

**THE CLASS ACTION FAIRNESS ACT OF 2005:
A PRELIMINARY ANALYSIS**

Gregory P. Joseph*

The Class Action Fairness Act of 2005 (“CAFA”) dramatically changes class action practice, primarily in four ways:

- It expands federal diversity jurisdiction to encompass most class actions — and some mass actions — that are not directed at state governmental entities.
- It authorizes removal of class actions filed in state courts, curtails the ability of the federal courts to remand them and authorizes accelerated appellate review.
- It substantially changes the procedure for settling any class action in federal court.
- It regulates settlements involving coupons or out of pocket payments by class members, and it bars geographically-disparate consideration to class members.

The Act applies to all actions commenced on or after its date of enactment (CAFA § 9).

This article examines the principal features of CAFA and identifies a variety of practical and legal issues that it raises.

I. EXPANSION OF DIVERSITY JURISDICTION

The heart of CAFA is its expansion of federal diversity jurisdiction. Section 4 of CAFA inserts a new 28 U.S.C. § 1332(d), which, with a few limited exceptions, confers federal jurisdiction over any class action if (i) the claims of all plaintiffs, aggregated together, exceed \$5 million, and (ii) at least one plaintiff is diverse from at least one defendant. *See* § 1332(d)(2) and (6).¹

* Gregory P. Joseph Law Offices LLC, New York. Fellow, American College of Trial Lawyers; former Chair, ABA Section of Litigation; former member, Advisory Committee on the Federal Rules of Evidence. Author, *CIVIL RICO: A DEFINITIVE GUIDE* (2d ed.); *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* (3d ed.); *MODERN VISUAL EVIDENCE*. Editorial Board, *MOORE’S FEDERAL PRACTICE* (3d ed.). ©2005 Gregory P. Joseph.

¹ Section 1332(d)(2) provides:

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—
(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

“Class action” is defined in § 1332(d)(1)(B) as any action filed pursuant to Federal Rule of Civil Procedure 23 or any analogous state rule or statute.² The grant of federal jurisdiction extends to uncertified, or putative, class actions under § 1332(d)(8).³

A. Assessing \$5 Million in “Value”

If the complaint seeks money damages, application of the \$5 million jurisdictional threshold is unlikely to be problematic. To the extent that there are questions concerning the reliability of the complaint’s prayer for relief, the federal courts have confronted analogous issues in the context of the preexisting \$75,000 amount-in-controversy requirement of § 1332(a)

In class actions seeking only injunctive or other non-monetary relief, however, CAFA may dictate a change in the law as to how to assess the “value” at stake in the litigation. The courts have historically confronted this issue, too, in the context of the amount-in-controversy requirement of § 1332(a). The recurring, problematic scenario has been one in which the cost to the defendant in complying with, for example, a requested injunction would exceed \$75,000, but the benefit to the plaintiff in obtaining the injunction would not. Is it the cost to the defendant or the benefit to the plaintiff that is the appropriate gauge of “value” for jurisdictional purposes?

-
- (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state;
(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

Aggregation of class members’ claims is dictated by §1332(d)(6), which provides: “In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.”

- 2 Section 1332(d)(1)(B) provides:
(B) the term “class action” means 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....
- 3 Section 1332(d)(8) provides:
This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

Courts have generally applied one of three methodologies to determine whether the amount in controversy exceeds \$75,000 — (1) some look at the question from the plaintiff's viewpoint (the benefit to the plaintiff); (2) others hold that the viewpoint of either plaintiff or defendant may be used; and (3) yet others use the viewpoint of the party invoking federal jurisdiction. *See generally* 15 MOORE'S FEDERAL PRACTICE § 102.109[1]-[5] (3d ed. 2004).

