



Class Action Fairness Act of 2005 (CAFA): Overview

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This Practice Note discusses the Class Action Fairness Act of 2005 (CAFA), which significantly expanded federal diversity jurisdiction over class and mass actions. Specifically this Note reviews CAFA's requirements for federal diversity jurisdiction over class and mass actions, the enumerated exceptions to federal jurisdiction, removal and class action settlements.

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On February 18, 2005, Congress enacted the Class Action Fairness Act of 2005 (CAFA), significantly expanding federal diversity jurisdiction over most class actions and mass actions (28 U.S.C. § 1332(d)). CAFA also enacted new rules and procedures related to removal (28 U.S.C. § 1453) and to settling class actions (28 U.S.C. §§ 1711-1715).

This Note outlines CAFA's provisions concerning:

- Expanded federal diversity jurisdiction over class actions.
- Certain enumerated exceptions to federal jurisdiction.
- Expanded federal diversity jurisdiction over mass actions.
- Removal.
- Class action settlements.

This Note is not intended to be a comprehensive assessment of all class action requirements, but rather outlines the procedural requirements effectuated through CAFA.

CLASS ACTION DEFINED UNDER CAFA

CAFA defines a class action as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action" (28 U.S.C. § 1332(d)(1)(B); 28 U.S.C. § 1711(2) (definition includes a removed action)).

A class need not be certified before a court may assert federal jurisdiction over the action under CAFA (28 U.S.C. § 1332(d)(8)).

FEDERAL DIVERSITY JURISDICTION OVER CLASS ACTIONS

CAFA's hallmark feature is its expansion of federal courts' discretion to exercise diversity jurisdiction over class actions. CAFA notably:

- Increased the amount in controversy requirement from \$75,000 to \$5 million, but relaxed the threshold standard by requiring the \$5 million to represent the aggregate sum of each individual plaintiff's claims (28 U.S.C. § 1332(d)(2), (6); see *Amount in Controversy in Class Actions*).
- Relaxed the requirement that all plaintiffs be diverse from all defendants to allow jurisdiction where at least one plaintiff is diverse from at least one defendant (28 U.S.C. § 1332(d)(2); see *Minimal Geographic Diversity between Plaintiffs and Defendants*).

For a full comparison between CAFA and traditional diversity rules, see *CAFA Jurisdiction Comparison Chart* (<http://us.practicallaw.com/8-532-3326>).

Amount in Controversy in Class Actions

CAFA changed the amount in controversy requirement for determining whether diversity jurisdiction exists over class actions. This section explains what rule changes were made and the practical implications of those changes, including:

- The amount in controversy requirement (see *Amount in Controversy Must Exceed \$5 Million Aggregated*).
- Relief that can be considered in calculating the amount in controversy (see *Calculating the Amount in Controversy*).
- Plaintiffs' attempts to disaggregate claims to limit the amount in controversy (see *Plaintiffs' Attempts to Avoid CAFA's Monetary Threshold*).

Amount in Controversy Must Exceed \$5 Million Aggregated

To qualify as a class action under CAFA, the amount in controversy must exceed the sum or value of \$5 million, exclusive of interest and costs (28 U.S.C. § 1332(d)(2)). Importantly, the claims of individual class members are **aggregated** when determining whether CAFA's \$5 million jurisdictional threshold is met (28 U.S.C. § 1332(d)(6)).

This represents a significant departure from how the amount in controversy was traditionally calculated for class actions started in or removed to federal court on diversity grounds. Before CAFA, at least one plaintiff class member had to assert a claim equaling or exceeding \$75,000, exclusive of interest and costs (see *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 566 (2005)). Courts could then exercise supplemental jurisdiction over any other diverse plaintiff seeking less than the \$75,000 monetary threshold (*Exxon Mobil Corp.*, 545 U.S. at 566). By contrast, under CAFA, the sum of all individual plaintiff class members' claims must total more than \$5 million, but no individual claim must total a threshold sum (see, for example, *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118, 1122 (11th Cir. 2010); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 59 (2d Cir. 2006)).

Calculating the Amount in Controversy

The court may consider the following types of relief when calculating the amount in controversy:

- Compensatory damages (see, for example, *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1245 (10th Cir. 2012)).
- Statutory damages (see, for example, *Blockbuster*, 472 F.3d at 55).
- Punitive damages (see, for example, *Frederick*, 683 F.3d at 1245, 1248).
- Attorneys' fees, where authorized by statute (see, for example, *Kerbs v. Safeco Ins. Co. of Illinois, No. 11-cv-1642*, 2011 WL 6012497, at *2 (W.D. Wash. Dec. 1, 2011)).
- Equitable relief sought by the plaintiff class (see, for example, *Keeling v. Esurance Ins. Co.*, 660 F.3d 273, 274 (7th Cir. 2011)).

Plaintiffs' Attempts to Avoid CAFA's Monetary Threshold

To avoid triggering removal under CAFA, plaintiffs sometimes may try to divide an action into separate lawsuits and limit the amount in controversy for each suit to less than CAFA's \$5 million threshold. Courts may not support attempts to disaggregate claims to subvert removal under CAFA (compare *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407-08 (6th Cir. 2008) (denying disaggregation between separate class actions because "there was no colorable reason for breaking up the lawsuit in this fashion, other than to avoid federal jurisdiction") with *Marple v. T-Mobile Cent. LLC*, 639 F.3d 1109, 1111 (8th Cir. 2011) (allowing disaggregation between lawsuits "where there is no indication that Marple artificially divided the lawsuit to avoid the CAFA")).

Using another mechanism to avoid removal under CAFA, some plaintiffs have sought to enter into pre-certification stipulations on behalf of the entire class agreeing not to seek more than \$5 million in damages. The Supreme Court, however, has held that these pre-certification stipulations are not binding on absent class members and therefore do not serve as an impediment to CAFA jurisdiction (see *Standard Fire Ins. Co. v. Knowles*, 133

S. Ct. 1345, 1348 (2013); *Legal Update, Supreme Court: CAFA Jurisdiction Not Defeated by Named Plaintiff's Stipulation to Seek Less than \$5 Million* (<http://us.practicallaw.com/1-525-2884>)).

