

## Class Action ADVISORY

January 20, 2010

### Fourth Circuit: LLCs Are “Unincorporated Associations” for Purposes of CAFA Removal

On January 8, 2010, the Fourth Circuit handed down the *Ferrell* decision, a reminder that even the Class Action Fairness Act of 2005 (CAFA) minimal diversity test for removal of class action lawsuits to federal court can encounter complicated and significant hurdles when a limited liability company (LLC) is involved as a defendant. The LLC may not be diverse from the plaintiff’s state after a court applies the two tests for determining the LLC’s principal place of business—the nerve center test and the place of operations test.

For purposes of diversity, LLCs have traditionally been deemed residents of the states where their members are citizens. This is the so-called “*Carden* Rule,” which comes from the 1990 U.S. Supreme Court decision *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990) (holding that a limited partnership is not itself a citizen as a separate entity, but instead, courts must look to the citizenship of its members to determine if diversity jurisdiction exists). Pre-CAFA, the Fourth Circuit applied the *Carden* Rule to LLCs in its 2004 ruling, *Gen. Tech Applications, Inc. v Exro Ltda.*, 388 F.3d 114, 121 (4th Cir. 2004).

On the facts in *Ferrell*, the defendant Express Check had a sole member, QC Financial Services, a resident of both Missouri and Kansas. All other parties were South Carolina citizens. Express Check claimed that diversity was satisfied, which is logical under the *Carden* Rule. However, CAFA’s removal rules first must be taken into consideration.

CAFA was passed in 2005, and the removal test language in the statutes makes reference to the citizenship of “corporations” and “unincorporated associations.” The question of statutory interpretation under CAFA presented by *Ferrell* was whether Section 1332(d)(10), which changed the rules for determining the citizenship of “unincorporated associations,” also applies to LLCs, such that the inquiry is not where the members reside, but where the LLC was established and where it has its principal place of business. The Fourth Circuit held that when CAFA removal is involved, an LLC is an “unincorporated association” and therefore is a citizen of the state in which it is organized and the state where it has its principal place of business.

As a result, in the *Ferrell* matter, Express Check’s principal place of business was not determined to be Kansas, where four high-level officers lived. Rather, the court determined that the LLC’s citizenship was South Carolina because it made loans, had store locations and most of its employees were in South Carolina. Thus, minimal diversity between the South Carolina plaintiff and the LLC defendant in *Ferrell* did not exist, and removal under CAFA was improper. The case has been remanded, and the parties will go back to state court to litigate the class action lawsuit.

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The appellate case is *Ferrell v. Express Check Advance of S. C. LLC et al.*, case number 09-2401, in the U.S. Court of Appeals for the Fourth Circuit.

The originating case is *Ferrell v. Advance Am. Cash Advance Centers of S.C. Inc. et al.*, case number 3:08-cv-03996, in the U.S. District Court for the District of South Carolina.

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