The wrinkle in class actions has been the Supreme Court's ruling in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that the plaintiff class members' claims may not be aggregated to satisfy the requisite jurisdictional amount. As a result, in class actions seeking non-monetary relief, many courts measure only the benefit to the plaintiff — each plaintiff separately — on the theory that to look at the total cost to the defendant would effectively be to aggregate the benefit to all plaintiffs, which is forbidden by *Zahn*.⁴ Those courts that consider the cost to the defendant require that backdoor aggregation be avoided by “looking separately at each named plaintiff's claim and the cost to the defendant of complying with an injunction directed to that plaintiff.”⁵

Section 1332(d)(6) expressly contemplates aggregation of the plaintiffs' claims in determining whether the \$5 million “value” requirement has been met. In light of that, and given CAFA's goal of moving class actions from state to federal court (CAFA § 2(a)(4)(A), § 2(b)(2)), it would appear that the proper way to measure the “value of \$5,000,000” under § 1332(d)(2), in class actions seeking non-monetary relief, is to look either at the total benefit to the plaintiff class

⁴ *See, e.g., Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3d Cir. 1993). The continuing vitality of *Zahn* in cases in which at least one class member's claim exceeds \$75,000, in light of the supplemental jurisdiction statute (28 U.S.C. § 1367), is in question. *See* Part I(E)(1), *infra*.

⁵ *Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 983 (7th Cir. 2002).

3. Mandatory Remand/Dismissal: Two-Thirds or More

Section 1332(d)(4) obliges the federal judge to decline jurisdiction if either of two tests is satisfied.⁷ One of the tests parallels § 1332(d)(3). Thus, under § 1332(d)(4)(B), the federal court must decline jurisdiction if (i) two-thirds or more of all class members, in the aggregate, are citizens of the state in which the action was originally filed, and (ii) the “primary defendants” are citizens of that state as well.

The other test, set forth in § 1332(d)(4)(A), mandates that federal jurisdiction be declined in the following circumstances: (i) if more than (but not equal to) two-thirds of all class

exercise jurisdiction under paragraph (2) over a class action in which 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 action was originally filed based on consideration of—

- (A) whether the claims asserted involve matters of national or interstate interest;
- (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
- (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
- (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
- (E) whether 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; and
- (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

7 Section 1332(d)(4) provides:

- (4) A district court shall decline to exercise jurisdiction under paragraph (2)—
 - (A)(i) over a class action in which—
 - (I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;
 - (II) at least 1 defendant is a defendant—
 - (aa) from whom significant relief is sought by members of the plaintiff class;
 - (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and
 - (cc) who is a citizen of the State in which the action was originally filed; and
 - (III) 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; and
 - (ii) during the 3-year period preceding the filing of that 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; or
- (B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

members are citizens of the original forum state; (ii) at least one defendant from whom “significant relief is sought” and whose alleged conduct forms a “significant basis for the claims” lives in that state; (iii) “principal injuries” were suffered in that state; and (iv) no other class action has been filed by anyone in the prior three years asserting “the same or similar factual allegations against any of the defendants.”

C. Components of the One-Third/Two-Thirds Rules

1. The Count

The One-Third/Two-Thirds measure is, to put it indelicately, a body count. Whether a class member has allegedly suffered \$1 or \$1 million in damages is irrelevant. The question is the number of class members who are citizens of the original forum state. Note that the statute requires a cumulative count of all plaintiffs in all classes.

Counting plaintiffs is not always easy. Corporations rarely know with any certainty the geographic dispersion of their shareholders because stock is often purchased and held by intermediaries. Consumers buy through intermediaries, pick up purchases and ship to non-home addresses. Former employees move. Therefore, the count is likely to be highly litigable. Expert assistance with class dispersion issues, and battles of experts on the subject, may become a feature of contested jurisdictional disputes.

The complaint’s definition of the class is critical to this determination because it fixes the denominator of the One-Third/Two-Third fraction. Classes are commonly defined to exclude allegedly culpable parties (*e.g.*, corporations and executives being sued, plus their affiliates, families, and the like). The count criterion is likely to stimulate creative class definition.

2. “The Primary Defendants”

In addition to deciding whether the One-Third/Two-Thirds criteria are met, the court must determine the citizenship of “the primary defendants” under § 1332(d)(3) and (d)(4)(B). There is no statutory definition of the phrase, “the primary defendants,” which leaves it to the case law to develop. It is possible to postulate various ways of approaching the issue as a matter of substantive law — *e.g.*, primary vs. secondary liability as statutorily defined; direct vs. vicarious liability at common law; actor vs. conspirator. But it is also possible that the statute is intending to focus on the target defendants in fact—the deep pockets from whom relief is actually available.