For a discussion of the ways in which plaintiffs have attempted to avoid CAFA jurisdiction, see *Article, CAFA Mass Actions: Will Courts Continue to Permit Plaintiffs to Game the System?* (<http://us.practicallaw.com/8-537-7705>)

Minimal Geographic Diversity between Plaintiffs and Defendants

CAFA also changed the geographic diversity requirements needed to support diversity jurisdiction, extending jurisdiction over class actions where there is "minimal diversity" between any class member and any defendant. This section outlines the key points to consider in determining whether minimal diversity exists under CAFA.

Determining Whether Minimal Diversity Exists: General Rule

Under CAFA, geographic minimal diversity is met when any member of a class of plaintiffs is:

- A citizen of a state different from any defendant.
- A foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a state.
- A citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state.

(28 U.S.C. § 1332(d)(2)(A)-(C).) In other words, if any class member is diverse from any defendant, minimal diversity is met (28 U.S.C. § 1332(d)(2); *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1194 n.24 (11th Cir. 2007)).

Named and Unnamed Class Members Are Included

To determine whether minimal diversity exists or whether a geography-based exception to CAFA applies, the citizenship of all class members (including putative), both named and unnamed, is considered (28 U.S.C. § 1332(d)(1)(D); see *Exceptions Based on Geography*). This represents a change from traditional diversity requirements in class actions in which diversity between class representatives and defendants was examined for complete diversity (see *Snyder v. Harris*, 394 U.S. 332, 340 (1969)).

As a result of this change, the citizenship of absent class members, whose specific whereabouts may be unknown, may be subject to dispute between the parties and ultimate determination by the court (see, for example, *Handforth v. Stenotype Inst. of Jacksonville, Inc.*, No. 09-cv-361, 2010 WL 55578, at *2-3 (M.D. Fla. Jan. 4, 2010) (permitting limited discovery and finding insufficient evidence to conclude that there were any diverse class members); and see *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 571-72 (5th Cir. 2011) (looking at census data and other statistics to determine whether a geography-based exception applied)).



Relevant Dates for Determining Citizenship

CAFA has specific provisions for the point in time when plaintiff class members' citizenship is determined:

- Citizenship is first considered as of the filing date of the complaint or amended complaint.
- If the initial pleading does not state facts supporting federal jurisdiction, then citizenship is considered as of the date plaintiffs serve an amended pleading, motion or other paper indicating the existence of federal jurisdiction.

(28 U.S.C. § 1332(d)(7).)

This section seems to permit the citizenship of plaintiff class members to alternatively be determined as of the date the state court complaint was filed **or** at a later date if facts supporting diversity jurisdiction arise later (see *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 152 (3d Cir. 2009) (noting this subsection explicitly provides that class member citizenship may be determined even after the time-of-filing and extending to consideration of defendants' citizenship in the action at the time of removal and motion to remand)).

Determining an Organization's Citizenship

In evaluating citizenship in a putative class action, counsel likely will need to determine the citizenship of at least one entity defendant.

For all cases seeking federal diversity jurisdiction, not just those covered by CAFA, a corporation is a citizen of both:

- The state of incorporation.
- Where it has its principal place of business.

(28 U.S.C. § 1332(c)(1) (note certain exceptions for insurers).)

For more information about the definition of principal place of business, see *Article, "Principal Place of Business" Clarified for Diversity Cases* (<http://us.practicallaw.com/9-501-8415>).

CAFA expressly outlines the citizenship of unincorporated associations, which include business entities that are not corporations, such as partnerships, limited liability companies or voluntary associations (see *Ferrell v. Express Check Advance LLC*, 591 F.3d 698, 705 (4th Cir. 2010); *Bond v. Veolia Water Indianapolis, LLC*, 571 F. Supp. 2d 905, 909 (S.D. Ind. 2008)). Under CAFA, an unincorporated association is a citizen both of the state where it has its principal place of business and under whose laws it is organized (28 U.S.C. § 1332(d)(10)).

Corporations and unincorporated associations are deemed to have dual, not alternate, citizenship and, under CAFA, each state of citizenship must be considered in analyzing minimal diversity (see *Johnson v. Advance Am.*, 549 F.3d 932, 935 (4th Cir. 2008); *Hertz v. Friend*, 559 U.S. 77, 88 (2010)).

Although CAFA's minimal diversity requirements generally make it easier to establish geographic diversity, it appears that even minimal diversity cannot be established where all plaintiff class members are citizens of a single state and a defendant

is also considered a citizen of that state, regardless of any dual citizenship it holds (*Johnson*, 549 F.3d at 936; *Marroquin v. Wells Fargo, LLC*, No. 11-cv-163, 2011 WL 476540, at *2 (S.D. Cal. Feb. 3, 2011) ("Plaintiff and the class members are alleged to be California citizens. Defendant is alleged to be a citizen of Delaware and California. Under these facts, Plaintiff has not alleged minimal diversity under CAFA.")).

For more information on entity citizenship under CAFA, see *Legal Update, The Final Frontier: Determining the Citizenship of Non-corporate Entities for Diversity Jurisdiction* (<http://us.practicallaw.com/9-532-4764>).

