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REPORT

JURISDICTION

The July 19 opinion by the U.S. Court of Appeals for the Eleventh Circuit in *Cappuccitti v. DIRECTV Inc.* adds unprecedented new requirements to the jurisdictional amount-in-controversy provision of the Class Action Fairness Act, say attorneys Anthony Rollo, H. Hunter Twiford III, Richard A. Freshwater, and Stephen T. Masley in this BNA Insight. The authors say the ruling incorrectly interprets CAFA in requiring at least one plaintiff allege $75,000 in controversy to trigger CAFA jurisdiction for class actions originally filed in federal court, as well as $5 million in controversy for the class as a whole.

Warning that the decision ''may effectively shut down access'' to federal courts in the Eleventh Circuit for most new class actions, the authors say the ripple effects from *Cappuccitti* are not limited to the Eleventh Circuit, as the ruling will be argued as authority nationwide by those opposing CAFA jurisdiction in new and pending cases.

An Analysis of *Cappuccitti*: Eleventh Circuit Panel Adds New Amount in Controversy Requirement to CAFA Jurisdiction

BY ANTHONY ROLLO, H. HUNTER TWIFORD III, RICHARD A. FRESHWATER, AND STEPHEN T. MASLEY

On July 19, 2010, a panel of the United States Court of Appeals for the Eleventh Circuit issued an extraordinary opinion in the case of *Cappuccitti v. DIRECTV, Inc.*, 2010 WL 2803093, No. 09-14107 (11th Cir. July 19, 2010), that added an unprecedented new requirement to the jurisdictional amount in controversy provisions of the Class Action Fairness Act (CAFA)[1], creating shock waves in the class action bar nationwide. Specifically, *Cappuccitti* now mandates that at least one plaintiff must allege more than $75,000 in controversy to trigger CAFA jurisdiction in class actions originally

[1] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

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filed in federal court, as well as a $5 million aggregate amount in controversy for the class as a whole. This new requirement for establishing CAFA jurisdiction — which will presumably apply equally in the removal context — has enormous ramifications on class action practice both within the 11th Circuit and across the nation.

If it stands, *Cappuccitti* may effectively shut down access to the federal courts in the circuit for most new class actions, even when it is undisputed that the aggregate amount at stake may be tens of millions of dollars. This ruling may further call into question the validity of previously established subject matter jurisdiction over pending CAFA-based class action cases in the Circuit where plaintiffs never pleaded the new *Cappuccitti*-required $75,000 individual amount in controversy. But the ripple effects are not limited to the Eleventh Circuit — *Cappuccitti* can be expected to be argued as authority nationwide by those opposing a federal forum under CAFA jurisdiction in both new and pending cases.

Since Congress enacted CAFA, it appears that every court prior to *Cappuccitti* has read CAFA's subject matter jurisdictional elements in 28 U.S.C. § 1332(d)(2) as requiring only: (i) a class action; (ii) more than 100 class members; (iii) more than $5 million in aggregated damages alleged by the class (with no additional individual $75,000 requirement); and (iv) minimal diversity of citizenship among the parties. Indeed, a primary reason for passing CAFA was to eliminate for class actions the existing individual $75,000 amount in controversy requirement under § 1332(a) because that high threshold blocked most interstate class actions from ever seeing a federal court. CAFA accomplished this change by expressly allowing small individual class member claims to be aggregated in order to determine whether the matter in controversy exceeds the new requisite $5 million in controversy, with no minimum claim amount needed for any individual. See 28 U.S.C. § 1332(d)(6).

Despite CAFA's clear language and its supporting legislative history, *Cappuccitti* held that, in order for CAFA jurisdiction to exist at the threshold, at least one of the plaintiffs in a class action filed in federal court ''must allege an amount in controversy that satisfies the current congressional requirement for diversity jurisdiction provided in 28 U.S.C. § 1332(a),'' which is $75,000. *Cappuccitti* at 9-10. This is *in addition* to meeting CAFA's $5 million aggregate dispute amount requirement. This decision immediately sent shockwaves throughout the class action world.[2] Even those practitioners not familiar with the subtleties of CAFA will likely question the logic of the opinion. Observers now can only speculate on its impact, ranging from challenges to subject matter jurisdiction for new and long-pending CAFA class actions in federal court, to completely barring large national classes comprised of numerous members with individual claims from federal court.

The new *Cappuccitti* amount in controversy requirement, however, runs counter to the plain language of CAFA, its expressly articulated legislative history, and the vast body of prior jurisprudence spelling out the amount in controversy requirements for CAFA jurisdiction.

