

QUARTERLY REPORT

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CAFA's Fourth Year Brings Noteworthy Updates

By H. Hunter Twiford, III



H. Hunter Twiford, III is a member and the managing partner of McGlinchey Stafford's Jackson, Mississippi office, where he heads the firm's Mississippi Commercial Litigation section. Hunter's practice focuses primarily on the representation of lenders and businesses in class actions, mass actions and other complex business litigation, particularly in the area of consumer finance litigation.

Hunter received his BA and JD from the University of Mississippi. He is listed in Best Lawyers, Chambers, Mid-South Super Lawyers and other peer-reviewed lists in the field of business and commercial litigation, and is a member of the American Board of Trial Advocates, a Master of the Bench of the William C. Keady Chapter of the American Inns of Court, a Fellow (and immediate past president) of the Mississippi Bar Foundation, and a long-time member of the Mississippi Board of Bar Admissions, writing the state and federal practice questions for the bar examinations.

Hunter is co-founder and co-Editor-in-Chief of McGlinchey's CAFA Law Blog, the first (and only) blog in the country dedicated to the Class Action Fairness Act of 2005, and is a frequent writer and lecturer on CAFA and class action litigation nationally. Hunter also received the Mississippi Bar's Distinguished Service Award in 2001 in recognition of his service and contributions to the profession through his work with the Technology Committee.

I. Introduction

The Class Action Fairness Act (CAFA) was enacted in February 2005, in an effort to reduce forum shopping and curb perceived abuses in the world of class action practice.¹ CAFA's enactment revolutionized existing class action law, practice and strategies. Today's rapidly evolving CAFA class action landscape is significantly different for class action practitioners, parties, and the courts than the landscape that existed pre-CAFA.

Countless ambiguities and uncertainties in class action law and jurisprudence following CAFA's passage pose opportunities for those attorneys and litigants who learn how to safely maneuver through this foreign terrain, and dangerous traps for those who do not. These ambiguities and uncertainties will continue to exist for years to come, and will only be resolved by further legislation, which is unlikely at present, or by interpretive opinions.

During CAFA's fourth year in existence (2008), there were a number of decisions regarding commencement, burden of proof, settlement and appellate review. This article outlines some of the major cases in these areas.

II. CAFA's Jurisdictional Provisions

A. Introduction

One of CAFA's stated goals was the expansion of federal subject matter jurisdiction. CAFA substituted the concept of minimal diversity, *i.e.*, at

least 100 plaintiffs and an aggregate \$5 million amount in controversy, for the old familiar standard for federal subject matter jurisdiction of complete diversity of citizenship and a \$75,000 amount in controversy as required under 28 U.S.C. section 1332(a). Under CAFA, a district court has original jurisdiction over civil actions where there are at least 100 class members and the amount in controversy exceeds \$5 million and:

- any member of a class of plaintiffs is a citizen of a state different from any defendant;
- any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a state; or
- 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.

In addition to class actions, CAFA also applies to "mass actions," which it defines as "any civil 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...."

B. *In Re Katrina Canal Litigation Breaches*²

The State of Louisiana instituted this class action as the plaintiff in state court, seeking damages and declaratory

1. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, § 2(a)(2)(A) (codified at 28 U.S.C. § 1711); see generally Anthony Rollo & Gabriel A. Crowson, *Mapping the New Class Action Frontier—A Primer on the Class Action Fairness Act and Amended Federal Rule 23*, 59 Consumer Fin. L.Q. Rep. 11 (2005).

2. 524 F.3d 700 (5th Cir. 2008).

and injunctive relief under Louisiana law against the defendant insurance companies, alleging that they failed to pay covered insurance claims after Hurricanes Katrina and Rita. The action named the State of Louisiana and Louisiana citizens as plaintiffs. The defendants removed the case to federal district court under CAFA, and the State of Louisiana moved to remand, asserting, first, that CAFA was inapplicable, and second, that the state's sovereign immunity prevented involuntary removal to federal court. The United States District Court for the Eastern District of Louisiana denied the motion for remand, and the defendants sought an interlocutory appeal.

