JONES DAY

MARCH 2010

IN RE SPRINT NEXTEL CORP.: THE SEVENTH CIRCUIT SAYS "NO" TO HEDGING IN CLASS ACTIONS

The Class Action Fairness Act of 2005 ("CAFA") was perhaps the most favorable legal development in years for corporate defendants facing class action lawsuits. Among other things, that statute opened up brand-new possibilities for removing class actions that are national in scope from state to federal court. In response, plaintiffs' class action lawyers have come up with increasingly bold strategies to keep cases in state court. At first, they carved them up into single-state actions, with class members only from that state. But in recent years, they have had some success hedging—defining their putative class to seem local as a logical matter, while at the same time maximizing the size of the class to increase the potential value of the case.

The Seventh Circuit's recent decision in *In re Sprint Nextel Corp.,* No. 09-8038, 2010 WL 308969 (7th Cir. Jan. 28, 2010) rejects some of these more aggressive hedging strategies. While numerous district courts have grappled with these issues, both in the Seventh Circuit and beyond, *Sprint* is the first Court of Appeals decision on point. It provides clear guidance for both plaintiffs and defendants about what kinds of cases may stay in federal court under CAFA and which ones will be remanded. And it re-centers the analysis to where, under the plain text of CAFA itself, it should be: the citizenship of members of the putative class.

CAFA: A BRIEF BACKGROUND

To understand why the *Sprint* decision is so important requires context. Passed in 2005, CAFA aimed to strike a balance. It sought to ensure that class actions that were truly national in scope could be heard in federal rather than state courts, which were frequently perceived to be friendly to local plaintiffs in large class actions. To that end, CAFA extended federal jurisdiction to class actions that satisfy three requirements: (1) 100 or more class members; (2) an amount in controversy of more than $5 million; and (3) minimal diversity, meaning that any one proposed class member is a citizen of a state different from any one defendant. 28

U.S.C. § 1332(d). It also explicitly made such actions removable when first filed in state court. 28 U.S.C. § 1453. The legislative history confirms that Congress, through CAFA, "intended to expand substantially federal court jurisdiction over class actions" and wanted "[i]ts provisions [to] be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." S. Rep. No. 109-14, 43 (2005).

But Congress also recognized that state courts do have a role to play in class actions, especially those that really are local in nature. Accordingly, other CAFA provisions require federal courts to abstain from exercising the broad jurisdiction given to them under CAFA in cases of more local scope. The applicability of these exceptions (the two main ones have been dubbed the "home state exception" and the "local controversy exception") turns in part on the citizenship of the putative class members. The home state exception requires federal courts to "decline to exercise [CAFA] jurisdiction" when, among other things, "greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(a)(i)(I). And the local controversy exception requires federal courts to "decline to exercise [CAFA] jurisdiction" where "two-thirds or more of the members of all proposed plaintiff classes in the aggregate . . . are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B). Once CAFA jurisdiction is established by showing the three elements set out above, the party opposing jurisdiction (typically the plaintiff in a class action removed from state court) bears the burden of proving that some abstention provision requires remand. *Hart v. FedEx Ground Package Sys., Inc.*, 457 F.3d 675, 680 (7th Cir. 2006). Through this allocation of burdens, Congress sought to avoid having the few narrow exceptions it specified swallow CAFA's rule of broad federal jurisdiction for class actions. *See* S. Rep. No. 109-14 at 39.

CREATIVE LAWYERS EVADE CAFA BY NARROWING THEIR PUTATIVE CLASSES

Plaintiffs' class action lawyers who wanted to stay in state court initially responded to CAFA by taking national class actions and carving them up into multiple one-state class actions. They ensured that their cases would satisfy the citizenship requirements for the CAFA exceptions by defining the class to only include citizens of one state. And federal courts, recognizing that the plaintiff is generally the master of her complaint, found that to be appropriate. For example, in *Kurth v. Arcelormittal USA, Inc.*, No. 2:09-CV-108RM, 2009 WL 3346588 (N.D. Ind. Oct. 14, 2009), the plaintiff filed a class action in state court alleging, in a one-count nuisance claim, that the defendants exposed children from Lake County, Indiana, to toxic pollutants that were emitted as a result of the defendants' industrial operations. The complaint limited the putative class to "[a]ll minors who are citizens of Indiana who have attended school in Lake County, Indiana . . . ." *Id.* at *2. Defendants removed, and plaintiff moved to remand. While remand was ultimately denied for other reasons, the court concluded that the complaint satisfied the citizenship requirements for the CAFA exceptions, holding that plaintiffs could "limit the scope of class actions" and avoid federal jurisdiction under CAFA by "proposing a class limited to the citizens of the home state." *Id.* at *3; *see also In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 564 F.3d 75, 81 (1st Cir. 2009) ("defining the class to include only citizens of a particular state can defeat jurisdiction under CAFA") (citing *Johnson v. Advance Am.*, 549 F.3d 932, 937 (4th Cir. 2008)).