This article analyzes the *Cappuccitti* decision through the lens of CAFA's jurisdictional provisions codified in 28 U.S.C. § 1332(d), its legislative history, and relevant case law, and considers the potential impact of *Cappuccitti* on class actions across the country.

The Decision In *Cappuccitti v. DIRECTV*

The *Cappuccitti* plaintiffs initiated their putative class action under Fed. R. Civ. P. 23 against DIRECTV, Inc. in the United States District Court for the Northern District of Georgia, invoking federal subject matter jurisdiction under CAFA, 28 U.S.C. § 1332(d)(2). The plaintiffs claimed that DIRECTV violated Georgia common law by charging early cancellation fees to its subscribers. In compliance with the jurisdictional requirements of CAFA, the complaint alleged that the parties were minimally diverse,[3] the class exceeded 100 members, and the aggregated damages exceeded $5 million. The *Cappuccitti* plaintiffs specifically alleged the existence of CAFA jurisdiction over the case, and DIRECTV did not contest the existence of CAFA jurisdiction.

CAFA's legislative history confirms that CAFA does not require a plaintiff to allege an amount in controversy exceeding $75,000.

DIRECTV timely moved the district court to compel the named plaintiffs to arbitration pursuant to the terms of its subscriber agreement, or alternatively, to dismiss the claims for damages pursuant to Fed. R. Civ. P. 12(b) for failure to state a claim. The district court denied DIRECTV's motion to compel arbitration, and DIRECTV filed an interlocutory appeal to the 11th Circuit under 9 U.S.C. § 16(a)(1)(B). Rather than address the arbitration issues appealed by DIRECTV, the 11th Circuit

[2] For a sampling of the ongoing discussions by commentators on this issue within days of the 11th Circuit's decision, *see, i.e.*, Anthony Rollo, Hunter Twiford & Richard Freshwater, *Seismic Alert: 11th Circuit Upends Existing Landscape of CAFA Subject Matter Jurisdiction*, CAFA Law Blog, http://www.cafalawblog.com/-case-summaries-seismic-alert-11th-circuit-upends-existing-landscape-of-cafa-subject-matter-jurisdiction.html, post dated July 24, 2010; Adam Steinman, *Commentary on Recent CAFA Decision (Cappuccitti v. DIRECTV)*, http://lawprofessors.typepad.com/civpro/, post dated July 26, 2010; Donald M. Faulk, Archis A. Parasharami & Kevin S. Ranlett, *Eleventh Circuit Decision Threatens To Eliminate Federal Jurisdiction Over Most Consumer Class Actions, Undermining The Goals Of The Class Action Fairness Act*, http://www.mayerbrown.com/publications/article.asp?id=9372&nid=6, post dated July 21, 2010; Matthew D. Allen, *What To Do With Cappuccitti?* http://www.carltonfields.com/classactionblog/blog.aspx?entry=381, post dated July 22, 2010, Eric Jon Taylor & Jon Chally, *More Musings on Cappuccitti*, CAFA Law Blog, http://www.cafalawblog.com/-case-summaries-guest-post-more-musings-on-cappuccitti-from-eleventh-circuit-practitioners-eric-jon-taylor-and-jon-chally.html, post dated July 25, 2010.

[3] The plaintiffs and the putative class members, by definition, consisted of Georgia residents, and DIRECTV was a California corporation.

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panel[4] hearing the case instead questioned its jurisdiction over the case, an issue that, having never been challenged by the parties, was apparently neither briefed nor argued.

According to the ruling, a federal court now has subject matter jurisdiction over a class action that originates in federal court and is brought under CAFA only when: (1) the ''amount in controversy [is] over $5,000,000 (obtained by aggregating the claims of the individual class members . . .)''; (2) there is minimal diversity between the parties; (3) the class action is ''filed under Federal Rule of Civil Procedure 23''; (4) the plaintiffs allege ''that there are 100 or more plaintiffs within the proposed class(es)''; and *if and only if* under the new *Cappuccitti* requirement (5) at least one of the plaintiffs in addition alleges ''an amount in controversy that satisfies the current congressional requirement for diversity jurisdiction provided in 28 U.S.C. § 1332(a),'' which is $75,000. *Cappuccitti*, at 3.

