dri
The Voice of the Defense Bar




The Business Suit

The Newsletter of the Commercial Litigation Committee

2/4/2014 Volume 17 Issue 1

In this Issue

Committee Leadership

Committee Chair
Kathleen A. Lang
Dickinson Wright
klang@dickinsonwright.com

Vice Chair
Christopher T. Sheean

A Second Bite at the Apple? CAFA Jurisdiction After Class Certification Denial

by Steven P. Benenson and John T. Chester

The Class Action Fairness Act of 2005 ("CAFA") expanded federal jurisdiction over class actions by granting district courts original jurisdiction over putative class actions in which minimal (rather than complete) diversity exists and the amount in controversy exceeds $5 million. *See* 28 U.S.C. § 1332 (d)(2). CAFA defines "class action" as "any civil action filed under [Federal Rule of Civil Procedure 23] or similar State statute or rule . . . ." *Id*. at (d)(1)(B). The claims of individual class members are aggregated to determine whether the amount in controversy exceeds the CAFA jurisdictional threshold. *Id*. at (d)(6).

By enacting CAFA, "Congress sought to check what it considered to be the overreadiness of some state courts to certify class actions." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 130 S.Ct. 1431, 1473 (2010) (Ginsburg, J., dissenting) (citing CAFA's legislative history). CAFA prevents lawyers from "gam[ing] the procedural rules [to] keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes." *Id*. (quoting S. Rep. No. 109-14, p. 4 (2005)). Under CAFA, "Congress envisioned fewer—not more—class actions overall." *Id*.

In its first decision addressing a CAFA-jurisdiction issue, the Supreme Court in *Standard Fire Insurance Co. v. Knowles*,133 S.Ct. 1345(2013), held earlier this year that a stipulation in the plaintiff's complaint that he and the putative class would seek less than $5 million in damages does not defeat CAFA jurisdiction because a proposed class representative cannot legally bind absent class members before a class is certified. In so holding, the unanimous Court rejected the plaintiff's attempt to game procedural rules to preclude federal jurisdiction and thereby keep a case in state court.

But what happens if a federal court denies class certification under Rule 23 and—as a result—the amount in controversy falls below CAFA's jurisdictional threshold? Does the district court retain federal jurisdiction? The impact that a federal court's denial of class certification has on CAFA jurisdiction is not readily apparent on the face of the statutory text—and may even be counterintuitive. In fact, when class certification is denied, it could be tempting to agree to a voluntary dismissal without prejudice because the amount in controversy has fallen below CAFA's $5 million threshold. Doing so, however, could be to snatch defeat from the jaws of victory in that it could allow the plaintiff "to take another bite at the certification apple in state court under the same facts but potentially different certification standards." *Samuel v. Universal Health Servs*., 805 F. Supp. 2d 284, 290 (E.D. La. 2011). Indeed, some courts have concluded that in such circumstances, federal jurisdiction under CAFA fails and the case must be dismissed (if it was originally filed in federal court) or remanded (if the case was removed). Unfortunately, this could "trigger a whole new round of litigation in state court on the same issues"—arguably defeating Congress' intent that CAFA expand federal jurisdiction to help stem the tide of class certifications by state courts. *See Robinson v. Hornell Brewing Co*., 2012 WL 6213777, *8 (D.N.J. Dec. 13, 2012); *see also id.* at *15.

In 2009, the Eleventh Circuit in *Vega v. T-Mobile USA, Inc*., 564 F.3d 1256, 1268 n. 12 (11th Cir. 2009), held that a plaintiff's failure to establish the requirements for

Swanson Martin & Bell
csheean@smbtrials.com

Publications Chair
Stephen P. Laitinen
Larson King
slaitinen@larsonking.com

class certification under Rule 23 "does not divest a federal court of subject matter jurisdiction under [CAFA]." The court reasoned that, in removed cases, jurisdictional facts are assessed *at the time of removal* and post-removal events generally do not alter jurisdiction. *Id*.

As of the date *Vega* was decided, however, no other circuit courts had weighed in and there was a split of authority among district courts as to whether federal jurisdiction under CAFA remains if class certification is denied. *See*, *e.g.*, *Rivera v. Washington Mutual Bank*, 637 F. Supp. 2d 256, 263 n. 8 (D.N.J. 2009) ("[t]he Third Circuit has not ruled on the issue and district courts within the circuit have come to conflicting conclusions") (citations omitted);[1]*see also Robinson*, 2012 WL 6213777 at *12 (D.N.J. Dec. 13, 2012) (same) (citations omitted).

