ARMSTRONG TEASDALE LLP

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CLASS ACTION PRACTICE GROUP

2005 YEAR IN REVIEW

2005 brought perhaps the most significant development in class action practice and procedure in decades – the passage of the Class Action Fairness Act ("CAFA") on February 17. In the wake of CAFA's passage, the federal courts have already issued numerous decisions regarding the new law.

2005 was busy on other fronts as well, right down to the closing weeks of the year. In particular, on December 15 the Illinois Supreme Court reversed a multi-billion dollar class action verdict, its second such action of the year. And finally, also in December, the United States Supreme Court clarified a persistent conflict of statutory interpretation, finding that courts may not presumptively award attorney fees when remanding improperly removed cases. If this late-year decisional activity is any predictor of things to come, it seems 2006 will be another year of important class action developments.

CAFA UPDATE

As widely reported and discussed, CAFA was passed to permit the litigation of more class actions in federal court. CAFA eliminated the major jurisdictional hurdles faced by defendants in the past, which had precluded removal of state court class actions to federal court based on diversity jurisdiction grounds. Stated generally, CAFA allows removal of a class action from state court to federal court if any putative class member and any defendant are citizens of different states and the aggregate amount in controversy exceeds $5 million.

The early litigation over CAFA has focused on the application of a February 17 effective date to cases already pending. The Seventh and Tenth Circuits took the initial lead in ruling that cases were "commenced" as of their initial filing in state court, and not as of their removal to federal court. See Pritchett v. Office Depot, Inc., 420 F.3d 1090 (10th Cir. 2005); Knudsen v. Liberty Mutual Insurance Co., 411 F.3d 805 (7th Cir. 2005). These decisions leave open the question whether some post-CAFA amendments to pre-existing class action allegations could serve as a basis for removal, a question that our Class Action Practice Group has been litigating. The decisions on this question are mixed. For instance, a Missouri federal judge has held that a post-CAFA amendment adding more specific allegations to a class action complaint was not sufficient for removal, while a Georgia federal judge allowed removal where an amendment expanded the class action complaint from a four year period to a sixteen year period. Compare Lee v. CitiMortgage, Inc., 2005 WL 2456955 (E.D. Mo. Oct. 5, 2005) with Senterfitt v. SunTrust Mortgage, Inc., 2005 WL 2100594 (S.D. Ga. Aug. 31, 2005). On January 20, the Eighth Circuit held that an amendment replacing a class representative was not sufficient to support removal. Plubell v. Merck & Co., 2006 WL 141661 (8th Cir. Jan. 20, 2006). The answers on this question will, it seems, be driven largely by the individual fact scenarios in the cases.

A second area of focus for the early CAFA litigation has been whether CAFA shifts the burden of proof in a remand dispute from the removing party to the party seeking remand. Some legislative history would suggest that CAFA was intended to shift the burden. But the Seventh Circuit, the first circuit to decide the issue, has ruled against that position. Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005). Numerous district courts have ruled the other way, see, e.g., Berry v. American Express Publishing Corp., 381 F. Supp. 2d 1118 (C.D. Cal. 2005), and this question will no doubt be the subject of continuing litigation.

In 2006, look for a continuing surge of CAFA litigation. As new cases are filed and existing cases mature, additional CAFA provisions, such as the regulation of class action settlements, are likely to be tested and interpreted for the first time.

ILLINOIS REVERSES ANOTHER HUGE CLASS ACTION VERDICT

Over the summer, the Illinois Supreme Court reversed a billion dollar class action verdict, rejecting class treatment of contract and consumer fraud claims relating to auto insurance terms. Avery v. State Farm Mutual Automobile Insurance Co., 216 Ill. 2d 100 (2005). On December 15, the same court reversed a ten billion dollar verdict against a tobacco company on claims that customers were mislead by the labeling and advertising of "light" and "low tar" cigarettes. Price v. Philip Morris, Inc., 2005 WL 3434368 (Ill. Dec. 15, 2005). The court's relatively narrow decision was based on an exception to the Illinois consumer fraud statute for actions authorized by federal law. The court found that the Federal Trade Commission had allowed tobacco companies to describe their products as "light" and "low," so long as the description was accompanied by disclosure of the tar and nicotine content of the product. The court did, however, express independent skepticism about the trial court's decision to certify a class action in the case. When combined with the prior decision in Avery, the language in Price sends a strong signal to the Illinois trial courts that they must scrupulously apply the standards for class certification.

SUPREME COURT RESTRICTS FEE AWARDS FOR FAILED REMOVALS

Removal practice has always been important in the area of class action litigation, and that is even more true with the passage of CAFA. One of the troublesome open questions in removal practice has been the standard for awarding attorney fees against the removing defendant when a removal is improper and remand is ordered. The applicable federal statute, 28 U.S.C. § 1447(c), simply says that courts "may" allow such an award. The U.S. Supreme Court resolved a conflict in the circuits on this question on December 7. Martin v. Franklin Capital Corp., 126 S. Ct. 704 (2005). Rejecting, among others, the Seventh Circuit's position that the plaintiff was presumptively entitled to an award of fees where the removal was improper, the Court held instead that, absent unusual circumstances, courts may award attorney fees under the statute only where the removing party lacked an objectively reasonable basis for seeking removal. Accordingly, fee awards for failed removals should become more rare, and are likely to occur only in extreme cases.

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