The Fifth Circuit U.S. Court of Appeals, writing through Judge Higgenbotham, affirmed the district court's jurisdiction under CAFA, finding that minimal diversity existed due to the joinder of Louisiana citizens as plaintiffs. The court also held that the joinder of Louisiana citizens as plaintiffs waived any sovereign immunity issues which might otherwise govern the question of involuntary removal by the defendants to federal court. Consequently, the District Court's denial of the motion to remand was affirmed.

C. *Advance America Servicing of Arkansas, Inc. v. McGinnis*³

The plaintiff lender brought this action in federal court against the defendant borrower to compel arbitration of a dispute concerning loan agreements, and to stay a state court action filed by the borrower. The United States District Court for the Western District of Arkansas granted the borrower's motion to dismiss the federal action. At the time the plaintiff filed the action to compel arbitration, asserting jurisdiction on the basis of CAFA and then amending its complaint to assert diversity jurisdiction under 28 U.S.C. section 1332(a), no class had been certified. The district court found that the state

court damage claim had a value of less than \$1,000, and dismissed the action.

The Eighth Circuit U.S. Court of Appeals, writing through Judge Murphy, held that the federal action did not meet the requisite amount in controversy requirement to establish diversity jurisdiction under 28 U.S.C. section 1332(a), and that the minimum jurisdictional requirements under CAFA had not been met. Consequently, the district court's decision granting the motion to dismiss was affirmed.

D. *Audler v. CBC Innovis, Inc.*⁴

The plaintiff homeowner filed this class action lawsuit against the defendant flood determination company and other flood determination companies which provided allegedly erroneous flood zone determinations which showed that the plaintiff's and other class members' property was situated outside of any special flood hazard area; the properties were actually situated within federally determined flood zones. The defendants removed the case to federal court, and moved to dismiss. The United States District Court for the Eastern District of Louisiana granted the motion, and dismissed all of the defendants. On appeal by the homeowner, two class defendants moved to dismiss the appeal for lack of standing.

Judge Stewart, writing for the Fifth Circuit U.S. Court of Appeals, agreed that: the homeowner plaintiff lacked standing with respect to claims against any defendant, other than the actual company which provided the report to his lender; a company performing a flood zone determination at the request of the lender does not owe a duty to the borrower under Louisiana state law; and that the homeowner failed to state claims for state or common law claims of negligence, negligent misrepresentation, failure to warn, detrimental reliance, and breach of warranty. The appellate court noted that the district court had jurisdiction based on the provisions of CAFA, in

that there was minimal diversity and the \$5 million amount in controversy requirement was satisfied. The court of appeals affirmed the district court's dismissal of the plaintiff's claims, and granted the defendants' motion to dismiss the appeal.

E. *Gene & Gene, LLC v. Biopay, LLC*⁵

This plaintiff filed a class action, alleging that Biopay had sent over 4,000 unsolicited fax advertisements to Gene and other unidentified class members in violation of the TCPA.⁶ *Inter alia*, the TCPA bars the sending of an "unsolicited advertisement" from one fax machine to another. Finding that the proposed class met the requirements of the Federal Rules of Civil Procedure, Rules 23(a) and 23(b)(3), the district court certified the class. Biopay appealed the class certification, as well as the district court's subject-matter jurisdiction over the case.

The Fifth Circuit U.S. Court of Appeals held that: (1) the district court did have subject matter jurisdiction under the provisions of CAFA; and (2) the district court abused its discretion in certifying the class, because the Rule 23(b) predominance requirement was not satisfied.

