



# CLASS ACTION LITIGATION



## REPORT

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May a federal trial court retain jurisdiction over a case if the Class Action Fairness Act is the only basis for a federal court's jurisdiction, and the court denies class certification? "To date," write attorneys Christine G. Rolph, Angela M. Olsen, and Sarah M. Gragert, "no court of appeals has weighed in on this precise question, and the district courts are deeply split."

Litigants, the authors advise, "should proceed with caution and be aware of how federal courts have ruled historically on this and other CAFA-related questions in their jurisdictions."

### **Courts Remain Split on Whether Denial of Class Certification Deprives Federal Courts of CAFA Jurisdiction**

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#### **Introduction**

**T**he U.S. Congress enacted the Class Action Fairness Act (CAFA) in 2005 to expand the authority of federal courts to hear large class actions with interstate implications and to curb perceived abuses that marked class action litigation in state courts. CAFA permits federal jurisdiction over class actions provided that the number of plaintiffs is equal to or exceeds 100; "minimal diversity" exists, meaning that at least one plaintiff and one defendant are citizens of different states; and the aggregate of claims exceeds \$5 million.<sup>1</sup>

<sup>1</sup> 28 U.S.C. § 1332(d)(2), (5)(b), (6).

In practice, however, CAFA has created a number of issues, resulting in uncertainty for courts and litigants.

One open question, for example, is whether a federal court may retain jurisdiction over a matter if the court denies a plaintiff's request for class certification—a necessary prerequisite to pursuing claims on a class basis. Stated differently, if the only basis for a federal court's jurisdiction is CAFA, and the court later determines that an action does not qualify for class action status, may the court nonetheless proceed to hear the case? To date, no court of appeals has weighed in on this precise question, and the district courts are deeply split.

Four of the most recent opinions to address this issue underscore the discord among district courts. On one side, the Western District of Louisiana in *Kitts v. CITGO Petroleum Corp.*<sup>3</sup> and the Northern District of California in *In re HP Inkjet Printer Litigation*,<sup>4</sup> each held that notwithstanding the court's denial of plaintiffs' motion for class certification, it retained subject matter jurisdiction over the matter under CAFA. Both courts explained that jurisdiction is determined at the outset of the proceedings, and subsequent developments in the case do not affect that original determination.<sup>5</sup> Because CAFA jurisdiction had been appropriate in each case at the beginning based on the pleadings, the subsequent denial of class certification did not strip the courts of their jurisdiction.<sup>6</sup>

In contrast, the Southern District of Florida in *Clausnitzer v. Federal Express Corporation*<sup>7</sup> and the Southern District of Illinois in *Ronat v. Martha Stewart Living Omnimedia*,<sup>8</sup> reached the opposite conclusion.

<sup>2</sup> Examples of cases in which district courts deciding this issue retained jurisdiction after denying class certification include: *In re HP Inkjet Printer Litig.*, No. C 05-3580, 2009 WL 282051 (N.D. Cal. Feb. 5, 2009); *Kitts v. CITGO Petroleum Corp.*, No. 2:07-CV-1151, 2009 WL 192550 (W.D. La. Jan. 23, 2009); *Broquet v. Microsoft Corp.*, Civ. No. CC-08-094, 2008 WL 2965074 (S.D. Tex. July 30, 2008); *Garcia v. Boyar & Miller, P.C.*, Civ. A. Nos. 3:06-CV-1936-D, 3:06-CV-1937-D, 3:06-CV-1938-D, 3:06-CV-1939-D, 3:06-CV-2177-D, 3:06-CV-2206-D, 3:06-CV-2236-D, 3:06-CV-2241-D, 2007 WL 1556961 (N.D. Tex. May 30, 2007); *Levitt v. Fax.com*, Civ. No. WMN-05-949, 2007 WL 3169078 (D. Md. May 25, 2007); *Genebacher v. CenturyTel Fiber Co. II, LLC*, 500 F. Supp. 2d 1014 (C.D. Ill. 2007); *Davis v. Homecomings Fin.*, No. C05-1466RSL, 2007 WL 905939 (W.D. Wash. March 22, 2007).

