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ATTORNEYS' FEES

CAFA

The exclusion of prospective attorneys' fees from the amount-in-controversy calculation will inevitably result in fewer putative class actions reaching federal court—an outcome directly at odds with the purpose of the Class Action Fairness Act, attorneys Matthew J. Adler and Jaime D. Walter say. The authors identify an important, unresolved issue in the Ninth Circuit: whether all or only a portion of attorneys' fees incurred by the parties and recoverable by statute or contract may be included in the calculation for satisfying CAFA's $5 million threshold for removal of federal cases.

CAFA's $5 Million Threshold: Do Future Attorneys' Fees Count?

By Matthew J. Adler and Jaime D. Walter

A string of decisions spanning multiple years highlights a tedious but consequential unresolved issue for Ninth Circuit practitioners who seek to remove putative class actions under the Class Action Fairness Act of 2005 (CAFA): whether all or only a portion of attorneys' fees incurred by the parties and recoverable by statute or contract may be included in an amount-in-controversy calculation for purposes of establishing that the action satisfies CAFA's $5 million jurisdictional threshold.

Under CAFA, 28 U.S.C. § § 1332(d), 1453, 1711–1715, removal is proper if (1) minimal diversity exists (i.e., at least one plaintiff's or putative class member's citizenship differs from at least one defendant's citizenship), (2) the proposed class contains more than 100 class members, and (3) the aggregate amount in controversy exceeds $5 million. 28 U.S.C. § 1332(d). To establish the last element, removing parties may point to allegations within the complaint. Often though, complaints are silent as to the amount in controversy or expressly state that less than $5 million is at issue, which leaves the removing party with the task of gathering extrinsic evidence to support its claim that the jurisdictional amount has been met.

Most often, attorneys' fees are excluded from the amount-in-controversy analysis because the successful party may not normally collect its fees in addition to or as part of the awarded judgment. However, courts generally recognize two exceptions: one in which attorneys' fees are provided for by contract, and the other in which a statute mandates or allows for the payment of such fees. *See Abdel-Aleem v. OPK Biotech LLC*, 665 F.3d 38, 42 (1st Cir. 2012); *Givens v. W.T. Grant Co.*, 457 F.2d 612, 614 (2d Cir. 1972), *vacated on other grounds*, 409 U.S. 56 (1972); *Suber v. Chrysler Corp.*, 104 F.3d 578, 585 (3d Cir. 1997); *Francis v. Allstate Ins. Co.*, 709 F.3d 362, 368 (4th Cir. 2013); *Foret v. Southern Farm Bureau Life Ins. Co.*, 918 F.2d 534, 537 (5th Cir. 1990); *Williamson v. Aetna Life Ins. Co.*, 481 F.3d 369, 376 (6th Cir. 2007); *El v. AmeriCredit Financial Services, Inc.*, 710 F.3d 748, 753 (7th Cir. 2013); *Rasmussen v. State Farm Mut. Auto. Ins. Co.*, 410 F.3d 1029, 1031 (8th Cir. 2005); *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155–56 (9th Cir. 1998); *Brady v. UBS Finan-*

cial Services, Inc., 696 F. Supp. 2d 1263, 1268–69 (N.D. Okla. 2010); *Leonard v. Enterprise Rent a Car*, 279 F.3d 967, 973–74 (11th Cir. 2002).

