CLASS ACTION COMMITTEE REPORT ON THE
CLASS ACTION FAIRNESS ACT OF 2003;
H.R. 1115; S. 274

INTRODUCTION

On April 11, 2003, the United States Senate Committee on the Judiciary approved S. 274, the Class Action Fairness Act of 2003 ("CAFA"). Two months later, on June 2, 2003, the bill was placed on the Senate's legislative calendar. On June 12, 2003, the House of Representatives passed H.R. 1115, its version of the Class Action Fairness Act of 2003 and referred its bill to the Senate. Action by the full Senate is imminent.

Before committee approval, S. 274 was extensively amended to mirror its companion bill, H.R. 1115. Nonetheless, the two bills retain limited but significant differences. Those differences, and summaries of both bills, are discussed below. In general, S. 274 and H.R. 1115 are coordinated efforts to revive the Interstate Class Action Jurisdiction Act of 1999 ("ICAJA"), a failed measure of the 106th Congress. *See* S. 353; H.R. 1875. [1] The ICAJA sought to expand federal jurisdiction over class actions by, *inter alia*, amending 28 U.S.C. § 1332 to (a) establish minimum diversity and, (b) eliminate the required minimum amount in controversy.

Like their 1999 counterpart, both S. 274 and H.R. 1115 seek to expand federal jurisdiction over class actions. They too would amend § 1332 to establish minimum diversity. Unlike the ICAJA though, S. 274 and H.R. 1115 include a minimum amount in controversy -- $

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[1] While opposing certain provisions of the ICAJA, the Class Action Committee supported the overall goals of that bill. 1999 NYSBA CLASS ACTION COMMITTEE REPORT ON THE INTERSTATE CLASS ACTION JURISDICTION ACT OF 1999 at 1.

5 million. This distinction is indicative of the more tempered approach taken by S. 274 and H.R. 1115 and the far more successful efforts of the bills' sponsors in garnering bipartisan support. [2] Such bipartisan support has dramatically increased the likelihood that the CAFA will become law despite suggested revisions to certain of its provisions by state and federal judicial, executive, and legislative officials. In particular, the Judicial Conference of the United States has, in a series of letters, issued recommendations to the Senate and House requesting revisions to S. 274 and H.R. 1115.

While the Committee supports the goals of the Class Action Fairness Act, for the reasons described below, we agree with the Judicial Conference in its attempts to revise certain provisions of the Class Action Fairness Act, to wit: (1) exceptions to minimal diversity should be expanded, and (2) rules regarding interlocutory appeal of class action certification orders should remain unchanged from those provided under Federal Rules of Civil Procedure 23(f). Furthermore, the provision applying the CAFA retroactivity should be eliminated from the Act.

PURPOSES AND GOALS OF THE CAFA

Reacting to concerns that an increasing number of state court class actions were filed merely to circumvent federal diversity jurisdiction, Congress drafted the ICAJA and its successor, the CAFA. As stated in S. 274, the CAFA seeks "to amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes."

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[2] The House bill passed on a 253 – 170 vote. Co-sponsors of the Senate bill include moderates such as Senators Lincoln Chafee (R. RI), Herb Kohl (D. WI) and Zell Miller (D. GA).

In general, the Committee agrees that federal diversity jurisdiction is entirely appropriate for large nationwide class actions that involve a great number of plaintiffs and defendants from many states. Because class actions may include or exclude plaintiffs based upon any number of factors, the rationale behind diversity jurisdiction -- preventing bias in favor of local plaintiffs over a foreign defendant -- applies with great force to all forms of bias found in class actions. Few would debate that "fairer outcomes" are highly desirable.

Nonetheless, the means that H.R. 1115 and S. 274 take to achieve those "fairer outcomes" are debatable. The bills provide limited exceptions to minimal diversity; do not adequately consider the implications for an already overloaded federal bench; conflict with Rule 23(f); and unduly burden parties, counsel, and courts by applying the CAFA retroactively for actions not yet certified. As such, the Committee supports the CAFA in principle but seeks alteration of those discrete provisions of the bills which, as explained below, do not further the purposes and goals of § 1332 diversity jurisdiction.

PROVISIONS TO WHICH THE COMMITTEE OBJECTS

I.

FEDERAL DISTRICT COURT JURISDICTION

A. Current Provisions of the Class Action Fairness Act

House and Senate versions of the CAFA currently contain identical provisions for federal district court jurisdiction of interstate class actions. Those provisions grant federal district courts original jurisdiction of any civil action in which the matter in controversy exceeds $5 million, exclusive of interest and costs, and is a class action in which any member of a class of plaintiffs is:

1) a citizen of a State different from any defendant;

2) a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

3) a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

The bills authorize a district court to decline jurisdiction over class actions in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of the following factors:

1) Whether the claims asserted involve matters of national or interstate interest.

2) Whether the claims asserted will be governed by laws other than those of the State in which the action was originally filed.

3) In the case of a class action originally filed in a State court, whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction.

4) Whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States.

5) Whether one or more class actions asserting the same or similar claims on behalf of the same or other persons have been or may be filed.

Exceptions to federal jurisdiction are limited. The CAFA will not apply to any class action in which:

A) two-thirds of more of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed;

B) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

C) the number of members of all proposed plaintiff classes in the aggregate is less than 100. [3]

B. Judicial Conference Recommendations

While the Judicial Conference acknowledged that minimal diversity may be appropriate when dealing with "significant multi-state class action litigation," the Conference nonetheless expressed concern that the jurisdictional provisions of the CAFA "would add substantially to the workload of the federal courts and are inconsistent with principles of federalism." As such, the Judicial Conference recommended that Congress raise the CAFA jurisdictional threshold by fashioning jurisdictional exceptions based on a series of relevant factors.

Those factors include: (1) whether citizens of the forum state make up "substantially all" of the plaintiff class; (2) whether plaintiff class members suffered personal injury or physical property damage within the state, whether or not citizens of the state; and (3) the relationship of the defendant (not necessarily the primary defendant) to the forum state. Further, principles of federalism require that Congress craft the CAFA to exclude "parallel in-state class actions" (class actions in which the plaintiff class is defined as limited to citizens of the forum state) and class actions in which the forum state has a "considerable interest."

C. Committee Recommendations

After reviewing CAFA's current jurisdictional provisions and the concerns raised by the Judicial Conference, the Committee concurs with the Judicial Conference's position that the

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[3] Like the ICAJA, the CAFA permits two additional exceptions to federal jurisdiction: (1) for claims concerning a "covered security" as defined in § 16(f)(3) of the Securities Act of 1933 and § 28(f)(5)(E) of the Securities Exchange Act of 1934, and (2) for claims arising under the "Delaware Carve-Out" exception for actions involving the internal

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CAFA exceptions to minimal diversity are unduly narrow in scope. The Committee further agrees that the factors identified by the Judicial Conference would be relevant in formulating an additional exception to the minimum diversity standard.

However, the Committee also believes that it should be made clear that the exception would not apply absent a significant presence of the defendants in the forum state, such as the in-state presence of a corporate subsidiary, or if the claims relate to conduct by the defendant occurring within the state. In that case, the exception to minimum diversity would not apply and jurisdiction would be limited to the federal courts.

II.

APPEAL OF CLASS ACTION CERTIFICATION ORDERS

A. Current Provisions of the Class Action Fairness Act

Only the House bill, H.R. 1115, contains a provision regarding interlocutory appeals. Section 6(a) of H.R. 1115 amends 28 U.S.C. § 1292, permitting interlocutory appeal of district court orders granting or denying class certification under Rule 23 of the Federal Rules of Civil Procedure, if notice of appeal is filed within 10 days after entry of the order. Section 6(b) of H.R. 1115 requires a mandatory stay of all proceedings during the pendency of any such appeal; this includes discovery, unless the court finds upon motion of any party that discovery is necessary to prevent undue prejudice or preserve evidence.

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affairs or governance of a corporation or other form of business enterprise arising out of state law.

B. Judicial Conference Recommendations

In unequivocal language, the Judicial Conference recommended that the House withdraw provisions § 6(a) and (b) because the provisions directly conflict with Rule 23(f) and, as such, are inconsistent with the Rules Enabling Act rulemaking process. *See* 28 U.S.C. §§ 2072-2077. The Conference further noted that if Congress removed the discretionary provisos that underlie Rule 23(f), it would be inviting the kinds of abuses and tactical maneuvering that existed before 23(f), where parties used the dual regimes of right to appeal and automatic stays to unnecessarily delay proceedings.

C. Committee Recommendations

The Committee concurs with the Judicial Conference and opposes inclusion of the House provision regarding interlocutory appeal. In further agreement with the Judicial Conference, the Committee finds that this CAFA provision prematurely preempts Rule 23(f), a provision that has only begun to find its footing among bench and bar. As the Judicial Conference noted, Rule 23(f) is the result of many painstaking and laborious attempts by the federal bench to eliminate the use of interlocutory appeals as a class action procedural tactic. Rule 23(f) should thus remain in effect until further statistical evidence demonstrates that shortcomings exist in the current procedure.

III.

RETROACTIVITY

A. Current Provisions of the Class Action Fairness Act

The Senate bill, S. 274, would apply to "any civil action commenced on or after the date of enactment." The House bill differs dramatically in that it applies to:

> any civil action commenced before such date of enactment in which a class certification order is entered on or after such date of enactment.

H.R. 1115, §§ 8(a)(1)-(2).

B. Committee Recommendations

The Committee opposes the House retroactivity provision because (1) as a general matter there is a presumption against retroactivity, (2) retroactivity would unfairly burden plaintiffs and their counsel, and (3) Congress articulates no pressing need for retroactivity and thus cannot overcome the presumption against retroactivity and the degree of unfairness involved.