Consumer Financial Services LAW REPORT

Focusing on Significant Caselaw and Emerging Trends

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Fair Credit

5th Cir.: Pre-FACT Act FCRA statute puts dispute reinvestigation duty on all CRAs

When it comes to claims against a credit reporting agency for failure to reinvestigate a consumer's dispute under the Fair Credit Reporting Act, the outcome hangs on which version of the statute governs the case. Prior to amendment by the Fair and Accurate Credit Transactions Act, said the **5th U.S. Circuit Court of Appeals**, the FCRA's duty to reinvestigate applied to all CRAs, not just the "owner" of a credit file. (*Morris v. Equifax Information Services, LLC, et al.*, No. 05-20578 (5th Cir. 07/24/06).)

"Because the [older] governing version of [S]ection 1681i does not distinguish between a CRA that owns the consumer's credit file and a CRA that distributes the consumer's credit file, we hold that the mere fact that a CRA does not own a consumer's file does not in itself necessarily relieve that CRA of the reinvestigation requirement of the FCRA," the 5th Circuit wrote.

Kenneth M. Morris obtained a report through **True Credit** that included his credit reports from the three major credit reporting agencies. Morris wrote to **Equifax Information Services LLC** to

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FACT Act

Bank's credit solicitation is firm offer, despite low initial value to consumer

A firm offer of credit to a consumer doesn't have to be substantial to be lawful. A bank's prescreened mailing to a consumer may only have offered an initial credit line of $75, but it plainly offered some value — enough to be adjudged a firm offer of credit under the Fair Credit Reporting Act. (*Bonner, et al. v. Cortrust Bank, N.A.*, No. 2:05-CV-137 PS (N.D. Ind. 07/12/06).)

"We conclude that the offer made by [the bank], while plainly a lousy deal for consumers of credit, is nonetheless a firm offer of credit and thus [the bank]'s accessing of the [consumer]s' credit histories was done for a permissible purpose," wrote Judge **Philip Simon** of the **U.S. District Court, Northern District of Indiana**.

Pierre Bonner and **Deborah Jackson** received identical prescreened MasterCard subprime credit solicitations from **Cortrust Bank NA** for a $250 line of credit. The bank's mailer also included an offer to join the "Premium Club," which would deliver hotel and car rental discounts to consumers for a fee.

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INSIDE

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CAFA enunciates a new burden of proof standard for federal jurisdiction

*By H. Hunter Twiford III, Anthony Rollo and John T. Rouse**

The Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005), has dramatically reshaped the class-action landscape, and it will take years for the courts and class-action practitioners to fully understand and appreciate the ramifications and wholesale changes made to the law related to class actions. Among other changes, the CAFA amends 28 USC 1332, which, prior to the CAFA, only provided for "complete diversity jurisdiction."

New 28 USC 1332(d)(2)

Specifically, new Section 1332(d)(2) now vests the federal courts with original "minimal diversity jurisdiction" over interstate class actions, provided that the thresholds of 100 or more plaintiffs and the minimum amount in controversy of $5 million are met, and there is minimal diversity — at least one plaintiff and one defendant are citizens of different states.

Since the enactment of 28 USC § 1332(d)(2), the CAFA's jurisdictional centerpiece, a critically important disagreement has arisen in the courts over the question of which party bears the burden of establishing the existence or nonexistence of minimal diversity jurisdiction under the CAFA. Historically, under well-settled jurisprudence applicable in the complete diversity context and in recognition that federal courts are courts of limited jurisdiction, the party asserting jurisdiction bears the burden of establishing that all jurisdictional requirements have been met, with all doubts resolved against a finding that jurisdiction exists (the "Complete Diversity Standard").

Under the CAFA, however, **Congress** sought to expand access to the federal courts for the narrow category of interstate class actions by creating minimal diversity jurisdiction for those which meet the jurisdictional requirements referenced above. When properly considered and interpreted, the text of the act and the legislative history combine to clearly indicate congressional intent that the courts apply a different standard, and shift the burden of proof to the party challenging jurisdiction (the "Minimal Diversity Standard").