Effect of Post-commencement or Post-removal Changes

CAFA does not specifically address whether a federal court retains diversity jurisdiction over a covered class action where future changes in the nature of the lawsuit would otherwise preclude independent federal jurisdiction. The weight of authority indicates that once federal diversity jurisdiction properly attaches under CAFA, it remains intact despite later changes to the underlying jurisdictional facts (see *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n.12 (11th Cir. 2009); *Pate v. Huntington Nat'l Bank*, No. 12-cv-1044, 2013 WL 557195, at *2 (N.D. Ohio Feb. 12, 2013)). The following are examples of situations in which a change to the underlying facts does not change the applicability of CAFA jurisdiction:

- Denial of class certification (see, for example, *Puerto Rico Coll. of Dental Surgeons v. Triple S. Mgmt*, No. 09-Civ.1209, 2013 WL 4806454, at *1 (1st Cir. Sept. 6, 2013); *Metz v. Unizan Bank*, 649 F.3d 492, 500 (6th Cir. 2011); *United Steel v. Shell Oil Co.*, 602 F.3d 1087, 1091 (9th Cir. 2010) and *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806 (7th Cir. 2010)).
- Class allegations withdrawn following removal (see, for example, *In re Burlington N. Santa Fe Ry. Co.*, 606 F.3d 379, 380-81 (7th Cir. 2010); *In Touch Concepts v. Cellco P'ship*, No. 13-cv-1419, 2013 WL 2455923, at * 11 (S.D.N.Y. June 4, 2013)).
- A party whose involvement formed the basis for diversity jurisdiction under CAFA withdraws or is dismissed from the lawsuit (see, for example, *Ellison v. Autozone*, 486 F. App'x 674, 675 (9th Cir. 2012); *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 515 (7th Cir. 2011)).

Moreover, even if federal jurisdiction did not exist over the case at removal, this defect may be cured if the plaintiff later amends her complaint to allege a basis for such jurisdiction (see *Moffitt v. Residential Funding Co.*, 604 F.3d 156, 159 (4th Cir. 2010)).

EXCEPTIONS TO CAFA JURISDICTION

Although CAFA is intended to broadly convey federal diversity jurisdiction over class actions, there are several express statutory exceptions, including:

- Exceptions based on the parties involved (see *Party-based Exceptions*).
- Claims-based exceptions (see *Claims-based Exceptions*).
- Geography-based exceptions (see *Exceptions Based on Geography*).

Party-based Exceptions

CAFA jurisdiction does not attach in the following circumstances:

- The primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief (28 U.S.C. § 1332(d)(5) (A)). This section requires that **all** the primary defendants be government defendants (see *Frazier v. Pioneer Ams. LLC*, 455 F.3d 542, 547 (5th Cir. 2006); *Gatti v. Louisiana*, No. 10-cv-329, 2011 WL 1827437, at *8 (M.D. La. Feb. 25, 2011) (noting the state was the primary defendant because without it, there was no claim that could stand alone)).
- The number of members of all proposed plaintiff classes in the aggregate is less than 100 (28 U.S.C. § 1332(d)(5)(B)).

It is unsettled whether these are jurisdictional prerequisites or exceptions (compare *Frazier*, 455 F.3d at 546 (characterizing subsection (d)(5) as an "exception" to CAFA jurisdiction) with *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1020 n.3, 1022 (9th Cir. 2007) (disagreeing with the Fifth Circuit and finding that subsection (d)(5) is a prerequisite, rather than an exception, to jurisdiction) and *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 679 (7th Cir. 2006) (noting that the provisions of Section 1332(d)(5) must be satisfied before CAFA applies to a class action)). The distinction between jurisdictional prerequisites and exceptions may inform the burdens involved in establishing CAFA jurisdiction (see *Burden of Demonstrating Exceptions and Burdens on Removal*).

Claims-based Exceptions

CAFA specifically exempts any class action that **solely** involves a claim:

- Concerning a covered security as defined under Section 16(f) (3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and Section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E)) (28 U.S.C. § 1332(d)(9)(A)). Courts have interpreted this section as carving out class actions for which jurisdiction exists elsewhere under federal law, such as under the Securities Litigation Uniform Standards Act of 1998 (see *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 622 (7th Cir. 2012); *Estate of Pew v. Cardarelli*, 527 F.3d 25, 30 (2d Cir. 2008)).
- Relating to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the state in which such corporation or business enterprise is incorporated or organized (28 U.S.C. § 1332(d)(9)(B)). This exception relates to actions regarding the relationships among or between a corporation

or other business entity, and its current officers, directors and shareholders (see, for example, *Brady v. Denton Cnty. Elec. Co-op., Inc.*, No. 09-cv-130, 2009 WL 3151177, at *5 (E.D. Tex. Sept. 28, 2009)).

- Relating to the rights, duties (including fiduciary duties) and obligations relating to or created by or under any security (as defined under Section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder) (28 U.S.C. § 1332(d)(9)(C)). This subsection has been interpreted narrowly as applying only to suits that "seek to enforce the terms of instruments that create and define securities, and to duties imposed on persons who administer securities" (see *Estate of Pew*, 527 F.3d at 33; *Appert*, 673 F.3d at 620; *Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23, 31 (2d Cir. 2010)).

Exceptions Based on Geography

CAFA excludes certain cases that meet its jurisdictional prerequisites, but nevertheless are uniquely local in nature. These geography-based exceptions include:

- The discretionary exception (see *Discretionary Exception*).
- The local controversy exception (see *Local Controversy Exception*).
- The home-state controversy exception (see *Home-state Controversy Exception*).

Discretionary Exception

The discretionary exception instructs that federal district courts may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction over a class action where 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 class action was originally filed (28 U.S.C. § 1332(d)(3)). Class actions involving the potential shared citizenship of more than two-thirds of the proposed plaintiff classes and defendants in the state in which the action was filed may be covered by one of the two mandatory geography exceptions (see *Local Controversy Exception* and *Home-state Controversy Exception*).

CAFA directs courts to consider the following in deciding whether to decline jurisdiction under the discretionary exception:

- Whether the claims asserted involve matters of national or interstate interest.
- Whether the claims asserted will be governed by the laws of the state where the action was originally filed or by the laws of other states.
- If the class action has been pleaded in a manner that seeks to avoid federal jurisdiction.
- If the action was brought in a forum with a distinct nexus to:
 - the class members;
 - the alleged harm; or
 - the defendants.

- 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.
- During the three-year period before the filing of the class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(28 U.S.C. § 1332(d)(3)(A)-(F).)

