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CAFA Removal and Remand: Key Developments for Plaintiff and Defense Counsel

Lessons from Recent Cases on Amount-in-Controversy, State AG Suits, Joint Trials and More

TUESDAY, FEBRUARY 24, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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CAFA REMOVAL AND REMAND

KEY DEVELOPMENTS FOR PLAINTIFF AND DEFENSE COUNSEL
STRAFFORD WEBINARS

TUESDAY, FEBRUARY 24, 2015

OVERVIEW

- The importance of CAFA jurisdiction
- Recent Supreme Court decisions
- Caselaw trends on CAFA exceptions
- Caselaw trends on mass actions
- State AG cases and removal under CAFA
- Recent developments on amount in controversy
- Retention of jurisdiction if class certification is denied
- Defense practice points
- Plaintiffs' practice points

THE IMPORTANCE OF CAFA JURISDICTION

- CAFA allows removal of interstate class actions to federal court
- Class actions are bet-the-company proceedings that often result in settlement if the action is certified
- CAFA was enacted in 2005 and so the case law on the law is relatively new and fast developing
- CAFA remand decisions are appealable
  - 28 U.S.C. § 1453(c)(1)

FEDERALISM AND LIMITED JURISDICTION OF FEDERAL COURTS (PLAINTIFFS' PERSPECTIVE)

- Basic premise of judicial separation of powers -- the jurisdiction of the federal courts is limited.
  - *E.g.*, *Exxon Mobil Corp. v. Allopattah Servs., Inc.*, 545 U.S. 546, 552 (2005).

- CAFA, enacted in 2005, expanded statutory federal jurisdiction, but constitutional requirements of federal subject-matter jurisdiction – diversity or federal-question – must be met.

- CAFA did not expand federal jurisdiction at the expense of state sovereignty.

FEDERALISM AND LIMITED JURISDICTION OF FEDERAL COURTS (PLAINTIFFS' PERSPECTIVE)

- CAFA did not expand federal jurisdiction at the expense of state sovereignty.
  - *E.g.*, Attorney General, parens patriae litigation.
    - *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014)
    - Hawaii ex rel. Louie v. HSBC Bank Nevada, N.A., 761 F.3d 1027 (9th Cir. 2014) (collecting cases)

- Because removal of an action from state court to federal court "deprives a state court of an action properly before it, removal raises significant federal concerns."
  - *Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d 278, 281 (5th Cir. 2007).

FEDERALISM AND LIMITED JURISDICTION OF FEDERAL COURTS (PLAINTIFFS' PERSPECTIVE)

- These federalism concerns are particularly acute when the removed action has been filed by the State in the State court.
  - *See Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 22 n.22 (1983) (observing that "considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it.").

- The removal statute is "strictly construed, and *any doubt about the propriety of removal must be resolved in favor of remand*."
  - *Id*. at 281-82 (emphasis added).

CAFA CHANGED TRADITIONAL FEDERALISM NORMS(DEFENSE PERSPECTIVE)

- Traditional federalism arguments do not apply because Congress intended to greatly expand federal jurisdiction over class actions of national importance

- In cases where "a Federal court is uncertain . . . the court should err in favor of exercising jurisdiction over the case." 151 Cong. Rec. 7326
  - (statement of Rep. Jim Sensenbrenner, an architect of CAFA)

CAFA CHANGED TRADITIONAL FEDERALISM NORMS (DEFENSE PERSPECTIVE)

- CAFA "constitute[s] the most sweeping changes to class-action practice in a generation, rendering obsolete many preexisting standards and practices."

- "This landmark tort reform legislation . . . '***federalizes***' most interstate class actions now in the state courts."

- "CAFA's text, purposes, and legislative history create a presumption in favor of finding that minimal-diversity jurisdiction exists, with the burden of proof assigned to the party opposing jurisdiction."
  - Hunter Twiford, III, et al., *CAFA's New 'Minimal Diversity' Standard for Interstate Class Actions Creates a Presumption that Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 Miss. C. L. Rev. 7, 53 (2005)

RECENT SUPREME COURT DECISIONS *DART CHEROKEE*

- **Supreme Court Rejects Presumption Against Removal**
  - In *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (Dec. 15, 2014), the Supreme Court rejected a presumption against removal in CAFA cases and held that evidence is ***not*** required to support removal
    - The removal statute only requires a "short and plain statement of the grounds for removal . . . By design," this language "tracks the general pleading requirement stated in Rule 8(a) of the Federal Rules of Civil Procedure"