F. *Bullard v. Burlington Northern Sana Fe Railway Co., et al.*⁷

One hundred forty-four plaintiffs asserted tort claims against four corporations in this litigation, alleging that the defendants had designed, manufactured, transported, or used chemicals that were emitted from a wood-processing plant, injuring the people living nearby. Relying on the mass action provisions of CAFA, the defendants removed

3. 526 F.3d 1170 (8th Cir. 2008).

4. 519 F.3d 239 (5th Cir. 2008).

5. 2008 WL 3511766 (5th Cir. 2008).

6. The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 109-21, 119 Stat. 362, § 2 (codified as amended at 47 U.S.C.A. § 227(b)(1)(C) (West, 2001 & Supp. 2006)); see generally Jean Noonan & Michael Goodman, *Fax, E-mail, and Telephone: Federal Regulation of Marketing Methods*, 62 Bus. Law. 575 (2007).

7. 535 F.3d 759 (7th Cir. 2008).

the case to federal court. The district court denied the plaintiffs' motion to remand, and the plaintiffs appealed.

The Seventh Circuit U.S. Court of Appeals held that removal was warranted as a "mass action" under CAFA and, since the complaint proposed one proceeding, and therefore there would be but one trial, with more than 100 plaintiffs. The court determined that the action constituted a mass action under CAFA, whether it was resolved at trial, summary judgment or settlement, and thus removal to federal court was proper.

G. *Louisiana, ex rel. Caldwell v. Allstate Ins. Co., et al.*⁸

The State of Louisiana, through its Attorney General and counsel from private law firms, filed this *parens patrie* action in state court against Allstate Insurance Co. and nine other insurance company defendants, claiming violations of the state's antitrust laws, and specifically alleging that the defendants had "worked together to form a combination that illegally suppressed competition in the insurance industry." The defendants removed the case under CAFA jurisdiction. The district court denied the state's motion to remand, and the state appealed.

The Fifth Circuit held that: (1) Louisiana's attorney general had the authority to bring *parens patrie* anti-trust actions; (2) the real parties in interest for treble damages were the individual policy holders; (3) removal of the action was proper pursuant to the CAFA "mass action" provisions; and (4) by joining private parties in the lawsuit, Louisiana had waived its Eleventh Amendment immunity.

III. Commencement

A. Introduction

CAFA was enacted on February 18, 2005; therefore, all class actions commenced on or after February 18, 2005 are subject to the provisions of CAFA. Rela-

tion-back analysis has become prevalent in the class action arena, due to CAFA's stated lack of retroactive application. Since CAFA only applies to cases commenced on or after February 18, 2005, courts have been required to determine whether an amended complaint relates back to the pre-CAFA complaint (so that CAFA does not apply), or whether the amendment does not relate back and in fact commences a new action post February 18, 2005, so that CAFA may apply. Although the issue is dying down as the distance between the date of passage of CAFA and the filing of cases (or amendments) increases, the issue continues to be litigated, as the following cases reflecting the most recent changes in CAFA's commencement provisions indicate.

B. *Lussier v. Dollar Tree Stores, Inc.*⁹

The plaintiff employees filed this state court putative class action against their employer, asserting claims for violation of Oregon's wage and hour laws. The defendant employer removed the action to federal court under CAFA. The United States District Court for the District of Oregon granted the plaintiffs' motion to remand, but denied their request for attorney fees. The employees appealed the denial of their attorney fees.

The Ninth Circuit U.S. Court of Appeals, writing through Judge Rymer, found that the defendant employer's basis for removal was not clearly unreasonable. While the lawsuit was initially filed prior to the effective date of CAFA, the court found that the defendant's argument that, for purposes of removal, the action was not deemed "commenced" until it was served (which did not occur until after CAFA's enactment) was a novel issue, and, therefore, not an unreasonable argument. Accordingly, the district court's decision to deny the plaintiffs' request for attorney fees was affirmed.

