No. 09-14107-BB

United States Court of Appeals
For the Eleventh Circuit

RENATO CAPPUCCITTI, on behalf of himself and all others similarly situated,

Plaintiff-Appellee,

v.

DIRECTV, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division, No. 1:09-cv-00627-CAP, Hon. Charles A. Pannell, Jr., United States District Judge

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CTIA—THE WIRELESS ASSOCIATION® AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1 and Eleventh Circuit Rule 26.1-1, set forth below is a list of the trial court judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of a party's stock, and other identifiable legal entities related to a party, to the best of my knowledge:

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CTIA—The Wireless Association® (*amicus curiae*)

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DIRECTV Enterprises, LLC, which is the 100% owner of Defendant DIRECTV, Inc.

DIRECTV Holdings LLC, which is the 100% owner of DIRECTV Enterprises, LLC

The DIRECTV Group, Inc., which is the 100% owner of DIRECTV Holdings LLC

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Dated: August 18, 2010

RULE 35.5 STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744 (11th Cir. 2010); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009); *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159 (11th Cir. 2006).

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance: whether 28 U.S.C. § 1332(d)'s grant of jurisdiction is limited to class actions in which at least one plaintiff's individual claim is for $75,000 or more.

_____

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Dated: August 18, 2010

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STATEMENT OF ISSUES MERITING REHEARING EN BANC

Whether jurisdiction under the Class Action Fairness Act is limited to cases in which at least one plaintiff's individual claim exceeds $75,000.

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It has 300,000 direct members and indirectly represents the interests of more than 3,000,000 businesses and organizations of every size and in every sector of the economy. CTIA—THE WIRELESS ASSOCIATION® represents all sectors of the wireless communications industry. Its members include service providers, manufacturers, and wireless data and Internet companies.

The Chamber's and CTIA's members have an acute interest in this case because they have been or may be named as defendants in class-action lawsuits filed in state or federal courts within this Circuit. Many such lawsuits assert state-law claims that involve far less than $75,000 in alleged damages per putative class member but that in the aggregate exceed $5 million. As Congress recognized in enacting the Class Action Fairness Act of 2005 ("CAFA"), PUB. L. NO. 109-2, 119 STAT. 4 (Feb. 18, 2005), such class actions are prone to abuses, and those abuses have been especially pronounced in certain state courts that were "magnets" for

[1] Pursuant to Fed. R. App. P. 29(a), both parties have consented to the filing of this brief.

class-action litigation. As a partial remedy to that problem, Congress made a federal forum available to increase the likelihood that class-action litigation will proceed in a fair and appropriate manner. Many defendants, including many Chamber and CTIA members, have removed cases to federal court in reliance on the jurisdictional provisions of CAFA.

The panel's decision casts that reliance into doubt. The panel appears to have misconstrued CAFA as withholding federal subject matter jurisdiction in virtually all consumer class actions (and many other class actions involving state-law claims). If rehearing is not granted, those class actions may have to be dismissed or remanded and potentially relitigated from scratch in state court. In addition, the panel decision may prompt a torrent of abusive class actions in state courts within this Circuit—including duplicates of class actions that were resolved long ago. Because that result is contrary to well-established law and would have grave consequences for the Chamber's and CTIA's members, the Chamber and CTIA respectfully submits this brief as *amici curiae* in support of rehearing.

SUMMARY OF ARGUMENT

Rehearing is warranted because the panel decision appears to rest on an inadvertent misreading of CAFA's provisions that would limit federal jurisdiction to those class actions in which at least one plaintiff's state-law claims are worth more than $75,000. The panel's interpretation of CAFA conflicts with four prior decisions of this Court and decisions of every other court of appeals.

Moreover, the consequences of the panel decision would be far-reaching and dire. ***First***, a substantial majority of class actions pending in this Circuit may have to be dismissed or remanded to state court. Each case then could be completely relitigated, as any rulings by the federal court would be void and subject to second-guessing by some of the very state courts whose lax class-action practices led Congress to enact CAFA in the first place.