RECENT SUPREME COURT DECISIONS *DART CHEROKEE*

- Suffices to present evidence in opposition to a motion to remand
- "Both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy has been satisfied." *Id.* at 554.
- The Court's ruling will likely spur more removals of class actions to federal court
- Lower courts are beginning to apply *Dart*, with varying approaches

RECENT SUPREME COURT DECISIONS *DART CHEROKEE*

- One federal court recently interpreted *Dart* as foreclosing remand where a plaintiff failed to rebut defendant's evidence with her own independent evidence
  - *Roa v. TS Staffing Servs.*, 2015 U.S. Dist. LEXIS 7442, at *4-5 (C.D. Cal. Jan. 22, 2015) ("[P]laintiff . . . contests [defendant's] evidence in support" of removal. "If [defendant] was not required to submit evidence in support of its allegations, as *Dart Cherokee* teaches, then [plaintiff's] attack on the evidence is fallacious. Furthermore, [plaintiff] submitted no independent evidence for the Court to consider.")

RECENT SUPREME COURT DECISIONS *DART CHEROKEE*

- But the Eleventh Circuit has suggested that *Dart* does not require a plaintiff to contest a defendant's evidence with her own independent evidence
  - *Dudley v. Eli Lilly & Co.*, 2014 WL 7360016 (11th Cir. Dec. 29, 2014) (affirming remand in employment action where defendant submitted evidence, but plaintiff did not come forward with independent evidence of her own; "Lilly could have provided the district court with more information about the amount of compensation that was allegedly denied the class members[.]").

RECENT SUPREME COURT DECISIONS *DART CHEROKEE* (PLAINTIFFS' PERSPECTIVE)

- However, facial plausibility is an issue as well as having evidence to back up factual allegations.

- Only surprise with *Dart* - one can imagine greater scrutiny of pleadings when the issue is not the sufficiency of the pleadings (as under Rule 8(a)), but establishing the satisfaction of the requirements of federal jurisdiction, which are constitutionally constrained.

RECENT SUPREME COURT DECISIONS *DART CHEROKEE* (PLAINTIFFS' PERSPECTIVE)

- On the other hand, *Dart* invites early discovery with respect to anything related to amount in controversy

- Undermines common effort by defendants to obtain full stay of discovery pending resolution of anticipated motions to dismiss the complaint.

RECENT SUPREME COURT DECISIONS *DART CHEROKEE* (DEFENSE PERSPECTIVE)

- *Dart Cherokee* does not open the gates to unlimited discovery
- Supreme Court merely suggested that discovery may be taken with regard to amount in controversy
- No suggestion that merits discovery or other forms of discovery are proper before resolution of a motion to dismiss

DART CHEROKEE PRESERVES CONGRESS'S INTENT TO EXPAND FEDERAL JURISDICTION (DEFENSE PERSPECTIVE)

- *Dart Cherokee* is consistent with Congress's intent 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."
  - Pub. L. 109-2, § 2(b)(2), 119 Stat. 4 (2005)

- The Supreme Court recognized that "no antiremoval presumption attends cases invoking CAFA" because "Congress enacted [that law] to facilitate adjudication of certain class actions in federal court." *Dart Cherokee*, 135 S. Ct. at 554

RECENT SUPREME COURT DECISIONS *STANDARD FIRE*

- **Supreme Court Rejects Binding Stipulations On Absent Class Members**
  - In *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), the Supreme Court held that a named plaintiff cannot avoid removal under CAFA by stipulating that she is not seeking to recover more than $5 million
  - This had become a common tactic used by plaintiffs to evade CAFA jurisdiction
  - *Dart Cherokee* and *Standard Fire* reflect an expansive approach to CAFA jurisdiction by the Supreme Court