In assessing whether to decline jurisdiction under the discretionary exception, courts have interpreted certain of the statutory language. For example, courts have held that:

- "Primary defendants" means those parties having a dominant relation to the subject matter of the controversy, in contrast to other defendants who played a secondary role by merely assisting in the alleged wrongdoing, or who are only vicariously liable (see *Copper Sands Homeowners Ass'n v. Copper Sands Realty, LLC*, No. 10-cv-00510, 2011 WL 941079, at *3 (D. Nev. Mar. 16, 2011); *Sorrentino v. ASN Roosevelt Ctr., LLC*, 588 F. Supp. 2d 350, 359 (E.D.N.Y. 2008)).
- All primary defendants must be citizens of the state in which the action was filed (see *Pate*, 2013 WL 557195, at * 5-6; *Dean v. Draughons Junior Coll., Inc.*, No. 12-cv-0157, 2012 WL 2357492, at *3 (M.D. Tenn. June 20, 2012); *Copper Sands Homeowners Ass'n*, 2011 WL 941079, at *2).

Local Controversy Exception

The local controversy exception requires federal courts to decline to exercise jurisdiction over a class action where all of the following criteria are met:

- Greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the class action was originally filed.
- 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.
- The 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.
- During the three-year period preceding the filing of the 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.

(28 U.S.C. § 1332(d)(4)(A).)

In determining whether to refuse to exercise jurisdiction under the

local controversy exception, courts have interpreted the statutory provisions and held that:

- Plaintiff "classes in the aggregate" is meant to capture subclasses within the same action, not other similar class actions (28 U.S.C. § 1332(d)(4)(A)(i)(I); see *In re Sprint Nextel Corp.*, 593 F.3d 669, 672 (7th Cir. 2010)).
- "Significant relief" looks to all the means a defendant may have to satisfy a judgment, and includes injunctive relief sought (28 U.S.C. § 1332(d)(4)(A)(i)(III)(aa); see *Coleman v. Estes Exp. Lines, Inc.*, 631 F.3d 1010, 1020 (9th Cir. 2011); *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1245 (10th Cir. 2009) (the exception looks to defendants from whom significant relief is sought, not from whom relief can necessarily be obtained)).
- "Significant basis" means an important ground for the asserted claims in light of all the defendants' alleged conduct (28 U.S.C. § 1332(d)(4)(A)(i)(II)(bb); see *Kaufman*, 561 F.3d at 157; *Opelousas Gen. Hosp. Auth. v. FairPay Solutions, Inc.*, 655 F.3d 358, 361-62 (5th Cir. 2011); *Westerfield v. Indep. Processing, LLC*, 621 F.3d 819, 825 (8th Cir. 2010); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1167 n.7 (11th Cir. 2006) (seeking joint and several liability is insufficient to satisfy the "significant basis" requirement)).
- The "principal injuries" requirement is satisfied where **either** alternative in the subsection is met (28 U.S.C. § 1332(d)(4)(A)(i)(III); see *Kaufman*, 561 F.3d at 158; *Williams v. Homeland Ins. Co. of N.Y.*, 657 F.3d 287, 292 (5th Cir. 2011)).
- "Similar" action within the prior three years does not include class arbitration and must have been against the defendants, not parties in privity with the defendants (28 U.S.C. § 1332(d)(4)(A)(ii); see *Vodenichar v. Halcon Energy Props., Inc.*, No. 13-cv-2812, 2013 WL 4268840, at *8-9 (3d Cir. Aug. 16, 2013); *Williams*, 657 F.3d at 293; *Lafalier v. State Farm Fire & Cas. Co.*, 391 F. App'x 732, 738 (10th Cir. 2010); *Villalpando v. Exel Direct Inc.*, No. 12-cv-04137, 2012 WL 5464620, at *11 (N.D. Cal. Nov. 8, 2012) (a prior action was insufficiently similar where the only commonality was certain discreet factual allegations)).

Home-state Controversy Exception

The home-state controversy exception requires federal courts to decline to exercise jurisdiction where two-thirds or more of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state where the class action was originally filed (28 U.S.C. § 1332(d)(4)(B)).

In determining whether to refuse to exercise jurisdiction under the home-state controversy exception, courts have interpreted certain of the statutory provisions. For example, courts have held:

- Plaintiff "classes in the aggregate" is meant to capture subclasses within the same action, not other similar class actions (28 U.S.C. § 1332(d)(4)(B); see *In re Sprint Nextel Corp.*, 593 F.3d at 672; *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 564 F.3d 75, 78-79 (1st Cir. 2009)).

- A "primary defendant" is allegedly directly liable to the plaintiffs, as opposed to parties sued under theories of vicarious liability, contribution or indemnification (see *Vodenichar*, 2013 WL 4268840, at *4-5 (determining whether a defendant is a primary defendant should assume liability and ask whether the defendant is the "real target" of the plaintiffs' accusations); *Corsino v. Perkins*, No. 09-cv-09031, 2010 WL 317418, at *7 (C.D. Cal. Jan. 19, 2010) (primary defendants have a dominant relationship to the subject matter of the controversy, in contrast to other defendants who played a secondary role by assisting in the alleged wrongdoing, or who are only vicariously liable) (citing cases); but see *Villalpando*, 2012 WL 5464620, at *9 (a primary defendant has alleged direct liability or alleged substantial exposure, even if that defendant faces only derivative liability)).
- All primary defendants must be citizens of the state where the action was filed (see *Draughons Junior Coll., Inc.*, 2012 WL 2357492, at *3; *Corsino*, 2010 WL 317418, at *5; *Copper Sands Homeowners Ass'n*, 2011 WL 941079, at *3).

Geography-based Exceptions Akin to Abstention

The discretionary, local controversy and home-state controversy exceptions to CAFA are not jurisdictional in nature. Instead, courts view them as more like a type of abstention (see *Gold v. N.Y. Life Ins. Co.*, No. 12-cv-2344, 2013 WL 5226183, at *3 (2d Cir. Sept. 18, 2013); *Graphic Commc'ns Local 1B v. CVS Caremark Corp.*, 636 F.3d 971, 973 (8th Cir. 2011)). As a result, a party can waive its right to raise these exceptions, for example, by failing to raise them in a timely manner (see *Gold*, 2013 WL 5226183, at *3; see *Legal Update, Second Circuit: Home State Exception to CAFA Jurisdiction Must Be Raised Within a Reasonable Amount of Time* (<http://us.practicallaw.com/1-542-3046>)).