Among the other findings and statements made in conjunction with its adoption of the CAFA, in Section 2 of the act, "Findings and Purposes," Congress specifically stated that prior abuses in class actions had served to undermine "the concept of diversity jurisdiction as intended by the Framers of the United States Constitution," in that state and local courts were keeping cases of national importance out of federal court and sometimes demonstrating bias against out-of-state defendants. Congress further stated in Section 2 of the CAFA that one purpose of the act is to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction."

The CAFA amends the jurisdictional provisions of Section 1332 to add new Section 1332(d). The provisions of this section specifically apply to interstate class actions filed under Federal Rule of Civil Procedure 23 or similar state statutes, and to mass actions involving 100 or more plaintiffs. Section 1332(d)(2) specifically enables minimal diversity jurisdiction.

These significant departures from the pre-CAFA law as it existed under the Complete Diversity Standard are aimed, in part, at preventing or minimizing what Congress viewed, as expressed in Section 2 of the act, as abuses involving class actions implicating interstate commerce that belonged in federal court, but were, instead, trapped in state courts.

Significantly, Congress wrote in the text of Section 2 of the CAFA a clear statement of its "Findings and Purposes" with respect to some of the factors it considered in enacting the CAFA. Section 2, which now appears in the "Historical and Statutory Notes" section of new 28 USC 1711, evidences Congress' plain desire to correct the problems with the jurisdictional status quo, in which the application of the restrictive Complete Diversity Standard often kept interstate class actions from making their way into the federal courts, where Congress obviously felt these cases more properly belonged.

Congress allocates minimal diversity

The CAFA's legislative history includes both a **House** sponsors' statement and a **Senate Judiciary Committee** report, each of which shows that Congress expressly allocated the minimal diversity jurisdictional burden of proof in class actions to the party that is opposing federal court jurisdiction.

Both state that the drafters of the CAFA intended that a new standard apply for the jurisdictional burden of proof — different from the previously existing complete diversity rule that had blocked interstate class-action access to the federal courts. The extent to which this unambiguous legislative history should be considered by the courts in their determination of which party bears the jurisdictional burden of proof under the CAFA is now the subject of litigation arising in significant numbers of removal contests, and will likely not be conclusively resolved until the Supreme Court decides the issue.

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BURDEN (continued from page 3)

Courts split over jurisdictional issue

Some courts addressing the question of which party bears the burden of proof have concluded that the party opposing minimal diversity jurisdiction under the CAFA bears the burden of establishing that jurisdiction does not exist, with a presumption in favor of jurisdiction, the "Minimal Diversity Standard."

Other courts addressing this issue have concluded to the contrary, and have applied the Complete Diversity Standard to interstate class actions asserting minimal diversity jurisdiction. Many of these courts, following the **7th U.S. Circuit Court of Appeal**'s reasoning in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005), have mechanically applied the Complete Diversity Standard in the CAFA context, seemingly with no recognition or analysis that the test for this category of cases may now be different under the CAFA.

Brill and similar decisions incorrect

The *Brill* decision erroneously imported the Complete Diversity Standard and applied it to interstate class actions where the Minimal Diversity Standard should have been the standard properly applied. *Brill*'s hostility to consideration of explicit contrary legislative history forces the square peg of the Complete Diversity Standard burden of proof into the round hole of minimal diversity jurisdiction, and does not withstand close scrutiny. A primary mistake in *Brill* and its progeny is that they completely ignore the congressional intent found in the text of the CAFA's "Findings and Purposes."

Brill mistakenly opined that the burden of proof language from the Senate Committee Report is "unconnected to any enacted text." *Brill*, 427 F.3d at 448. In fact, however, CAFA's legislative history is directly connected to the "enacted text" of the CAFA in two respects: first, as described above, the enacted text of the CAFA establishes a new statutory standard for federal court jurisdiction and removal, and the legislative history explicates that text; second, the CAFA's legislative history stating that Congress intended to impose the burden of proof on the party opposing federal jurisdiction to minimize existing abuses which improperly keep interstate class actions out of federal court, directly relates to and informs the "Findings and Purposes" in the text of Section 2 of the act.