C. *Springman v. AIG Marketing, Inc.*¹⁰

The plaintiff brought this class action in Illinois state court, and finally, after some four years of being told that he had sued the wrong party, the plaintiff requested and obtained leave to amend the complaint to substitute the correct party. In the interim, Congress passed CAFA. The case was not removable when filed, but was removed post-CAFA by the newly-added party.

The plaintiff sought to remand the case, arguing that the amendment related back to the original filing date. Under either federal or state law (the court did not reach the issue as to which was applicable), relation-back requires that the newly-added party "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against" that defendant. The Seventh Circuit held that because the plaintiff did not change defendants for years, the not-yet-named defendant would not have assumed the action would have been brought against it but for the plaintiff's mistake. Accordingly, the newly-filed complaint did not relate back to the original action, and the appellate court found that the post-CAFA removal was proper.

D. *Komeshak v. Risk Enterprise Management Services, Inc.*¹¹

The plaintiffs filed suit four days before CAFA's enactment. Although the plaintiffs named the wrong defendant, they were given multiple opportunities to correct their mistake, and finally served the complaint on the proper defendant, although not until well after CAFA's effective date. In this unpublished decision, the Seventh Circuit reversed the district court's remand order, and held that because the plaintiffs did not exercise diligence in attempting to serve the proper defendant, even though they had

8. 536 F.3d 418 (5th Cir. 2008).

9. 518 F.3d 1062 (9th Cir. 2008).

10. No. 08-1019, 2008 WL 1722153 (7th Cir. Apr. 15, 2008).

11. No. 07-1194, 2007 WL 930257 (7th Cir. Mar. 27, 2007).

access to documents which would have identified the correct defendant during the period in question, the amendment of the complaint to add the properly named defendant constituted the commencement of a new case under CAFA.

E. *McAtee v. Capital One, FSB*¹²

The plaintiff filed a complaint in state court prior to the effective date of CAFA, and amended that complaint after CAFA's effective date to substitute a named party for a Doe defendant. Looking to California law, the Ninth Circuit found that the substitution did not "commence" a new action which would justify removal. The court explained that, under the applicable state law to which the court must look to determine whether the action was commenced before the effective date of CAFA, the relation-back doctrine applies only for purposes of determining the statute of limitation and timeliness of the service of process. As a consequence, the amendment to the complaint did not commence a new action, and, therefore, removal was properly denied.

IV. Burden of Proof--CAFA Jurisdiction as a Basis for Removal

A. Introduction

A majority of the courts considering the question to date have held that the burden of proof pertaining to CAFA jurisdiction is on the proponent of federal court jurisdiction. The following are the circuit cases decided in 2008 on the issue of the burden of proof for maintaining CAFA jurisdiction as a basis of removal.¹³

B. *Lowdermilk v. U.S. Bank NA*¹⁴

The plaintiff, in her complaint, disclaimed that the aggregate damages were in excess of \$5 million; nevertheless, the defendant removed, and the district court remanded. On appeal, the Ninth Circuit held that to contradict the plaintiff's allegation that the damages were less than the jurisdictional amount, the defendant must prove the "legal certainty" of jurisdiction. Applying this heightened standard (for which, incidentally, there is no support in the text of CAFA and which is, in fact, counter to the express purposes of CAFA as set out in the legislative history and in Section 2 of the CAFA), the court then found that the defendant failed to present sufficient proof to support federal jurisdiction.

C. *Strawn v. AT&T Mobility, LLC*¹⁵

The plaintiffs, two consumers, commenced a class action in state court against the defendant AT&T on behalf of telephone customers who were charged a monthly roadside assistance fee without having requested the service. The complaint sought a declaratory judgment and "damages of which individual recoveries do not exceed \$75,000 for Plaintiffs or any member of the class." Additionally, three stipulations that the minimum amount in controversy was not satisfied were attached to the complaint.