Second, the panel decision may spawn a new breed of shakedown lawsuit. Because many earlier judgments resolved class actions that surely cannot satisfy the panel's new amount-in-controversy requirement, opportunistic plaintiffs' lawyers could seek to resurrect these cases by filing them anew in state courts within this Circuit. Although hundreds or thousands of these cases have been laid to rest—almost always by dismissals on the merits or settlement agreements approved by federal courts—businesses may be sued again by plaintiffs' lawyers (whether the same or different) seeking to extract a new settlement. Although these "do over" class actions should not succeed, businesses nonetheless may be forced to expend considerable resources to defend them.

Third, because most consumer class actions (and many other lawsuits) would not be removable under the panel's new limitation on CAFA, state courts within this Circuit will become magnet jurisdictions for nationwide class actions. Indeed, very few multi-state class actions filed in those courts would be remova-

ble—the opposite from what Congress intended. And the very abuses that CAFA was enacted to prevent would gain a new lease on life.

ARGUMENT

Commentators have described the panel decision as a "bombshell" of "seismic" importance that "has the class action bar reeling" and is "very hard to square with CAFA's text and purpose."[2] This startled reaction is justified; if allowed to stand, the panel decision would have a catastrophic impact on class-action litigation nationwide.

I. THE PANEL DECISION MISREADS THE CLASS ACTION FAIRNESS ACT AND CREATES INTRA- AND INTER-CIRCUIT CONFLICTS.

As the Petition explained, the panel decision misreads CAFA and departs from decisions of every other Circuit and four decisions of this Court.[3]

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[2] Jessie K. Kamens, *Breaking Appellate Ranks, Eleventh Circuit Requires $75,000 Amount in Controversy*, BNA Class Action Litigation Report, http://news.bna.com/clsn/CLSNWB/split_display.adp?fedfid=17619116&vname=clasnotallissues&fn=17619116&jd=a0c3x0w3f9&split=0 (last visited Aug. 17, 2010); McGlinchey Stafford, *Seismic Alert: 11th Circuit Upends Existing Landscape of CAFA Subject Matter Jurisdiction*, CAFA Law Blog, July 22, 2010, http://www.cafalawblog.com/-case-summaries-seismic-alert-11th-circuit-upends-existing-landscape-of-cafa-subject-matter-jurisdiction.html; Adam Steinman, *Commentary on Recent CAFA Decision (Cappuccitti v. DirecTV)*, Civil Procedure & Federal Courts Blog, July 26, 2010, http://lawprofessors.typepad.com/civpro/2010/07/commentary-on-recent-cafa-decision-cappuccitti-v-directv.html.

[3] *See Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744 (11th Cir. 2010); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009); *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006); and *Evans v. Walter Indus., Inc.*, 449 F.3d 1159 (11th Cir. 2006); *see also* Pet. 13 n.2 (citing conflicting cases).

The panel appears to have inadvertently misread 28 U.S.C. § 1332, which governs diversity jurisdiction in the federal courts. Section 1332(a), which existed long before CAFA and governs diversity jurisdiction in ordinary civil actions, provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs," and there is complete diversity of citizenship of the parties. Contrary to the panel's holding, however, Section 1332(d), which was enacted as part of CAFA and confers jurisdiction over certain class actions, ***does not*** incorporate Section 1332(a). Rather, Section 1332(d) provides that "[t]he district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which" minimal diversity exists. 28 U.S.C. § 1332(d)(2). As the leading treatise puts it, Section 1332(d) "extends federal subject matter jurisdiction to class actions when there is minimal diversity and the total amount in controversy exceeds $5,000,000, exclusive of interest and costs, and provides for aggregation ***even if no individual class member asserts a claim that exceeds $75,000***." 14AA CHARLES ALAN WRIGHT *ET AL.*, FEDERAL PRACTICE AND PROCEDURE § 3704 (3d ed. Supp. 2010) (emphasis added).

The panel nonetheless concluded that "there is no evidence of congressional intent in § 1332(d) to obviate § 1332(a)'s $75,000 requirement as to at least one

plaintiff" when a class action in federal court under CAFA. Panel Op. 10. But Congress intended to do (and did) just that: The general diversity provision (Section 1332(a)) and CAFA's provision governing class actions (Section 1332(d)) are independent grants of jurisdiction. If Congress intended to limit federal jurisdiction to class actions in which at least one claim exceeds Section 1332(a)'s $75,000 threshold, Congress would have said so when listing the jurisdictional requirements for class actions in Sections 1332(d)(1)-(10).[4] But it did not.

