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Latest Developments in the "Class Action Fairness Act"

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Welcome to the inaugural issue of Dinsmore & Shohl's CAFA Connection, a quarterly firm e-publication reporting on recently decided cases addressing the Class Action Fairness Act ("CAFA").[1] Although CAFA was enacted in 2005, its provisions are the subject of ongoing review and interpretation. Our newsletter is designed to provide insight into CAFA's evolving body of case law.

1. A court may allow discovery regarding the citizenship of the members of the class in order to determine if CAFA's local controversy and home state exceptions apply.

In *Wilson v. PBI Bank, Inc*., No. 1:11-CV-19, 2011 U.S. Dist. LEXIS 39675 (W. D. of Ky. April 12, 2011), the plaintiff brought a putative class action on behalf of a class consisting of commercial loan borrowers of PBI Bank, Inc. who where affected by the bank's alleged scheme of luring borrowers into commercial loans by quoting and agreeing to charge interest at a yearly rate while intending to charge interest at a higher rate. The plaintiff specifically excluded from the class any person or entity who is not now a resident of the state of Kentucky.

The defendant removed the case to federal court pursuant to CAFA. It was undisputed that the amount in controversy exceeded $5 million, the proposed class exceeded 100 individuals and the defendant was a citizen of Kentucky. The plaintiff challenged the existence of minimal diversity, and argued for the application of both the home state and local controversy exceptions to CAFA jurisdiction.

The plaintiff argued that CAFA's home state controversy exception applied because two thirds or more of the members of the proposed class and the primary defendant were citizens of the state where the action originally was filed. The plaintiff also argued that the local controversy exception applied because greater than two thirds of the members of the class were citizens of Kentucky; the defendant from who significant relief was sought and whose conduct formed a significant basis of the claims asserted was a citizen of the state where the action was originally filed; and the principal injuries from the alleged conduct were incurred in the state where the action originally was filed. The plaintiff also argued that the court should exercise its discretion to decline jurisdiction under 28 U.S.C. § 1332(d)(3).

As to the minimal diversity argument, the defendant argued that because the plaintiff had excluded from the class definition all persons or entities who were not "residents" of Kentucky, rather than not "citizens" of Kentucky, the complaint on its face did not preclude a finding of minimal diversity under CAFA.

The court granted the plaintiffs' motion for limited discovery regarding the citizenship of the members of the class in order to determine whether any of the CAFA exceptions raised by the plaintiff were applicable. In the interim, the court denied the plaintiffs' motion to remand but with leave to re-file.

2. A court still may have federal diversity jurisdiction under 28 U.S.C. § 1332(a), even if it does not have jurisdiction under CAFA.

In *Shah v. Hyatt Corp*., No. 10-1492, 2011 U.S. Dist. LEXIS 8747 (3rd Cir. April 27, 2011), the plaintiff employee brought suit in state court individually and on behalf of a putative class of others similarly situated who allegedly failed to receive compensation for hours worked in excess of forty hours per week

in violation of the Pennsylvania Minimum Wage Act. The plaintiff specifically claimed that the class size was less than 100 and the damages were less than $5 million.

Hyatt removed the case under the general diversity statute contained in 28 U.S.C. § 1332(a). Hyatt asserted that the amount in controversy for Shah's claim exceeded $75,000 and there was diversity of citizenship between the parties allowing the district court to exercise supplemental jurisdiction over the class claims. Ignoring Hyatt's § 1332(a) argument, the plaintiff disputed the court's jurisdiction under 28 U.S.C. § 1332(d) because the class size was less than 100 and the amount in controversy did not exceed $5 million.

The district court found that it lacked CAFA jurisdiction due to the plaintiffs' limit of the class damages to less than $5 million. The district court acknowledged that it had original jurisdiction over Shah's individual claim against Hyatt, but declined to exercise supplemental jurisdiction over the class claims under 28 U.S.C. § 1367. The entire case was then remanded to state court and Hyatt appealed.

On appeal, the Third Circuit reversed and remanded the case to the district court for further proceedings. While the appellate court agreed that the district court lacked jurisdiction over the class action claims under CAFA, it found that the district court had original jurisdiction over the plaintiff's individual claim against Hyatt based on 28 U.S.C. §1332(a) because Shah and Hyatt were citizens of different states and Shah's claim likely exceeded $75,000.

The plaintiff contended that Hyatt needed to prove the $75,000 jurisdictional amount to a legal certainty, even though the plaintiff had acknowledged in the lower court that there was a good probability that her claim exceeded $75,000. The appellate court disagreed with the plaintiff, noting that in a case where the plaintiff has not limited the recovery to an amount below the jurisdictional requirement, the case will be remanded if it appears to a legal certainty that the plaintiff cannot recover more than the jurisdictional amount. That rule, however, does not require a removing defendant to prove to a legal certainty that the plaintiff can recover $75,000.

