

## Seeking CAFA Clarity: A Summary of Recent Case Law Addressing Challenges to Jurisdiction Under the Class Action Fairness Act

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### **I. The Class Action Fairness Act ("CAFA")**

In 2005, CAFA was enacted to assure fair and prompt recoveries for class members with legitimate claims, restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction, and benefit society by encouraging innovation and lowering consumer prices. Pub. L. No. 109-2, 119 Stat. 4 (2005), LEXSEE 109 PL 2.

To achieve these stated purposes, 28 U.S.C. §1332 was amended to expand diversity jurisdiction in class action litigation. Subsection (d)(2) of §1332 provides that in class action cases involving 100 or more class members:

- (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$ 5,000,000, exclusive of interest and costs, and is a class action in which--
  - (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
  - (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
  - (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

CAFA eliminates some of the traditional procedural impediments to removal by no longer placing a 1 year limit on removal, allowing removal even if the defendant is a citizen of the state where the suit was initiated, and no longer requiring the removing defendant to obtain consent to removal from the co-defendants. 28 U.S.C. §1453(b).

Pursuant to 28 U.S.C. §1332(d)(11), mass actions also may be removed to federal court. A mass action is a civil action 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. Jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the \$75,000 jurisdictional amount found in of §1332(a), and if the other requirements of CAFA removal are met, including minimal diversity and an aggregate amount in controversy in excess of \$5 million.

Even though CAFA expands diversity jurisdiction, the removing party still has the burden to establish the court's jurisdiction by demonstrating that the requisite number of plaintiffs exist, that there is minimal diversity, and that the amount in controversy is sufficient to meet the statutory requirements.

## **II. Exceptions to CAFA Jurisdiction**

Certain class actions are specifically excluded from CAFA's reach. The exceptions to CAFA jurisdiction are fertile territory for plaintiffs trying to keep their class actions cases in state court. CAFA's exceptions are found in 28 U.S.C. §1332(d)(3) through (5) and include the following:

- the discretionary/interests of justice exception,
- the local controversy exception,
- the home state exception, and
- the state action exception.

### **A. Discretionary/Interests of Justice Exception - 28 U.S.C. §1332(d)(3)**

The discretionary/interests of justice exception allows a district court to decline jurisdiction in the interests of justice and looking at the totality of the circumstances if greater than one third but less than two-thirds 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. In exercising this discretion the court must consider: whether the claims asserted involve matters of national or interstate interest; whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States; whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction; whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

### **B. Local Controversy Exception - 28 U.S.C. §1332(d)(4)(A)**

Under the local controversy exception, a district court shall decline to exercise jurisdiction over a class action which meets the following three criteria. First, 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. Second at least one defendant is a defendant from whom significant relief is sought by members of the plaintiff class; whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and who is a citizen of the State in which the action was originally filed; and 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. Third, during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.

### **C. Home State Exception - 28 U.S.C. §1332(d)(4)(B)**

The home state exception applies when 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.

### **D. State Action Exception - 28 U.S.C. §1332(d)(5)(A)**

If the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief then the case falls within the state action exception to CAFA jurisdiction.

### **III. Arguments raised to defeat CAFA jurisdiction**

#### **A. Is this case a class action?**

CAFA applies to class actions and a class action is defined in 28 U.S.C. §1332 (d)(1) (B) as an civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing action to be brought by 1 or more representative persons as a class action. But does CAFA apply if the complaint does not specifically define a proposed class?

In *College of Dental Surgeons of Puerto Rico v. Connecticut Gen. Life Ins. Co.*, 585 F. 3d 33 (1st Cir. 2009) the First Circuit grappled with this issue. The plaintiff, the College of Dental Surgeons of Puerto Rico, brought suit on behalf of its members, consisting of licensed dentists in Puerto Rico, against multiple defendants claiming that the defendants' claims handling practices were questionable, fraudulent and economically detrimental to the members. Two defendants removed the case to federal court pursuant to CAFA. The district court remanded the case on the basis that the complaint did not sufficiently define the plaintiff class. On appeal, the remand order was vacated. The First Circuit noted that the complaint plausibly alleged claims for class-wide relief and consistently alleged harm to the members as a professional group. The appellate court rejected the argument that remand was appropriate because the case could never be certified since an association cannot be a member of a certifiable class. The Court found that the association met the standing requirements to sue on behalf of its members because the members had standing to sue in their own right, the interests the association sought to protect were germane to its purposes; and neither the claim asserted nor the declaratory relief requested required the participation of individual members in the suit. More importantly, the Court stated that class composition was not the issue at the inception of a class action. Review of the complaint alone typically is insufficient for determining if the class can be certified, so the district court's ruling on the inadequacy of the class definition was premature.