In contrast, other district courts dismissed or remanded the action after denial of class certification, asserting that the court lacked subject matter jurisdiction. See, e.g., *Ronat v. Martha Stewart Living Omnimedia, Inc.*, Civ. No. 05-520-GPM, 2008 WL 4963214 (S.D. Ill. Nov. 12, 2008); *Jones v. JELDWEN, Inc.*, No. 07-22328-CIV, 2008 WL 4541016 (S.D. Fla. Oct. 2, 2008); *Clausnitzer v. Fed. Express Corp.*, No. 06-21457-CIV, 2008 WL 4194837 (S.D. Fla. June 18, 2008); *Arabian v. Sony Elecs. Inc.*, No. 05cv1741 WQH, 2007 WL 2701340 (S.D. Cal. Sep. 13, 2007); *Falcon v. Philips Elecs. N. Am. Corp.*, 489 F. Supp. 2d 367 (S.D.N.Y. 2007); *McGaughey v. Treistman*, No. 05 Civ.7069, 2007 WL 24935 (S.D.N.Y. Jan. 4, 2007).

<sup>3</sup> *Kitts v. CITGO Petroleum Corp.*, No. 2:07-CV-1151, 2009 WL 192550 (W.D. La. Jan. 23, 2009).

<sup>4</sup> *In re HP Inkjet Printer Litig.*, No. C 05-3580 JF (PVT), 2009 WL 282051 (N.D. Cal. Feb. 5, 2009).

<sup>5</sup> *Id.* at \*1-2; *Kitts*, 2009 WL 192550, at \*3.

<sup>6</sup> *In re HP Inkjet Printer Litig.*, 2009 WL 282051, at \*3; *Kitts*, 2009 WL 192550, at \*4.

<sup>7</sup> *Clausnitzer v. Fed. Express Corp.*, No. 06-21457-CIV, 2008 WL 4194837 (S.D. Fla. June 18, 2008).

<sup>8</sup> *Ronat v. Martha Stewart Living Omnimedia, Inc.*, Civ. No. 05-520-GPM, 2008 WL 4963214 (S.D. Ill. Nov. 12, 2008).

Both courts focused on the text of CAFA itself and decided that jurisdiction could not survive the denial of class certification. The *Clausnitzer* court acknowledged that various facts relevant to diversity jurisdiction (such as the \$5 million amount in controversy and minimal diversity) are determined at the outset of litigation, and subsequent developments do not upset jurisdiction. Relying on the statute's plain text, however, the court decided that this principle is inapplicable to class certification, which is a legal conclusion—not a fact—that a judge usually renders after a case has begun.<sup>9</sup> Similarly, the *Ronat* court found it significant that the text of CAFA requires entry of a class certification order, holding that without such an entry, jurisdiction is lost.<sup>10</sup>

For practitioners, CAFA can be a powerful tool to consider when looking to remove an action or keep an action in federal court. Litigants, however, should proceed with caution and be aware of how federal courts have ruled historically on this and other CAFA-related questions in their jurisdictions.

### ***Kitts v. CITGO Petroleum Corp.***

In *Kitts v. CITGO Petroleum Corporation*, the Western District of Louisiana held that once a case has been removed properly under CAFA, denial of class certification does not strip a district court of CAFA jurisdiction.<sup>11</sup>

In June 2007, resident plaintiffs filed suit in a Louisiana state court against the defendant, claiming damages resulting from an alleged oil spill from a facility that was owned and operated by CITGO.<sup>12</sup> In their complaint, the plaintiffs stated that they were filing their suit on behalf of hundreds or potentially thousands of adversely affected individuals.<sup>13</sup> In July 2007, defendant CITGO invoked CAFA and filed a notice of removal in the U.S. District Court for the Western District of Louisiana.<sup>14</sup> More than a year later, the plaintiffs filed a motion to certify a class of similarly-situated individuals, which the district court denied on January 8, 2009.<sup>15</sup> On January 16, 2009, less than one week before the scheduled trial, the plaintiffs asked the court to remand the case back to state court, contending that the court's denial of class certification divested the court of CAFA jurisdiction over the lawsuit.<sup>16</sup>