In addressing its novel requirement that at least one plaintiff must now also allege at least $75,000 in controversy, the court reasoned that, while 28 U.S.C. § 1332(d) ''may have altered § 1332(a) to require only minimal diversity in CAFA actions . . . there is no evidence of congressional intent in § 1332(d) to obviate § 1332(a)'s $75,000 requirement as to at least one plaintiff.'' It was undisputed that the complaint adequately alleged the previously well established four elements for CAFA jurisdiction over a class action under § 1332(d)(2). But, because no plaintiff in *Cappuccitti* further alleged an individual amount in controversy exceeding $75,000, the 11th Circuit concluded that the plaintiffs lacked a ''basis for invoking the federal courts' subject matter jurisdiction under CAFA.'' *Cappuccitti*, at 3.

This is the first known instance in hundreds of cases since CAFA's enactment where a court has grafted onto CAFA's $5 million aggregate amount in controversy requirement the additional requirement that at least one plaintiff must also allege more than $75,000 in damages.[5]

CAFA's Required Amount In Controversy

A. The Plain Text of CAFA

After a long and arduous multi-year legislative battle,[6] Congress enacted the Class Action Fairness Act in 2005, amending 28 U.S.C. § 1332 by eliminating for subject matter jurisdiction over class actions both the $75,000 amount in controversy and the complete diversity of citizenship requirements.[7] CAFA greatly expanded diversity jurisdiction over interstate class actions filed in, or removed to, federal court, per the clearly stated words in the statute, and the record of the legislative intent of Congress.

CAFA's ''minimal'' diversity jurisdiction over both class actions and mass actions is outlined in 28 U.S.C. § 1332(d). Subsections (a) through (c) of § 1332 describe the previously existing requirements of subject matter jurisdiction in the federal district courts based on ''complete'' diversity of citizenship. Subsection (a), which formerly was the only vehicle for finding diversity jurisdiction over a class action, and which was unchanged by CAFA, states the required amount in controversy for ''complete diversity'' jurisdiction as follows: ''The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs . . .'' 28 U.S.C. § 1332(a).

Subsection (d), added by CAFA, incorporates the legislative provisions that created minimal diversity subject matter jurisdiction for those cases filed as class actions under Federal Rule of Civil Procedure 23 or any equivalent state provision. 28 U.S.C. § 1332(d)(1)(B). Subsections (d)(2) through (10) establish and define the remaining jurisdictional requirements (and exceptions) for establishing minimal diversity jurisdiction over class actions under CAFA. 28 U.S.C. §§ 1332(d)(2)-(10). In addition, in an effort to cure other abuses in multiplaintiff lawsuits, CAFA provides minimal diversity jurisdiction over cases which may not be styled as a ''class action,'' but which may still be ''deemed to be a class action removable'' to federal court under CAFA if it qualifies as a ''mass action'' under subsection (d)(11). 28 U.S.C. § 1332(d)(11).

CAFA's minimal diversity jurisdictional requirements for establishing federal court jurisdiction over class actions are clearly and succinctly stated in the Act: (1) the action must be filed under Fed. R. Civ. P. 23 or other similar rule or statute (*see* 28 U.S.C. § 1332(d)(1)(B)); (2) minimal diversity must exist between the parties (*see* 28 U.S.C. § 1332(d)(2)(A)-(C)); (3) the total membership of the proposed class of plaintiffs must number at least 100 (*see* 28 U.S.C. § 1332(d)(5)(B)); and the matter in controversy must exceed the sum or value of $5,000,000, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2). There is no requirement whatsoever in § 1332(d) that at least one plaintiff must allege an individual claim exceeding $75,000. Subsection § 1332(d)(6) further establishes that the existing prohibitions under § 1332(a) (complete diversity) against ''aggregation'' of claims no longer apply to class actions, which states: ''[i]n any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the

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[4] The panel consisted of 11th Circuit Judges Gerald Bard Tjoflat (who authored the opinion) and Charles R. Wilson, and Tenth Circuit Judge David M. Ebel, sitting by designation.

[5] The *Cappuccitti* court stated it was not the first court to make this finding, through citing *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 689 (9th Cir. 2006). *Cappuccitti*, at 9, n.10. *Abrego*, however, was a *mass* action case filed under § 1332(d)(11), which has different and separate CAFA subject matter required elements (including a $75,000 minimum amount in dispute), and was not a *class* action case filed under § 1332(d)(2) (which does not contain that $75,000 requirement).

[6] The Class Action Fairness Act had been introduced in Congress in a variety of forms each session from 1998 until its adoption in 2005, but in each of the prior sessions, failed to gain necessary bipartisan support for passage. *See,. e.g..,* Anthony Rollo & Gabriel A. Crowson, *The Newly Enacted Class Action Fairness Act (Part 1)*, Consumer Financial Services Law Report, Volume 8, Issue 17 (March 9, 2005).

