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Combating Class Certification After CAFA Removal

Law360, New York (June 10, 2010) -- The class action procedure gives plaintiffs a powerful weapon. Class actions allow a representative plaintiff to sue on behalf of other persons who have similar claims. Combining potentially thousands of claims raises the stakes in litigation, creates the possibility of a massive monetary damages award, and magnifies the risks posed even by weak claims.

These risks often can be compounded by an award of significant attorneys' fees. Thus, even if the underlying claims are of questionable merit, once a class is certified a defendant faced with even a small possibility of losing faces tremendous pressure to settle. And statistics confirm that most certified class actions, unless reversed on appeal, end in settlement rather than trial.

The Ninth Circuit's recent decision upholding a possible million-member gender discrimination class against Wal-Mart is illustrative. *Dukes v. Wal-Mart Stores Inc.*, ___ F.3d ___, 2010 WL 1644259 (9th Cir. 2010). If the class survives Supreme Court review, and if Wal-Mart chooses to fight on, the company likely will endure years of disruptive and expensive litigation followed by a trial that could be of breathtaking magnitude.

If it loses the case, Wal-Mart will face damages and attorneys' fees that could run into billions of dollars. Even if Wal-Mart believes it has a 90 percent chance of ultimately prevailing, the cost of proving its case, and the 10 percent risk of a billion dollar judgment, will provide huge incentives to settle. Wal-Mart may take that risk. Many corporate defendants will not.

This powerful post-certification settlement dynamic has caused the fight over class certification to be the key battle in most class action suits. That, in turn, has often caused extensive pre-certification litigation over whether jurisdiction of the case lies in federal or state court.

In the former, most circuits require a rigorous analysis of the law and evidence supporting the

decision whether to certify a class. Although all state courts have rules intended to assure that only legitimate classes will be certified, state rules vary, some being much more flexible than others. Moreover, certain state court venues have developed reputations as being highly certification-friendly. Plaintiffs' lawyers can file class claims of dubious merit in such venues, seeking to do nothing more than force a settlement.

Congress reacted to these perceived abuses in 2005 by enacting the Class Action Fairness Act. Among other things, CAFA relaxed the requirements that defendants must satisfy to remove putative class cases from state to federal court. By enacting CAFA, Congress expressed its strong preference that federal courts, applying uniform federal procedures, should decide whether large, interstate cases will proceed as class actions. In general, a complaint filed in state court that seeks class action status is much more likely to be successfully removed to federal court than before CAFA.

A question has arisen, however, about what happens to such a case if the federal court then eventually decides that a class should not be certified. Since it no longer is a putative class action, is the basis for CAFA jurisdiction eliminated? And, if it is, does that mean a plaintiff can then obtain a remand back to the original state court of his choosing and a second bite at the certification apple — this time in a possibly friendlier forum? If so, the value of the CAFA removal, and of the federal court decision not to certify, would be a fairly limited value.

A recent Ninth Circuit decision — the same federal appeals court that decided Wal-Mart — took an important step to assure that federal courts will make the final class decision in such cases. In *United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers Int'l Union, AFL-CIO, CLC, v. Shell Oil Co., et al.*, ___ F.3d ___, 2010 WL 1571190 (9th Cir. 2010), plaintiffs filed a class action in California state court alleging violations of state consumer fraud and labor laws.

Defendants removed to federal court pursuant to CAFA. In federal court, plaintiffs proposed two classes of defendants' employees, but the court refused to certify either of them. The court did not believe a class action was the best way to resolve the parties' disputes. After denying the request for certification, however, the district court granted plaintiffs' request to send the case back to state court, deciding that the case no longer satisfied CAFA's jurisdictional requirements because there was "no reasonably foreseeable possibility" that a class action would be certified.

The Ninth Circuit reversed the remand order that would have sent the case back to state court.

The court noted that CAFA explicitly creates original federal court jurisdiction before class certification, by stating that CAFA applies to any putative class action before or after the entry of a class certification order. Thus, Congress did not intend class certification to be a prerequisite to federal jurisdiction. Moreover, Congress was aware of the well-established general rule that, once federal jurisdiction is established, it will not be lost by later developments in a case.

In traditional (non-class) jurisdictional situations, a party seeking federal jurisdiction must show that the parties are citizens of different states. The long-established general rule was that, once such "diversity jurisdiction" is established, it cannot be changed by a subsequent event such as a change in a party's citizenship.

If Congress wanted to change that general rule, the Ninth Circuit concluded in *United Steel*, Congress could have expressly required federal courts to send CAFA cases back to state court if they deny class certification. Congress did not do so. The Ninth Circuit thus held that once a defendant properly removes a class action to federal court, a district court's later denial of class certification does not divest the federal court of jurisdiction and it should not send the case back to state court. *Id.* at *4.

In deciding that federal courts have continuing CAFA jurisdiction after denying class certification, the Ninth Circuit was consistent with the other two federal appellate courts that have squarely ruled on this issue. See *Cunningham Charter Corp. v. Learjet Inc.*, 592 F.3d 805, 806-07 (7th Cir. 2010); *Vega v. T-Mobile USA Inc.*, 564 F.3d 1256, 1268 n. 12 (11th Cir. 2009).

These decisions are essential to promoting CAFA's goal of resolving important interstate class action issues in federal courts. If cases were returned to state court after a federal court denied certification, plaintiffs could re-argue the certification issue in the very state forum that CAFA deems inappropriate, perhaps obtaining certification under a more generous state standard.

United Steel, *Cunningham Charter Corp.*, and *Vega* will be important decisions for defendants seeking to achieve a federal resolution of claims pleaded as significant interstate class actions. Defendants that remove a case from state court pursuant to CAFA and defeat a request for class certification must be prepared to cite these cases to combat any effort to send the case back to state court.

Once the federal forum is secured, a successful defendant should also anticipate the persistence

of plaintiff's class counsel and be ready to ask the federal court to enjoin plaintiffs, and any unnamed class members, from attempting to re-litigate the class issue in any other court.

Federal courts have been willing to give teeth to their denials of class status by entering injunctions tailored to prevent repeat efforts to certify the same class. See *In re Baycol Products Litigation*, 593 F.3d 716; *In re Bridgestone/Firestone*, 333 F.3d 763 (7th Cir.2003). With an anti-suit injunction in place, claimants will be free to pursue their individual cases, which can then be resolved on the merits.

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