Burden of Demonstrating Exceptions

It is the party opposing federal jurisdiction (typically the plaintiff who moves to remand once the case is removed under CAFA) who carries the burden of demonstrating one of the exceptions applies (see, for example, *Appert*, 673 F.3d at 619; *Greenwich Fin. Servs.*, 603 F.3d at 26; *Westerfield*, 621 F.3d at 822; *In re Hannaford Bros.*, 564 F.3d at 78; *Kaufman*, 561 F.3d at 153; *Serrano*, 478 F.3d at 1024; *Frazier*, 455 F.3d at 546; *Evans*, 449 F.3d at 1165).

FEDERAL JURISDICTION OVER MASS ACTIONS

In addition to expanding federal jurisdiction over traditional class actions, CAFA also allows federal courts to exercise jurisdiction over "mass actions." This section discusses CAFA's mass action provisions.

Mass Action Defined

CAFA defines a mass action as any civil action (other than one fitting CAFA's definition for a traditional class action), in which the 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 (28 U.S.C. § 1332(d)(11)(B)(i)).

Notably, the requirement that a mass action contain 100 or more plaintiffs is based on the plaintiffs' proposed case. Therefore, if a group of 99 or fewer plaintiffs choose not to have their claims tried with those of the plaintiffs in some other case, the defendants cannot force them to do so to then remove both cases (28 U.S.C. § 1332(d)(11)(B)(ii)(II)). This is consistent with the general rule that plaintiffs are masters of their own complaints (see *Scimone v. Carnival Corp.*, 720 F.3d 876, 885 (11th Cir.2013)). For more information on the mass action numerosity requirement, see *Article, CAFA Mass Actions: Will Courts Continue to Permit Plaintiffs to Game the System?* (<http://us.practicallaw.com/8-537-7705>) and *Legal Update, CAFA Mass Actions: How Do You Count to 100?* (<http://us.practicallaw.com/9-535-1205>)

Similar to class actions, as long as a mass action has been proposed, CAFA's mass action provisions will apply, regardless of whether the case is ultimately tried as a mass action (*Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008)).

Mass Actions Treated as Class Actions

A mass action is deemed to be a class action removable under Sections 1332(d)(2)-(10) if it otherwise meets the provision of those paragraphs (28 U.S.C. § 1332(d)(11)(A)). CAFA's general requirements and exceptions also apply to covered mass actions (see, for example, *Abraham v. St. Croix Renaissance Grp., LLLP*, 719 F.3d 270, 275 (3d Cir. 2013); *Lowery*, 483 F.3d at 1200-01).

Amount in Controversy in Mass Actions

The aggregated \$5 million amount in controversy requirement applies to mass actions as well as class actions (28 U.S.C. § 1332(d)(11)(A); *Lowery*, 483 F.3d at 1202-03). Nonetheless, CAFA also provides that federal jurisdiction may extend only over those mass action plaintiffs whose claims satisfy the jurisdictional amount of \$75,000 set out in 28 U.S.C. §1332(a) (28 U.S.C. § 1332(d)(11)(B)(i)). The prevailing understanding of these two provisions is that a federal court can exercise diversity jurisdiction over a mass action under CAFA so long as the aggregate amount in controversy exceeds \$5 million. However, the court must remand the claims of each plaintiff whose individual claim is for less than \$75,000 (see, for example, *Lowery*, 483 F.3d at 1204-1207; *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 689 (9th Cir. 2006) (noting that there must be at least one plaintiff who satisfies the \$75,000 jurisdictional amount); see *S. Rep. 109-14, 2005 WL 627977, at *47 (2005)* ("it is the Committee's intent that any claims that are included in the mass action that standing alone do not satisfy the jurisdictional amount requirements of Section 1332(a) (currently \$75,000), would be remanded to state court")).

Cases That Do Not Qualify as Mass Actions

CAFA's definition of mass action **excludes** the following types of civil actions:

- Cases in which all of the claims arise from an event or occurrence in the state in which the action was filed and that allegedly resulted in injuries in that state or in neighboring states (28 U.S.C. § 1332(d)(11)(B)(ii)(I)). The event or occurrence exclusion requires the claims to arise from a single event or occurrence (see *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 668 (9th Cir. 2012)). That event or occurrence, however, can refer to major incidents that share a commonality, even where they persist over time (see *St. Croix Renaissance Grp.*, 719 F.3d at 276-77) (noting that the continuous release of toxic substances from a single facility over years was an event or occurrence for the mass action exclusion)).
- Claims that are joined by the defendant (28 U.S.C. § 1332(d)(11)(B)(ii)(III)). This subsection prevents defendants from removing by consolidating several smaller state court actions into one mass action for jurisdictional purposes (see *Scimone*, 720 F.3d at 885; *Anderson v. Bayer Corp.*, 610 F.3d 390, 393 (7th Cir. 2010); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 955 (9th Cir. 2009)).
- Cases in which all of the claims are asserted on behalf of the general public (not on behalf of individual claimants or members of a purported class) under a state statute specifically authorizing these actions (28 U.S.C. § 1332(d)(11)(B)(ii)(III)). Whether so-called *parens patriae* suits, generally brought by the state attorney general, qualify as mass actions or are excepted may depend on how the court views the real party in interest in the action (compare *Miss. v. AU Optronics Corp.*, 701 F.3d 796, 800-02 (5th Cir. 2012) (CAFA applies because individual consumers real party in interest), *cert. granted*, 2013 WL 655204 (May 28, 2013) with *LG Display Co. v. Madigan*, 665 F.3d 768, 772 (7th Cir. 2011) (CAFA does not apply because Attorney General was deemed a real party in interest) and *Bank of Am.*, 672 F.3d at 672).
- Claims that have been consolidated or coordinated solely for pretrial proceedings (28 U.S.C. § 1332(d)(11)(B)(ii)(IV)).