Since 2009, however, several other circuits have joined the Eleventh Circuit in holding that CAFA jurisdiction persists when class certification is denied. *See* *Metz v. Unizan Bank*, 649 F.3d 492, 500 (6th Cir. 2011); *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806 (7th Cir. 2010); *Buetow v. A.L.S. Enters., Inc.*, 650 F.3d 1178, 1182 n. 2 (8th Cir. 2011); *United Steel v. Shell Oil Co.*, 602 F.3d 1087, 1091-92 (9th Cir. 2010). The other circuit courts have not squarely addressed the issue to date. None of them have rejected this line of cases.[2]

In *Metz*, the Sixth Circuit acknowledged that "CAFA does not specifically address whether a district court may retain jurisdiction following the denial of class certification." *Metz*,649 F.3d at 500. Notwithstanding, the court concluded that by defining a class action as any civil action "filed under" Federal Rule of Civil Procedure 23 or similar state statute or rule, "it is the time of filing that matters for determining jurisdiction under CAFA." *Id*. This is consistent with the general jurisdictional principle that "if jurisdiction exists as the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Id*. at 500-01 (citations omitted).[3] "Congress did not base CAFA jurisdiction on a civil action being 'certified' as a class action, but instead on an action being 'filed under' the rule governing class actions." *Id*. at 500. Although it recognized that some district courts have relied upon other language in CAFA to reach a contrary result, the *Metz* court concluded that a district court retains CAFA jurisdiction following denial of class certification. *Id*. at 500-501.

In the frequently-cited *Cunningham Charter* case, the Seventh Circuit similarly held that in a case removed under CAFA, subject matter jurisdiction is not lost if class certification is denied. This conclusion "vindicates the general principle that jurisdiction once properly invoked is not lost by developments after a suit is filed . . . ." 592 F.3d at 807 (citing, *inter alia*, *St. Paul Mercury Indem. v. Red Cab Co.*, 303 U.S. 283, 293-95 (1938)); *see also* Senate Report for CAFA, S. Rep. No. 109-14 at 60-61 (2005) (recognizing that under *St. Paul Mercury*, "events occurring subsequent to removal which reduce the amount recoverable . . . do not oust the district court's jurisdiction once it has attached").

Some district courts, however, have interpreted CAFA to require dismissal or remand if class certification is denied. For instance, in *Epps v. JP Morgan Chase Bank, N.A.*, 2012 WL 5250538 (D.Md. Oct. 22, 2012), the court stated:

> Courts around the country have split . . . . Under [one] line of reasoning a denial of class certification . . . yields the same result as a change to the residency of the parties or the amount in controversy: jurisdiction is not destroyed. Another group of cases holds that remand to state court or dismissal is appropriate when certification is denied because the denial is a determination that a class action did not exist *at the time of removal,* therefore, removal jurisdiction never existed.
>
> The Court will follow this latter line of cases for two reasons. First, they are more faithful to the text and intent of CAFA. CAFA clearly requires the existence of a "class action," 42 U.S.C. § 1332(d)(2), which it defines as any action filed under Rule 23. *Id.* § 1332(d)(1)(B). Courts following this line of reasoning have astutely recognized that a "class action" is unl kely to exist at the time the case is filed in or removed to federal court. This is because Rule 23 requires a party seeking certification to meet the . . . requirements of Rule 23(a) *and* it requires action by the court to "determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). The certification requirement distinguishes the existence of a class action from jurisdictional facts such as minimum diversity or an amount in

> controversy requirement, which must be alleged to exist at the time of removal and which, if subsequently eliminated, would not destroy jurisdiction. Rather, it suggests that Congress intended the existence of a class action to be a legal conclusion that the district court must reach in order for jurisdiction to properly exist in the first place. Second, this line of cases hews closer to the overarching and important principle that federal courts are courts of limited jurisdiction. . . .

Id. at *10 (internal citations, quotation marks, and footnotes omitted; emphasis in original).

As Judge Richard Posner asserted in *Cunningham Charter*, however, courts that have concluded that CAFA jurisdiction does not depend on certification adopt the "better interpretation," because it would be contrary to CAFA's purpose if a case could proceed as a putative class action in state court after a federal court's denial of class certification. 592 F.3d at 806-07. Judge Posner explained:

> Behind the principle that jurisdiction once obtained normally is secure is a desire to minimize expense and delay. If at all possible, therefore, a case should stay in the system that first acquired jurisdiction. It should not be shunted between court systems; litigation is not ping-pong. . . . An even more important consideration is that the policy behind [CAFA] would be thwarted if because of a remand a suit that was within the scope of the Act by virtue of having been filed as a class action ended up being litigated as a class action in state court.