These are not necessarily inconsistent approaches. The statute speaks in the plural, and uses the definite article. “All” is seemingly implied in the phrase, “*the* primary defendants.” But the court retains the discretion to determine which defendants it deems “primary.”

Necessary/Indispensable Defendants. Because it is not difficult to define a class as limited to citizens of the forum state (or to maximize their number), the courts’ analysis of “the primary defendants” — and “significant” defendants discussed in the next section — will be crucial. This may trigger litigation as to precisely who are necessary or indispensable parties defendant under Federal Rule of Civil Procedure 19, given the causes of action asserted in the complaint, which raises the question whether one can be a “necessary” defendant under Rule 19 but not a “primary” defendant within § 1332(d)(3) and (d)(4)(B).

3. “Significant” Defendants

There is the further question whether, or to what extent, “the primary defendants” are distinct from the category of “significant” defendants described in § 1332(d)(4)(A)(II)(aa)-(bb). “Significant” defendants refers to those from whom “significant relief is sought” and whose

Factor (C) is subjective, focusing on intent — whether the class action was pleaded in a manner designed to avoid federal jurisdiction. That subjective intent may be objectively inferable from the face of the complaint. It is in analyzing this factor that the court may take into account whether class counsel’s creativity in defining the class (to maximize the number citizens of the forum state), selecting the claims and choosing the defendants should result in a federal or state forum.

Factor (D) will favor declining federal jurisdiction if the original forum state has a “distinct nexus” with the class, the harm or the defendants, and will favor maintaining federal jurisdiction if it does not. There is no statutory definition of the phrase, “distinct nexus.” The presence of more than one-third of the plaintiff class in itself might have been thought to form such a nexus between the forum state and the class, the harm and the defendants. But the structure of the statute may contemplate something more or different, given that the presence of more than one-third of the plaintiffs in the forum state is a precondition to the court reaching the “nexus” issue.

Factor (E) prescribes a second body count. It will weigh in favor of declining federal jurisdiction if the number of class members in the forum state is, in the aggregate, “substantially larger” than the number of class members in any other state, and the out-of-state class members as a whole are dispersed among “a substantial number” of states. Neither use of “substantial” is defined. Foreign class members are not mentioned, although nothing would prevent the judge from considering them.

Factor (F) will favor federal jurisdiction if prior class actions have been filed by anyone in the prior three years asserting the same or similar claims. Note that factor (F) does not require that the prior class actions have been brought against any of the same defendants. This is not an

inadvertent omission — *compare* § 1332(d)(3)(F) *with* § 1332(d)(4)(A)(III). It is sufficient that there have been prior class actions brought by anyone against any other defendants asserting the same or similar claims (*e.g.*, other members of the same industry). This factor will be important if, for example, there are multiple state class actions filed against the same defendant, with the complaints in each state tailored to maximize the number of in-state plaintiffs and defendants.

6. Dates for Determining Citizenship

Section 1332(d)(7) sets forth three separate times for determining the citizenship of the plaintiff class members — “as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction” — and no time for determining the citizenship of the defendants.⁸

Under established Supreme Court jurisprudence, the time for determining citizenship for diversity purposes is generally the date of the filing of the complaint.⁹ CAFA has not explicitly changed this with respect to the defendants, and it is the first of the three points in time as of which the citizenship of the class “shall be determined” under § 1332(d)(7). With respect to defendants, one could argue that it would be sensible to consider the citizenship of the defendants each time the citizenship of the plaintiffs must be considered. However, there is no statutory basis for doing so and, if it were done, courts would be constrained to address the problem of defendants fleeing the state in an effort to affect federal jurisdiction.

⁸ Section 1332(d)(7) provides in full:

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

⁹ *See, e.g., Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 459 (1980).

Section 1332(d)(7) also provides that, if the case stated by the initial pleading is not subject to federal jurisdiction, then the citizenship of the class shall be determined as of the date that the plaintiff serves a document reflecting the existence of federal jurisdiction. As discussed in Part II(A), below, the one-year absolute time limit on removal (28 U.S.C. § 1446(b)) has been removed by CAFA, in 28 U.S.C. § 1453(b). Consequently, upon the appearance of federal jurisdiction at any time during the pendency of a state class action, the action may be removed to federal court. Theoretically, a directed verdict at the end of the plaintiff's case that eliminates the claims of a significant sub-class or other group of class members could change the One-Third/Two-Thirds calculus and lead to removal. This is discussed further in Part II(A).

