



## Class Action

### *Class Action Fairness Act Provides New Opportunities for Removal*



The Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (“CAFA”), became law on February 18, 2005, and made significant changes to class action jurisdiction and procedure in federal courts.

In the year since CAFA’s enactment, a significant body of law has developed interpreting the act, and practitioners should remain familiar with the key provisions of CAFA to determine whether a removal to federal court is appropriate.

CAFA’s new jurisdictional rule, 28 U.S.C. § 1332(d)(2), expands federal court diversity jurisdiction, with certain exceptions, to include class actions with more than 100 class members, provided at least one class member is diverse from one defendant, and the total controversy is more than \$5 million. CAFA contains four exceptions to the new minimal diversity requirements, the most common concerns cases with a connection to the forum state. Two of the exceptions are the “local controversy” and “defendant’s home state” exceptions. For the “local controversy” exception, federal courts *must* decline subject matter jurisdiction when more than two-thirds of the class members are from the forum state; and either the primary defendant is from that state, or a significant defendant is from that state; the principal injuries were incurred in-state; and no other class action has been filed in the preceding three years. For the “defendant’s home state” exception, federal courts *may* decline subject matter jurisdiction in the interests of justice, looking at the totality of the circumstances, when more than one-third but less than two-thirds of the class members are from the forum state, and the primary defendants are from that state. CAFA also contains exceptions for class actions related to Delaware corporate law, certain securities class actions, and civil rights class actions.

Although the provisions in CAFA are not retroactive, in certain narrow instances a claim filed prior to February 18, 2005, can be removed to federal court if subsequent events support a removal. Depending on the nature of your case and the specific facts, certain issues once regarded as settled may give rise to a removal and opportunity to litigate in federal court.

Initially, one of the most active areas of litigation related to CAFA has been when a case is “commenced” for purposes of removal if the case was filed in state court prior to CAFA becoming law. Generally it is settled that “commenced” for purposes of CAFA means “filed” rather than “removed.” See *Natale v. Pfizer, Inc.*, 424 F.3d 43

(1st Cir. 2005); *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805 (7th Cir. 2005) (Knudsen I); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090 (10th Cir. 2005).

What constitutes the commencement of an action in state court is determined by that state’s own laws and rules of procedure. Although it would seem to be clear, a case may actually be “commenced” for removal purposes at times other than when it was actually filed in state court. Late service on a defendant, the addition of a new defendant, or the addition of a new claim may trigger a new commencement date under state law and allow a removal under CAFA. This is illustrated by *Dinkel v. General Motors Corp.*, 400 F. Supp. 2d 289 (D. Me. 2005). Under Kansas law, a suit is “commenced” when it is filed with the clerk of the court if service of process is made within 90 days, but a suit is “commenced” upon service of process if service is made more than 90 days after the suit is filed. In *Dinkel* the court found that the suit was “commenced” when the removing defendants were served with process – after CAFA’s effective date. This late service triggered a new window for removal, and allowed the late-served defendants to remove the entire case to federal court. See also, *Knudsen v. Liberty Mut. Ins. Co.*, No. 05-8037, 2006 WL 197133 (7th Cir. Jan. 27, 2006) (Knudsen II) (second removal upheld, a novel claim added to an existing case commences new litigation for purposes of CAFA); *Eufaula Drugs, Inc. v. TDI Managed Care Services, Inc.*, No. 2:05-CV-293-F, 2005 WL 3440635 (M.D. Ala. Dec. 14, 2005) (remand denied for suit filed prior to enactment of CAFA, because under Alabama law the failure to immediately provide summonses to the clerk of court resulted in the action being “commenced” after the effective date of CAFA); *Heaphy v. State Farm Mut. Auto Ins. Co.*, No. C05 5404RBL, 2005 WL 1950244 (W.D. Wash. Aug. 15, 2005) (new claims in first amended complaint were independent of original contentions, did not relate back to date of original complaint, and constituted new litigation under CAFA allowing removal). But see, *Plubell v. Merck & Co., Inc.*, No. 05-4217, 2006 WL 141661 (8th Cir. January 20, 2006) (affirming remand where amended petition substituting new class representative related back to original petition filed before enactment of CAFA).

Whenever a new party is added to a suit, or a case materially changes, CAFA may provide federal court jurisdiction and the case should be examined to determine whether a removal is warranted.

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