Relying on the opinion and legal analysis provided by the Southern District of Florida in *Colomar v. Mercy Hospital, Inc.*,<sup>17</sup> the *Kitts* court denied plaintiffs' motion to remand and ultimately retained jurisdiction.<sup>18</sup> The court concurred with the *Colomar* opinion and held that "case developments subsequent to removal do not alter the courts' CAFA jurisdiction, if jurisdiction was

<sup>9</sup> *Clausnitzer*, 2008 WL 4194837, at \*4.

<sup>10</sup> *Ronat*, 2008 WL 4963214, at \*7.

<sup>11</sup> *Kitts*, 2009 WL 192550, at \*3-4.

<sup>12</sup> See *id.* at \*1.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at \*4, n.7.

<sup>16</sup> *Id.* at \*4.

<sup>17</sup> *Colomar v. Mercy Hosp., Inc.*, No. 05-22409-CIV, 2007 WL 2083562 (S.D. Fla. July 20, 2007) (retaining CAFA jurisdiction, even though the court dismissed the only non-diverse defendant, on the grounds that jurisdiction is determined at the time of removal, and plaintiff's request to remand was not timely).

<sup>18</sup> *Kitts*, 2009 WL 192550, at \*3-4.

proper at the time of removal.’<sup>19</sup> Both the *Kitts* and *Colomar* courts looked to the language of the 2005 Senate Report that accompanied CAFA, which explained that “once a complaint is properly removed to federal court, the federal court’s jurisdiction cannot be ousted by later events.”<sup>20</sup> Otherwise, “plaintiffs who believed the tide was turning against them could . . . amend their complaint months (or even years) into the litigation to require remand to state court.”<sup>21</sup>

The *Kitts* court found that plaintiffs’ efforts in seeking to remand the case following the court’s denial of class certification—18 months after the removal of their suit to federal court and four working days before their scheduled trial date—“equates to a forum shopping which the traditional rules of removal and remand are designed to preclude.”<sup>22</sup>

### ***In re HP Inkjet Printer Litigation***

In February 2009, in *In re HP Inkjet Printer Litigation*, the Northern District of California ruled, consistent with *Kitts*, that denial of class certification does not deprive a federal court of CAFA jurisdiction.<sup>23</sup>

In October 2005, two putative nationwide class actions against Hewlett-Packard (HP) were consolidated in the Northern District of California.<sup>24</sup> The amended complaint was filed on behalf of persons who purchased HP inkjet printers that prematurely notified users of a low or empty ink cartridge.<sup>25</sup> The court’s subject matter jurisdiction was based on CAFA.<sup>26</sup> In July 2008, the court denied plaintiff’s motion to certify the class because, in part, such a class would be unmanageably overbroad.<sup>27</sup> Plaintiffs subsequently indicated that they planned to seek certification of a California-only class, which—because defendant HP also was a citizen of California—would destroy diversity of citizenship.<sup>28</sup> Defendant HP consequently filed a motion, asking the court to confirm that it retained subject matter jurisdiction over the case, even if the minimal diversity requirements of CAFA were no longer met.<sup>29</sup>

The court held that notwithstanding its denial of plaintiffs’ motion to certify a nationwide class, it retained subject matter jurisdiction under CAFA.<sup>30</sup> The court was persuaded by the reasoning of district court cases that have followed the “‘longstanding rule that courts are to assess jurisdictional facts as they stand at the time of removal,’”<sup>31</sup> particularly in light of CAFA’s legislative history.<sup>32</sup> The Judicial Committee Report on CAFA explained: “‘It uniformly has been held that in a

suit properly begun in federal court the change of citizenship does not oust the jurisdiction. The same rule governs a suit brought in a state court and removed to federal court.’”<sup>33</sup>