[7] *See e.g.,* Adam N. Steinman, *''Less'' Is ''More?'' Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act's Appellate Deadline Riddle*, 92 Iowa L. Rev. 1183, 1191 (2007) (discussing how CAFA changed the $75,000 requirement to allow for $5,000,000 in aggregated damages to establish federal subject matter jurisdiction for interstate class actions).

sum or value of $5,000,000, exclusive of interest and costs.'' 28 U.S.C. § 1332(b)(6).

Subsection (d)(11) lays out the new requirements for minimal diversity jurisdiction over ''mass actions'' under CAFA. 28 U.S.C. § 1332(d)(11). CAFA's mass action jurisdictional requirements differ significantly from CAFA's class action jurisdictional requirements. While at least 100 plaintiffs are required for both class actions and mass actions, and the $5,000,000 aggregate threshold applies to both, class action status under Fed. R. Civ. P. 23 or similar state provisions is not required for a case to be deemed a mass action. Pursuant to subsection (d)(11), mass action ''jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a),'' which is currently $75,000, 28 U.S.C. § 1332(d)(11)(B)(i). In creating CAFA, Congress envisioned a scenario under which a federal court could exercise minimal diversity jurisdiction over only those plaintiffs in a mass action whose individual amounts in controversy exceed $75,000. *See* 28 U.S.C. § 1332(d)(11), by referencing § 1332(a).[8]

CAFA explicitly permits the aggregation of the claims of all class members, regardless whether the amounts of those individual claims are all under $75,000, in meeting the $5 million amount in controversy threshold requirement. *See* 28 U.S.C. § 1332(d)(6). Conversely, in a mass action, in addition to the $5 million aggregate amount in controversy requirement, jurisdiction exists only over those plaintiffs who also have individual claims exceeding $75,000. *See* 28 U.S.C. § 1332(d)(11)(B)(i). This additional $75,000 requirement was added to CAFA's mass action subsection only, *see* 28 U.S.C. § 1332(d)(11)(B)(i), and is not found in CAFA's class action subsection. While Congress chose to require plaintiffs in a mass action to establish individual amounts in controversy of at least $75,000 each, it chose not to impose this same requirement on class action plaintiffs. *See* 28 U.S.C. § 1332(d)(11)(B)(i).

Under fundamental principles of statutory construction, then, that the Courts must presume that Congress did not intend for the additional $75,000 requirement for mass actions to similarly apply to class actions. *See, e.g., Bates v. United States*, 522 U.S. 23, 29-30 (1997) (''Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.''). In sum, for class actions like *Cappuccitti*, CAFA's plain language requires in order to meet its jurisdictional amount in dispute only that the aggregate damages of the class exceed $5 million, rendering the question of the amount of any individual plaintiff's damages wholly irrelevant.[9]

B. CAFA's Legislative History

A fair reading of CAFA's text, applying traditional statutory interpretation principles, leaves little room for misinterpretation of the amount in controversy requirement for minimal diversity jurisdiction over class actions. CAFA's legislative history further confirms the conclusion that CAFA does not require at least one plaintiff to allege an amount in controversy exceeding $75,000.[10] While the provisions of 28 U.S.C. § 1332(d) appear unambiguous, and therefore reliance on its legislative history may be unnecessary, review of the underlying Senate Judiciary Report[11] further confirms that the *Cappuccitti* decision is flawed.

Section 2 of the Act itself, labeled *Findings and Purposes*, the Preamble to CAFA, specifies that one of the purposes of CAFA is to restore the intent of the framers of the Constitution by having cases of national importance heard in the federal courts. The Senate Judiciary Report expounds on this concept expressed in the text of CAFA, providing that CAFA's jurisdictional provisions were enacted to expand the number and types of cases heard by federal courts, and are to be read broadly, ''with a strong preference that interstate class actions should be heard in a federal court. . . .,''[12] and noted that ''if a federal court is uncertain about whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value of $5,000,000,' the court should err in favor of exercising jurisdiction over the case.'' [13]

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[8] For a discussion of the stark jurisdictional differences between ''class actions'' and ''mass actions'' under CAFA, *see* Guyon Knight, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 Fordham L. Rev. 1875, 1876-82 (2010).