#### **B. Is this case a mass action under 28 U.S.C. §1332(d)(11)?**

In a series of cases brought in California, the plaintiffs were able to avoid CAFA jurisdiction by pleading around both the jurisdictional amount and the number of persons necessary to satisfy a mass action under §1332(d)(11).

In *Tanoh v. Dow Chemical, Co*, 561 F.3d 945 (9<sup>th</sup> Cir. 2009), *cert. denied*, 130 S. Ct. 187, 175 L. Ed. 2d 236 (2009) the defendant removed seven state court actions involving over 600 foreign nationals who claimed that they had been injured by exposure to the chemical DBCP while working on banana and pineapple plantations in the Ivory Coast. In each case of the seven cases there were fewer than 100 plaintiffs. The cases were removed to federal court on the basis of diversity jurisdiction and the mass action provisions of CAFA. Dow Chemical argued that the seven actions, taken together, constituted a mass action and that the cases had been filed separately just to frustrate the purposes of CAFA jurisdiction.

The district court disagreed and remanded the actions. Specifically, the court looked at the language in 28 U.S.C. §1332(d)(11) which specifically states that a mass action shall not include claims that are joined upon the motion of a defendant. It found that Dow Chemical's attempt to aggregate the actions for purposes of CAFA, was tantamount to doing an end-run around this limitation in the statute. On appeal, the Ninth Circuit upheld remand of the actions to state court. It rejected Dow Chemical's argument that the plaintiffs should not be allowed to structure the complaints in order to defeat CAFA jurisdiction. The appellate court did not consider cases decided under provisions other than CAFA's mass action provision to be persuasive.

See also, *Venegas v. Dole Food Co., Inc.*, 2009 U.S. Dist. LEXIS 22885 (C.D. Cal. Mar. 9, 2009), where approximately 2500 plaintiffs, banana plantation workers, filed multiple lawsuits against the same defendants alleging damages from exposure to a chemical used in banana farming operations in Costa Rica, Panama, Honduras and Guatemala. The plaintiffs were divided into groups alphabetically and by country so

that each case had less than 100 plaintiffs. Defendants removed the cases to federal court on CAFA jurisdictional grounds asserting that all the actions should be considered one action because the plaintiffs divided their claims solely for purposes of avoiding federal court jurisdiction. The motion for remand was granted. Remand was granted, in part, because nothing in CAFA suggests that the plaintiffs, as the masters of their own complaint, may not file multiple actions each with fewer than 100 plaintiffs. The court also held that the defendant had not met its burden of demonstrating that amount in controversy exceeded \$75,000 individually or \$5 million in the aggregate.

**C. Is there minimal diversity?**

**1. For purposes of federal diversity jurisdiction, a corporation is considered a citizen of the state where it is incorporated and of the state where it has its principal place of business. 28 U.S.C. §1332(c)(1). But what constitutes a corporation's principal place of business?**

In *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010), the U.S. Supreme Court addressed the meaning of principal place of business ("PPB") for diversity jurisdiction purposes. Plaintiffs, California citizens sued their employer, Hertz, in state court alleging California wage and hour law violations. They brought the suit on behalf of themselves and a class of California citizens suffering similar harms. Hertz removed the case to federal court on the basis of diversity jurisdiction, asserting that its PPB was in New Jersey. The plaintiffs moved for remand alleging that Hertz's PPB was in California. Hertz submitted a declaration to establish that its PPB was in New Jersey. In the declaration, Hertz stated that it had facilities in 44 states, that its corporate headquarters was in New Jersey, and that its core executive and administrative functions were carried out in New Jersey. With respect to the state of California, Hertz stated that it had 273 of its 1606 car rental locations there, that about 2300 of its 11,230 full time employees were in California and that its business in California amounted to about \$811 million of its \$4.371 billion in annual revenue. Based on these facts, the district court found that Hertz's PPB was in California under the Ninth's Circuit's test which required the court to examine Hertz's business on a state-by-state basis. If the amount of activity in one state is significantly larger or substantially predominates, then that is the company's PPB, but if there is no such state, then the PPB is the corporation's nerve center, i.e., the place where the majority of its executive and administrative functions are performed. After examining the plurality of Hertz's business activity in various states, the district court found that its activity in California was significant and so Hertz's PPB was in California. The Ninth Circuit affirmed the remand order and Hertz appealed.

