Consumer Financial Services LAW REPORT

Focusing on Significant Caselaw and Emerging Trends

Route to:

Volume 9, Issue 10 November 2, 2005

Mortgage Lending

Ruling 'mines' safe harbor provisions: Texas lending regs unconstitutional

A Texas trial court judge's decision left the home equity lending industry there in turmoil when he found seven of the safe harbor interpretive regulations for lenders to be unconstitutional.

"If a number of these points are sustained on appeal, they will radically upset the practices and finances of the huge home equity lending market in Texas," observes Lawrence Young, a partner with Hughes Watters Askanase LLP in Houston. "This trial judge has now mined the 'safe harbor.'" Young advises that lenders make a risk assessment to determine how they need to alter operations relevant to each of the seven safe harbor regulations during the pending appeal process.

Association of Community Organizations for Reform Now challenged the constitutionality of the state banking agencies' rules that implement Section 50u of Article XVI of the Texas Constitution. ACORN contested pre-paid interest, origination fees, the time of closing, points, the loan application process, notice of rights, loan consolidation, the number of copies of documents provided, and preprinted solicitation checks. A letter explaining the decision from

(See **TEXAS** on page 14)

Arbitration

No time like the present to confirm award

A bank that exceeds the one-year statute of limitations for confirming an award granted under the Federal Arbitration Act cannot recover the amount awarded, because the time period allowed is fixed and not discretionary. MBNA America Bank, N.A. v. Rogers, No. 02A03-0506-CV-260 (Ind. Ct. App. 10/05/05) reminds banks to promptly seek confirmation of an arbitral award or risk losing it as a matter of law.

MBNA America Bank NA submitted a claim to the National Arbitration Forum for the credit card balance of Thomas W. Rogers. The arbitrator awarded MBNA $29,000 and, over a year later, MBNA filed a complaint seeking judgment against Rogers for the amount of the award and for costs.

Rogers moved to dismiss MBNA's complaint, claiming the action was time-barred under the FAA at 9 USC § 9, which says in pertinent part:

"If the parties in their agreement have agreed that a judgment of the Court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award."

(See **AWARD** on page 6)

INSIDE

SPECIAL SUPPLEMENT

CONSUMER FINANCIAL PRIVACY
Neil Richards covers privacy, from the 'uber-database' to the First Amendment, and more 17-20

1098-9315/05/$5 + $3.75

Resorting to CAFA's legislative history resolves some ambiguities

By Anthony Rollo, Hunter Twiford and Gabriel A. Crowson*

The dramatic changes to the jurisdiction, removal and settlement of class action cases brought about by the recently enacted Class Action Fairness Act of 2005 contain an endless number of nuances and ambiguities that courts will wrestle with for years to come. Accordingly, class action lawyers should become intimately familiar with the CAFA's extensive legislative history, which helps to refine and clarify some of the CAFA's murkier provisions. This article briefly addresses a few circumstances in which parties and courts may have to resort to the CAFA's legislative history, and then explains what they may expect to find in those situations.

When to turn to legislative history

The starting point in any statutory interpretation analysis is the language of the statute itself, and courts should only consider legislative history if the statute is ambiguous. Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978). 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 should 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. Id. (citations omitted).

There are two main sources of legislative history in interpreting the CAFA. First, the Senate Judiciary Committee published a report on the CAFA on Feb. 28, 2005, just 10 days after the CAFA was enacted. See S. Rep. 14, 109th Cong., 1st Sess. (the "Senate Report"). Because the 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").