In fact, the only place in CAFA that mentions the $75,000 threshold is the provision addressing "mass actions," which CAFA defines as "civil action[s] * * * in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). These mass actions can also be removed under CAFA, "except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a) [*i.e.*, § 1332(a)]." *Id.* Section 1332(d)(11) therefore imposes an additional limitation on jurisdiction over mass actions that does not apply to class actions (covered in Section 1332(d)(1)-(10)). If Section 1332(a)'s "jurisdictional

[4] Sections 1332(d)(1)-(10) define the number of putative class members required; explain when minimum diversity exists; specify that CAFA's $5 million amount-in-controversy threshold should be calculated by aggregating the claims of individual class members; carve out limited exceptions, such as for class actions involving local controversies or particular kinds of securities, or when the primary defendants are state governmental entities.

amount requirements" applied to all actions removable under CAFA, it would have been unnecessary for Congress to repeat that limitation in the mass-action provision.

The panel also reasoned that its interpretation of CAFA was necessary to treat cases under "CAFA original jurisdiction" in the same way as cases under "CAFA removal jurisdiction." Panel Op. 11. But the panel's assumption that Section 1332(a)'s $75,000 requirement applies to CAFA removals is mistaken. The panel apparently believed that the sole authority for CAFA removals is Section 1332(d)(11), which as noted above does indeed refer to the $75,000 "jurisdictional amount requirement" of Section 1332(a). But Section 1332(d)(11) applies only to removal of "mass actions" and explicitly limits jurisdiction over them. By contrast, class actions over which a federal court otherwise would have original jurisdiction under Section 1332(d)(2) may be removed under Section 1441(a), which provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed" to district court. 28 U.S.C. § 1441(a); *see also id.* § 1453(b) ("A class action may be removed to a district court of the United States * * *.").[5]

Finally, the panel expressed concern that failing to limit jurisdiction under

[5] The panel (Op. 9 n.10) cited *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006), for the proposition "that at least one plaintiff must meet the $75,000 amount in controversy requirement in the CAFA removal context." But *Abrego* involved removal of a " 'mass action'," not a class action. *Id.* at 686.

CAFA to class actions in which at least one plaintiff's claims exceed $75,000 "would essentially transform federal courts hearing originally-filed CAFA cases into small claims courts, where plaintiffs could bring five-dollar claims by alleging gargantuan class sizes." Panel Op. 10. But contrary to the panel's belief, that is exactly "the result [that Congress] intended." *Id.*

Indeed, Congress enacted CAFA in response to state courts that were rubber-stamping class certifications of dubious nationwide classes. For example, before CAFA, a single "state court in rural Alabama certified almost as many class actions (thirty-five cases) as all 900 federal district courts did in a year (thirty-eight cases)." Victor E. Schwartz *et al.*, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 499 (2000). These state courts' bias against business defendants (especially out-of-state defendants) gave "class attorney[s] unbounded leverage" to force businesses "to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits." S. REP. NO. 109-14, at 20 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 21.[6]

[6] *See also* S. REP. NO. 109-14, at 3, *reprinted in* 2005 U.S.C.C.A.N. 3, 5-6 (before CAFA, "current law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests"); 151 CONG. REC. E136 (daily ed. Feb. 2, 2005) (remarks of Rep. Goodlatte) (CAFA was necessary because "some state courts routinely certify classes before the defendant is even served with a complaint and giv-

These questionable state-court class actions often involved small-dollar claims. For example, the Senate Judiciary Committee's Report described the prototypical class action for which CAFA was intended to provide a federal forum as one "involving 25 million people living in all fifty states and alleging claims * * * that are collectively worth $15 billion." S. REP. NO. 109-14, at 11, *reprinted at* 2005 U.S.C.C.A.N. at 12. Yet because the average claim per class member comes out to only $600, that exemplar class action would flunk the Panel's new amount-in-controversy requirement for federal jurisdiction under CAFA.