The United States Supreme Court reversed. Noting that there were many different ways in which the various circuit courts over the years had determined what constitutes a company's PPB, the Supreme Court thought it necessary to find a single, more uniform interpretation of this statutory phrase. The Court adopted the nerve center test, holding that PPB is best read as referring to the place where a corporation's officers direct control, and coordinate the corporation's activities. In practice this should normally be the place where the corporation maintains its headquarters -- provided that the headquarters is the actual center of direction, control, and coordination, i.e., the nerve center, and not simply an office where the corporation holds its board meetings.

**2. What if the plaintiffs sue a limited liability company instead of a corporation. What is the citizenship of an LLC under CAFA?**

In *Ferrell v. Express Check Advance of SC LLC*, 591 F. 3d 698, (4<sup>th</sup> Cir. 2010), the plaintiffs filed a class action on behalf of South Carolina citizens against a payday lender for alleged violations of South Carolina law. The lender removed the case under CAFA. Following a long line of case law holding that the citizenship of an unincorporated association is determined based upon the citizenship of each of the association's members, the lender argued that there was diversity based on the citizenship of its sole member, a Missouri corporation with its PPB in Kansas.

Alternatively, the lender argued that if it was deemed an unincorporated association within the meaning of 28 U.S.C. §1332(d)(10), it was a citizen of Tennessee, under whose laws it was organized, and of Kansas where it had its PPB.

The plaintiff moved to remand, arguing that the defendant's PPB really was South Carolina, the place where it made all its loans and where all of its employees, but for its top four officers were located. The district court held that the defendant, a limited liability company, was an unincorporated association under 28 U.S.C. §1332(d)(10). Consequently, it was a citizen of the state under whose laws it is organized and of the state where it has its PPB. The district court found that the lender's PPB was in South Carolina, not Kansas, and therefore the case should be remanded.

On appeal, the Fourth Circuit affirmed. It examined the citizenship language in 28 U.S.C. §1332. Section 1332 (c)(1) provides that a corporation is a citizen of the state of its incorporation and the state of its PPB. Section 1332(d)(10) provides that the citizenship of an unincorporated association is determined by the state under whose laws it is organized and the state where it has its PPB. However, the court observed that because the provisions relating to the citizenship of corporations and of unincorporated associations are found in different sections of the statute, the provision relating to unincorporated associations in §1332(d)(10) applies only to class actions covered by CAFA. The court concluded that the term "unincorporated association" found in §1332(d)(10) refers to all non-corporate business entities. The appellate court agreed with the district court's analysis that the defendant's PPB was in South Carolina so the case was remanded.

**D. Is the amount in controversy greater than \$5 million?**

**1. Has the plaintiff alleged any amount in controversy?**

When a plaintiff does not allege an amount in controversy in the complaint, the defendant must prove by a preponderance of the evidence that CAFA's in excess of \$5 million amount in controversy has been met. As the following cases demonstrate, this is not always an easy task.

***Berniard v. Dow Chemical Co.***, 2010 U.S. App. LEXIS 16515 (5<sup>th</sup> Cir. 2010), involved the remand of seven class actions stemming from a single incident, the sudden accidental release of ethyl acrylate, a potentially noxious chemical. The release resulted in the evacuation of residents and businesses with a 2 mile area east of the facility where the release had occurred. On the day of the release, two class actions were filed in state court. Eventually, three more state court class actions were filed and two class actions were filed in federal court.