Counting Current or Future Fees

When attorneys' fees are recoverable, the question then becomes whether the removing party may include prospective attorneys' fees, as opposed to only those incurred up to the time of removal, in the amount-in-controversy calculation. The Ninth Circuit has yet to rule on the issue, and district courts within the circuit are split, even within their own districts. *Compare Sasso v. Noble Utah Long Beach, LLC*, No. CV 14-09154 (C.D. Cal. Mar. 3, 2015) (future fees that can reasonably be anticipated may be included), *Vasquez v. Arvato Digital Servs., LLC*, No. CV 11-02836 RSWL (C.D. Cal. June 27, 2011) (same), *Chambers v. Penske Truck Leasing Corp.*, No. 1:11-CV-00381 LJO (E.D. Cal. Apr. 15, 2011) (same), *Celestino v. Renal Advantage Inc.*, No. C 06-07788-JSW (N.D. Cal. Apr. 24, 2007) (same), *Beaver v. NPA Intern., Inc.*, 451 F. Supp. 2d 1196, 1198–2000 (D. Or. 2006) (same), *and Roe v. Teletech Customer Care Mgmt. (CO), LLC*, No. C07-5149 RBL (W.D. Wash. June 6, 2007) (same), *with Palomino v. Safeway Ins. Co.*, No. CV-11-01305-PHX-NVW (D. Ariz. Aug. 5, 2011) (attorneys' fees to be incurred after the date of removal are not properly included), *Bennet v. Alaska Airlines, Inc.*, No. CV 14-2804 (C.D. Cal. Apr. 30, 2014) (same), *MIC Philberts Investments v. Am. Cas. Co. of Reading, Pa.*, No. 1:12-CV-0131 AWI-BAM (E.D. Cal. June 11, 2012) (same), *Conrad Assocs. v. Hartford Accident & Indem. Co.*, 994 F. Supp. 1196, 1200 (N.D. Cal. 1998) (same), *Pegram v. Jamgotchian*, No. 3:12-CV-50-RCJ-VPC (D. Nev. Sept. 7, 2012) (same), *and Reames v. AB Car Rental Serv., Inc.*, 899 F. Supp. 2d 1012, 1020–21 (D. Or. Mar. 8, 2012) (same).

The disagreement bubbling within the Ninth Circuit is not surprising; courts in other circuits so too are split. *Compare Raymond v. Lane Const. Corp.*, 527 F. Supp. 2d 156, 163 (D. Me. 2007) (amount in controversy includes estimate of future attorneys' fees), *Lewis v. Ford Motor Co.*, 610 F. Supp. 2d 476, 486 (W.D. Pa. 2009) (implying same), *Francis*, 709 F.3d at 368 (implying same), *Basham v. Am. Nat. Cnty. Mut. Ins. Co.*, No. 4:12-CV-4005 (W.D. Ark. Oct. 23, 2013), *and Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1340 (10th Cir. 1998), *with ABM Sec. Services, Inc. v. Davis*, 646 F.3d 475, 479 (7th Cir. 2011) (only attorneys' fees incurred up to the time of removal may be included), *and Englemann v. Hartford Cas. Ins. Co.*, No. 8:09-cv-2274-T-30-EAJ (M.D. Fla. Dec. 23, 2009).

The divergence in these cases often stems from the established principle that courts are to determine the amount in controversy as it exists at the time of removal. *See Rea v. Michaels Stores Inc.*, 742 F.3d 1234, 1237 (9th Cir. 2014) (noting general rule that amount in controversy be determined at time of filing notice of removal). Courts that exclude prospective fees from the analysis typically question how such fees—which have yet to be incurred—could ever be ''in controversy.'' Indeed, these courts typically view the amount in controversy as the sum that would resolve the plaintiff's claim—a figure that, at least at the time of removal, would necessarily exclude prospective fees. *See, e.g.*, *Hart v. Schering–Plough Corp.*, 253 F.3d 272, 274 (7th Cir. 2001) (noting—in the context of a standard diversity removal—that ''[i]f the defendant can extinguish the plaintiff's entire claim by tendering $75,000 or less at the [time of removal], then the amount 'in controversy' does not exceed $75,000''); *Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955, 958–59 (7th Cir. 1998) (noting ''the amount 'in controversy' between the parties at the outset is . . . the sum the [defendant] would have to pay to resolve the case,'' and rejecting notion that an appeal, for example, could enable counsel to ''run up the tab'' to finally create a basis for federal jurisdiction); *see also Dukes v. Twin City Fire Ins. Co.*, No. CV-09-2197-PHX-NVW (D. Ariz. Jan. 6, 2010) (concluding ''the better view is that attorneys' fees incurred after the date of removal are not properly included because the amount in controversy is to be determined as of the date of removal'') (citations omitted).

