Law360

September 20, 2010

Aggregation Aggravation: Cappuccitti's Effect On CAFA

by Michael J. Mueller and Jason M. Beach, Hunton & Williams LLP

On July 19 the U.S. Court of Appeals for the Eleventh Circuit struck a blow to jurisdiction under the Class Action Fairness Act. It held that the federal courts lack original diversity jurisdiction for CAFA class actions where putative class members merely aggregate their claims to exceed the amount-in-controversy threshold of $5 million.

Instead, at least one plaintiff now must allege an amount in controversy in excess of $75,000 for CAFA class actions originally filed in federal court.

Cappuccitti v. DirecTV Inc. involved subscribers who brought a CAFA class action against cable television provider DirecTV regarding early termination fees. 611 F.3d 1252, 1253 (11th Cir. 2010).

Cappuccitti was not the typical federal class action: it was not originally filed in state court then removed. Id. at 1255. Rather, it was the relatively rare CAFA-based class action that was initiated in federal court rather than removed from state court. Id.

DirecTV sought to compel arbitration or, alternatively, to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). Id. The trial court denied the motion to compel arbitration but granted the motion to dismiss. Id. at 1254.

Rather than addressing the substance of the trial court's order on arbitration or dismissal, the Eleventh Circuit considered CAFA's jurisdictional requirements for putative class actions originally filed in federal court.

The Eleventh Circuit reasoned that "CAFA did not alter the general diversity statute's requirement that the district court have original jurisdiction 'of all civil actions where the matter in controversy exceeds the sum or value of $75,000' and is between citizens of different states." Id. at 1256 (citing 28 U.S.C. § 1332(a)).

The court also stated that "[n]o court of appeals case of which we are aware has expressly held that at least one plaintiff must meet the Section 1332(a) amount in controversy requirement to maintain an original CAFA action." 611 F.3d at 1256.

With the *Cappuccitti* decision, that has changed. Because plaintiff Cappuccitti failed to allege that at least one putative class member had an amount in controversy exceeding $75,000, the *Cappuccitti* panel vacated the trial court's order and remanded the case so that it could be dismissed for want of subject matter jurisdiction.

Although *Cappuccitti* is arguably limited to CAFA class actions that are originally filed in federal court, plaintiffs' lawyers already are using *Cappuccitti* to avoid federal jurisdiction in other circumstances.

Although the initial jurisdictional wrangling with plaintiffs' counsel for a removed action typically occurs with a motion to remand, one plaintiffs' attorney made jurisdictional intentions clear by preemptively pleading that the case was not removable under CAFA based on *Cappuccitti*. See *Eisenberg v. McNeil Consumer Health Care*, No. 10-30400, 2010 WL 3412852, Compl. at ¶ 4 (Circuit Court of Florida, Broward County, July 26, 2010).

Aside from pleading jurisdictional legal conclusions out of the gate, the most common use of *Cappuccitti* for newly filed class actions likely will be the absence of information; in other words, mentioning no amount in controversy at all in an effort to further increase a removing defendant's burden to establish subject matter jurisdiction.

Of course, federal courts are empowered to conduct sua sponte examinations of subject matter jurisdiction, including whether jurisdiction exists for a pending CAFA class action. Such sua sponte *Cappuccitti*-inspired review, however, may be unlikely if federal district courts elect to wait and see whether the Eleventh Circuit decides to rehear *Cappuccitti*.

Although the procedural methods to raise jurisdictional issues under *Cappuccitti* may differ, some federal district courts across the country are starting to grapple with the Eleventh Circuit's panel decision. E.g., *Dupree v. General Motors*, No. CV-10-00955-RGK, 2010 WL 3447082, at *3 n.1 (C.D. Cal. Aug. 27, 2010) (rejecting application of *Cappuccitti* on factual grounds); *Kline v. Earl Stewart Holdings LLC,* No. No. 10-80912-CIV 2010 WL 3432824, at *1-2 (S.D. Fla. Aug. 30, 2010) (declining to decide whether *Cappuccitti* applied to class action removed under CAFA).

Because few class actions involve even one individual claim exceeding $75,000, establishing the *Cappuccitti*-mandated jurisdictional requirement will be more difficult in the Eleventh Circuit, and perhaps in other jurisdictions.

However, some agreement does exist on the *Cappuccitti* decision. On Aug. 9 both plaintiff Cappuccitti and defendant DirecTV petitioned for rehearing. Both argued that CAFA does not require any single putative class member to allege an amount in controversy over $75,000.

Specifically, *Cappuccitti* said the Eleventh Circuit's decision seems to conflate CAFA's class action and mass action requirements. DirecTV added that *Cappuccitti* cannot be reconciled with either legislative history or precedent.

If the Eleventh Circuit panel grants the petition for rehearing of *Cappuccitti*, it has three courses of action under Federal Rule of Appellate Procedure 40(a)(4): (1) make a final disposition of the case without reargument; (2) restore the case to the calendar for reargument or resubmission; or (3) issue any other appropriate order.

Pursuant to Federal Rule of Appellate Procedure 35, a majority of the active circuit judges may also order that the case be heard by the entire court. To the extent the Eleventh Circuit declines to conduct a rehearing or rehearing en banc, an appeal to the U.S. Supreme Court likely will be the next step in addressing the aggregation aggravation caused by *Cappuccitti*.

Michael Mueller (mmueller@hunton.com) is a partner with Hunton & Williams in the firm's Washington, D.C., office and co-chairman of the firms' complex commercial litigation practice. Jason Beach (jbeach@hunton.com) is an associate in the litigation and intellectual property practice in the firm's Atlanta office.