The district court examined the allegations in the pleadings to determine if it had jurisdiction under CAFA. It examined the geographical reach of the chemicals, the number of persons affected, the seriousness and extent of the injuries suffered, and the potential monetary value of the damages, including punitive damages. Upon removal, defendants had a choice to either sustain removal by: (1) adducing summary judgment evidence of the amount in controversy; or (2) demonstrating that it is facially apparent from the pleadings alone that the amount in controversy has been met. The defendants chose the latter approach.

To meet the amount in controversy requirement, the defendants offered census data of the geographical areas at issue, and compared the quantum recovery in previously reported cases involving similar incidents and injuries. This was held to be insufficient. The court noted that the defendants had improperly equated the geographic areas in which potential plaintiffs might reside with the population of the class itself. The comparison to damage recoveries in similar cases was found to be speculative. It did not matter that the plaintiffs were claiming compensatory damages, pain and suffering, psychological and long term future damages, and even punitive or exemplary damages.

In ***Pretka v. Kolter City Plaza II, Inc.***, 608 F. 3d 744, (11<sup>th</sup> Cir. 2010), the court addressed what types of evidence the defendant could present to establish the jurisdictional amount in controversy. The seven plaintiffs brought a putative class action on behalf of themselves and all other similarly situated depositors who had placed deposits on the purchase of luxury condominiums in the defendant's development in West Palm Beach, Florida. The complaint alleged breach of contract and violation of Florida's Condominium Act, and sought rescission of the purchase contracts and return of the deposits, but did not state an amount in controversy. Attached to the complaint were the plaintiffs purchase contracts showing an average deposit amount of roughly \$105,000. The complaint stated that the class was believed to consist of over 300 members.

The defendant removed the case under CAFA. In support of the removal, defendant attached a declaration of the CFO of its parent company indicating that the company had collected over \$5 million in deposits from more than 100 prospective purchasers. The plaintiffs moved for remand arguing that the court could not consider the CFO's declaration because it was not a paper received from the plaintiffs. In its opposition brief, the defendant attached another declaration from its parent company's closing manager who had reviewed the closing contracts. She stated that those contracts showed that the defendant possessed purchase deposits totaling over \$41 million.

The district court, relying on the 11<sup>th</sup> Circuit's decision in a prior case, *Lowery*, held that it could not consider either the declaration evidence in support of the amount in controversy, or the contracts of other putative class members because such documents had not been supplied by the plaintiffs. The district court also found that the first declaration impermissibly speculated as to the potential damage claim of all putative class members and the second declaration could not be considered because it had not been submitted with the notice of removal. The district court remanded the case.

The defendant appealed, and the 11<sup>th</sup> Circuit held that district court had erred in rejecting the defendant's evidence of the amount in controversy. In reaching this conclusion, it distinguished its holding in *Lowery*, and disavowed any statements in the dicta of *Lowery* that could be considered contradictory to its holding in *Pretka*. The Circuit Court held that when a case is removed under the first paragraph of 28 U.S.C. §1446(b), i.e., within 30 days of receipt of an initial pleading setting forth a claim for relief, that statutory language does not restrict the type of evidence that a defendant may use to satisfy the jurisdictional requirements for removal. This is in contrast, however, to removal under the second paragraph of 28 U.S.C. §1446(b) i.e., within 30 days of receipt of an amended pleading, motion or other paper, upon which it may first be ascertained that the case is removable. In the latter instance, the evidence to be considered is limited to reliance on receipt of an "other paper" due to a voluntary act of the plaintiff.

Contrary to the district court's ruling, the appellate court recognized that documents generated by a defendant do not necessarily involve impermissible speculation. In the instant case, the CFO's declaration contained non-speculative knowledge of the amount of every putative class member's claim which could be considered, since the claims of the individual class members could be aggregated to determine the amount in controversy. The court stated that evidence added post-removal also could be considered by the court. Consequently, upon consideration of all of the defendant's amount in controversy evidence, the remand order was rescinded.

In ***McGee v. Sentinel Offender Services LLC***, 2010 U.S. Dist. LEXIS 126842 (S.D. Ga. Nov. 30, 2010), the plaintiff challenged the defendant's CAFA removal on several grounds, including whether the amount in controversy requirement had been met. The Plaintiff filed a putative class action on behalf of all individuals previously convicted of a misdemeanor or ordinance violation in Georgia who were under probation supervised by Sentinel, a private probation company. The plaintiff sued for alleged violation of Georgia's RICO statute and sought reimbursement in an amount equal to times the amount paid to Sentinel for supervision of the class members in private probation.

