

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).

