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CAFA Creep: Federal Removal Grows After 11th Circ. Case

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Law360, New York (April 08, 2014, 5:53 PM ET) -- In *South Florida Wellness Inc. v. Allstate Insurance Co.* (2014), the Eleventh Circuit ruled that a plaintiff's declaratory judgment alone can satisfy the Class Action Fairness Act's amount in controversy requirement. The Eleventh Circuit's ruling in *South Florida Wellness* continues the recent trend in the federal courts of strengthening the ability of defendants to remove class actions to federal courts pursuant to CAFA.

District Court Finds Allstate's Amount Too Speculative

In July 2013, *South Florida Wellness* filed a putative class action in state court alleging that Allstate underpaid for treatment provided by *South Florida Wellness* to Allstate's insured under the insured's personal injury protection policy. Instead of paying 80 percent of the total amount billed, the default payment amount under state law, Allstate paid 80 percent of the amounts listed in a statutory fee schedule.

According to *South Florida Wellness*, Allstate's payment of the fee schedule amounts allegedly was improper because Allstate did not "clearly and unambiguously indicate in the personal injury protection policy" that Allstate was opting out of the general payment requirements.[1] *South Florida Wellness* did not ask for monetary damages, but sought only a declaratory judgment stating that Allstate's policy language "did not clearly and unambiguously indicate that payments would be limited" to the statutory fee schedule.[2]

Allstate removed the putative class action to federal court under CAFA's federal jurisdiction.[3] In support of removal, Allstate submitted an employee affidavit that the amount in controversy, assuming the allegations plead in the complaint were true, was potentially \$68 million, far greater than CAFA's \$5 million minimum. Allstate arrived at its \$68 million figure by calculating the difference between the amounts paid to providers swept within the putative class based on the statutory fee schedule and the amounts that would have been paid to those providers based on the total amount billed for the entire proposed class.

The federal district court, however, remanded the case back to state court finding that Allstate's amount in controversy calculation was "too speculative ... because Allstate had failed to show that a declaratory judgment [for the plaintiff] will necessarily trigger a flow of money" to the proposed class members.[4]

Eleventh Circuit Finds Allstate Satisfied CAFA

On appeal, the Eleventh Circuit ruled that Allstate's removal to federal court was proper and, importantly, that Allstate's amount in controversy calculation was not too speculative to confer federal jurisdiction. The Eleventh Circuit disagreed with and rejected the district court's holding that a declaratory judgment did not translate into a monetary recovery, reasoning that such a conclusion is "contrary to human nature and the nature of lawyers." [5]

Instead, the panel expansively concluded that the amount in controversy is "how much will be put at issue during the litigation" and not "how much the plaintiffs are ultimately likely to recover." [6] As such, the Eleventh Circuit ultimately determined that Allstate had established by a preponderance of evidence the amount in controversy when it submitted an affidavit accompanied by underlying data that approximated the amount at issue if a putative class was certified based upon the allegations in the operative complaint, noting that "[e]stimating the amount in controversy is not nuclear science; it does not demand decimal-point precision." [7]

South Florida continues the trend towards a liberal removal policy and permits defendants flexibility in their amount in controversy arguments.

The Eleventh Circuit's decision in South Florida continues a trend started by the Supreme Court in *Standard Fire Co. v. Knowles* (2013): strengthening the ability of defendants to remove cases to federal court under CAFA, while simultaneously limiting the ability of class action plaintiffs to avoid or creatively plead around federal jurisdiction.

Originally, class action plaintiffs attempted to avoid removal by stipulating in the language of the complaint itself that the amount of damages plaintiffs sought would not exceed CAFA's \$5 million minimum threshold. The plaintiffs argued that a class representative is "master of his complaint" and, therefore, is permitted to stipulate the amount in controversy. Defendants, however, countered that, not only did a plaintiff's amount in controversy stipulation breach the class representative's fiduciary duty to absent class members, but also that the stipulation was not binding and a plaintiff could later utilize a bait and switch tactic to amend his complaint to seek more than \$5 million in damages.

Last year, the Supreme Court addressed these arguments in *Standard Fire*, in which the high court held that a plaintiff could not stipulate the amount in controversy to avoid removal to federal court under CAFA. Writing for the court, Justice Breyer reasoned that if the district court accepted the plaintiff's stipulation and failed to aggregate the claims of a putative class to determine the amount in controversy, then a plaintiff could keep a class action in state court by subdividing a large interstate class action into several smaller class actions each with damages just below CAFA's \$5 million threshold. That result, Breyer explained, would squarely conflict with CAFA's objective of preventing forum-shopping plaintiffs from abusing the class action process by filing class actions only in plaintiff-friendly state courts.