[9] *See, e.g.*, Michael W. Lewis, *Comedy or Tragedy: The Tale of Diversity Jurisdiction Removal and the One-Year Bar*, 62 SMU L. Rev. 201, 204 (2009) (where it is noted that ''[a]lthough this aggregated value [$5,000,000] is much larger than the individual claim requirements of $75,000, by allowing aggregation of claims CAFA effectively expanded federal jurisdiction over diverse class actions.'' *See also* Stephen B. Burbank, *The Class Action Fairness Act of 2005 In Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1455 (2008) (noting that CAFA amended the jurisdictional requirement of $75,000 for amount in controversy to an aggregated amount of $5,000,000 in the class action context); Todd N. Hutchison, *Loosening the Uniform Application of Removal Jurisdiction*, 80 Temp. L. Rev. 1229, 1235(2007) (noting Congress ''explicitly revised[ed] the legal principles of diversity jurisdiction'' to remove the individual $75,000 requirement in class actions).

[10] ''The starting point in any statutory interpretation analysis is the language of the statute itself, and courts should consider legislative history only if the statute is ambiguous. *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570, 1575, 108 L.Ed.2d 842 (1990). A court can also look to a statute's legislative history if the statute is silent on a certain issue. *See, e.g., United States v. Gayle*, 342 F.3d 89, 93-94 (11th Cir. 2003). Additionally, courts may consider legislative history ''when a statute is susceptible to divergent understandings and when there exists authoritative legislative history that assists in discerning what Congress actually meant.'' Anthony Rollo, H. Hunter Twiford III & Gabriel A. Crowson, *Resorting to CAFA's Legislative History Resolves Some Ambiguities*, Consumer Financial Services Law Report, Vol. 9, Issue 10 (November 2, 2005).

[11] See S. Rep. 14, 109th Cong., 1st Sess. (the ''Senate Report''). Because CAFA originated in the Senate as S. 5, the report of the Senate Judiciary Committee should be considered ''an authoritative source'' on interpreting the CAFA. *See, e.g., Guaranty Fin. Servs., Inc. v. Ryan*, 928 F.2d 994, 1004 (11th Cir. 1991) (recognizing that an ''authoritative source is the official congressional report on the bill'').

[12] S. Rep. 14, 109th Cong., 1st Sess., at p. 43.

[13] S. Rep. 109-14 at 42.

   ISSN 1529-0115

If *Cappuccitti* stands, it will have a game-changing impact on future class actions in the 11th Circuit.

The Senate Judiciary Report expressly states that CAFA is intended to cover class actions where each plaintiff ''only [has] a small financial stake in the litigation.''[14] This stated intent of Congress explains why the $75,000 complete diversity requirement was intentionally omitted from CAFA's new amount in controversy jurisdictional provisions for class actions and why the new $5 million aggregate measurement was substituted in its place.

Page 70 of the Senate Judiciary Report specifically addresses the intent of Congress to change the amount in controversy requirement for minimal diversity class action jurisdiction under CAFA:

> As noted previously, in some federal Circuits, the jurisdictional amount requirement in a class action is satisfied [pre-CAFA] by showing that any member of the proposed class is asserting damages in excess of $75,000 . . . [I]t will [now] be much easier to determine [under CAFA] whether the amount in controversy presented by a purported class as a whole (that is, in the aggregate) exceeds $5 million than it is to assess the value of the claim presented by each and every individual class member [to see if it reaches $75,000], as is required by the current diversity jurisdictional statute.[15]

Page 12 of the Senate Judiciary Report observes that, prior to CAFA, ''class actions often include[d] a provision stating that no class member will seek more than $75,000 in relief . . . . This leads to the nonsensical result under which a citizen can bring a 'federal case' by claiming $75,001 in damages for a simple slip-and-fall case against a party from another state, while a class action involving 25 million people living in all fifty states and alleging claims against a manufacturer that are collectively worth $15 billion must usually be heard in state court (because each individual class member's claim is for less than $75,000).'' [16]

On pages 26-27, Congress further explained its reasoning:

> As noted above, the two most common tactics employed by plaintiffs' attorneys [before CAFA] in order to guarantee a state court tribunal are: adding parties to destroy diversity and shaving off parties with claims for more than $75,000. . . . Other complaints seek $74,999 in damages on behalf of each plaintiff or explicitly exclude from the proposed class anybody who has suffered $75,000 or more in damages. . . . The Committee believes that federal courts are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy.[17]

And further, ''the Committee notes that as with the other elements of section 1332(d), the overall intent of these provisions is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications.''[18]

Footnote 29 of the Senate Judiciary Report reiterates this theme: ''The committee stresses, however, that even in those Circuits following this rule [referring to the extension of supplemental jurisdiction in *Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003)], relatively few class actions find their way into federal court because plaintiffs offer named plaintiffs who do not have $75,000 claims or name a non-diverse plaintiff or defendant in order to prevent removal of the case to federal court.''