The third time at which class citizenship "shall be determined" under § 1332(d)(7) is "as of the date of the filing of the ... amended complaint." This reference is not to an amended complaint that confers federal jurisdiction — that type of amended complaint is separately set forth in the statute, as discussed immediately above. This "amended complaint" is, then, by definition one that did not first "indicat[e] the existence of Federal jurisdiction."

This statutory mandate requires that class citizenship be reassessed as of the filing of any amended complaint, even after removal. In many types of complex litigation, amended pleadings are the norm, not the exception. Depending on the nature of the class, citizenship may vary significantly over time (*e.g.*, heavy arbitrage of a corporation's securities; movement of consumers; retirement; bankruptcy or dissolution). Federal jurisdiction could be acquired (or lost) simply by the timing of the plaintiffs' filing of an amended complaint, regardless of the nature of the change in any claims.

7. Partnerships and Unincorporated Entities

Existing Supreme Court precedent, which retains vitality outside of the class action context, holds that the citizenship of partnerships and other unincorporated entities is generally determined by piercing through to the citizenship of each member.¹⁰ Section 1332(d)(10), in contrast, treats them essentially as equivalent to corporations, providing that, for purposes of § 1332(d) and removal, an unincorporated association is deemed a citizen of the state(s) under whose laws it is organized and in which it has its principal place of business.¹¹

D. Jurisdictional Carve-Outs

CAFA excludes from the reach of § 1332(d):

- **Governmental Defendants.** Under § 1332(d)(5), CAFA's enhanced federal jurisdiction does not apply to actions in which "the primary defendants" are states, state officials, "or other governmental entities against whom the district court may be foreclosed from ordering relief."
- **Small Classes (<100 Members).** Similarly, under § 1332(d)(5), the enhanced federal jurisdiction of § 1332(d)(2)-(4) does not apply to class actions in which the total number of class members, in the aggregate, is less than one hundred.
- **Securities.** Under § 1332(d)(9)(A), the jurisdictional grant of § 1332(d) does not encompass an action that "solely involves a claim" concerning a "covered security" within the Securities Litigation Uniform Standards Act of 1998, , Pub. L. No. 105-353, 112 Stat. 3227.
- **Internal Corporate Affairs.** Under § 1332(d)(9)(B), the jurisdictional grant of § 1332(d) does not encompass an action that "solely involves a claim" regarding the internal affairs of a corporation or other business enterprise arising under state law.
- **Fiduciary and Related Duties.** Under § 1332(d)(9)(C), the jurisdictional grant of § 1332(d) does not encompass an action that "solely involves a claim"

¹⁰ See, e.g. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 197 (1990) (limited partnership).

¹¹ Section 1332(d)(10) provides:
(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

concerning a fiduciary or other rights, duties and obligations relating to, or created by, any security, as that term is used in the federal securities laws.

E. Mass Actions

Section 1332(d)(11)(A) provides that, for purposes of § 1332(d) and removal, a “mass action shall be deemed to be a class action” if it otherwise satisfies the requirements of § 1332(d)(2)-(10).¹² Mass actions are defined to include only cases joined for trial and, like class actions, only those involving 100 or more plaintiffs. *See* § 1332(d)(11)(B).¹³

While nothing in the class action provisions limits the reach of the jurisdictional provision to plaintiff *class* actions, the *mass* action grant of jurisdiction focuses on multiple plaintiffs, not defendants — specifically, “monetary relief claims of 100 or more persons [that] are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact.” Thus, also unlike class actions, mass actions must be claims for “monetary relief” (*id.*). Nor can a mass action be transferred pursuant to 28 U.S.C. § 1407, the

12 Section 1332(d)(11)(A) provides:

(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

13 Section 1332(d)(11)(B) provides:

(B)(i) As used in subparagraph (A), the term “mass action” means any civil action (except a civil action within the scope of section 1711(2) [*i.e.*, a class action]) in which monetary relief 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, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term “mass action” shall not include any civil action in which —

(I) all of the claims in the action 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 States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