In addition, on the day that the CAFA passed in the House of Representatives, Rep. F. James Sensenbrenner, R-Wis., inserted into the House record a "statement relative to the intent of the managers of the bill." See 151 Cong. Rec. H723-02, at H727 (daily ed. 02/17/05) (the "Sponsors' Statement"). Since this statement relates to the intent of the managers of the CAFA, it deserves to be accorded substantial weight in interpreting the CAFA. See Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976). (The Senate Report had not been released when the authors published an article which cited only the Sponsors' Statement for certain sources of CAFA's legislative history. See Mapping the New Class Action Frontier – A Primer on the Class Action Fairness Act and Amended Federal Rule 23, 59 Consumer Fin. L. Q. Rep. 11 (Spring-Summer 2005); see also www.cafalawblog.com)

Resources

Recent CAFA case law on removal

Several District Courts have concluded that the party opposing removal bears the burden of showing that removal was inappropriate:

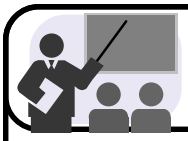
- *Waitt v. Merck & Co., Inc.*, No. C05-0759L (W.D. Wash. 07/27/05) ("it is plaintiff's responsibility to demonstrate that removal from state court was improvident").
- *Natale v. Pfizer, Inc.*, 379 F.Supp 2d 161 (D. Mass 07/28/05), *aff'd*, 2005 WL 2263622 (1st Cir. 09/16/05) ("burden of removal is on the party opposing removal to prove that remand is appropriate").
- *Harveyv.Blockbuster,Inc.*, No. Civ. A. 05-1606, (D.N.J. 08/08/05 *slip copy*) (party opposing removal bears the burden of demonstrating that the case should be remanded).
- *In re Textainer P'ship Secur. Litig.*, No. C05-0969 MMC (N.D. Cal. 07/27/05) (CAFA's legislative history indicates plaintiff has burden of proof that class action be remanded).
- *Berry v. American Express Publishing Corp.*, 381 F.Supp. 2d 1118 (C.D. Cal. 06/15/05) (Senate Report expresses a clear intention to place the burden of removal on the party opposing removal).

Courts concluding the CAFA does not shift burden from defendants to plaintiffs include *Schwartz v. Comcast Corp.*, No. Civ. A. 05-2340 (E.D. Pa. 07/28/05); *Plummer v. Farmers Group, Inc.*, No. Civ. 05-242 (E.D. Okla. 09/15/05); and *Judy v. Pfizer, Inc.*, No. 05 CV 1208 WS (E.D. Mo. 09/14/05). ❑

Burden of proof

There are several ambiguities of the CAFA that may require courts to consult the Senate Report and the Sponsors' Statement. One example concerns the issue as to which party should bear the burden of proof in a removal dispute. A review of the CAFA's legislative history is required because the CAFA is actually silent on this issue. Moreover, plaintiffs' lawyers will undoubtedly rely on existing case law on diversity jurisdiction and removal for the proposition that the removing party should bear the burden of proof and that all doubts should be resolved in favor of remand.

Both the Sponsors' Statement and the Senate Report make it clear that the named plaintiffs bear the burden of proving that the court should remand a class action removed under the CAFA, which is a change from the prior law. For instance, the Senate Report states that if a class action is removed pursuant to the CAFA, "the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdiction requirements are not satisfied)." See S. Rep. 14, 109th Cong., 1st Sess., at p. 42. Similarly, the Sponsors' Statement provides that following removal, the



CAFA Classroom

Keeping an eye on Class Action Fairness Act developments

■ The 7th U.S. Circuit Court of Appeals affirmed the remand of an unjust enrichment action brought prior to the enactment of the CAFA by a consumer against a railroad. The court found removal under the CAFA inappropriate because a clerical error apparently naming a new defendant did not create a new action, and because there was no expansion of the proposed class since the parties to the litigation did not change and no new claims were added beyond the CAFA's effective date. (Schillinger v. Union Pacific Railroad Co., No. 05-8019 (7th Cir. 10/05/05).)

■ The U.S. District Court, Eastern District of Missouri remanded to state court a mortgagor's suit against a lender for failing to apply mortgage payments in violation of the Missouri Merchandising Practices Act. The court found that an amended petition was not removable because it related back to the mortgagor's original suit that was filed prior to the CAFA's enactment. (Lee v. CitiMortgage, Inc., No. 4:05CV1216 JCH (E.D. Mo. 10/05/05).)