The Flawed Reasoning Of *Cappuccitti*

Despite the fact that Congress enacted separate and distinct amount in controversy requirements for mass actions versus class actions under CAFA, *Cappuccitti* found that the mass action requirements apply equally to all class actions.

Cappuccitti began by discussing three previous Eleventh Circuit opinions: *Lowery v. Ala. Power Co.*, 483 F.3d 1184 (11th Cir. 2007); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159 (11th Cir. 2006); and *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006), each of which involved the removal of actions originally filed in state courts. *Cappuccitti* was filed by plaintiffs in federal court, relying on CAFA for federal jurisdiction from the onset.[19] The opinion relies heavily on *Lowery*, in which jurisdiction was not premised upon CAFA's class action provisions, but rather, on its mass action provisions.

The *Cappuccitti* court, which incidentally also authored *Lowery*, noted that *Lowery* concluded that '' 'mass actions' removable under CAFA are class actions that meet the requirements of § 1332(d)(2) through (10).'' *Cappuccitti*, p.6, citing *Lowery*, 483 F.3d at 1199-1200. After an extensive discussion of *Lowery* and a reference to § 1332(d), the court correctly noted that both the minimal diversity of citizenship and $5 million thresholds under § 1332(d)(2) had been met. *Cappuccitti*, p.8. The court also correctly observed that, because this was, in fact, a class action with not less than 100 potential members, the requirements of § 1332(d)(2) and (5) were also established.

The court then made this quantum leap: ''[T]he requirements for an original CAFA action resemble those for a mass action removable under CAFA,'' and concluded, ''CAFA did not alter the general diversity statute's requirement that the district court have original jurisdiction 'of all civil actions where the matter in controversy exceeds the sum or value of $75,000' and is between citizens of different States. § 1332(a).'' *Cappuc-*

[14] S. Rep 109-14 at 32.
[15] S. Rep. 109-14 at 70.
[16] S. Rep. 109-14 at 12.
[17] S. Rep. 109-14 at 26-27.
[18] S. Rep. 109-14 at 35.
[19] This distinction should be immaterial to the jurisdictional analysis, since both original and removal jurisdiction have identical requirements under the Act. *See* 28 U.S.C. §§ 1332(d), 1441(a).

citti, p.9. The court reasoned that § 1332(d) was not intended to expand ''federal court jurisdiction beyond Congress's authorization.'' *Cappuccitti*, p.10. The court then observed that requiring only the $5 million aggregate threshold, without an additional $75,000 minimum claim alleged by a plaintiff, ''would essentially transform federal courts hearing originally-filed CAFA cases into small claims courts, where plaintiffs could bring five-dollar claims by alleging gargantuan class sizes to meet the $5,000,000 aggregate amount requirement.''[20]

Finally, the court grafts a portion of the mass action requirement onto the separate class action provision of CAFA when it concludes that ''the $75,000 requirement expressly applies in actions removed under CAFA, 28 U.S.C. § 1332(d)(11)(B)(i) [referencing § 1332(a)], and we can think of no reason why Congress would have intended the requirement in the context of CAFA removal jurisdiction, but not CAFA original jurisdiction.''[21] *Cappuccitti*, at p.4. The court also stated that this conclusion was shared by the Ninth Circuit in *Abrego Abrego v. Dow Chem. Co*., 443 F.3d 676, 689 (9th Cir. 2006). *Abrego*, however, was a mass action case under CAFA, and not a class action.