As evidenced by the Eleventh Circuit's ruling in South Florida, the circuit courts have been emboldened by *Standard Fire* and continue to expand the reach of CAFA's removal. For instance, before *Standard Fire*, the Ninth Circuit required defendants to prove the amount in controversy by "a legal certainty" when the plaintiff alleged damages below CAFA's \$5 million threshold. However, the Ninth Circuit's legal certainty standard conflicted with other circuits that required the defendant to prove the amount in controversy only by a preponderance of the evidence. Following *Standard Fire*, the Ninth Circuit, in *Rodriguez v. AT&T Mobility Services LLC* (2013), abandoned its legal certainty standard and adopted the preponderance of the evidence standard.

In South Florida, not only did the Eleventh Circuit allow the defendant to remove to federal court when only declaratory relief was sought, but the court also joined the Ninth Circuit in applying the relaxed preponderance of evidence standard to the amount in controversy requirement. These are encouraging and welcome development for defendants who generally prefer to be in federal court for class action adjudication.

Similarly, the Eleventh Circuit's ruling in South Florida corresponds with the Eighth Circuit's ruling in *Raskas v. Johnson & Johnson* (2013), another post-*Standard Fire* case.

In *Raskas*, the Eighth Circuit held that a defendant seeking removal to federal court under CAFA did not have to prove that damages "in fact" exceeded \$5 million, only that a fact finder might conclude the damages exceeded \$5 million. Moreover, the *Raskas* court ruled that because a defendant's removal burden is a pleading requirement and not a demand for proof, a defendant's documents supporting removal do not have to be admissible under the Federal Rules of Evidence.

Both the Eleventh Circuit and the Eighth Circuit, in South Florida and *Raskas* respectively, acknowledge that a defendant's burden at the removal stage is not to prove the actual amount of damages and, therefore, a precise damages calculation is not required. As a result, it appears that class action defendants have some flexibility in

their amount in controversy calculations. However, because the exact scope of defendants' flexibility is unclear, class defendants should continue to take care to corroborate removal petitions with underlying supporting data.

Class action plaintiffs will continue to maneuver to avoid federal jurisdiction and district courts must rigorously analyze putative class actions.

Plaintiffs will continue their efforts to circumvent CAFA's federal jurisdiction by undercutting class defendants' efforts to calculate a realistic amount in controversy. However, if the current proremoval trend continues, class defendants will likely be given the opportunity to present facts supporting their amount in controversy calculation and CAFA removal.

An obvious result of the current trend is that more putative class actions are ending up in federal district courts for class certification consideration. Consequently, defendants should ensure that district courts rigorously analyze plaintiffs' claims to determine whether Rule 23's class certification requirements are met.

Defendants should be prepared to highlight any discord among the putative class's injuries and to argue that the plaintiff's liability theory fails to comport with the putative class members' damages. Doing so should be facilitated by the recent decisions, like *South Florida* and *Raskas*, in the wake of *Standard Fire* because the upshot of those cases is that federal courts are unlikely to uphold any gamesmanship attempts by plaintiffs to craft pleadings that mask the true nature, scope and breadth of the litigation.

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[1] *S. Fla. Wellness Inc. v. Allstate Insurance Co.*, No. 14-10001, 2014 WL 576111, at *1 (11th Cir. Feb. 14, 2014).

[2] *Id.* at *2.

[3] Under CAFA, defendants may remove a case from state court to federal court if there is minimal diversity between the parties and the amount in controversy exceeds \$5 million. 28 U.S.C. § 1332(d)(2), (5)-(6).

[4] *S. Fla. Wellness*, 2014 WL 576111 at *2 (internal citations omitted). See also *Mann v. Unum Life Ins. Co. of Am.*, 505 F. App'x 854 (11th Cir. 2013) (*per curiam*) (affirming remand to state court of a putative class action when defendant's amount in controversy calculation relied, in part, on future damages and was too speculative); *Reilly v. Amy's Kitchen, Inc.*, 2014 WL 905419 (S.D. Fla. Mar. 7, 2014) (granting motion to dismiss for lack of subject matter jurisdiction because plaintiff's valuation of the requested injunctive relief was too speculative to establish the requisite amount in controversy).

[5] *Id.* at *4.

[6] *Id.* at *3.

[7] *Id.* at *4.