APPLICATION OF *STANDARD FIRE*

- Lower courts have been faithful to *Standard Fire*
  - *Johnson v. Pushpin Holdings, LLC,* 748 F.3d 769, 772-73 (7th Cir. 2014) ("The Court in *Knowles* . . . did not discuss the tradeoff between class counsel's giving up a part of the class damages claim and, by doing so, being able to litigate in a forum believed to be more favorable to the class. No matter; the Court has spoken and we are bound.")
  - *Basham v. Am. Nat'l County Mut. Ins. Co.*, 2013 U.S. App. LEXIS 26008, at *2-3 (8th Cir. Apr. 12, 2013) (remand order based on "plaintiffs' purported stipulations concerning the amount in controversy[] is vacated in light of *Standard Fire*")
- Ninth Circuit interpreted *Standard Fire* as abrogating "legal certainty" requirement for amount in controversy
  - *Rodriguez v. AT&T Mobility Services LLC,* 728 F.3d 975(9th Cir. Aug. 27, 2013)
    - Rationale for "legal certainty" standard is that the plaintiff "is the 'master of her complaint' and can plead to avoid federal jurisdiction. *Id.* at 980.
    - That standard "is clearly irreconcilable with . . . *Standard Fire*." *Id.* at 977.
  - *Dart Cherokee* confirmed that standard is "preponderance of the evidence"

CASELAW TRENDS ON CAFA EXCEPTIONS

- Must remand if requirements of local controversy exception or home state exception are met
- Local Controversy Exception: 1) Two-thirds of proposed class members are citizens of forum state; 2) At least one primary defendant from whom "significant relief" is sought is a citizen of forum state; 3) Principal injuries incurred in forum state; 4) During 3 years prior to filing, no other class actions filed against any defendants on behalf of same or other persons with similar factual allegations. 28 U.S.C. § 1332(d)(4)(A).
- Home State Exception: 1) Two-thirds of proposed class members are citizens of forum state; 2) Primary defendants are citizens of forum state. 28 U.S.C. § 1332(d)(4)(B).

CASELAW TRENDS ON CAFA EXCEPTIONS

- "Time of removal" is general rule for determining whether CAFA exception applies.
  - Citizenship of plaintiffs and defendants considered at the time case is filed.
    - *Doyle v. OneWest Bank*, FSB, 764 F.3d 1097, 1098 (9th Cir. Aug. 22, 2014) (*per curiam*) (vacating the district court's order granting remand based on the citizenship of the plaintiff class as pleaded in a Second Amended Complaint filed after removal);
    - *Ardino v. RetroFitness LLC*, Civ. No. 14-cv-01567, 2014 WL 7271937, *4 (D. N.J. Dec. 18, 2014) (declining to consider the residency of fifty-six *potential* defendants in remanding under the local controversy exception as citizenship of the parties is considered at the time of removal).

CASELAW TRENDS ON CAFA EXCEPTIONS

- Severing claims does not defeat federal jurisdiction under CAFA
  - "[F]ederal jurisdiction under . . . CAFA is explicitly concerned with the status of an action when filed – not how it subsequently evolves."
    - *Louisiana v. American National Property & Casualty Co.*, 746 F.3d 633, 638 (5th Cir. 2014) ("Because at the time of removal CAFA supplied federal subject matter jurisdiction over these cases . . . we hold that CAFA continues to provide jurisdiction over these individual cases notwithstanding their severance from the class.")

CASELAW TRENDS ON CAFA EXCEPTIONS

- Courts are split on whether subsequent addition or removal of parties defeats jurisdiction under exceptions
  - Some courts have rejected remand under the local-controversy exception based on post-removal addition of local defendant
    - *Cedar Lodge Plantation, LLC v. CSHV Fairway View I, LLC*, 768 F.3d 425, 427-29 (5th Cir. 2014) (allowing plaintiff to avoid federal jurisdiction through post-removal amendment would undermine Congress's intention that CAFA would afford "broad federal court jurisdiction with only narrow exceptions.").

CASELAW TRENDS ON CAFA EXCEPTIONS

- But other courts have remanded under the local-controversy exception based on an amended complaint
  - *Premo v. Family Dollar Stores of Mass., Inc.*, No. 13-11279-TSH, 2014 WL 1330911, *3-5 (D. Mass. Mar. 28, 2014) (granting motion to amend complaint to remove defendant against whom similar claim had been filed, resulting in remand under local-controversy exception)
    - Defendants argued that plaintiff was trying to "manipulate the pleadings to defeat federal jurisdiction." *Id.* at *1.
    - The court disagreed. "[T]he local controversy exception requires consideration of the defendants presently in the action." *Id.* at *3.