Furthermore, there appears to be no other case since CAFA's 2005 enactment that states or supports *Cappuccitti*'s additional requirement for minimal diversity jurisdiction that one plaintiff must also allege at least $75,000 in controversy. All of the other cases simply say that there must be an aggregate jurisdictional amount exceeding $5 million, and/or suggest that the $75,000 amount in controversy for complete diversity no longer exists for class actions under CAFA. *See Blockbuster Inc. v. Galeno*, 472 F.3d 53, 59 (2d Cir. 2006) (''Unlike the general diversity statute which requires at least one claim to meet the amount-in-controversy minimum of $75,000, CAFA explicitly provides for aggregation of each class member's claim in determining whether the amount of controversy is at least $5,000,000.'' (internal citations omitted)); *Frederico v. Home Depot*, 507 F.3d 188, 198-99 (3d Cir. 2007) (after finding individual plaintiff would be entitled to $2,239.96, court ruled that plaintiff had stated a cause of action with class members' aggregate damages of $5,000,000 in satisfaction of CAFA requirements); *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 298-99 (4th Cir. 2008) (finding that defendant had met its burden of proof regarding $5,000,000 aggregate amount in controversy under CAFA by showing that proposed class was estimated at 58,800 individuals entitled to statutory minimum damages of $200 each); *Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 545 n. 10 (5th Cir. 2006)(''Unlike § 1332(a), CAFA explicitly allows aggregation of each class member's claim.''); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005) (finding that defendant had met its burden of proof regarding amount in controversy under CAFA by showing that proposed class was estimated at 3,800 individuals who may recover up to $1,500 each); *Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp.2d 285, 292-93 (S.D.N.Y. 2009)(recognizing the $75,000 individual amount in controversy requirement for mass actions, but not applying that requirement to class action with aggregate amount in controversy of $5,000,000).[22]

Other Observations

11th Circuit precedent provides that the Court of Appeals is not authorized to rewrite or amend statutory language under the guise of interpretation, particularly when doing so serves to defeat the clear purpose behind the statute. *Nguyen v. U. S*., 556 F.3d 1244 (11th Cir. 2009); *In re Hedrick*, 524 F.3d 1175 (11th Cir. 1175). It is the court's function to simply construe what Congress has written; ''after all, Congress expresses its purpose by words, and it is for the court to ascertain, but neither to add nor to subtract, neither to delete nor to distort.'' *Resident Councils of Washington v. Leavitt*, 500 F.3d 1025 (9th Cir. 2007). Here, *Cappuccitti* has effectively rewritten the jurisdictional requirements expressly enunciated by Congress and has effectively foreclosed the exercise of subject matter jurisdiction in class actions when no plaintiff alleges at least $75,000 in controversy, even though the total relief sought by members of the class may far exceed CAFA's $5 million aggregate minimum.

Chances may be good that the ruling will be modified by the 11th Circuit on rehearing.

Although the 11th Circuit may not embrace the ''rule of orderliness'' adopted by the Fifth Circuit,[23] it appears nonetheless that *Cappuccitti* may conflict with at least one previous opinion issued by another panel of the same circuit, *Pretka v. Kolter City Plaza II*, 608 F.3d 744, 772 (11th Cir. 2010). In *Pretka*, the 11th Circuit specifically ruled that CAFA jurisdictional requirements under § 1332(d)(2) are: (1) an aggregated amount in controversy exceeding $5,000,000; (2) minimal diversity

[20] This result is, however, precisely what Congress intended. *See* S. Rep. 109-14 at 32, which provides that the Act is intended to cover class actions where each plaintiff ''only [has] a small financial stake in the litigation.'' *And see id*., stating the jurisdiction shall NOT exist where ''(1) more than two-thirds of the plaintiffs are citizens of the same state as at least one of the primary defendants; (2) the principal injuries occurred in that state; (3) the matters in controversy are less than $5,000,000 or the membership of the proposed class is less than 100; or (4) the primary defendants are states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief.'' *See also id*. at 28, where the ''Diversity Section and Removal'' portion of the legislative history contains a discussion on the amount in controversy only as being at least $5,000,000 to establish federal jurisdiction.

[21] Of note, the *Cappuccitti* court specifically cites to the mass action section of CAFA, § 1332(d)(11)(B)(i), with its completely separate, additional $75,000 amount in controversy requirement, and then, misapplies it to the class action section of CAFA, § 1332(d)(2), which contains no such requirement.

[22] This list is not exhaustive, but merely provides a snapshot of relevant holdings around the country.

[23] *See, e.g., Saqui v. Price Cent. America, LLC*, 595 F.3d 206 (5th Cir. 2010) (''Our rule of orderliness forbids one of our panels from overruling a prior panel.''); *U. S. v. Bueno*, 585 F.3d 847 (5th cir. 2009) (same); *Jacobs v. Drug Intelligence Center*, 548 F.3d 375 (5th Cir. 2008) (rule of orderliness applies to prevent one panel of court of appeals from declaring a prior panel's decision void, even if prior panel's interpretation appears to be flawed, absent intervening change in law, such as statutory amendment or through decision of en banc court or U. S. Supreme Court).