The defendant removed under CAFA, and submitted an affidavit stating that the class could potentially reach over 58,000 AT&T customers and that, based on the statutory minimum amount of damages, the amount in controversy requirement was satisfied. However, the plaintiffs responded by shrinking the class to exclude those customers who willingly remained in the roadside assistance program. The district court ordered the defendant to recalculate

damages, but the defendant responded that the recalculation was impossible for this group of hypothetical customers because they were never tracked as such. In response, the district court entered a "judgment/order," remanding the case for want of subject-matter jurisdiction.

The Fourth Circuit U.S. Court of Appeals reversed the district court, holding that the party seeking to invoke federal jurisdiction must allege the basis for federal jurisdiction in the notice of removal, and, when challenged, must demonstrate the basis for federal jurisdiction. The court found that AT&T had amply demonstrated the requisite amount in controversy, based on the number of class members.

D. *Guglielmino v. McKee Foods Corp.*¹⁶

The plaintiffs, distributors of bakery products, brought a class action suit in state court against the defendant McKee Foods, alleging that McKee had violated various wage and labor laws by treating its distributors as independent contractors, rather than employees. In the "jurisdiction and venue" section of the complaint, the plaintiffs alleged that their damages were less than \$75,000; however, in the "prayer for relief" they sought, among other damages, monetary damages under statutory and common law, punitive damages, attorney's fees and payment of back taxes.

McKee removed the action to federal court, claiming potential damages in excess of \$75,000 per plaintiff based on their prayers. Following removal, the plaintiffs moved to remand, challenging McKee's calculations of the amount in controversy. The district court denied the plaintiffs' motion, and applied the "preponderance of the evidence" standard, stating that "the defendant has the burden to show the allegations in the complaint set forth an amount in controversy that is 'more likely than not' greater than \$75,000."

The question that went up for interlocutory review was: "What is defendant's

12. 479 F.3d 1143 (9th Cir. 2007).

13. For more background on this issue, as well as the author's view as to the proper allocation of the burden of proof under CAFA, see H. Hunter Twiford, III, Anthony Rollo & John T. Rouse, *CAFA's New "Minimal Diversity" Standard For Interstate Class Actions Creates A Presumption That Jurisdiction Exists, With The Burden of Proof Assigned To The Party Opposing Jurisdiction*, 25 Miss. C. L. Rev. 7 (2005).

14. 479 F.3d 994 (9th Cir. 2007).

15. 530 F.3d 293 (4th Cir. 2008).

16. 506 F.3d 696 (9th Cir. 2007).

burden of proof when plaintiffs move to remand pursuant to 28 U.S.C. section 1447(c) and their state-court complaint specifies that their damages are less than the jurisdictional requirement?"

The Ninth Circuit U.S. Court of Appeals looked at three different burdens of proof to determine the amount in controversy when it is uncertain from the face of the CAFA complaint: (1) the inverse legal certainty test; (2) the preponderance of the evidence test; and (3) the legal certainty test. The court held that the preponderance of the evidence burden of proof applied to the removing defendants.

E. *Frederico v. Home Depot*¹⁷

The plaintiff sued Home Depot in state court, alleging a violation of the New Jersey Consumer Fraud Act and common law fraud. The case was removed to federal court, where it was dismissed when the court concluded that the jurisdictional amount was not satisfied.

On appeal, the Third Circuit U.S. Court of Appeals addressed whether the case satisfied the amount in controversy test set by CAFA, and concluded that it did, because it did not appear "to a legal certainty" that the class could not recover in excess of the jurisdictional amount. As a result, the Third Circuit found that the diversity jurisdiction requirement had been satisfied.

V. CAFA's Exceptions to Jurisdiction

A. Introduction

Courts have generally held that the burden of proof as to CAFA exceptions is on the party seeking to demonstrate their applicability. Typically, plaintiffs seek to apply CAFA exceptions as a tool for remaining in state court. Three of these exceptions mandate the district court's declination of CAFA jurisdiction: (1) local controversy; (2) home state; and (3) securities actions. Additionally,

there is a discretionary exception which allows courts to decline to exercise CAFA jurisdiction "in the interests of justice." The cases noted below include some of the more recent discussions as to which party bears the burden of proof as to the CAFA exceptions.