592 F.3d at 807.

In conclusion, although there is a consensus among the Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, the jurisprudence is still developing and it is important to be familiar with the issues.

Steven P. Benenson *is a senior Principal of Porzio, Bromberg & Newman, PC in Morristown, New Jersey, and chair of the firm's Litigation Practice Group.* ***John T. Chester*** *is Counsel with Porzio and is a member of the firm's Litigation Practice and Life Sciences Groups. They represent public and private companies in high-stakes and "bet-the-company" class-action, commercial, business, and product-liability litigation in trial and appellate courts across the country.*

Steven Beneson, Porzio, Bromberg & Newman, PC, spbenenson@pbnlaw.com *or 973.889.4339.*

John Chester, Porzio, Bromberg & Newman, PC, jtchester@pbnlaw.com *or 973.889.4102*.

[1]The *Rivera* court noted its disagreement with the Eleventh Circuit in *Vega* and other courts that had made similar rulings. 637 F. Supp. 2d at 263 n. 8 (citations omitted). The *Rivera* court cited *Falcon v. Philips Electronics North America Corp.*, 489 F. Supp.2d 367, 368 (S.D.N.Y. 2007) for its statement that, if class certification is "denied on a basis that precludes even the reasonably foreseeable possibility of subsequent class certification in the future, the Court may lose jurisdiction at that point." *Id*. (noting that the denial of class certification in *Falcon* was affirmed by the Second Circuit at 304 Fed.Appx. 896 (2d Cir. 2008) with "no comment about the district court's attendant dismissal for lack of CAFA jurisdiction"); *but see Weiner v. Snapple Beverage Corp.*, 2011 WL 196930, *2 (S.D.N.Y. Jan. 21, 2011) (*contra*).

[2] As noted, the Third Circuit has yet to rule on the issue. Nor have the First, Second, Fourth, Fifth or Tenth Circuits. *See Puerto Rico Coll. of Dental Surgeons v. Triple S Mgmt. Inc.*, 290 F.R.D. 19, 32 (D.P.R. 2013) ("[t]he question whether jurisdiction under CAFA still exists following decertification is an open question within the First Circuit"); *Gagasoules v. MBF Leasing LLC*, 286 F.R.D. 205 (E.D.N.Y. 2012) (stating that the Second Circuit has not addressed whether subject matter jurisdiction survives a denial of class certification); *Carter v. Allstate Ins. Co.*, 2012 WL 3637239 (N.D.W.Va. Aug. 21, 2012) (reviewing Courts of Appeal decisions outside the Fourth Circuit, and holding that CAFA jurisdiction was not divested by the defendants' motion to strike class action allegations); *Samuel v. Universal Health Servs.*, 805 F. Supp. 2d 284, 287 (E.D. La 2011) (stating that the Fifth Circuit has not addressed the issue, and that district courts are divided, but that the tide has shifted "in favor of finding jurisdiction post-denial"); *Sims v. Carrington Mortgage Services, L.L.C.*, __ Fed. Appx. __, 2013 WL 4083287, *2 n. 8(5th Cir. Aug. 14, 2013) (not reaching issue of CAFA jurisdiction); *Burdette v. Vigindustries Inc.*, 2012 WL 5505095, *2 (D. Kan. Nov. 13, 2012) ("predict[ing] that the Tenth Circuit would follow the other courts of appeal that have considered whether the denial of class certification divests the federal courts of jurisdiction in a case properly removed

under CAFA," and holding that it does not). On the other hand, district courts in these circuits have continued to split on the issue.

[3] The *Metz* court commented that "a contrary reading of CAFA would mean that a district court would be unable to revisit an order denying class certification because it would no longer have subject matter jurisdiction. Such an interpretation would nullify [Rule] 23(c)(1)(C), which provides that '[a]n order that grants or denies class certification may be altered or amended before final judgment.'" 649 F.3d at 501. Moreover, the court noted that if Congress meant to divest district courts of jurisdiction following denial of class certification, it could have said so explicitly. *Id*. at 500 n. 3 (citing an earlier version of CAFA that would have required dismissal of any case subject to the jurisdiction of the court if the court determines that it may not proceed as a class action under Rule 23); *see also Lewis v. Ford Motor Co*., 685 F. Supp. 2d 557, 568 (W.D. Pa. 2010) (asserting that Congress' omission of a proposed CAFA provision that would have mandated dismissal of actions that did not satisfy Rule 23 "reflects a Congressional intent to allow cases which were originally filed as class actions . . . to continue in federal court even after certification is denied").