   ISSN 1529-0115

between parties; (3) 100 or more plaintiffs; and (4) a commonality requirement that the claims involve common questions of law or fact.[24] *Pretka* does not mention a $75,000 requirement. *Cappuccitti*'s addition of the $75,000 amount in controversy requirement for at least one plaintiff is a marked departure from the less-onerous 11th Circuit standard previously applied in *Pretka*.

At least one commentator has suggested that *Cappuccitti*'s addition of the $75,000 requirement may be deemed dicta, and therefore may be disregarded by subsequent courts considering the question.[25] Under 11th Circuit law, statements in an opinion not ''fitted to the facts'' or which ''extend further than the facts of the case'' are considered to be dicta, and are not required to be followed. *Pretka v. Kolter City Plaza II*, 608 F.3d 744, 762 (11th Cir. 2010). *Pretka* also instructs, ''[w]hatever their opinions say, judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced.'' 608 F.3d at 762.

Interestingly, before this ruling and prior to CAFA's enactment, removal of a class action was easier in the 11th Circuit than it is now, post–CAFA, and after *Cappuccitti*. In the case of *Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003), aff'd *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U. S. 546 (2005), the court held that for a class action to be heard in federal court only one or more named plaintiffs must have claims exceeding $75,000, while the value of the claims of other class members was irrelevant, and need not also exceed an aggregate amount of $5 million, because supplemental jurisdiction existed. It could be argued that *Cappuccitti* will actually serve to decrease access to federal courts in large, multistate class actions after CAFA's passage, the polar opposite of Congress's intended effect in adopting CAFA.

In sum, the *Cappuccitti* decision clearly stands alone in how it applies the amount in controversy requirements under CAFA.

Potential Ripple Effects

If the ruling in *Cappuccitti* stands as good law, it will unquestionably have a game-changing impact on future class actions filed in the state and federal district courts within the 11th Circuit. The ruling will also impact cases currently pending within that circuit if and when removed plaintiffs in pending cases now raise, post–*Cappuccitti*, fresh jurisdictional challenges based on the lack of a plaintiff who has alleged the $75,000 amount in controversy requirement. Challenges to subject matter jurisdiction can be raised at any time prior to final judgment, *see Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570-71 (2004), and thus, opponents to federal court jurisdiction may argue that any case currently pending in a federal district court under CAFA within the 11th Circuit could be subject to dismissal or remand for lack of subject matter jurisdiction under the reasoning of *Cappuccitti*. Consequently, the state courts within the 11th Circuit could effectively become the exclusive jurisdictions for class actions in the affected states, with the very real potential that they become ''magnet'' jurisdictions for multi-state and national classes of plaintiffs with small claims, particularly in consumer class actions.

The ripple effects of Cappuccitti do not end at the borders of the 11th Circuit, however. Removed plaintiffs across the country can also be expected to cite to *Cappuccitti* as authoritative support for remand for those cases outside the Eleventh Circuit where no plaintiff alleges a claim exceeding $75,000. And plaintiffs can now more easily strategically pray for damages of less than $75,000 for any plaintiff, named or otherwise, citing *Cappuccitti* as their basis as to why the federal courts would lack jurisdiction under CAFA even where the total amount in controversy easily exceeds the requisite $5 million aggregate amount.

Conclusion

Cappuccitti incorrectly interpreted and applied the jurisdictional provisions of CAFA in 28 U.S.C. § 1332(d). The decision has startling ramifications, in both the 11th Circuit and across the country, as long as the decision stands. *Cappuccitti* is not supported by CAFA's plain statutory language, or CAFA's legislative history, and is inconsistent or conflicts with all known existing CAFA case law on this issue. Until this matter is addressed and resolved, either through rehearing or rehearing en banc or by later Supreme Court review, the parameters of CAFA jurisdiction under 28 U.S.C. § 1332(d) will be in turmoil, leaving the federal courts at both the district and circuit levels around the country to wrestle with reconciling this circuit-level opinion. However, due to the strength of the arguments that *Cappuccitti* was incorrectly decided, the chances may be good that they will be modified on rehearing, or that few courts outside of the 11th Circuit will otherwise choose to follow *Cappuccitti*.

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[24] Two other opinions of the Eleventh Circuit state the same requirements, albeit indirectly. *See, e.g, Evans v. Walter Industries, Inc.*, 449 F.3d 1159 (11th Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1332 (11th Cir. 2006).

[25] *See, i.e.,* D. Matthew Allen, ''What to do with Cappuccitti?'' Carlton Fields Class Action Blog, http://www.carltonfields.com/classactionblog/blog.aspx?entry=381, post dated July 22, 2010.