if the action were to remain in state court and the plaintiff later amended the complaint in an attempt to remove those damage limitations?

All these questions—and more—should be carefully considered before undertaking any CAFA removal.

Even though the Class Action Fairness Act was passed as a way to address runaway class certifications in some state court venues by making federal court a more available option, this does not mean that federal court is the best option for every defendant in every case. CAFA has its own downsides, and venues that were bad in the past may not be as bad today. The political pendulum is constantly moving to and fro—sometimes quickly, at other times slowly—and neither the state nor the federal judicial system is immune from that phenomenon. Every decision one makes on whether to remove a class action under CAFA should be an individual decision that is tailored to that particular case, and be based on the most current information possible about the relative merits of both the courts and the law in each venue. **TFL**

Michael R. Pennington is a graduate of the Harvard University Law School, and is a partner in the Birmingham, Ala., office of Bradley Arant Boult Cummings LLP, where he co-chairs the firm's insurance and financial services practice group. He has broad experience defending class actions involving consumer, commercial, and insurance products. Robert J. Campbell is a graduate of the Vanderbilt University School of Law, and is also a partner in the Birmingham, Ala., office of Bradley Arant Boult Cummings LLP. He has litigated nearly 30 class actions and coordinated litigation matters across the country. More information about both authors is available at www.ba-boult.com. © 2009, Michael R. Pennington and Robert J. Campbell. All rights reserved.



Endnotes

¹See, for example, *Knudsen v. Liberty Mut. Ins. Co.*, 435 F.3d 755 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 79 (2006) (post-CAFA amendment expanding class definition to include insureds of defendant's affiliates constituted new action for purposes of CAFA removal, even though the affiliates themselves were not named as parties); *Prime Care of Northeast Kansas v. Humana Ins. Co.*, 447 F.3d 1284 (10th Cir. 2006) (amendment that does not relate back to the filing of the original complaint for limitations purposes triggers new right of removal under CAFA); *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748 (7th Cir. 2005) (addition of new defendant opens a “new window of removal” under CAFA, but amend-

ment merely enlarging class definition does not because it does not add new parties to the suit); *Schillinger v. Union Pac. R.R.*, 425 F.3d 330 (7th Cir. 2005) (amendment adding new defendant creates new right of removal under CAFA, but amendment changing class from a statewide to a nationwide class does not, and amendment merely correcting the name of a defendant incorrectly named in the original complaint does not); *Senterfitt v. Suntrust Mortg. Inc.*, 385 F. Supp. 2d 1377 (S.D. Ga. 2005) (amendment expanding the class period from four to 20 years did not relate back to filing of original complaint and therefore “commenced” new action for purposes of CAFA); *Plummer v. Farmers Group Inc.*, 388 F. Supp. 2d 1310 (E.D. Okla. 2005) (amendment changing the case from an individual action to a class action constituted “de facto commencement of a new suit” for purposes of CAFA removal, as did amendment adding new plaintiffs with separate contracts and separate factual allegations from original plaintiffs); *Plubell v. Merck & Co.*, 434 F.3d 1070 (8th Cir. 2006) (amendment adding a new class representative without materially changing the underlying claims or class definition does not create a new right of removal under CAFA).

²See, for example, *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 298 (4th Cir. 2008) (“the party seeking to invoke federal jurisdiction [under CAFA] must allege it in his notice of removal

and, when challenged, demonstrate the basis for federal jurisdiction”); *Smith v. Nationwide Prop. and Cas. Ins. Co.*, 505 F.3d 401, 404–405 (6th Cir. 2007); *Blockbuster v. Galeno*, 472 F.3d 53, 57–58 (2nd Cir. 2006) (accord); *Morgan v. Gay*, 471 F.3d 469, 473 (3rd Cir. 2006), *cert. denied*, 128 S.Ct. 66 (2007) (“Under CAFA, the party seeking to remove the case to federal court bears the burden to establish that the amount in controversy requirement is satisfied.”); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006) (“under CAFA the burden of establishing removal jurisdiction remains, as before, on the proponent of federal jurisdiction”); *Frazier v. Pioneer Ams. LLC*, 455 F.3d 542, 546 (5th Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328–1329 (11th Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005).

³See, for example, *Serrano v. 180 Connect Inc.*, 478 F.3d 1018, 1019 (9th Cir. 2007) (“[T]he party seeking remand bears the burden of proof as to any exception under CAFA.”); *Hart v. FedEx Ground Package System Inc.*, 457 F.3d 675, 679–682 (7th Cir. 2006); *Frazier*, 455 F.3d 546; *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164–1165 (11th Cir. 2006). The Second Circuit has acknowledged the foregoing decisions but has expressly declined to say whether it agrees with them; see *Blockbuster*, at 58.

ASYLUM *continued from page 27*

old claimants in this case were no longer youths).

What is perhaps the most important is the BIA’s attack on the perceived circularity of the accepted definition: “Youth who have been targeted for recruitment by, and resisted, criminal gangs may have a shared experience. ... However ... we do not find that in this case the social group can be defined exclusively by the fact that its members have been subjected to harm in the past.”⁹ Even though the board noted that this shared experience could be a factor in determining the visibility of the claimed social group, the opinion made it clear that there had to be more of a connection.

With respect to particularity, the BIA found that the claimed social group was simply too amorphous: the group was not “described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”¹⁰ Similarly, with respect to the “visibility” element, the social group must be one that is perceived as a group in society.¹¹ What’s more, according to the board, the very pervasiveness of gang violence in El Salvador lessens the distinctiveness of the perceived group: “Victims of gang violence come from all segments of society, and it is difficult to conclude that any ‘group,’ as actually perceived by the criminal gangs, is much narrower than the general population of El Salvador.”

In some sense, the BIA’s decisions in these two cases are not trailblazing rulings—very little of the reasoning behind the opinions had not been employed in other cases. What is incredibly significant about the reasoning, however, is the entity handing it down: the Board of Immigration Appeals, which until then had been silent on this issue

and had theretofore provided an opening for immigration attorneys to argue vehemently for gang-based asylum claims. Even though the BIA by no means shut the door on such claims via these rulings, there is no doubt that a hard road just became a little more difficult. **TFL**

Nathan Brooks is general counsel for U.S. ISS Agency, and he sits on the editorial board of The Federal Lawyer.

Endnotes

¹8 U.S.C. § 1101(a)(42)(A); 8 U.S.C. § 1158(b)(1)(B)(i).

²See, for example, *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (determination that a female who had been raped and beaten by guerrillas was not a member of a particular social group for asylum purposes).

³These claims include those from former gang members and women who fear being raped by gang members. For a good discussion of these other groups, see Matthew J. Lister, *Gang-Related Asylum Claims: An Overview and Prescription*, 38 U. MEM. L. REV. 827, 831–832 (Summer 2008).

⁴8 C.F.R. § 208.

⁵*In re D-V* (IJ Castro, Sept. 9, 2004). The slip opinion can be found at refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/H.002.pdf.

⁶*Id.*, slip opinion at 15.

⁷502 F.3d 285 (3rd Cir. 2007).

⁸*Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008).

⁹*Matter of S-E-G-*, at 584.

¹⁰*Id.*

¹¹*Id.* at 587.