Transfer of Removed Mass Actions

CAFA limits a defendant's ability to transfer a mass action after removal to federal court. Specifically, a removed mass action may not be transferred to another federal district court under the multidistrict litigation provision of 28 U.S.C. § 1407 unless a majority of the plaintiffs request the transfer (28 U.S.C. § 1332(d)(11)(C)(i)).

However, this prohibition does not apply where:

- The case has been certified as a class action under Federal Rule of Civil Procedure (FRCP) 23.
- Plaintiffs propose that the action proceed as an FRCP 23 class action.

(28 U.S.C. § 1332(d)(11)(C)(ii)(I)-(III).)

This section does not prohibit transfer where an action has been removed as a mass action if another ground for removal was also asserted (such as federal question jurisdiction) (see *In re*

Darvocet, Darvon & Propoxyphene Prods. Liab. Litig., MDL No. 2226, 2013 WL 1635469, at *4 (J.P.M.L. Apr. 17, 2013); see *Legal Update*, MDL Panel: Mass Action Status Does Not Prevent Transfer When Other Grounds For Removal Are Present (<http://us.practicallaw.com/2-526-1005>)).

Statute of Limitations

The limitations period governing claims asserted in a mass action removed under CAFA is tolled during the period that the action is pending in federal court (28 U.S.C. § 1332(d)(11)(D)). This provision parallels the tolling available in class actions generally (see *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974)).

REMOVAL UNDER CAFA

CAFA addresses removal of class actions filed in state court to federal court. This section discusses the changes to the removal procedures for covered class actions.

Most Removal Rules Apply under CAFA, With Three Exceptions

Many of the rules and procedures applicable to removal generally also apply to class actions. CAFA specifically provides that a class action may be removed to federal court in accordance with 28 U.S.C. § 1446 and lists only three exceptions:

- The one year outer limitation for removing diversity cases provided in 28 U.S.C. § 1446(c)(1) does not apply to covered class actions.
- A covered class action may be removed on federal diversity grounds regardless of whether any defendant is a citizen of the state in which the action is brought.
- Any defendant may remove a covered class action on federal diversity grounds without consent of all the defendants.

(28 U.S.C. § 1453(b).)

Notably, CAFA seems to have left intact the prior rule that counterclaim and third-party defendants cannot remove class actions (see *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 854 (6th Cir. 2012)).

For more information on removal generally, see *Practice Note*, *Removal: Overview* (<http://us.practicallaw.com/3-532-4248>).

Burdens on Removal

Despite a Senate Report published ten days after CAFA's enactment appearing to support the position that the burden of establishing federal jurisdiction should be shifted to plaintiffs, appellate courts have consistently held that CAFA did not alter the general rule that the defendant, as the party seeking to remove a case to federal court bears the burden of establishing federal jurisdiction (see *S. Rep. 109-14*, 2005 WL 627977, at *42 (2005); *Appert*, 673 F.3d at 618; *Westerfield*, 621 F.3d at 822; *Kaufman*, 561 F.3d at 151; *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 48 (1st Cir. 2009); *Blockbuster*, 472 F.3d at 58; *Evans*, 449 F.3d at 1165; *Abrego Abrego*, 443 F.3d at 686).

Review of Orders Granting or Denying Remand

After a defendant removes a class action to federal district court based on CAFA jurisdiction, the plaintiff may move in the district court to have the case remanded (that is, sent back) to state court. This section explains what types of remand orders may be appealed under CAFA and the procedure for seeking appellate review.

Appealing Remand Orders

Under CAFA, a district court's order granting or denying a motion to remand a class action may be appealed (28 U.S.C. § 1453(c)(1)). This section has been extended to include remand orders issued sua sponte (*Watkins v. Vital Pharms., No. 13-cv-55755, 2013 WL 3306322, at *2 (9th Cir. July 1, 2013)*).

This represents a significant departure from the rules governing the appealability of remand orders generally. Before CAFA, a district court's order remanding a class action for lack of subject matter jurisdiction or a defect in the removal process typically was not appealable (28 U.S.C. § 1447(d); *Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 127-28 (1995)*). CAFA now gives federal appellate courts discretion to hear these appeals in covered cases.

For more information on appealing remand orders outside of CAFA, see *Practice Note, Removal: Appealing the Remand Order* (<http://us.practicallaw.com/8-519-8030>).

Appellate Procedure

A party seeks review of a remand order under CAFA by filing a petition for permission to appeal with the relevant appellate court within ten days after entry of the order (28 U.S.C. § 1453(c)(1)). Because appellate review is discretionary under CAFA, Federal Rule of Appellate Procedure 5 governs a petition for permission to appeal (28 U.S.C. § 1453(c)(1); *Froud v. Anadarko E & P Co., 607 F.3d 520, 522 (8th Cir. 2010)*; *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc., 475 F.3d 1228, 1230 (11th Cir. 2007)*).

Factors Considered in Granting or Denying Review

In considering whether to grant the appeal, courts of appeal have considered the following:

- The presence of an important or novel CAFA-related question.
- An uncertain or unsettled question presented.
- Whether the district court decision seems incorrect.
- Whether the question is consequential to the resolution of the particular case, and whether it is likely to evade review if leave to appeal is denied.
- The fullness of the record on review.
- Likelihood of recurrence of the issue under review.
- Balance of the relevant harms.

(See, for example, *Opelousas Gen. Transit Auth. v. Multiplan, No. 13-cv-90027, 2013 WL 3245169, at *1 n.7 (5th Cir. June 28, 2013)*; *Coleman, 627 F.3d at 1100*; *BP Am., Inc. v. Oklahoma ex rel. Edmondson, 613 F.3d 1029, 1034-36 (10th Cir. 2010)*; *Coll.*

of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co., 585 F.3d 33, 38 (1st Cir. 2009); *Estate of Pew, 527 F.3d at 29*).

Stay of Remand Order Not Required

Appellate jurisdiction to review remand orders under CAFA is not premised on a party seeking a stay of the remand order in the district court before appealing (see *Estate of Pew, 527 F.3d at 28*; *BP Am., Inc., 613 F.3d at 1033*).