Moreover, many of the actual cases that led to the passage of CAFA were consumer class actions in which each plaintiff's claims would have been worth far less than $75,000. For example, car manufacturers were targeted by "a spate of class actions * * * alleging that the paint on 20-year-old vehicles was discoloring or peeling." *Id.* at 22, *reprinted in* 2005 U.S.C.C.A.N. at 23. Insurance companies were forced to settle class actions alleging that the practice of rounding premiums up to the nearest dollar—although required by state regulators—nevertheless violated state law. *Id.* at 21, *reprinted in* 2005 U.S.C.C.A.N. at 22. And in one case from a State in this Circuit that powerfully demonstrated the need for reform—because class members actually ***lost*** money from the settlement when money to pay class counsel was deducted from individual class members' accounts—the

en a chance to defend itself," with others "employ[ing] very lax class certification criteria, rendering virtually any controversy subject to class action treatment").

plaintiffs' claims were each worth less than $10. *Id.* at 15, *reprinted in* 2005 U.S.C.C.A.N. at 11 (discussing *Hoffman v. BancBoston Mortgage Corp.*, No. CV 91-1880 (Ala. Cir. Ct., Mobile Cty.)); *see also* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1057-68 (1996) (same). Under the panel's decision, however, each of these actions would once again be mired in state court.

Rehearing is warranted because the panel decision—which is at odds with prior decisions of this Court and other circuits—would frustrate Congress's objective to provide a federal forum to class actions involving "numerous plaintiffs, each of whom has only a small financial stake in the litigation." S. REP. NO. 109-14, at 33, *reprinted in* 2005 U.S.C.C.A.N. at 32.

II. REHEARING IS WARRANTED BECAUSE THE PANEL DECISION WOULD UNSETTLE MANY PENDING AND RESOLVED CLASS ACTIONS AND LEAD TO A FLOOD OF ABUSIVE AND DUPLICATIVE LITIGATION IN STATE COURTS.

If not withdrawn, the panel decision would have sweeping adverse effects on class-action litigation in this Circuit and may spawn a new breed of abusive lawsuit—the "do over" class action. The ripple effect of these lawsuits will be felt throughout the national economy.

To begin with, the panel decision may well result in the mass dismissal of class actions pending in district courts in this Circuit. Virtually all consumer class actions—and many other class actions, such as wage-and-hour employment class

actions—seek to aggregate state-law claims that individually are for less than $75,000. Accordingly, they would all flunk the panel's new jurisdictional amount-in-controversy prerequisite.

The number of affected cases is staggering. Since CAFA was enacted just over five years ago, tens of thousands of class actions have been filed in or removed to federal court. A Federal Judicial Center study analyzing data through June 2007 put the annual number of new class actions in federal courts at between 4,000 and 5,000. *See* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Federal Judicial Center, Apr. 2008, App. B fig. 1, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Fourth%20Interim%20Report%20Class%20Action.pdf. More than two-thirds of these new filings and removals were consumer and employment class actions. *See id.* The experience of Chamber and CTIA members suggest that the pace of new class action filings has only quickened since 2007—and consumer and employment cases are an even greater share of the total. Moreover, the Eleventh Circuit gets a disproportionate number of these cases. In fact, during the 26 months after CAFA was enacted, courts within this Circuit saw their class-action dockets balloon, with the third-highest increase in new cases among all circuits. *See id.*, App. B fig. 2.

If these cases are dismissed or remanded, plaintiffs will almost certainly pur-

sue them in state court, refiling them if necessary. Once there, these cases would likely have to be relitigated from scratch, as plaintiffs predictably will argue that any adverse rulings made by the federal court—whether a denial of class certification or the dismissal of claims—are void because that court lacked subject-matter jurisdiction. *See Kircher v. Putnam Funds Trust*, 547 U.S. 633, 647 (2006) (noting that a state court to which a case has been remanded for lack of subject matter jurisdiction "is perfectly free to reject the remanding court's reasoning"). The suddenly multiplied expense of defending these actions may force many businesses simply to surrender and settle. And that is so even for claims that a federal court has declared to be meritless or ineligible for class certification, as there is a risk that a state court may rule differently.

