Counsel's Advisory

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FEDERAL APPEALS COURTS RULE ON CLASS ACTION FAIRNESS ACT

by
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The Class Action Fairness Act (CAFA) was enacted on February 18, 2005 as a means through which defendants can remove certain class actions from state to federal court. Naturally, a hot-button issue of contention is the applicability of CAFA to actions filed prior to its enactment. Two recent U.S. Court of Appeals decisions close the door on one legal theory allowing removal of such cases, but one judge suggested the possibility of defendants finding "a new window for removal."

In *Pritchett v. Office Depot, Inc.*, 404 F.3d 1232 (10th Cir. 2005), the Plaintiff, Romia Pritchett, originally filed a class action complaint against his employer, Office Depot, on April 2, 2003 in Colorado District Court alleging that the Defendant required employees to work extra hours while failing to pay them overtime. The class was certified on June 21, 2004 and a trial date was set for March 14, 2005. However, on March 1, 2005, just two weeks after CAFA's enactment, the Defendant sought removal of the case to federal court.

Essentially, the Defendant argued that the act of filing the removal to federal court constitutes the suit's "commencement." Predicating its reasoning on a "general federal rule" that a lawsuit commences at the time the original complaint is filed in a court of "competent jurisdiction," the U.S. Court of Appeals for the Tenth Circuit concluded that a civil action is "commenced" when it is filed in state court, therein rejecting the Defendant's argument and denying the motion for leave to appeal. The court did note however, that "some states provide that service of process may commence a suit." *Id.* at 1235; *see, e.g.*, CONN. GEN. STAT. § 52-45a (2003).

Similarly, in *Knudsen v. Liberty Mutual Insurance Company, Inc.*, 411 F. 3d 805 (7th Cir. 2005), the Defendant attempted to remove the case filed against it after CAFA's February 2005 enactment, nearly five years after the Plaintiffs originally filed in state court. The motion came after the Plaintiffs filed suit against "LIBERTY" (defined as Liberty Mutual Insurance Company) wherein the Defendant deemed the complaint void because the Plaintiffs in fact were policy holders with Liberty Mutual *Fire* Insurance Company, a private insurer unaffiliated with Liberty Mutual.

The Defendant therefore contended that any "substantial" or "significant" change to the class definition "commences" a new case. The Seventh Circuit rejected this argument saying "significance is not the measure of a new claim…(and) often lies in the eye of the beholder." *Id.* at 806. The court did however, suggest that "any step sufficiently distinct that courts would treat as independent for limitations purposes (such as a new claim for relief or the addition of a new defendant), could well commence a new

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piece of litigation for federal purposes…" *Id.* at 807. The court expounded this point by citing FED. R. CIV. P. 15(c) which states "when a claim relates back to the original complaint (and hence is treated as part of the original suit) and when it is sufficiently independent of the original contentions it must be treated as fresh litigation." However, the court determined that this statute does not apply to Liberty Mutual because amending class definition does not "present a novel claim for relief or add a new party." *Id.* at 807.

At this time the significance of the rulings is unclear, except to say that merely removing a case to federal court does not equal "commencement" under CAFA. However, other defendants may have the opportunity to advance Judge Easterbrook's dicta that additional developments once a complaint has been filed could allow for application of CAFA, in effect, "retroactively."

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