CASELAW TRENDS ON MASS ACTIONS

- Mass actions: cases in which the 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)
- Plaintiffs' lawyers have tried to evade CAFA jurisdiction by artificially dividing plaintiffs into several cases even where they have consolidated the cases for pretrial purposes

CASELAW TRENDS ON MASS ACTIONS (PLAINTIFFS' PERSPECTIVE)

- Plaintiffs should not hesitate to point out inconsistency in defendants' arguments –

- I.e., that on the one hand, plaintiffs are overreaching in a complaint with combined demands or types of claims, and, on the other hand, that they are "artificially dividing" plaintiffs into several distinct cases, purportedly to avoid CAFA jurisdiction

CASELAW ON MASS ACTIONS (DEFENSE PERSPECTIVE)

- Defendants should use inconsistent arguments by plaintiffs in support of removal under "mass action" provision
- For example, plaintiffs should not be able to simultaneously request coordination of overlapping cases and keep the aggregate cases out of federal court
- "Mass action cases function very much like class actions" and "are simply class actions in disguise."
  - 109 S. Rep. 14

CASELAW TRENDS ON MASS ACTIONS

- **Ninth Circuit Expands Removal Of Mass Actions**
- *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218 (9th Cir. 2014)
  - Pair of cases in which a divided panel approved the remand of 40 just-under-100-plaintiff cases as to which plaintiffs had invoked a California procedural rule that authorizes coordination of complex civil actions "for all purposes"
  - In an *en banc* ruling, the Ninth Circuit held that a proposal for a joint trial may be made implicitly as well as explicitly; requiring plaintiffs to use the magic words "joint trial" "would ignore the real substance" of plaintiffs' proposals
  - Plaintiffs sought coordination "for all purposes," which the court found "must include the purposes of trial"
- Decision aligns Ninth Circuit with Seventh and Eighth Circuits, but puts it at odds with Tenth and Eleventh Circuits
- Clear circuit split makes this area of CAFA law another candidate for Supreme Court intervention

STATE AG CASES AND REMOVAL UNDER CAFA

- **Supreme Court Holds That AG *Parens Patriae* Suits Are Not Mass Actions**
  - *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014)
  - Mississippi sued LCD manufacturers in state court, alleging violations of state law and seeking, *inter alia*, restitution for LCD purchases made by itself and its citizens.
  - The Supreme Court held that state AG lawsuits seeking restitution do not qualify as "mass actions" under CAFA.
  - "According to CAFA's plain text, a 'mass action' must involve monetary claims brought by 100 or more persons who propose to try those claims jointly as named plaintiffs. Because the State of Mississippi [was] the only named plaintiff in the instant action, the case [had to] be remanded to state court." 134 S. Ct. at 739.
  - Decision resolves a prior circuit split on whether these types of AG suits qualify as "mass actions"

STATE AG CASES AND REMOVAL UNDER CAFA

- **Lessons of *Hood* beyond State AG suits**

- No "complaint-piercing"

  - "By prohibiting defendants from joining unnamed individuals to a lawsuit in order to turn it into a mass action, Congress demonstrated its focus on the persons who are actually proposing to join together as named plaintiffs in the suit. Requiring district courts to pierce the pleadings to identify unnamed persons interested in the suit would run afoul of that intent."

  - *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 746 (2014)

STATE AG CASES AND REMOVAL UNDER CAFA

- Defendants should consider other types of removal theories
- Substantial federal question under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,* 545 U.S. 308 (2005).
  - Federal district courts are split on whether AG actions seeking to recover Medicaid dollars are subject to federal question jurisdiction under *Grable*.
    - Judge Jack Weinstein, who is overseeing the federal litigation involving the drug Zyprexa, has repeatedly held that state-law claims seeking to recoup Medicaid payments for drugs are removable because the claims require interpretation of federal Medicaid law.
      - *See, e.g., In re Zyprexa Prods. Liab. Litig.*, 476 F. Supp. 2d 230, 233 (E.D.N.Y. 2007)
    - However, a number of courts disagreed.
      - *See, e.g., Pennsylvania v. Eli Lilly & Co.*, 511 F. Supp. 2d 576, 581 (E.D. Pa. 2007).