In this case, the court explained that because the plaintiffs had pled the nationwide class action in good faith, the court’s jurisdiction had been proper when the complaint was filed, and the court retained jurisdiction, notwithstanding the court’s denial of class certification.<sup>34</sup> In addition, because the case had been pending in that court for over three years, considerations of judicial economy weighed in favor of retaining jurisdiction.<sup>35</sup>

### ***Clausnitzer v. Federal Express Corp.***

In *Clausnitzer v. Federal Express Corporation*,<sup>36</sup> the Southern District of Florida issued an opinion squarely at odds with the holdings in *Kitts* and *In re HP Inkjet Printer Litigation*. Diverging even from the *Colomar* decision of its own jurisdiction, the *Clausnitzer* court held that CAFA jurisdiction was not retained following the denial of class certification.<sup>37</sup>

In June 2006, the plaintiffs filed a complaint in the Southern District of Florida against defendant Federal Express Corporation (FedEx), alleging a cause of action pursuant to the Fair Labor Standards Act.<sup>38</sup> Three months later, the plaintiffs amended their complaint, asserting various Florida contract law claims on behalf of a putative nationwide class of FedEx employees.<sup>39</sup> The Amended Complaint was premised on CAFA jurisdiction.<sup>40</sup> Plaintiffs subsequently filed for class certification, which the court denied on February 28, 2008.<sup>41</sup> Concerned that the denial of class certification called into question its continuing CAFA jurisdiction, the court *sua sponte* requested briefing on the issue from both parties.<sup>42</sup>

The *Clausnitzer* court acknowledged the nationwide split over the CAFA jurisdictional question; however, it ultimately held that jurisdiction was not retained following the denial of class certification.<sup>43</sup> The court explained that jurisdictional facts (such as the \$5 million amount in controversy and minimal diversity requirements), are determined at the outset of litigation, and subsequent developments regarding those facts do not undermine a court’s jurisdiction.<sup>44</sup> The court noted, however, that pursuant to the plain language of the statute, class certification is not a prerequisite to CAFA jurisdiction,<sup>45</sup> and therefore, it cannot be a jurisdictional fact. Rather, the existence of a class “is a legal conclusion that the district court must reach in order for jurisdiction to properly exist in the first place.”<sup>46</sup> By impli-

<sup>19</sup> *Id.* at \*3 (citing *Colomar*, 2007 WL 2083562, at \*3).

<sup>20</sup> *Id.* (quoting Judicial Committee Report on Class Action Fairness Act, S. Rep. No. 109-14 (1st Sess. 2005), reprinted in 2005 U.S.C.A.N. 3, 2005 WL 627977, at \*70-71 (internal citation and quotation marks omitted)).

<sup>21</sup> *Id.*; *Colomar*, 2007 WL 2083562, at \*3.

<sup>22</sup> *Kitts*, 2009 WL 192550, at \*4 (internal quotation marks omitted). After resolving the CAFA jurisdiction issue, the court briefly addressed, and rejected, plaintiffs’ second argument based on diversity jurisdiction. *Id.* at \*4-5.

<sup>23</sup> *In re HP Inkjet Printer Litig.*, 2009 WL 282051, at \*3.

<sup>24</sup> *Id.* at \*1.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at \*1-3.

<sup>31</sup> *Id.* at \*2 (quoting *Colomar*, 2007 WL 2083562, at \*2).

<sup>32</sup> *Id.* at \*2.

<sup>33</sup> *Id.* at \*2 (quoting S. Rep. No. 109-14, *supra* note 20, at \*71).

<sup>34</sup> *Id.* at \*3.

<sup>35</sup> *Id.*

<sup>36</sup> *Clausnitzer v. Fed. Express Corp.*, No. 06-21457-CIV, 2008 WL 4194837 (S.D. Fla. June 18, 2008).

<sup>37</sup> *Id.* at \*3-4.

<sup>38</sup> *Id.* at \*1.

<sup>39</sup> *Id.* at \*1.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at \*1-3.

<sup>44</sup> *Id.* at \*2.

