

DISPUTE RESOLUTION ALERT

THE CLASS ACTION FAIRNESS ACT OF 2005 AND ITS EFFECT UPON FLORIDA LITIGATION

by Fred O. Goldberg, Esq.

On Friday, February 18, President Bush signed the Class Action Fairness Act of 2005 ("CAFA"). The CAFA, billed as the Administration's first step towards tort reform, affects future class actions in two ways, both of which were discussed by President Bush during the signing ceremony. According to President Bush:

"First, it [CAFA] moves most large, interstate class actions into federal courts. This will prevent trial lawyers from shopping around for friendly local venues. The Bill will keep out-of-state businesses, workers, and shareholders from being dragged before unfriendly local juries, or forced into unfair settlements.... Second, the Bill provides new safeguards to ensure that plaintiffs and class action lawsuits are treated fairly. The Bill requires judges to consider the real monetary value of coupons and discounts, so that victims can count on true compensation for their injuries. It demands settlements and rulings to be explained in plain English, so that class members understand their full rights."

While both stated goals of the CAFA are significant and constitute important changes to existing law, it is the former, the possibility of invoking federal jurisdiction for large, interstate class actions, which will likely be of the greatest interest to both business and the legal profession.

Before the enactment of the CAFA, federal diversity jurisdiction was not available unless there was complete diversity between the citizenship of every class member and all of the defendants (i.e., every class member must be a citizen of a State different from the State(s) of which the defendant or defendants are citizens) and each individual class member's individual

claim exceeded the \$75,000 amount in controversy requirement (each class member's claim was required to exceed \$75,000, exclusive of costs, fees, and interest). The CAFA modified prior law so that now only minimal diversity and an aggregate amount of damages to the

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class are required for federal diversity jurisdiction. The minimal diversity requirement is satisfied if any member of the class is a citizen of a State different from any defendant. The aggregate amount of damages to the class requirement is satisfied if aggregate damages to the class are in excess of \$5 million. If minimal diversity and the amount in controversy are satisfied and more than two-thirds of the proposed class are citizens of a State other than the State in which the case was filed, the federal court must accept jurisdiction. If between one-third and two-thirds of the members of the proposed class are citizens of the State in which the case was filed, the federal court may decline to exercise jurisdiction "in the interests of justice and looking at the totality of the circumstances" including several enumerated factors. If more than two-thirds of the members of the proposed class and at least one significant defendant are citizens of the State in which the action was filed, the federal court must decline to exercise jurisdiction.

Clearly, the complicated rules governing class action diversity under the CAFA will result in significant litigation. When faced with the decision of whether or not to remove a class action which appears to satisfy the CAFA diversity criterion, a defendant should consider the possible benefits of removal. In particular, a defendant should consider the present convoluted State of Florida's choice of law rules in the class action context.

The United States Supreme Court has held that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating State interests, such that the choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 18 (1985), citing *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981). In the class action context, choice of law can be a critical issue. In a multi-state class, if the laws of numerous

states would potentially apply to the claims of a class, class certification may be defeated because common issues of law do not predominate. See *Montgomery v. New Piper Aircraft, Inc.*, 219 F.R.D. 221 (S.D. Fla. 2002); *Hammett v. American Bankers Insurance Co.*, 203 F.R.D. 690 (S.D. Fla. 2001); *Andrews v. AT&T*, 95 F.3d 1014 (11th Cir. 1996).

Because Florida's choice of law rules with respect to inter-state class actions, particularly those involving statutory claims, are in turmoil, this factor alone may militate in favor of removal to federal court under the CAFA. Some Florida courts have held that Florida statutes, such as the Florida Deceptive and Unfair Trade Practices Act, are for the benefit of Florida consumers and do not apply to out-of-state claims. *Coastal Physicians Services of Broward County, Inc. v. Ortiz*, 764 So. 2d 7 (4th DCA 1999); *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090 (4th DCA 2003); *Oce Printing Systems USA, Inc. v. Mailers Data Services, Inc.*, 760 So. 2d 1037 (2nd DCA 2000); *Stone v. CompuServe Interactive Services, Inc.*, 804 So. 2d 383 (4th DCA 2001). However, other Florida courts have held that if the conduct contributing to the claim occurred in this state or the defendant is a Florida resident, Florida law should apply even to out-of-state claims. See *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436 (4th DCA 1999); *Millennium Communications & Fulfillment, Inc. v. State of Florida*, 761 So. 2d 1256 (3rd DCA 2000). Because the issue of choice of law in a multi-state class action is extremely important in determining the propriety of class certification, a federal court may provide a superior forum for determining such issues given the current unsettled landscape of Florida law. The CAFA provides a defendant with an opportunity to obtain such a federal forum via removal in cases where the CAFA's diversity requirements have been satisfied.

The full text of the Class Action Fairness Act of 2005 is available at the following website: <http://www.bergersingerman.com/index.php?action=newsletter>.

Fred O. Goldberg and the other attorneys that comprise Berger Singerman's Dispute Resolution department are available for consultation regarding the availability and ramifications of federal jurisdiction under the Class Action Fairness Act of 2005. ■



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Fred O. Goldberg is a partner on the Dispute Resolution team of Berger Singerman. He received his undergraduate degree, with honors, from Brandeis University in 1983, and his law degree from Suffolk University Law School in 1987. Prior to joining Berger Singerman, Mr. Goldberg was the managing partner of the Miami office of a litigation firm which maintained offices in Washington D.C. and Florida. His practice centers on complex litigation, including business, insurance and aviation law, class actions and the defense of transna-

tional actions. Mr. Goldberg has appeared in courts throughout the country in connection with transnational suits and is lead national counsel for a major multinational corporation in the defense of a mass tort action which arose in Latin America. He has lectured on various topics related to international litigation and authored *Forum Non Conveniens: Issues Affecting Multi-Nationals* for a symposium presented in Washington D.C. Mr. Goldberg has received an AV rating from *Martindale-Hubbell*.

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