B. *Estate of Pew v. Cardarelli*¹⁸

The plaintiff, a holder of money market certificates, filed suit in state court against the defendant issuers and their officers and auditor, asserting a state law claim of fraudulent concealment of the issuer's insolvency under New York's state consumer fraud law. The defendants removed the action to federal court pursuant to CAFA, and the United States District Court for the Northern District of New York granted the plaintiff's motion to remand. Following remand, the defendants appealed.

The Second Circuit U.S. Court of Appeals held that the putative class allegations that the officers of the issuer of the certificates had failed to disclose the issuer's insolvency did not fall within CAFA's exception to its grant of original and appellate jurisdiction for actions solely involving claims that "relate [] to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security." Thus, the Second Circuit granted the defendant's petition for permission to appeal, and reversed the district court's decision to remand the action to state court.

Judge Poler dissented, arguing that the majority had misconstrued the plain terms of CAFA and that the instant matter did qualify as one in which securities holders sought to enforce rights created by or relating to their securities; he would have accordingly affirmed the district court's decision to remand the case.

C. *Luther v. Countrywide Homes Loans Servicing, LP*¹⁹

The plaintiff Luther filed a class action alleging that the defendant, Countrywide Home Loans Servicing, had violated the Securities Act of 1933 by issuing false and misleading registration statements related to mortgage pass-through statements. The defendant removed the action under CAFA, and the plaintiff moved to remand on grounds that section 22(a) of the Securities Act of 1933 bars the removal of claims under CAFA that were originally filed in state court. The district court agreed, holding that the section 22(a) prohibition trumps CAFA's general grant of diversity and removal jurisdiction.

The Ninth Circuit held that: (1) CAFA's general grant of removal in "high-dollar" class actions fails to trump section 22(a)'s specific bar to removal in under the Securities Act of 1933; and (2) pursuant to section 22(a) of the Securities Act of 1933, the class action was not removable.

VI. Appellate Review

A. Introduction

The courts have continued to evaluate appellate review of remand orders under CAFA. According to CAFA's text, the appellate court may accept an application for appeal that is made not less than seven days after a remand order is issued. This language has caused confusion because, if taken literally, a party would be required to wait seven days before filing an appeal, but would have no outer time limit on filing after the expiration of the first seven days. The following cases demonstrate the courts' unwillingness to grant appeals where CAFA appellate procedure is not followed by the parties.

B. *Spivey v. Vertrue, Inc.*²⁰

The plaintiff filed a class action suit alleging that the defendant Vertrue

17. No. 06-2266, 2007 WL 3310553 (3d Cir., Nov. 9, 2007).

18. 527 F.3d 25 (2nd Cir. 2008).

19. 533 F.3d 1031 (9th Cir. 2008).

20. 528 F.3d 982 (7th Cir. 2008).

systematically submitted unauthorized charges on his credit cards through twenty-two of Vertrue's programs. Vertrue removed to federal court, citing federal jurisdiction under CAFA. The plaintiff moved to remand on the grounds that the amount in controversy requirement was not satisfied. The district court agreed, and remanded the case. Vertrue then filed its petition for leave to appeal. Vertrue's counsel mailed the petition on the seventh day following the court's remand order, and the petition reached the court and was "filed" on the tenth day after the district court's order.

Spivey then argued that the appellate court lacked jurisdiction because Vertrue's lawyer did not adhere to the required time period under 28 U.S.C. section 1453(c)(1), which provides that "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to a State court from which it was removed if application is made to the court of appeals not less than seven days after the entry of the order."