Yet the risks flowing from the panel's decision are not confined only to pending cases. Even class actions that already have achieved closure—whether by settlement, dismissal, or otherwise—may be used as the vehicle to resurrect the dispute in a state-court class action. If the federal class action would not have satisfied the panel's new jurisdictional rule, plaintiffs might seek to reopen the judgment as "void" under Federal Rule of Civil Procedure 60(b)(4).[7] Enterprising

[7] *See, e.g.*, *Williams v. Brooks*, 996 F.2d 728, 730 (5th Cir. 1993) ("A party who fails to appeal a dismissal within the thirty-day period may nevertheless have the case reinstated on the ground that the judgment dismissing the case was void for lack of jurisdiction by filing a motion pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure."); 11 CHARLES ALAN WRIGHT *ET AL.*, FEDERAL PRACTICE

plaintiffs' lawyers might take an even more aggressive approach by attempting to refile previously dismissed or settled class actions in state court and contending that the prior judgments lacked *res judicata* effect because they were rendered by courts that lacked subject-matter jurisdiction. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 1, 17 (1982). Still bolder plaintiffs' lawyers may seek to refile class actions that had been resolved in federal courts in other Circuits, arguing that those courts too lacked jurisdiction under this Court's reading of CAFA.

It would be extraordinarily unfair—and would lead to chaos—to allow the filing of state-court class actions that duplicate previously resolved federal class actions. In some cases, businesses have paid the full amount of actual and perhaps even punitive damages, in accordance with a jury's verdict or federal court's final judgment. More commonly, businesses have yielded to the hydraulic pressure to settle even meritless claims that comes from the use of the class-action device, paying millions of dollars under settlement agreements that federal courts have approved as fair to the class. *See* Fed. R. Civ. P. 23(e).

These prior judgments should still bar duplicative class actions filed in state court. As the Supreme Court has observed, "[a] party that has had an opportunity to litigate the question of subject-matter jurisdiction may not * * * reopen that

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AND PROCEDURE § 2862 (2d ed. Supp. 2010) ("There is no time limit [under Rule 60(b)(4)] on an attack on a judgment as void," as when the "the court that rendered [the judgment] lacked jurisdiction of the subject matter.").

question in a collateral attack upon an adverse judgment." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982). But because the state courts' resolution of the issue is uncertain, businesses nonetheless likely will be required to expend considerable resources in defending against these suits. And if these prior judgments are deemed to lack preclusive effect, they will offer no practical defense to repeat class actions brought in state court; plaintiffs' lawyers seeking a windfall payout—who may not have represented the plaintiffs in the original case—will reason that a business that was forced to pay once can be coerced to pay again, particularly if the new lawsuit is filed on more favorable turf.

In addition, the panel decision also invites a tidal wave of nationwide consumer and employment class-action litigation in state courts within this Circuit. If even nationwide class actions against defendants from around the country cannot be removed to federal courts in this Circuit—as would be true for most consumer and employment class actions under the Panel's decision—the plaintiffs' bar can be expected to flock to those jurisdictions.

The businesses targeted by these abusive lawsuits will not be the only victims, as the shock waves from these cases will be felt throughout the economy. The potential cost to businesses of having to relitigate virtually every consumer class action—and many others—filed or removed in this Circuit since 2005 will be gargantuan. And the cost of litigating and settling the new flood of nationwide

class actions that will be filed in state courts within this Circuit likewise will be immense. But those burdens will not be borne by the defendant businesses alone: Instead, those expenses will likely be passed along to their customers and employees in the form of higher prices and lower wages and benefits.

In sum, rehearing is warranted because the panel's decision would have a disastrous impact on class-action litigation and give rise to a new kind of abusive lawsuit that will exact a huge toll on the national economy.

CONCLUSION

The petition for rehearing or rehearing en banc should be granted.

Dated: August 18, 2010

Respectfully submitted,

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I hereby certify that, on August 18, 2010, I served one copy of the foregoing Brief of the Chamber of Commerce of the United States of America and CTIA—The Wireless Association® as *Amici Curiae* in Support of Petition for Rehearing and Rehearing En Banc by First Class Mail, postage prepaid, on each of the following:

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