Conclusion

Few would dispute that Congress, by adopting the CAFA, sought to increase access to the federal courts for interstate class actions; the conflict in the cases involves the narrower question focused on which party bears the jurisdictional burden of proof. Proponents of the expansive Minimal Diversity Standard assert that a fair reading of the operative provisions of the CAFA's legislative history reflect that Congress intended to shift the burden of proof to persons opposing federal jurisdiction over interstate class actions, and that the text of the CAFA supports the legislative history by dramatically easing the existing restrictions under the Complete Diversity Standard. Further supporting this conclusion is CAFA Section 2, "Findings and Purposes," which expressly explains the strong Congressional policy seeking to limit class action abuses occurring in state courts by allowing more interstate class actions to be maintained in federal courts.

All the courts thus far rejecting judicial consideration of the CAFA's legislative history or application of the Minimal Diversity Standard have instead applied the Complete Diversity Standard to interstate class actions to find a presumption against jurisdiction. The authors believe that those cases are incorrectly decided, based in part on the provisions of Section 2 of the CAFA. The clear statement of Congressional "Findings and Purposes," which is part of the text of the act itself, appears to have been overlooked by the majority of courts that have considered the burden of proof issue in their analyses.

Correctly interpreted, the CAFA's text, purposes, and legislative history combine to create a presumption in favor of finding that minimal diversity jurisdiction exists, with the burden of proof assigned to the party opposing jurisdiction. Any other result defeats Congress' clear intent in crafting this special purpose statute. ❑

Resources

Courts are split on the issue of whether the Class Action Fairness Act places the burden of proving jurisdiction on the plaintiff seeking to avoid federal jurisdiction, instead of on the party removing, as the following representative cases reveal.

Decisions which hold that the CAFA changes the burden of proof:

- *Berry v. Am. Exp. Publ'g Corp.*, 381 F. Supp. 2d 1118 (C.D. Cal. 2005)
- *Yeroushalmi v. Blockbuster, Inc.*, 2005 WL 2083008 (C.D. Ca. 2005).
- *Waitt v. Merck & Co., Inc.*, 2005 WL 1799740 (W.D. Wash. 2005).
- *Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161 (D. Mass. 2005).
- *Lussier v. Dollar Tree Stores, Inc.*, 2005 WL 2211094 (D. Or. 2005).
- *Dinkel v. General Motors Corp.*, 2005 WL 3006728 (D. Me. 2005).

Decisions which mechanically apply the traditional burden of proof:

- *Evans v. Walter Industries, Inc.*, 2006 WL 1374688 (11th Cir. 2006).
- *In re Expedia Hotel Taxes and Fees Litigation*, 377 F. Supp. 2d 904 (W.D. Wash. 2005).
- *Awaida v. Pfizer, Inc.*, No. Civ-05-425-W (W.D. Okla. 2005).

Decisions which apply the traditional burden of proof by rejecting the CAFA's legislative history:

- *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005).
- *Abrego v. The Dow Chemical Co.*, 2006 WL 864300 (9th Cir. 2006).
- *Schwartz v. Comcast Corp.*, 2005 WL 1799414 (E.D. Pa. 2005).
- *Moll v. Allstate Floridian Ins. Co.*, No. 3:05-cv-160/RV/MD (N.D. Fla. 2005).
- *Ongstad v. Piper Jaffray & Co.*, 407 F. Supp. 2d 1085 (D.N.D. 2006).
- *Rogers v. Central Locating Serv. Ltd.*, No. C05-1911C (W.D. Wash. 2006).
- *Werner v. KPMG, LLP*, No. H-05-0821 (S.D. Tex. 2006). ❑

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