STATE AG CASES AND REMOVAL UNDER CAFA (PLAINTIFFS' PERSPECTIVE)

- Allegation of federal-question jurisdiction often accompanies attempt to remove under CAFA
- Defendants routinely misinterpret the State's claims and allegations in a strained attempt to argue that the State's claims "arise under the Constitution, laws, or treaties of the United States."
  - 28 U.S.C. § 1331.
- Plaintiffs: Well-pleaded complaint rule. Federal question only if "the plaintiff's statement of his own cause of action shows that it is based upon federal law."
  - *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009); *accord, e.g., Hawaii ex rel. Louie v. HSBC Bank Nev., N.A.*, 761 F.3d 1027, 1034 (9th Cir. 2014) (CAFA AG suit; collecting cases).

STATE AG CASES AND REMOVAL UNDER CAFA (PLAINTIFFS' PERSPECTIVE)

- **Well-pleaded complaint rule**

- Defense arguments that lose (e.g., in AG pharmaceutical cases): the State's claims …

  - (1) turn on interpretations of the Federal Medicaid statute and/or its implementing regulations;

  - (2) allege violations of the federal Food, Drug, and Cosmetic Act (FDCA); or

  - (3) allege claims based on false "best price" reporting allegations, implicating the Medicaid Rebate Statute.

STATE AG CASES AND REMOVAL UNDER CAFA (PLAINTIFFS' PERSPECTIVE)

- Careful pleading can help ensure remand.
- Representative cases:
  - *Louisiana ex rel. Caldwell v. Abbott Labs.,* No. 3:11-cv-542-BAJ-SCR (M.D. La. March 28, 2012) (remanding action by Attorney General against pharmaceutical manufacturer)
  - *Louisiana ex rel. Caldwell v. GlaxoSmithKline, LLC,* No. 3:13-cv-191-JJB-SCR (M.D. La. June 28, 2013) (Doc. No. 23) (comprehensive and well-reasoned MJ opinion recommending that similar action by Attorney General against pharmaceutical manufacturer be remanded)

STATE AG CASES AND REMOVAL UNDER CAFA (PLAINTIFFS' PERSPECTIVE)

- Careful pleading can help ensure remand (representative cases, cot'd)
  - *Louisiana ex rel. Caldwell v. Bristol Myers- Squibb Sanoft Pharms. Holding P'Ship,* No. 2:12-cv-443, 2012 WL 3866493 (W.D. La. Sept. 4, 2012) (remanding action by Attorney General against pharmaceutical manufacturer)
  - *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.,* MDL No. 1871, *Louisiana v. GlaxoSmithKline, LLC*, No. 2:11-cv-3521CMR, 2012 WL1137097, at *3 (E.D. Pa. Apr. 4, 2012) (same).

STATE AG CASES AND REMOVAL UNDER CAFA (PLAINTIFFS' PERSPECTIVE)

- Defendants often confuse setting with plot in removing a case.
- At most, peripheral issues of federal law merely form part of the backdrop of the State's claims, an insufficient basis on which to find federal question jurisdiction because the State's "right to relief [does not substantially or significantly] depend [ ] upon the construction or application of [federal law]."
  - *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005); *see also Abbott*, at 12 (concluding that references to federal law in the State's Petition against defendant constituted mere "background information").

STATE AG CASES AND REMOVAL UNDER CAFA (DEFENSE PERSPECTIVE)

- Growing category of AG cases raise substantial questions of federal law that trigger jurisdiction under *Grable*
- In litigation involving the drug Zyprexa, whether the state was obligated to cover the drug "using funds largely provided by the federal government" was a federal question that was "essential" to the AG's theory of recovery. *West Virginia ex rel. McGraw v. Eli Lilly & Co.,* 476 F. Supp. 2d 230, 233 (E.D.N.Y. 2007)
- "Except in certain narrowly defined situations, states participating in the Medicaid program must cover drugs that are subject to an agreement between the manufacturer and the federal government." *Id.*
- In other words, West Virginia's claims could not be evaluated without careful consideration of the federal statutory scheme.

STATE AG CASES AND REMOVAL UNDER CAFA

- **Private Attorneys General Suits not necessarily within CAFA**

- *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1121 (9th Cir. 2014) (holding CAFA removal improper in action brought by private employee's overtime suit brought individually, and on behalf of other members of the general public similarly situated, under California's Private Attorneys General Act (PAGA), among other reasons because the complaint did not invoke the California class action statute and that PAGA, essentially a law enforcement mechanism, is dissimilar to Rule 23), *cert. denied,* 135 S. Ct. 870 (2014)

STATE AG CASES AND REMOVAL UNDER CAFA

- CAFA's "general public exception" excludes from the "mass action" definition "any civil action in which . . . all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action."
  - 28 U.S.C. § 1332(d)(11)(B)(ii)(III).