Issues Considered on Appeal

On appeal from a remand order, the appellate court may have the discretion to decide any potential error in the district court's decision, not just mistaken application of CAFA (see *Bank of Am. Corp., 672 F.3d at 673*; *Coffey, 581 F.3d at 1247*; *Brill v. Countrywide Home Loans, 427 F.3d 446, 451 (7th Cir. 2005)* ("When a statute authorizes interlocutory appellate review, it is the district court's entire decision that comes before the court for review.")). However, there is also authority that this discretion cannot extend to other non-reviewable issues once it is determined that CAFA jurisdiction is inapplicable (see *Patterson v. Dean Morris, LLP, 448 F.3d 736, 742, n.7 (5th Cir. 2006)* (finding the court was deprived of appellate jurisdiction over a remand order, at least where CAFA does not provide an independent basis for jurisdiction)).

Time in Which Appellate Court Must Act

If the appellate court accepts an appeal of a remand order, the court must complete all action on the appeal, including rendering judgment, no later than 60 days after the date on which the appeal was filed, unless an extension is granted (28 U.S.C. § 1453(c)(2)). Courts calculate this 60-day period from the date the order granting leave to appeal is issued, not when the appeal is initially filed (see, for example, *DiTolla v. Doral Dental IPA of N.Y., 469 F.3d 271, 274 (2d Cir. 2006)*; *Hart v. FedEx Ground Package Sys. Inc., 457 F.3d 675, 678 (7th Cir. 2006)*; *Evans, 449 F.3d at 1162*; *Patterson v. Dean Morris LLP, 444 F.3d 365, 368 (5th Cir. 2006)*).

The appellate court may grant an extension of the 60-day period, not to exceed ten days, if:

- The parties agree.
- For good cause and in the interests of justice.

(28 U.S.C. § 1453(c)(3).)

If final judgment is not issued within either the 60-day or extended time frame, the appeal will be deemed denied (28 U.S.C. § 1453(c)(4)).

Specific Carve-outs to CAFA Removal

Similar to the exceptions to original CAFA jurisdiction, CAFA exempts certain types of securities and corporate governance class actions from removal. These exceptions are construed in the same manner as the claims-based exceptions to original jurisdiction (28 U.S.C. § 1332(d)(9); *Greenwich Fin., 603 F.3d at 27*). Specifically, class actions that solely involve the following may not be removed under CAFA:



- A claim concerning a covered security as defined under Section 16(f)(3) of the Securities Act of 1933 (*15 U.S.C. 78p(f)(3)*) and Section 28(f)(5)(E) of the Securities Exchange Act of 1934 (*15 U.S.C. 78bb(f)(5)(E)*).
- A claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the state in which the corporation or business enterprise is incorporated or organized.
- A claim that relates to the rights, duties (including fiduciary duties) and obligations relating to or created by or under any security (as defined under Section 2(a)(1) of the Securities Act of 1933 (*15 U.S.C. 77b(a)(1)*) and the regulations issued thereunder).

(*28 U.S.C. § 1453(d)(1)-(3)*; see *Claims-based Exceptions*.)

CAFA'S EFFECT ON CLASS ACTION SETTLEMENTS

In addition to expanding federal diversity jurisdiction and removal rights for class actions, CAFA contains new limitations and procedures for settling class actions pending in federal court. This section of the Note outlines CAFA's effect on the settlement process.

For more information on settling class actions generally, see *Practice Note, Settling Class Actions: Process and Procedure* (<http://us.practicallaw.com/3-541-8765>).

Notice Requirements

CAFA requires defendants to comply with certain notice procedures (beyond those required by FRCP 23) before a class action settlement may be approved. CAFA's notice provisions are outlined as follows.

Timing and Contents of Notice

Within ten days of filing a proposed class action settlement, each defendant participating in the proposed settlement must serve the appropriate state official in each state in which class members reside and the appropriate federal official, with a notice of settlement containing:

- A copy of the complaint, any materials filed with the complaint and any amended complaint. If these materials are made electronically available through the Internet, this requirement is satisfied where the notice includes information about how to electronically access the material.
- Notice of any scheduled judicial hearing in the action.
- Any proposed or final notification to class members of:
 - the right to request exclusion from the class action;
 - if no right to request exclusion exists, a statement saying so; and
 - a proposed settlement.
- Any proposed or final class action settlement.
- Any settlement or other agreement contemporaneously made between class counsel and defense counsel.

- Any final judgment or notice of dismissal.
- If feasible, the names of class members who reside in each state and the estimated proportionate share of the claims of those members to the entire settlement to that state's appropriate state official. If the provision of this information is not feasible, then a reasonable estimate of the number of class members residing in each state and the estimated proportionate share of the claims of these members to the entire settlement.
- Any related written judicial opinions.

(*28 U.S.C. § 1715(b)(1)-(8)*.)

Who to Notify

CAFA requires settling defendants to send the statutory notice to the appropriate state official of each state in which a class member resides and the appropriate federal official.

Appropriate federal officials are:

- The United States Attorney General.
- In any case in which the defendant is a federal depository institution, a state depository institution, a depository institution holding company, a foreign bank or a non-depository institution subsidiary of the foregoing (as defined in Section 3 of the Federal Deposit Insurance Act (*12 U.S.C. § 1813*)), the person who has the primary federal regulatory or supervisory responsibility for the defendant, if any of the matters alleged in the class action are subject to regulation or supervision by that person.

(*28 U.S.C. § 1715(a)(1)*.)

Appropriate state officials are:

- The person in the state who has the primary regulatory or supervisory responsibility for the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the state if any of the matters alleged in the class action are subject to regulation by that person.
- If there is no primary regulator, supervisor or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the state attorney general.

(*28 U.S.C. § 1715(a)(2)*.)

This subsection does not alter any obligations, duties or responsibilities on the part of the federal or state officials described (*28 U.S.C. § 1715(f)*).