<sup>45</sup> *Id.* at \*4.

<sup>46</sup> *Id.*

cation, the denial of class certification meant that “there is not—and never was—diversity jurisdiction . . . pursuant to CAFA.”<sup>47</sup>

The court proffered two additional arguments in support of its decision to remand the case. First, the court explained that it was constrained by the competing mandates of FRCP 12(h)(3), which prescribes that a court “must dismiss the action” if “at any time . . . it lacks subject-matter jurisdiction.”<sup>48</sup> Second, the plaintiffs had no “foreseeable possibility” that they might secure certification in the future because the time had passed to amend their complaint.<sup>49</sup> The court noted that if a reasonably foreseeable possibility of future class certification remained, however, the court’s jurisdiction would have survived.<sup>50</sup>

### **Ronat v. Martha Stewart Living Omnimedia**

More recently, the Southern District of Illinois addressed the CAFA jurisdictional question in *Ronat v. Martha Stewart Living Omnimedia*,<sup>51</sup> and issued an opinion consistent with the *Clausnitzer* court.

A group of original and intervenor plaintiffs initiated a putative class action under CAFA in the Southern District of Illinois against Martha Stewart Living Omnimedia, Inc., Kmart Corporation, and JRA Furniture Industries, LLC.<sup>52</sup> The plaintiffs amassed unjust enrichment and implied warranty claims from a variety of states’ laws, alleging that the “Victoria” glass-top patio table from the “Martha Stewart Everyday” collection spontaneously shatters during ordinary use.<sup>53</sup> The plaintiffs

requested class certification, which was denied on November 12, 2008.<sup>54</sup>

The court then considered whether it retained subject matter jurisdiction over the case, notwithstanding its denial of class certification.<sup>55</sup> Like the district court in *Clausnitzer*, the court noted its obligation under FRCP 12(h)(3) to dismiss an action when jurisdiction is lacking. The court further explained that “[f]ederal judges are ‘textualists,’ ”<sup>56</sup> and that when interpreting CAFA, the court should look only to the plain text of the statute.<sup>57</sup> In examining the language, the court determined that CAFA failed to provide a basis for subject matter jurisdiction following denial of class certification. The text of CAFA states that federal jurisdiction “shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.”<sup>58</sup> Because the court denied entry of a class certification order, the court therefore concluded, “[t]his is no longer a class action and so the case ends here.”<sup>59</sup>

### **Conclusion**

Federal district courts remain divided on the issue of whether denial of class certification deprives district courts of CAFA jurisdiction.<sup>60</sup> The Western District of Louisiana, Northern District of California, Southern District of Florida, and the Southern District of Illinois are among four of the latest jurisdictions to confront the issue—two held in favor of retaining jurisdiction and two held against retaining jurisdiction. Practitioners should be aware of how district courts have ruled on this issue in their jurisdiction. Until the appellate courts weigh in, it is unlikely that district courts will adopt a uniform approach.

<sup>47</sup> *Id.* at \*3 (quoting *Arabian v. Sony Elecs. Inc.*, No. 05cv1741 WQH, 2007 WL 2701340, at \*5 (S.D. Cal. Sep. 13, 2007)).

<sup>48</sup> *Id.* (quoting Fed. R. Civ. Proc. 12(h)(3)).

<sup>49</sup> *Id.* at \*4.

<sup>50</sup> *Id.*

<sup>51</sup> *Ronat v. Martha Stewart Living Omnimedia, Inc.*, Civ. No. 05-520-GPM, 2008 WL 4963214 (S.D. Ill. Nov. 12, 2008).

<sup>52</sup> *Id.* at \*1, \*6.

<sup>53</sup> *Id.* at \*2-3.

<sup>54</sup> *Id.* at \*3-6.

<sup>55</sup> *Id.* at \*6-7.

<sup>56</sup> *Id.* at \*7.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (quoting 28 U.S.C. § 1332(d)(8)).

<sup>59</sup> *Id.*

<sup>60</sup> *See supra*, at n.2.