Sentinel supported its CAFA removal with a declaration from its COO and Vice President, who stated that there were 35,753 individuals convicted of misdemeanors or ordinance violations in the State of

Georgia under probation supervised by Sentinel, and that Sentinel had collected \$5,675,639.20 from these individuals in supervision fees. Plaintiff challenged the declaration because it did not specify when the fees were collected, whether they were collected within the statute of limitations period, or if they had been paid by persons who were class members. The court rejected this challenge and retained jurisdiction. The court noted that the declaration set forth an amount reflective of the damages sought by the plaintiff in the complaint. The RICO claim sought the divestiture of *any* interest in the enterprise or personal property, including *all fees* collected by Sentinel. As for plaintiff's statute of limitations argument, the court noted that when determining the amount in controversy for jurisdictional purposes, it could not look past the complaint to the merits of a defense that had not yet been established.

## **2. Has the plaintiff alleged an amount in controversy less than \$5 million?**

While some plaintiffs may allege no amount in controversy in the complaint, other plaintiffs may disavow an amount that meets the jurisdictional requisite. For instance, in ***Freeman v. Blue Ridge Paper Products, Inc.***, 551 F. 3d 405 (6<sup>th</sup> Cir. 2008), the plaintiffs made every effort to avoid CAFA jurisdiction.

The claims involved 300 landowners who sued a paper mill for nuisance created by water pollution. In their first class action suit filed in 2005 in Tennessee state court, the plaintiffs asserted claims covering a 6-year period from 6/1/99 to 8/17/05. At trial in that case, they recovered an aggregate award of \$2 million.

Thereafter, plaintiffs filed an additional class action lawsuit in state court, in which they sought damages accruing after 8/17/05 until the date of trial. The name plaintiff disavowed individual damages above \$74,000 or aggregate damages above \$4.9 million. The defendant removed the suit to federal court, but it was remanded for failure to satisfy the jurisdictional amount.

After remand, the plaintiffs amended the complaint to seek damages from 8/17/05 to 2/17/06. The state court orally granted the motion to amend in December of 2007, but the written order was not entered until February of 2008. In the interim, the plaintiffs filed four more lawsuits in state court, each suit covering a different six month time period. Each complaint was essentially identical and pled the same damage limitations as the initial complaint. On February 4, 2008, the defendant removed all five cases to federal court where they were consolidated and subsequently remanded. Defendant appealed.

On appeal, the Sixth Circuit found that the CAFA threshold had been met because the \$4.9 million sought in each complaint had to be aggregated. In so holding, the court noted that the complaints were identical, except for the artificially broken up time periods, and the plaintiffs offered no colorable reason for breaking up the lawsuits other than to avoid CAFA jurisdiction. The court limited its holding to the situation where no colorable basis exists for dividing up the sought-for retrospective relief into separate time periods, other than to frustrate the purposes of CAFA. The Sixth Circuit recognized that generally a plaintiff could avoid CAFA jurisdiction by seeking amounts less than the threshold, "but where recovery is expanded, rather than limited, by virtue of splintering of lawsuits for no colorable reason, the total of such identical splintered lawsuits may be aggregated." *Id.* at 409.

## **E. Arguments for exceptions to CAFA jurisdiction**

While the party removing a case has the burden to establish that the federal court has jurisdiction under CAFA, once that burden has been met, the burden then shifts to the party seeking to remand the case to establish that a CAFA exception applies.

### **1. The Home State Exception.**

In ***Jackson v. Sprint Nextel Corp.***, 2011 U.S. Dist. LEXIS 7005, (N.D. Ill. Jan. 21, 2011) the plaintiffs sued Sprint, a Kansas Corporation alleging that Sprint conspired with other cell phone providers to impose artificially high prices for text messaging. The action was brought on behalf of a putative class of all

individuals who purchased texting from Sprint or an alleged co-conspirator from 1/1/05 to the present, had a Kansas cell phone number, received their cell phone bill at a Kansas mailing address, and paid a Kansas USF fee. Sprint removed based on CAFA jurisdiction and the plaintiffs sought remand on the basis of the home state exception.