■ The 9th U.S. Circuit Court of Appeals affirmed the remand of a class action filed pre-CAFA, claiming violations of California's Unfair Business Practices Act by an online travel agency for charging consumers illegitimate taxes and fees. The court refused the agency's argument that the action was not commenced until it was remanded, or alternatively until the agency received service of process, since both events occurred post-CAFA. (Bush v. Cheaptickets, Inc., No. 05-55995 (9th Cir. 10/06/05).) ❑

named plaintiffs "should bear the burden of demonstrating that removal was improper." See 151 Cong. Rec. H723-01, at H727.

Jurisdiction, removal

Questions could also arise as to how courts should interpret CAFA's jurisdiction and removal rules, i.e., whether courts should interpret them broadly or strictly. Plaintiffs' lawyers may rely on existing case law which holds that federal courts should interpret jurisdiction provisions restrictively with an inclination toward keeping cases out of federal court. The CAFA's preamble briefly touches on this issue, as it states that one of the purposes of the act is to restore the intent of the framers of the Constitution by having cases of national importance heard in federal court. The Sponsors' Statement and the Senate Report, however, expounded on this concept, as they both state that CAFA's jurisdictional provisions were enacted to expand the cases heard by federal courts and should be read broadly "with a strong preference that interstate class actions should be heard in a federal court if removed by any defendant." See 151 Cong. Rec. H723-01, at H727; S. Rep. 14, 109th Cong., 1st Sess., at p. 43. Additionally, if a federal court is uncertain about whether the amount in controversy requirement has been satisfied, "the court should err in favor of exercising jurisdiction over the case." See 151 Cong. Rec. H723-01, at H727; S. Rep. 14, 109th Cong., 1st Sess., at p. 42.

Injunctive, declaratory, equitable relief

One other issue likely to be litigated often in CAFA removal disputes is the appropriate method of calculating injunctive, declaratory, or equitable relief for purposes of the CAFA's $5 million amount in controversy requirements. More particularly, an issue may arise as to whether this type of relief should be calculated from the viewpoint of the plaintiff or defendant.

Again, the CAFA is silent on this issue, although it does allow aggregation of the claims of all putative class members in computing the amount in controversy requirement. Both the Sponsors' Statement and the Senate Report, however, state that in cases seeking injunctive relief, a class action is subject to federal jurisdiction if the value of the matter in litigation exceeds $5 million "either from the viewpoint of the plaintiff or the defendant." See 151 Cong. Rec. H723-01, at H727; S. Rep. 14, 109th Cong., 1st Sess., at p. 42. Likewise, for cases seeking declaratory relief, the court should include in the calculation the "value of all relief and benefits that would logically flow from granting the declaratory relief sought by the claimants." See 151 Cong. Rec. H723-01, at H727; S. Rep. 14, 109th Cong., 1st Sess., at p. 43.

As class action cases continue to be removed to federal court pursuant to the CAFA, we can expect to see litigants arguing over these and other issues created by the ambiguities and nuances in the CAFA's expansive jurisdiction and removal rules. Class action lawyers should carefully consider spending the time to study the Senate Report, the Sponsors' Statement and other legislative history of the CAFA, prior to engaging in a full-blown removal battle. ❑

*__Anthony Rollo__ chairs the Consumer Financial Services Litigation Group at __McGlinchey Stafford PLLC__, specializing in consumer financial services and class action litigation. Contact him in Baton Rouge, La., at (225) 383-9000 or *arollo@mcglinchey.com.* __HunterTwiford__ is a member of the firm in Jackson, Miss. Contact him at (601) 960-3523 or *htwiford@mcglinchey.com*. __Gabriel A. Crowson__ is an associate of the firm in Baton Rouge. Contact Crowson at (225) 383-9000 or *gcrowson@mcglinchey.com*.

1098-9315/05/$5 + $3.75