RECENT DEVELOPMENTS ON AMOUNT IN CONTROVERSY

- In a pair of rulings, the Ninth Circuit held that assumptions underlying an estimate of amount in controversy must be "reasonable"
  - *Ibarra v. Manheim Invs., Inc.*, 2015 U.S. App. LEXIS 334 (9th Cir. Jan. 8, 2015) ("Because the complaint does not allege that [defendant] universally, on each and every shift, violates labor laws by not giving rest and meal breaks," it was not "reasonable" to assume that every putative class member missed one meal or rest break per shift)
  - *Lacross v. Knight Transp. Inc.*, 2015 U.S. App. LEXIS 335 (9th Cir. Jan. 8, 2015) (calculations were reasonable because they were based on extrapolated fuel costs and staffing levels and did not unreasonably assume that the class worked the entire year)

RECENT DEVELOPMENTS ON AMOUNT IN CONTROVERSY

- Companies must scrutinize complaint to determine what sort of assumptions can be "reasonably" made
- In *Ibarra*, it was unreasonable to assume that every putative class member missed one meal or rest break per shift because there was no allegation that violations were universal
- In *Lacross*, defendant provided multiple estimations yielding an amount in controversy in excess of $5 million.
- The rulings suggest that a defendant's prospect for keeping a class action in federal court is greater when it submits multiple estimates of the amount in controversy, all of which yield an amount in excess of $ 5 million

RECENT DEVELOPMENTS ON AMOUNT IN CONTROVERSY

- Defective claims still count towards determining whether amount in controversy for CAFA jurisdiction is satisfied
  - In *McDaniel v. Fifth Third Bank*, 568 F. App'x 729, 731 (11th Cir. 2014), the Eleventh Circuit held that courts should not inquire into what a plaintiff is *likely* to receive on the merits, but rather what they *could* receive.
  - The district court erred by refusing to consider the amount of punitive damages related to plaintiff's fraud claims based on its determination that those claims lacked merit.

RETENTION OF JURISDICTION IF CLASS CERTIFICATION IS DENIED

- CAFA does not address whether post-removal denial of class certification divests a federal court of jurisdiction
- Many Circuit Courts (Sixth, Seventh, Eighth, Ninth, Eleventh Circuits) agree that denial of class certification does not destroy CAFA jurisdiction.
  - *See, e.g., Stalley v. ADS Alliance Data Sys., Inc.*, No. 8:11-CV-1652-T-33TBM, 2014 WL 348564, at *4-5 (M.D. Fla. Jan. 31, 2014) (collecting cases)
  - *Metz v. Unizan Bank*, 649 F.3d 492, 501 (6th Cir. 2011)
  - *Buetow v. A.L.S. Enterprises, Inc.*, 650 F.3d 1178, 1182 n.2 (8th Cir. 2011)

RETENTION OF JURISDICTION IF CLASS CERTIFICATION IS DENIED

- "Had Congress intended that a properly removed class action be remanded if a class is not eventually certified, it could have said so. We think it more likely that Congress intended that the usual and long-standing principles apply – post-filing developments do not defeat jurisdiction if jurisdiction was properly invoked at the time of filing."
  - *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. Shell Oil Co.*, 602 F.3d 1087, 1091 (9th Cir. 2010) (holding that continued CAFA jurisdiction does not depend on class certification).

RETENTION OF JURISDICTION IF CLASS CERTIFICATION IS DENIED

- Remaining Circuits have not yet addressed the issue.
- Federal district courts are divided.
  - *Epps v. JP Morgan Chase Bank, N.A.*, 2012 WL 5250538, at *10 (D. Md. Oct. 22, 2012) (denying motion for class certification and remanding for lack of jurisdiction under CAFA "because the denial is a determination that a class action did not exist *at the time of removal*, therefore, removal jurisdiction never existed.")
  - *Allen-Wright v. Allstate Ins. Co.*, No. 07-4087, 2009 WL 1285522, at *3 (E.D. Pa. May 5, 2009) (holding that the federal court retained jurisdiction despite denial of class certification because "an action in which class certification is later denied would still be defined as a 'class action' because it was filed as such.").