The Seventh Circuit held that: (1) Vertrue's petition for leave to appeal was timely; and (2) the amount in controversy requirement for removal under CAFA

was satisfied. The court interpreted the open-ended phrase "not less than seven days" to mean there was no terminal date for appeal, and relied on Federal Rules of Civil Procedure Rule 5(a) as imposing a thirty day limit on the time within which to file a notice of appeal.

VII. Other Sources

For additional information regarding CAFA, consider the following articles discussing important CAFA issues, all of which are available on your author's CAFALaw Blog, www.cafalawblog.com:

- *Mapping the New Class Action Frontier-A Primer on the Class Action Fairness Act and Amended Federal Rule 23*, 59 Consumer Fin. L.Q. Rep. 11 (2005).
- *The newly enacted Class Action Fairness Act (Part 1 of 2)*, Consumer Financial Services Law Report, Volume 8, Issue 17 (Mar. 2005).
- *The newly enacted Class Action Fairness Act (Part 2 of 2)*,

Consumer Financial Services Law Report, Volume 8, Issue 18 (Mar. 2005).

- *Practitioners Review "Abstention" Procedure under Sections 1332(d)(3) and (4)*, Consumer Financial Services Law Report, Volume 9, Issue 2 (June 2005).
- *CAFA's New "Minimal Diversity" Standard For Interstate Class Actions Creates A Presumption That Jurisdiction Exists, With The Burden of Proof Assigned To The Party Opposing Jurisdiction*, 25 Miss. C. L. Rev. 7 (2005).
- *Resorting to CAFA's Legislative History Resolves Some Ambiguity*, Consumer Financial Services Law Report, Volume 9, Issue 10 (Nov. 2005).
- *CAFA Enunciates a New Burden of Proof Standard for Federal Jurisdiction*, Consumer Financial Services Law Report, Volume 10, Issue 5 (Aug. 2006).

HUD's New Final RESPA Rule Affects...

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cannot exceed the total aggregate amount paid for obtaining that settlement service. By using an average charge, settlement service providers avoid having to track individual prices for third-party transactions on a transaction-by-transaction basis. The method of determining the average charge is left to the discretion of the settlement service provider. Settlement service providers may define a class of transactions based upon a period of time, type of loan and geographic area and must recalculate the average charge at least every six months.

For example, a settlement service provider could calculate the average charge for all purchase-money mortgages in a state or geographic area in a specified period of time, or it could establish a class of transactions in which it would use a single average charge for all transactions in a period of time, regardless of the specific loan type or location. If an average charge is used in any class of transaction defined by the settlement service provider, the provider must use the same average charge for every

transaction in that class. However, the rule prohibits using an average charge for a settlement service where the charge is based on the loan amount or the value of the property, such as transfer taxes, interest charges, reserves or escrows; and also for all types of insurance, including mortgage insurance, title insurance and hazard insurance. Any settlement service provider using an average charge for a particular settlement service must retain all documents used to calculate the average charge for a period of at least three years after any settlement in which the average charge was used.

C. New Servicing Disclosure Statement

The up-front Servicing Disclosure Statement has been revised to reflect the 1996 statutory change to RESPA that requires a statement as to whether a loan's servicing may be assigned, sold or transferred to any other person while the loan is outstanding. The revised Servicing Disclosure Statement

eliminates the numerical disclosure of the lender's historical practice of the sale or transfer of servicing rights, and the requirement that the applicant acknowledge in writing that he or she has read and understands the Servicing Disclosure Statement. While a model form is provided in the rule, its use is not mandatory, and the form may be revised by a lender to include additional information that clarifies or enhances the model language. The rule, with respect to a face-to-face application, also eliminates the requirement to deliver the Servicing Disclosure Statement at the time of application. In addition, the rule explicitly provides that the Servicing Disclosure Statement need not be issued if the application is denied within three business days of receipt. Further, in addition to delivery by mail, the disclosure may be sent by hand delivery, or, if the applicant agrees, by fax, e-mail or other electronic means.

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