The Third Circuit held that because the court had original jurisdiction over the plaintiff's individual claim pursuant 28 U.S.C. §1332(a) , it was error for the court to remand the entire case under the supplemental jurisdiction provisions contained in 28 U.S.C. §1367(c). The supplemental jurisdiction statute does not allow a court to decline a case over which it has original jurisdiction. Consequently, the case was remanded to the district court for further proceedings with the direction that the court shall exercise jurisdiction over the plaintiff's individual claim against Hyatt pursuant to 28 U.S.C. §1332(a), and reconsider whether it will exercise supplemental jurisdiction over the class claims pursuant to 28 U.S.C. §1367.

3. As master of the complaint, a plaintiff may successfully plead around CAFA's amount in controversy requirement to keep the case in state court.

In *Tuberville v. New Balance Athletic Shoe, Inc*., No. 1:11-CV-01016, 2011 U.S. Dist. LEXIS 45894 (W.D. Ark. April 21, 2011) the plaintiff filed a putative class action on behalf of thousands alleging that the defendants had violated the Arkansas Deceptive Trade Practices Act by unfairly representing the health benefits of their athletic shoes in the absence of scientific evidence. The complaint did not specify the total amount in controversy, but the plaintiff attached to her complaint affidavits limiting her potential recovery to $74,000 per class member and/or $5 million for the entire class.

The defendants removed the case to federal court pursuant to CAFA, arguing that the plaintiff and her counsel could not stipulate to a limited recovery binding the other class members, the aggregate of the plaintiff's claims as pled would or could exceed the jurisdictional maximum allowed in state court; and the plaintiff's claim for equitable relief and for "such other relief as the Court deems just and proper" translated into a potential recovery in excess of the state court's jurisdictional limits. The plaintiff moved for remand relying on the affidavits attached to the complaint which explicitly limited the recovery to an amount less than CAFA's jurisdictional requirement.

First, the district court addressed the burden of proof of the parties, noting that the removing defendant must show by a preponderance of the evidence that the amount in controversy requirement has been met. Following the Eighth Circuit's definition of preponderance contained in *Bell v. Hershey*, 557 F. 3d 830, 834 (8th Cir. 2009), the district court noted that in this fact intensive inquiry the test is "not whether the damages are greater than the requisite amount, but whether a fact finder might legally conclude that they are." Once the preponderance standard has been met, then the plaintiff must establish to a legal certainty that her claims are below the jurisdictional amount, relying only upon the initial pleadings in doing so. The party seeking remand may not present new evidence.

Next, the court addressed whether a plaintiff may meet the legal certainty burden by stipulating at the time of the filing of the complaint that she will not seek more than the jurisdictional minimum. The court concluded that such a stipulation met the legal certainty burden. In granting the plaintiff's motion to remand, the court reasoned that the plaintiff was the master of her complaint, even in a putative class action, and that there were sufficient due process protections for the defendants including: subsequent removal if a later pleading revealed a damages claim exceeding the jurisdictional amount; prorating the recoverable damages among the class members; or utilizing judicial estoppel to bar the plaintiff from recovering more than the jurisdictional maximum. Furthermore, class members could opt out if they felt the limitations on recovery were too restrictive.

The court rejected due to lack of evidence the defendants' contention that if there were 1,000 class members, and if each member recovered $75,000, that would be a recovery of $75 million. The defendants offered no information about the number of purchasers in the state of Arkansas even though the defendants presumably had access to that information. The court also did not accept the defendant's argument that the plaintiff's request for injunctive relief alone would exceed $5,000,000 in disgorged profits (the cost of the defendants' nationwide advertising campaign) because the Eighth Circuit does not follow the rule that "the amount in controversy can sometimes be measured by the defendant's costs, rather than the potential benefit the plaintiff stands to gain in winning."

Finally, the court disagreed with the defendants' assertion that the catch all "such other and further relief as is just and proper" contained in the prayer for relief included injunctive relief and punitive damages. The court knew of no precedent that dictated that punitive damages are assumed pled unless specifically disclaimed.

See also Murphy v. Reebok International, Ltd., No. 4:11-CV-214, 2011 U.S. Dist. LEXIS 46983 (E.D. Ark. April 22, 2011) (another case remanded for failure to meet the requisite amount in controversy under CAFA, filed by the same plaintiff's counsel who filed the *Tuberville* case).

4. Due to a recent Fourth Circuit decision, there now is a split among two circuits as to whether a parens patriae action may be removed pursuant to CAFA.

On May 20, 2011, the Fourth Circuit remanded a case to West Virginia state court, holding that the action was not a class action subject to removal under CAFA. *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc*., 2011 U.S. App. LEXIS 10171 (4th Cir. May 20, 2011). The attorney general of West Virginia brought a *parens patriae* action in state court against numerous out-of-state pharmacies, alleging that the defendants sold generic drugs to West Virginia consumers but failed to pass along to consumers the cost savings of the generics over the brand name equivalents, in violation of the West Virginia Consumer Credit Protection Act and the West Virginia Pharmacy Act. The Attorney General claimed to be suing in his sovereign and quasi-sovereign capacity seeking injunctive relief, restitution, and disgorgement of overcharges on behalf of West Virginia consumers.