The lower court granted remand, finding that the plaintiffs had met their burden of establishing the existence of the home state exception because Sprint was a resident of Kansas and at least two thirds of the members of the proposed class were citizens of Kansas since the class only included members with Kansas billing addresses and cell phone numbers. Sprint appealed.

On appeal the Seventh Circuit reversed, finding that the lower court could not draw conclusions about the citizenship of the class members based on information like the class members cell phone numbers and mailing addresses. Instead, the district court could have relied on evidence of citizenship obtained through affidavits or survey responses in which putative class members revealed whether they intended to remain in Kansas or were a Kansas business. Using statistical principles, the plaintiffs could then establish the two thirds number required under the home state exception. Alternatively, the court noted that the plaintiffs could have defined their class as "all Kansas citizens who purchased text messaging from Sprint Nextel or an alleged co-conspirator. The case was remanded for further proceedings.

On remand, the parties conducted jurisdictional discovery. Following the evidentiary roadmap set forth in the Seventh Circuit's opinion, the plaintiffs obtained updated customer information from Sprint and its alleged co-conspirators. The plaintiffs conducted a telephone survey of a random sample of putative class members. They searched voter registration, driver license and secretary of state records and collected Internet information to determine the citizenship of those individuals and businesses who had not answered the survey. Using this new data, the Plaintiffs renewed their motion for remand. While Sprint challenged the survey results on various grounds, in the end the court found that the plaintiffs had met their burden of establishing the elements of the home state exception. Hence the case was remanded.

## **2. The Local Controversy Exception.**

Under the local controversy exception, plaintiffs may name a local defendant from whom significant relief is sought and whose alleged conduct forms a significant basis for the claims asserted by the class, and who has not been sued in a class action in the previous three years.

Case in point, *LaFalier v. State Farm Fire & Cas. Co.*, 2010 U.S. App. LEXIS 17588 (10<sup>th</sup> Cir. 2010), where the plaintiffs owned properties located in an environmentally contaminated town in Oklahoma. The state established a Trust to purchase the properties and assist the homeowners in relocating. During the purchase/relocation process, many homes were damaged by a tornado. The Trust then offset any amounts the plaintiffs might receive from insurance against the amounts the plaintiffs would receive under the Trust. The plaintiffs eventually brought suit against two individuals responsible for administering the Trust, and two appraisal companies, alleging that the defendants deliberately used appraisals that undervalued the properties, and conducted secret proceedings concerning the appraisals. The plaintiffs also sued ten insurance companies, three from Oklahoma and ten from out of state, alleging that the insurers paid only cash value for the tornado damage because they knew the properties would not be repaired or replaced, failed to reveal all coverage available, and improperly leveraged Trust offsets to urge the insureds to accept lower payments.

State Farm removed the case pursuant to CAFA. The plaintiffs moved for remand under the local controversy exception and the case was remanded. The insurers appealed, but remand was upheld. The insurers argued that the claims against the Trust defendants had been misjoined with the claims against the insurers, consequently, the Trust defendant claims should have been ignored for purposes of analyzing the local controversy exception. The district court disagreed. Every plaintiff had a claim against the Trust defendants, but not every plaintiff had a claim against each named defendant insurer. The Trust defendants were local defendants from whom significant relief was sought and whose conduct formed a significant basis

for the claims asserted. The doctrine of procedural misjoinder had not been adopted in the Tenth Circuit, and even if it had, it was not clear that the severed claims against the insurers would meet CAFA's jurisdictional requirements of over 100 class members and in excess of \$5,000,000.

The lower court also rejected the insurers' contention that an earlier lawsuit filed by these plaintiffs against the Trust itself, and not against the current named Trust defendants, meant that the plaintiffs could not satisfy the last prong of the local controversy exception. On appeal the Tenth Circuit agreed with the district court, noting that the plain language of 28 U.S.C. §1332(d)(4)(A)(ii) says there must be a prior action "against any of the defendants" and not "against any of the defendants *or parties in privity with them*" as the insurers would have had the court interpret the statute. The Tenth Circuit also noted that State Farm had admitted that not every plaintiff had a claim against an insurer, and there was nothing before the court to demonstrate that at least 100 plaintiffs had claims against the insurers.