EVEN MORE CREATIVE LAWYERS TRY TO EVADE CAFA WHILE KEEPING CLASS SIZE UP

While defining a class to include only citizens of one state thus proved to be a reliable way for plaintiffs to thwart CAFA-based removals, doing that has an obvious drawback: It makes the class size smaller. That, in turn, diminishes the potential value of a case; fewer plaintiffs means fewer claims and fewer dollars. So, in recent years, plaintiffs' class action lawyers have devised increasingly bold class definitions designed to make class actions *look* like they are local in nature and meet the CAFA exceptions, while at the same time not limiting them to just the citizens of one state. For example, they might define the putative class in terms of where its members own property, where they work, or where they subscribe to a service. Examples abound. *See, e.g.*, *Gerstenecker v. Terminix Int'l, Inc.*, No. 07-CV-0164-MJR, 2007 WL 2746847, at *1 (S.D. Ill. Sept. 19, 2007) (defining the class as all persons and entities that owned property in

Illinois and purchased contracts from defendants); *Anthony v. Small Tube Mfg. Corp.*, 535 F. Supp. 2d 506, 508 (E.D. Pa. 2007) (defining the class as all employees who worked at a Pennsylvania factory); *Schwartz v. Comcast Corp.,* No. Civ. A. 05-2340, 2006 WL 487915, at *3 (E.D. Pa. Feb. 28, 2006) (defining the class as all persons and entities residing or doing business in Pennsylvania who subscribed to Comcast high-speed internet service during a one-year time period); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1165 (11th Cir. 2006) (defining the class as all property owners, lessees, and licensees of properties where the defendants deposited toxic materials and all individuals who came in contact with these materials).

These maneuvers proved vexing for defendants, as many federal courts familiar with cases like *Kurth* did not perceive the crucial distinction between those cases where plaintiffs defined themselves into CAFA exceptions by limiting their classes, and cases where plaintiffs hedged. So they held plaintiffs to have satisfied the citizenship components of the CAFA exceptions based solely on their putative class definitions, without more, even though those definitions did not actually limit the putative classes to citizens of one state. Accordingly, notwithstanding the clear Congressional intent manifested in CAFA, defendants ended up having to litigate large class actions, with huge dollars at stake, in state courts—even though those cases were not truly local in nature.

THE SEVENTH CIRCUIT SAYS "NO" TO HEDGING

It was against this backdrop that the Seventh Circuit took up the *Sprint* case. In *Sprint*, the plaintiffs had filed a complaint in Kansas state court alleging that defendant Sprint Nextel ("Sprint") conspired with other cell phone providers to fix prices for text-messaging services. The plaintiffs purported to represent a class of all Kansas residents who purchased text-messaging services from Sprint or one of the alleged co-conspirators. But rather than define their class with respect to citizenship, the plaintiffs limited their class to those who (1) had a Kansas cell phone number, (2) received their cell phone bill at a Kansas mailing address, and (3) paid a Kansas USF fee, a fee applied to long-distance calls in Kansas.

Sprint removed the case to federal court in Kansas, and it was transferred by the Judicial Panel on Multidistrict Litigation to the United States District Court for the Northern District of Illinois as part of MDL 1997. Plaintiffs sought remand. The district court granted the motion, noting that while the defendants had established the three prerequisites for CAFA jurisdiction, the plaintiffs had shown that the home-state exception applied, requiring the court to decline to exercise that jurisdiction. As to the citizenship requirement, the defendants argued (and the district court agreed) that plaintiffs had not provided any evidence. But the court found that unproblematic, ruling that plaintiffs' class definition was dispositive: "By defining the putative class narrowly to include only those individuals and businesses that have both a Kansas telephone number and a Kansas billing address, plaintiffs have established, by a preponderance of the evidence, that over two-thirds of class members are Kansas citizens." *In re: Text Messaging Antitrust Litig.*, MDL No. 1997, 2009 WL 2488301, at *3 (N.D. Ill. Aug. 13, 2009).

While remand orders generally are not appealable, 28 U.S.C. § 1447(d), the defendants sought and received permission from the Seventh Circuit to appeal the remand pursuant to a provision in CAFA that permits discretionary appeals from remand orders in CAFA cases, 28 U.S.C. § 1453(c)(1). In a unanimous opinion authored by Judge Terrence Evans, the Seventh Circuit took a much different view. As to the citizenship of the putative class members, the court began by noting that, once CAFA jurisdiction was established, the burden shifted to "the plaintiffs, who were seeking remand, to show that the home-state exception applies." *Sprint,* 2010 WL 308969, at *3. To do that, "the plaintiffs had to establish by a preponderance of the evidence that two-thirds of their proposed class members are Kansas citizens, that is, either individuals domiciled in Kansas or corporations organized there (or other business entities meeting the relevant tests)." *Id.* So, without any evidence as to the citizenship of the putative class members, the court had to decide whether plaintiffs' class definition—which looked local, but was not tied to citizenship—was enough to satisfy this burden.