DEFENSE PRACTICE POINTS

- Supreme Court has made it easier to successfully remove class actions under CAFA
  - Burden is still on the removing party
  - But "[t]he Supreme Court recently clarified this burden by explaining that 'the defendant's amount-in-controversy allegations should be accepted when not contested by the plaintiff or questioned by the court.'" *Garnett v. ADT LLC*, 2015 U.S. Dist. LEXIS 16204, 3-4 (E.D. Cal. Feb. 10, 2015)
  - "If the plaintiff contests the defendant's allegations . . . both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount in controversy requirement has been satisfied." *Dart Cherokee*, 135 S. Ct. at 554.

DEFENSE PRACTICE POINTS

- Attach affidavit to notice of removal and opposition to motion to remand demonstrating amount in controversy
- Demonstrate to court that the assumptions underlying amount-in-controversy estimates are "reasonable"
- Consider appealing order granting motion to remand under CAFA
  - Both Supreme Court rulings on CAFA (*Knowles* and *Dart*) arose out of federal appeals courts' refusal to take up appeals of remand orders

DEFENSE PRACTICE POINTS

- Consider other non-CAFA bases for removal
  - Substantial federal question under *Grable*
    - State AG cases seeking to recover Medicaid dollars necessarily implicate substantial questions of federal Medicaid law

- Diversity jurisdiction
  - More and more plaintiffs are joining non-diverse or in-state defendants solely to defeat diversity jurisdiction.
  - If there is no reasonable possibility of establishing claims against these nominal defendants, they are fraudulently joined.
  - Citizenship of fraudulently joined defendants must be ignored for purposes of jurisdiction.

DEFENSE PRACTICE POINTS

- Scrutinize all class definitions carefully
  - Unless expressly limited to citizens of forum, look for ways to call into question the citizenship of class members
- Scrutinize all local defendants named in complaint (defendants who are citizens of the forum)
  - Consider fraudulent joinder argument – i.e., no reasonable possibility of succeeding on claim against that defendant
  - Are the local defendants the "primary" defendants? Is "significant" relief being sought from the local defendants?
  - If the answer is no, defendants can avoid application of local-controversy and home-state exceptions to CAFA jurisdiction. Defendants can turn subjective determinations and sloppy drafting of a complaint to their advantage.

PLAINTIFFS' PRACTICE POINTS

- Limited federal jurisdiction & federalism concerns for State court system
- Burden of establishing requirements of federal jurisdiction on removing party
- Plaintiffs masters of their own complaints
  - Disclaimer of class status & no "complaint-piercing"
- Well-pleaded complaint rule
  - Federal question: don't confuse setting with plot
- Defendant's waiver of right to remove
- Limited appealability of remand orders

PLAINTIFFS' PRACTICE POINTS

Burden

- Jurisdiction must be proven and is never presumed.
- The party who attempts removal must bear the burden of demonstrating federal subject matter jurisdiction.
  - *E.g., Hood ex rel. Mississippi v. JP Morgan Chase & Co.*, 737 F.3d 78, 84-85 (5th Cir. 2013); *Lone Star OB/GYN Assoc. v. Aetna Health, Inc.*, 579 F.3d 525, 528 (5th Cir. 2009).
    - *But see Coleman v. Estes Exp. Lines, Inc.*, 631 F.3d 1010, 1013 (9th Cir. 2011) ("A plaintiff seeking remand has the burden of showing that the local controversy exception applies.").

PLAINTIFFS' PRACTICE POINTS

Burden

- The Supreme Court's opinion in Dart did not alter this burden
  - *See Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014) (finding no "'presumption' against removal" under CAFA)

- Burden remains on party asserting federal jurisdiction, regardless of any "presumption"

  - "It is to be presumed that a cause lies outside this limited [federal] jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994) (internal citations omitted).

  - "This is especially true where, as here, the State brings a case in the courts of its own state." *Hood ex rel. Mississippi v. JP Morgan Chase & Co.*, 737 F.3d 78, 84-85 (5th Cir. 2013) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 21 n. 22 (1983)).

PLAINTIFFS' PRACTICE POINTS

- **Plaintiffs are the masters of their own complaints**.

- Disclaimer of class status: "Failure to request class status or its equivalent is fatal to CAFA jurisdiction."

