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CLASS ACTION WATCH

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EARLY DECISIONS INTERPRETING CLASS ACTION FAIRNESS ACT

Several months after its enactment on February 18, 2005, the Class Action Fairness Act ("CAFA") is beginning to generate a sufficient body of judicial interpretation to identify a number of key issues. Among others, litigants and courts are grappling with questions about which actions were "commenced" before the effective date of CAFA; how to calculate the amount in controversy for purposes of the statute; and what to make of the statute's provisions regarding calculation of attorneys' fees.

While CAFA provides that its jurisdictional and other provisions apply to all actions "commenced" on or after February 18, 2005, the meaning of the word "commence" has already generated significant debate. Some defendants have argued that an action is "commenced" for purposes of the statute on the date it is removed to federal court, regardless of how long the action may have been pending in state court. That position is not without support; several cases decided in connection with statutory amendments increasing the amount-in-controversy require-

ment of 28 U.S.C. § 1332 have held that the increased jurisdictional amount applied to cases that were removed after the increase took effect—regardless of when they were filed in state court—because the removal date was the date on which the action was "commenced."¹ The first appellate decision under CAFA, however, has declined to adopt that approach. In *Pritchett v. Office Depot, Inc.*,² the Tenth Circuit rejected a defendant's removal to federal court of a case that had

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REFORMS TO CALIFORNIA'S UNFAIR COMPETITION LAW ALTER LITIGATION LANDSCAPE

While all 50 states have some form of unfair and deceptive trade practices statute, California's Unfair Competition Law, Business and Professions Code Section 17200 *et seq.* (the "UCL"), was unique in that it permitted anyone to bring a claim as a "private attorney general" on behalf of the "general public"—regardless of whether the plaintiff himself had actually been affected by the challenged conduct. Thus, a plaintiff who had never done any business with the defendant, seen the defendant's advertising or used the defendant's products or services could pursue a UCL claim on a quasi-class-action basis without having traditional standing or satisfying any of the due process requirements

for class action cases. Not surprisingly, California became the preferred forum for consumer class action litigation in large part because of the UCL; in some cases, plaintiffs' law firms went so far as to file UCL claims naming themselves as the plaintiffs.

On November 2, 2004, California voters approved Proposition 64, which reformed the UCL. Most importantly, Proposition 64 established two new requirements for UCL claims. First, it established a standing requirement for UCL claims, prohibiting private plaintiffs from prosecuting UCL claims unless they suffered "actual injury" and lost money or property. Thus, plaintiffs' lawyers must find a client who actually was

harmed by the business practice at issue before they can bring a claim. Second, it requires plaintiffs to meet the class certification requirements of California Code of Civil Procedure Section 382 before they can obtain classwide relief. While there had been some progress by litigants seeking to impose class certification-like requirements on UCL claims, Proposition 64 resolved the question through statutory fiat. Proposition 64 took effect on November 3, 2004.

California Supreme Court To Review Proposition 64's Application To Pending Cases

Although Proposition 64

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been filed in state court before February 18, 2005. The court held that the term “commenced,” as used in CAFA, refers to the filing of a complaint (or similar initiating pleading), and not to the act of removal itself.

Given the large number of purported class actions filed on February 17, 2005 (apparently based on anticipation that the President would sign CAFA the next day), a number of defendants have argued that CAFA’s “date of enactment” was February 17, 2005, the day on which the bill was passed by Congress, rather than February 18, 2005, the day on which the president signed the bill into law. The one court to release an opinion on the subject thus far has rejected that argument, invoking the lyrics of a song from a popular 1970s children’s television program: “I’m just a bill/Yes, I’m only a bill/And if they vote for me on Capitol Hill/Well, then I’m off to the White House/Where I’ll wait in a line/With a lot of other bills/For the president to sign/And if he signs me, then I’ll be a law/How I hope and pray that he will/But today I am still just a bill.”³ (Neither of these two decisions addresses other contested issues concerning the applicability of CAFA; among other things, litigants continue

to debate whether CAFA applies to pre-February 18th cases that are amended to add parties after February 18th, to pre-February 18th cases that are amended after February 18th to include class allegations, etc.)

The first publicly available decision to interpret CAFA’s modified amount-in-controversy provision suggests that removing defendants (and initiating plaintiffs) will continue to face challenges in establishing that removed cases involve sufficiently large amounts of potential damages or other relief. While CAFA eliminates any doubt that the amount in controversy in putative class actions is to be calculated in the aggregate (thus abolishing previous precedents that had relied on *Snyder v. Harris* and *Zahn v. International Paper* to require each individual class member to satisfy the jurisdictional amount requirement), it still appears that defendants will need to do more than simply assert that a large amount is at issue. In *Holland v. Cole Nat’l Corp.*,⁴ the plaintiff in an action originally filed in federal court argued that CAFA’s jurisdictional requirements were met because the case involved “many thousands of class members,” and because the defendant generated revenues of more than \$50 million from the sale of the challenged products and services.⁵ The district court rejected this argument, thus suggesting the possibility that federal courts will continue to scrutinize the amount-in-controversy requirement

with some rigor.

Finally, the first publicly available decision interpreting the class-settlement provisions of CAFA suggests that courts will not be reluctant to reduce attorneys’ fee awards where they are out of proportion to the actual benefit received by settlement class members. In *Fears v. Wilhelmina Model Agency, Inc.*,⁶ the district court relied in part on CAFA (which was not technically applicable, since the action predated the effective date of the statute) to hold that plaintiffs’ counsel was entitled to a fee award based only on a percentage of class claims actually submitted and approved for payment, and not based on a percentage of the total settlement fund made available to class members.

Footnotes

¹ See, e.g., *Lorraine Motors, Inc. v. Aetna Case. & Sur. Co.*, 166 F. Supp. 319, 323-24 (E.D.N.Y. 1958); *Hunt v. Transp. Indem. Ins. Co.*, 1990 U.S. Dist. LEXIS 16555 (D. Haw. July 30, 1990).

² 404 F.3d 1232 (10th Cir. 2005).

³ *Berkowitz v. Transfirst Health Servs., Inc.*, 2005 U.S. Dist. LEXIS 9604, at *2 n.1 (E.D. Missouri May 19, 2005) (emphasis in opinion).

⁴ 2005 U.S. Dist. LEXIS 9862 (W.D. Va. May 24, 2005).

⁵ *Id.* at *46.

⁶ 2005 U.S. Dist. LEXIS 7961 (S.D.N.Y. May 5, 2005).

PROPOSITION 64 (CONT. FROM PG. 1)

clearly applies to actions filed on or after November 3, 2004, it does not expressly state whether it applies to actions filed prior to its enactment. Not surprisingly, trial courts have been inundated by motions seeking the dismissal of pending UCL actions, primarily on three grounds. First, the language of Proposition 64 and its prefatory section describing its

intent and purpose arguably suggest that it should be applied to all UCL actions, including pending cases.¹ Second, the repeal of a statutory right of action immediately terminates pending actions based on that right.² Third, Proposition 64’s new standing and class action requirements are procedural in nature and apply to pending actions because they do not impair vested rights or impose new, additional or different

liabilities based on past conduct.³ In response, plaintiffs are contending, among other things, that Proposition 64 does not expressly provide that it applies to pending actions and that the right to prosecute a UCL action vests when it is filed and cannot be impaired.

Because numerous UCL cases were on appeal when Proposition 64 was enacted, the Courts