The defendants removed the case to federal court on the basis of CAFA, maintaining that the case was a disguised class action, there was minimal diversity, the number of plaintiffs exceeded 100, and the amount in controversy exceeded $5 million. The district court disagreed that the case could be considered a class action or a mass action within the meaning of CAFA, and remanded the case to state court. The defendants sought and received permission to appeal the district court's ruling as it related to CAFA jurisdiction.

On appeal, the Fourth Circuit focused on CAFA's language in 28 U.S.C. § 1332(d)(1)(B) which defines a 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 Court held that since this case was not brought under Fed. Civ. Rule 23 or West Virginia's equivalent Civil Rule 23, it was not a class action subject to removal under CAFA. In so holding, the Fourth Circuit reasoned that Rule 23 provided that one or more members of a class may sue or be sued as representative parties on behalf of all members only if the criteria for numerosity, commonality, typicality and adequacy of representation are satisfied. Examining the West Virginia statutes under which the Attorney General's action had been brought, the Court concluded that those statutes did not include the essential requirements of Rule 23.[2] Under these statutes, the Attorney General is not designated as a member of the class whose claim would be typical of the claims of class members. The Fourth Circuit also noted that if it were to mandate that the State was not entitled to pursue this action in state court, it would "risk trampling on the sovereign dignity of the State" and inappropriately transform an essentially state matter into a federal matter.

In a lengthy dissent, Judge Gilman concluded that the action was removable under CAFA. He asserted that the numerosity, commonality, typicality and adequacy of representation elements of Rule 23 were but subsidiary factors in determining the true essence of the action. He did not believe the Attorney General had articulated a quasi-sovereign interest in maintaining the action as a *parens patriae* action. Instead, Judge Gilman saw the primary thrust of the action as an excess charges claim where by statute the reimbursement was payable directly to affected consumers, and where the Attorney General's power over a particular generic-purchaser's claim was ultimately controlled by the purchaser. Judge Gilman's conclusion was bolstered by CAFA's legislative history, and the fact that the lawsuit had been filed by private attorneys on behalf of the Attorney General, and those same attorneys were simultaneously representing individuals in class actions filed in other states with essentially identical claims. Judge Gilman disagreed with the majority that removal of the action implicated the State's sovereign immunity since by initiating the action, the State voluntarily subjected itself to all the attendant rules and consequences.

Judge Gilman felt that the Fifth Circuit's claim-by-claim approach utilized in *Louisiana ex rel. Caldwell v. Allstate Ins. Co*., 536 F.3d 418, 424 (5th Cir. 2008) would best determine whether West Virginia had a sufficient quasi-sovereign interest such that it was truly acting in a parens patriae role in bringing the suit. In *Caldwell*, an attorney general's antitrust action against multiple insurance companies, the Fifth Circuit upheld the removal of a parens patriae action as a mass action under CAFA, finding that the real parties interest were the policyholders and not the state.

Given the differing approaches of the Fifth and Fourth Circuit to the analysis of whether a parens patriae cases is removable under CAFA, it is not surprising that on June 10, 2011, the Washington Legal Foundation ("WLF") filed a brief with the Fourth Circuit urging the court to grant rehearing en banc. The WLF asserts that it was Congress' intention to include such cases within CAFA's definition of class action since the state's consumers are the real parties in interest and if the state prevails, it will obtain a recovery for the consumers that is essentially the same as the recovery that would have been had if the case had proceeded as a class action. The WLF also takes issue with what it says is the majority's view of a "presumption against removability."

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(1) CAFA was enacted in 2005 to assure fair and prompt recoveries for class members with legitimate claims, to restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction, and to benefit society by encouraging innovation and lowering consumer prices. Pub. L. No. 109-2, 119 Stat. 4 (2005), LEXSEE 109 PL 2.

To achieve these stated purposes, 28 U.S.C. §1332 was amended to expand diversity jurisdiction in class action litigation. Subsection (d)(2) of §1332 provides that in class action cases involving 100 or more

class members:

2.) The 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--

A.) any member of a class of plaintiffs is a citizen of a State different from any defendant;
B.) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
C.) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

CAFA eliminates some of the traditional procedural impediments to removal by no longer placing a 1 year limit on removal, allowing removal even if the defendant is a citizen of the state where the suit was initiated, and no longer requiring the removing defendant to obtain consent to removal from the co-defendants. 28 U.S.C. §1453(b).

(2) The case had been brought for alleged violations of West Virginia Code, § 30-5-12b(g) regulating the practice of pharmacy and West Virginia Code, §§ 46A-6-104 and 46A-7-111, under the West Virginia Consumer Credit Protection Act.