  - *Hawaii ex rel. Louie v. HSBC Bank Nev., N.A.*, 761 F.3d 1027, 1040 (9th Cir. 2014) (emphasis added) (AG parens patriae suit) (collecting cases)

  - *See also id.* at 1042 ("Because the complaints unambiguously disclaimed class status, these actions cannot be removed under CAFA." (emphasis added)).

PLAINTIFFS' PRACTICE POINTS

- **Plaintiffs are the masters of their own complaints**.
- Plaintiffs, including State Attorneys General, must say what case is and what it is not.
  - *E.g.*: "This action seeks the imposition of statutory civil fines and penalties in addition to damages incurred by the State of Louisiana via the enforcement powers of the Louisiana Attorney General as provided by Louisiana state laws and statutes. . . . This is not an action for monetary damages generally, for individuals, or classes or groups of individuals who suffered financial losses or personal injuries as a result of the purchase or use of the [ADHD Drugs]. Rather, the State brings this action exclusively under the laws of Louisiana and exclusively on behalf of the State of Louisiana; no claims arising under the laws of the United States are asserted." (*Shire*)

PLAINTIFFS' PRACTICE POINTS

Well-pleaded complaint rule

- Allegation of federal-question jurisdiction often accompanies attempt to remove under CAFA
- Careful pleading can ensure remand.
- Federal question only if "the plaintiff's statement of his own cause of action shows that it is based upon federal law."
  - *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009); *accord, e.g.*, *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936) (a state law claim "arises under" federal law only when the federal question is apparent from "the face of the complaint, unaided by the answer or by the petition for removal."); *Hawaii ex rel. Louie v. HSBC Bank Nev., N.A.*, 761 F.3d 1027, 1034 (9th Cir. 2014) (CAFA AG suit; collecting cases).

PLAINTIFFS' PRACTICE POINTS

Well-pleaded complaint rule & *Grable*

- Defendants may attempt to rely on *Grable*, contending that federal question jurisdiction is present when a state law claim "implicate[s] significant federal issues."
  - *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) (emphasis added)
- However, this so-called "embedded federal issue" federal question jurisdiction is limited to "a 'special and small category' of cases [asserting state law claims] in which arising under jurisdiction still lies."
  - *Gunn v. Minton*, 133 S. Ct. 1059, 1064-65 (2013) (emphasis added) (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006)).

PLAINTIFFS' PRACTICE POINTS

Well-pleaded complaint rule & *Grable*

- Otherwise, for a state-law claim truly to be said to "arise under" federal law, the claim must "turn on substantial questions of federal law and thus justif[ies] resort[ing] to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."
  - *Grable,* 545 U.S. at 312 (emphasis added).
- The federal issue must be: (1) necessarily raised; (2) actually disputed; (3) substantial; and (4) capable of resolution in federal court without disrupting the federal-state balance of judicial responsibilities approved by Congress.
  - *Gunn,* 133 S. Ct. at 1065; *see also Singh v. Duane Morris LLP*, 538 F.3d 334, 338 (5th Cir. 2008).

PLAINTIFFS' PRACTICE POINTS

- Don't let defendants confuse setting with plot
- Often-quoted rationale for well-pleaded complaint rule from Justice Cardozo's opinion in *Gully*:
  - [A] finding upon the evidence that [State] law has been obeyed may compose the controversy altogether, leaving no room for a contention that federal law has been infringed. The most one can say is that a question of federal law is lurking in the background, just as farther in background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.
  - *Gully v. First Nat'l Bank*, 299 U.S. 109, 117 (1936) (emphasis added).

PLAINTIFFS' PRACTICE POINTS

- Don't forget strategies for defeating removal in general – *e.g.*, waiver of the right to remove.
  - *See, e.g., Waxler Transp. Co. v. Valspar Corp.*, No. CIV.A. 08-1363, 2008 WL 4936510, at *3 (E.D. La. Aug. 6, 2008)
  - Granting plaintiffs' motion to remand on the basis of defendant's waiver after defendant participated in state-court proceedings, though in a limited fashion, by filing an exception to prescription prior to remand

PLAINTIFFS' PRACTICE POINTS

- Limited appealability of CAFA Remand Decisions
- An order remanding a removed case to state court is ordinarily not reviewable by appeal.
  - 28 U.S.C. § 1447(d).
- CAFA remand decisions are appealable per § 1453(c)(1), BUT:
  - Appeal must be timely made (within 10 days), and
  - Must be timely "accepted" and decided (normally within 60 days) by the Court of Appeals.

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