Notice for Depository Institutions

The following notice requirements apply in cases involving depository institutions:

- **Federal and other depository institutions.** In any case in which the defendant is a federal depository institution, a depository institution holding company, a foreign bank or a non-depository institution subsidiary of the foregoing, the notice requirements are satisfied by serving the required notice on the person who has the primary federal regulatory or supervisory responsibility for the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person (*28 U.S.C. § 1715(c)(1)*).
- **State depository institutions.** In any case in which the defendant is a state depository institution (as defined in Section 3 of the Federal Deposit Insurance Act (*12 U.S.C. § 1813*)), the notice requirements are satisfied by serving the required notice on the state bank supervisor of the state in which the defendant is incorporated or chartered, if any of the matters alleged in the class action are subject to regulation or supervision by that person, and on the appropriate federal official (*28 U.S.C. § 1715(c)(2)*).

Final Settlement Approval

An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate federal official and the appropriate state official are served with the required notice (*28 U.S.C. § 1715(d)*).

Non-compliance with Notice Provisions

A class member may refuse to comply with and choose not to be bound by a class settlement agreement where the class member can demonstrate non-compliance with the notice requirements (*28 U.S.C. § 1715(e)(1)*).

A class member may not, however, refuse to comply with or be bound by a settlement where notice was directed to:

- The appropriate federal official.
- Either the state attorney general or the person that has primary regulatory, supervisory or licensing authority over the defendant.

(*28 U.S.C. § 1715(e)(2)*.)

One court has found that this provision is meant to prevent class members from exempting themselves from a proposed settlement where notice was sent, even if it failed to meet certain timing requirements of service (see *Adoma v. Univ. of Phx., Inc.*, *913 F. Supp. 2d 964, 973 (E.D. Cal. 2012)*).

Coupon Settlements

Coupon settlements occur where class plaintiffs receive coupons or other promises for services instead of cash, yet attorneys receive cash for their services. This section examines CAFA's procedural requirements for these types of settlements.

Meaning of Coupon

Although Congress did not define the term "coupon" in CAFA, a coupon settlement generally is one that provides benefits to class members in the form of a discount towards the future purchase

of a product or service offered by the defendant (see *Chakejian v. Equifax Info. Servs., LLC*, *275 F.R.D. 201, 215 n.17 (E.D. Pa. 2011)*).

Contingency Fees in Coupon Settlements

If a proposed class action settlement provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons must be based on the value to class members of the coupons that are redeemed (*28 U.S.C. § 1712(a)*).

The Ninth Circuit has interpreted this section to mean that where attorney's fees are awarded on a contingent basis in a settlement providing only coupon relief, the amount of those fees must be solely based on the redemption value of the coupons (*In re HP Inkjet Printer Litig.*, *716 F.3d 1173, 1181-82 (9th Cir. 2013)*; see *Legal Update, Ninth Circuit Rejects Attorney Fee Award in Settlement for Coupon Relief in CAFA Case* (<http://us.practicallaw.com/8-529-6907>)).

Other Attorney's Fee Awards in Coupon Settlements

If a proposed class action settlement provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award must be based on the amount of time class counsel reasonably expended working on the action (*28 U.S.C. § 1712(b)(1)*).

If any fees are awarded under this subsection, they are subject to court approval and shall include an appropriate attorney's fee, if any, for obtaining equitable relief (*28 U.S.C. § 1712(b)(2)*).

This provision does not prohibit calculating attorney's fees, which are not based on coupon relief, on the amount of time class counsel reasonably expended working on the action, also known as using the lodestar method (*28 U.S.C. § 1712(b)(2)*; *In re HP Inkjet Printer Litig.*, *716 F.3d at 1183-84*).

Attorney's Fee Awards Calculated on a Mixed Basis in Coupon Settlements

If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief, then the portion of the attorney's fee to be paid to class counsel:

- Based on a portion of the recovery of the coupons must be calculated in accordance with *28 U.S.C. § 1712(a)*.
- Not based on a portion of the recovery of the coupons must be calculated in accordance with *28 U.S.C. § 1712(b)*.

(*28 U.S.C. § 1712(c)*.)

The Ninth Circuit has interpreted this section to mean that if a settlement provides for coupon and equitable relief, and attorney's fees are based on the value of the entire settlement and not solely on the basis of injunctive relief, then the district court must use the value of the coupons redeemed when determining the attorney's fee award based on the coupon part of the settlement (*In re HP Inkjet Printer Litig.*, *716 F.3d at 1184-85*).



Expert Opinion

If a motion is made, the court has discretion to receive expert testimony regarding the actual value to class members of the coupons that are to be redeemed (28 U.S.C. § 1712(d)).

Judicial Scrutiny

The court may approve a proposed coupon settlement only after a hearing to determine the settlement is "fair, reasonable, and adequate," and must make a written finding to this effect (28 U.S.C. § 1712(e)). Although this "fair, reasonable, and adequate" language is identical to the language relating to settlement approval in FRCP 23(e)(2), some courts have interpreted CAFA as imposing a heightened level of scrutiny in reviewing coupon settlements (see *In re HP Inkjet Printer Litig.*, 716 F.3d at 1178; but see *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 55 (D.D.C. 2010)).

The court may also require that any unclaimed coupons be donated to charitable or government organizations, and this portion of the coupon award may not be used to calculate attorney's fees under Section 1712 (28 U.S.C. § 1712(e)).

Net Loss Settlement

The court may approve a settlement in which the sums paid to class counsel will result in a net loss to any class member only if the court makes a written finding that non-monetary benefits substantially outweigh the monetary loss (28 U.S.C. § 1713). Although CAFA does not define "net loss," the legislative history indicates that it is meant to describe the situation where plaintiffs in a class action settlement receive less in recovery than they must pay in attorneys' fees (see *S. Rep. No. 109-014, 2005 WL 627977, at *14 n.50, 32 (2005)* (citing *Kamilewicz v. Bank of Boston*, 92 F.3d 506, 511 (7th Cir. 1996))).

Prohibition against Settlements Favoring Local Plaintiffs

The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court (28 U.S.C. § 1714).

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