The court observed that the district court's class definition-based "approach has some appeal" because, as a logical matter, "[p]eople with Kansas cell phones presumably have them because they lived or worked in the state at some time, and the current Kansas mailing addresses suggest that they still do." *Id.* "[O]ne would think that the vast majority of individual Kansas cell phone users do in fact live in that state and that the vast majority of them view it as their true home." *Id.* Or put differently, it is

> hard to believe that . . . nondomiciliaries are collectively more than a drop in the bucket when it comes to class composition: The population of Kansas is approximately 2.8 million people, . . . but the state's biggest military base, Fort Leavenworth, is home to only 10,000 soldiers and family members, . . . and the out-of-state population of the University of Kansas, the state's biggest school, is under 10,000[.]

Id. The court found similar logic persuasive as to cell phones belonging to businesses and concluded that, "[a]ll in all, we're inclined to think that at least two-thirds of those who have Kansas cell phone numbers and use Kansas mailing addresses for their cell phone bills are probably Kansas citizens." *Id.* at *4 (collecting district court cases where courts found citizenship requirement met based on similar logic).

But, the court continued—and this is the critical point—ultimately, all of that "logic" is really just "guesswork." *Id.* Indeed, "[t]here are any number of ways in which our assumptions about the citizenship of this vast class might differ from reality." *Id.* Accordingly, the court declined to follow the district court decisions using logic to limit a class definition that was not itself limited by citizenship. As the court put it: "we agree with the majority of district courts that a court may not draw conclusions about the citizenship of class members based on things like their phone numbers and mailing addresses." *Id.*

Instead of relying on a hedging class definition without anything more, the court explained, to win remand plaintiffs should have followed one of two approaches. As in *Kurth*, they could have limited their class by citizenship. Specifically, they could "have defined their class as all Kansas citizens who purchased text messaging from Sprint Nextel or an alleged coconspirator." *Id.* at *6; *see id.* ("By using that definition, the plaintiffs could have guaranteed that the suit would remain in state court."). Of course, as the court recognized, "[t]he tradeoff" involved in doing that "is that this definition would have limited the pool of potential class members, something that plaintiffs and their lawyers [we]re apparently unwilling to do." *Id.*

Alternatively, to preserve their larger putative class, the plaintiffs were required to "submit[] *evidence* that two-thirds of the class members were indeed Kansas domiciliaries or businesses." *Id.* at *5 (emphasis added). The court added that, while the class size might have made individual proof on this issue infeasible, "the district court could have relied on evidence going to the citizenship of a representative sample"—for example, a statistical analysis based on "affidavits or survey responses in which putative class members reveal whether they intend to remain in Kansas indefinitely, . . . or, if they are businesses, their citizenship under the relevant test." *Id.*

Because plaintiffs had done neither of these things, the court concluded that they had not met their burden to prove citizenship of putative class members by a preponderance of the evidence, and it vacated the district court's remand order. *Id.* at *6.

LESSONS AND CONCLUSIONS FROM *SPRINT*

The *Sprint* decision is important. It represents the first Court of Appeals to weigh in on whether plaintiffs can avoid CAFA by relying solely on their putative class definition where that definition is not tied to citizenship. The decision holds several key lessons for defendants trying to remove class actions under CAFA. First, such defendants should pay careful attention to how plaintiffs have defined their putative class. If plaintiffs are not willing to tie their putative class to citizenship, it should be a red flag that they are hedging. And if they are hedging, defendants should press them to prove up the citizenship element of the CAFA exceptions *with evidence*. *See also Hertz Corp. v. Friend*, No. 08-1107, 559 U.S. ___, slip op. at 18 (Feb. 23, 2010) (noting that "[w]hen challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof"). They may not be able to do so, in which case federal jurisdiction can be achieved. Moreover, just putting them to the task might be enough to get them to redefine their class to tie it to citizenship. That in itself can be a huge victory, for in many cases, the plaintiffs with the biggest claims (often out-of-state corporations) may not be citizens of the state where it was brought.

Of course, *Sprint* is not a panacea. It did not definitively resolve things in favor of federal jurisdiction in all cases with creative plaintiffs' counsel. Indeed, it did not even resolve the issue for Sprint, but instead remanded to allow plaintiffs to try to marshal citizenship evidence to support remand. But the *Sprint* court's definitive "no" to hedging, and its insistence on actual evidence in such cases, is certainly welcome relief for defendants in state-court class actions, in the Seventh Circuit and beyond.

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