### **3. The Discretionary/Interests of Justice exception**

If greater than one third but less than two-thirds 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 the discretionary exception may apply. One of the difficulties in addressing this exception is that the term "primary defendant" is not defined in CAFA. The definition is important because the statute requires that "all" of the primary defendants be residents of the state where the suit was filed.

In *Powell v. Tosh*, 40 Env'tl. L. Rep. 20251, 2009 U.S. Dist. LEXIS 98564 (W.D. Ky. Oct. 21, 2009), the plaintiffs sought to remand their case to state court based, in part, on CAFA's discretionary exception. The plaintiffs, 28 Kentucky landowners, brought a class action nuisance lawsuit against nine defendants alleging that noxious fumes from the defendants' hog farm operations were negatively impacting the value of the plaintiffs' property and causing personal injuries. Among the defendants were the local operators of the hog farms as well as some diverse defendants who were the owners of the hogs on those farms.

While it was undisputed that the CAFA's jurisdictional requirements had been met, the plaintiffs argued that the case should be remanded pursuant to two of CAFA's mandatory exceptions, the local controversy exception and the discretionary exception. With respect to the discretionary exception, the plaintiffs argued that greater than one third but less than two-thirds of the members of the proposed class were citizens of Kentucky and the court agreed. Next, the plaintiffs argued that the primary defendants were citizens of Kentucky. The court disagreed.

The court looked at the language of the exception and determined that the requirement that the primary defendants be citizens of the state where the suit was filed, meant "all" of the primary defendants. Next, the court examined the complaint and noted that all members of the plaintiff class had claims against the diverse defendants. Accordingly, those defendants appeared to be the real targets of the class action. Also indicative of their status as primary defendants was the fact that the diverse defendants had been sued directly and were the subject of a significant portion of the claims asserted by the plaintiffs.

### **4. The State Action Exception**

One of the least argued exceptions to CAFA jurisdiction is the state action exception which applies if the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief. Like the discretionary exception, the state action exception also contains the language "primary defendants" which has been interpreted to mean "all" the primary defendants must be state actors.

The question then turns on whether the defendants can be considered States, State officials or other governmental entities against whom the district court may be foreclosed from ordering relief. The purpose behind the enactment of 28 U.S.C. §1332(d)(5)(A) was to prevent states, state officials or

governmental entities from removing a case to federal court, and then arguing that due to immunity the federal court would be prohibited from ordering the relief requested by the plaintiff.

The issue was addressed in *Frazier v. Pioneer Americas LLC*, 455 F.3d 542 (5<sup>th</sup> Cir. 2006) where the plaintiffs brought a class action against the operator of hydrogen processing equipment and the Louisiana Department of Environmental Quality ("DEQ") for damages allegedly caused by seeping mercury. Pioneer removed the case pursuant to CAFA. The plaintiffs moved for remand on multiple grounds including that CAFA's state action exception applied. The district court denied remand and the plaintiffs appealed. On appeal, the plaintiffs argued that the DEQ was both a primary defendant and a state entity so remand was appropriate. The Fifth Circuit disagreed because the statute requires "all" primary defendants to be States, State Officials or other governmental entities and Pioneer also was a primary defendant. The court rejected the plaintiffs' argument that such a result violated the 11<sup>th</sup> Amendment and the principles of state sovereign immunity. The appellate court noted that unless the state joins in the removal, which it is not required to do so under CAFA, it does not waive its right to assert sovereign immunity. Furthermore, the court may ignore sovereign immunity until the state asserts it. The fact that absent waiver of the immunity, the court may not be able to order relief against the state, does not mean the court cannot assume jurisdiction over a case involving a state.

### **CONCLUSION**

In the six years since CAFA's enactment, the courts have seen many arguments against CAFA jurisdiction. Several of these arguments could not have been foreseen by the drafters of the legislation. In the coming year, we should expect to see more arguments relating to calculation of the amount in controversy, interpretation of the "mass action" provisions, and interpretation of CAFA exceptions containing undefined phrases such as "primary defendant" and "significant relief."