

January 25, 2010

## Seventh Circuit: CAFA Jurisdiction Remains After Class Certification Is Denied

On Friday, January 22, 2010, the U.S. Court of Appeals for the Seventh Circuit held that a federal court does not lose Class Action Fairness Act (CAFA) jurisdiction over an action when class certification is denied. *Cunningham Charter Corp. v. Learjet, Inc.*, \_\_\_ F.3d \_\_\_, 2010 WL 199627 (7th Cir. Jan. 22, 2010). The Eleventh Circuit came to the same conclusion in *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009), noting that its vacating an order certifying a class action did not affect CAFA jurisdiction. *Id.* at 1268 n.12. The First Circuit declined to reach the issue in *College of Dental Surgeons v. Connecticut General Life Insurance Co.*, 585 F.3d 33, 42 (1st Cir. 2009), although an earlier decision from the First Circuit, *In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 492 (1st Cir. 2009) suggested in dicta that CAFA jurisdiction might be eliminated by the denial of class certification. There is a split of authority on the question among district courts. Compare *Ramirez v. Dollar Phone Corp.*, \_\_\_ F. Supp.2d \_\_\_, 2009 WL 3747215, at \*20 (E.D.N.Y. Nov. 10, 2009) (“Class certification having been denied, jurisdiction over this action is lacking.”); *Salazar v. Avis Budget Group*, 2008 WL 5054108, at \*5 (S.D. Cal. Nov. 20, 2008) (“When this Court denied class certification, it determined there is not – and never was – CAFA diversity jurisdiction.”) with *Lewis v. Ford Motor Co.*, 2010 WL 27409, at \*8-9 (W.D. Pa. Jan 5, 2010) (citing CAFA’s legislative history, specifically the deletion of a provision that would have required dismissal of putative class actions after denial of class certification, and holding that CAFA jurisdiction remained after denial of class certification).

The *Cunningham* opinion, written by Judge Posner, is grounded in CAFA’s text. 28 U.S.C. § 1332(d)(1)(B) defines “class action” as “any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.” The use of the word “filed” in § 1332(d)(1)(B) led the Seventh Circuit to conclude that jurisdiction attaches under CAFA when a putative CAFA class action is filed – and, in accordance with the “general principle that jurisdiction once properly invoked is not lost by developments after a suit is filed,” *Cunningham*, 2010 WL 199627 at \*2, jurisdiction is not eliminated by a subsequent denial of the plaintiff’s motion for class certification. The rule also comports with “the Act’s purpose of relaxing the requirement of complete diversity of citizenship so that class actions involving incomplete diversity can be litigated in federal court”; if a federal court’s denial of class certification resulted in a loss of subject-matter jurisdiction, the result could be subsequent certification of the same putative class in state court, if the state’s criteria for certification differ from those in Rule 23. *Id.*

The court acknowledged that filing a complaint including the words “class action” does not necessarily confer CAFA jurisdiction – if the request for class treatment is frivolous, CAFA jurisdiction will not attach. *Id.* at \*1 (“Frivolous attempts to invoke federal jurisdiction fail, and compel dismissal.”). But in the Seventh Circuit, a district court’s determination that an action filed as a class action cannot be “maintained” as a class action does not eliminate subject-matter jurisdiction under CAFA. *Id.* at \*2. The holding, particularly if followed by other Courts of Appeals, should reassure removing defendants that CAFA jurisdiction does not require class certification.

© 2010 Sutherland Asbill & Brennan LLP. All Rights Reserved.

This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Sutherland and the recipient.



*If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.*

Thomas M. Byrne	404.853.8026	<a href="mailto:tom.byrne@sutherland.com">tom.byrne@sutherland.com</a>
Thomas W. Curvin	404.853.8314	<a href="mailto:tom.curvin@sutherland.com">tom.curvin@sutherland.com</a>
Daniel H. Schlueter	202.383.0146	<a href="mailto:dan.schlueter@sutherland.com">dan.schlueter@sutherland.com</a>
Steuart H. Thomsen	202.383.0166	<a href="mailto:steuart.thomsen@sutherland.com">steuart.thomsen@sutherland.com</a>
Valerie S. Sanders	404.853.8168	<a href="mailto:valerie.sanders@sutherland.com">valerie.sanders@sutherland.com</a>