But not all courts choose to adopt this relatively narrow definition of ''amount in controversy.'' *See, e.g.*, *McPhail v. Deere & Co.*, 529 F.3d 947, 956 (10th Cir. 2008) (describing amount in controversy as ''an estimate of the amount that *will be put at issue* in the course of the litigation'') (emphasis added). And some courts further recognize that if the amount in controversy at the time of removal may include future damages, such as pain and suffering, anticipated medical bills, and lost wages, etc., court should consider prospective attorneys' fees as well. *See, e.g.*, *Raymond*, 527 F. Supp. 2d at 163 (rejecting a ''rule that treats attorney's fees differently from any other category of damage'' for purposes of ascertaining the amount in controversy) (footnote omitted). Unsurprisingly, not all courts share this latter view. *See, e.g.*, *Gardynski-Leschuck*, 142 F.3d at 958 (finding attorneys' fees ''avoidable'' as compared to lost future income due to injury).

Speculative Fees

Then there is the slightly different rift among the circuits (and, as noted, within the Ninth Circuit), that has emerged even in those courts that appear willing, at least in theory, to include prospective attorneys' fees in the amount-in-controversy calculation. The dividing line in these cases: whether such fees are simply too ''speculative.'' *See, e.g.*, *Palomino* (finding future attorneys' fees ''entirely speculative''); *Dukes* (same). A sharply-worded opinion from the United States District Court for the District of Oregon aptly summarizes this view:

> [I]t is impossible to devise any workable ''actuarial'' formula for determining the amount of attorney fees that may

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> be reasonably anticipated at the time of removal. Any attempt to do so must necessarily rely on wholly arbitrary decisions regarding, for example, whether or not to consider the possibility of pre-trial settlement of a removed dispute, whether or not to consider the possibility that fees will be incurred post-trial in connection with appellate proceedings, and how to define the universe of material historical data to which the formula should be applied. In addition . . . any such actuarial formula, no matter how exquisitely crafted, will inevitably and systematically produce dramatically inaccurate predictions a significant proportion of the time.

Reames, 899 F. Supp. 2d at 1021.

But courts at the other end of the spectrum quickly point to the arguably ''speculative'' nature of most damages calculations, and therefore conclude that parties should not categorically omit prospective attorneys' fees from the amount-in-controversy analysis. *See, e.g.*, *Roe* (''All fees—indeed, most damages—are to some extent 'speculative' at the time of removal; no defendant can predict with one hundred percent accuracy the manner in which the plaintiff will pursue his claim, and neither party can know exactly how the case will unfold. Accordingly, . . . a reasonable, informed estimation of fees, based on the various tasks to be accomplished by both sides, and the hourly rates of the attorneys who will conduct those tasks (including *future* attorneys' fees), properly comprise the evidence that can and should be considered in evaluating the amount in controversy . . . .'') (citations omitted, emphasis in original).

Aligning Prospective Fees With CAFA's Purpose

As can be seen, courts across the country have grappled with whether to include prospective attorneys' fees in the amount-in-controversy calculation. In some instances, the resolution of this debate will be inconsequential because fees incurred at the time of removal will tip the jurisdictional balance. *See, e.g.*, *Long v. Destination Maternity Corp.*, No. 15cv2836-WQH (S.D. Cal. Apr. 21, 2016); *Trahan v. U.S. Bank Nat. Assoc.*, No. C 09-03111-JSW (N.D. Cal. Jan. 13, 2014); *New W. Health Servs. v. Express Scripts Sr. Care, Inc.*, No. CV 13-35-H-CCL (D. Mont. June 11, 2013).

The fact remains, however, that the exclusion of prospective attorneys' fees from the amount-in-controversy calculation will inevitably result in fewer cases reaching federal court—an outcome directly at odds with the underlying purpose of CAFA. *See Westerfeld v. Independent Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010) (noting CAFA was ''intended to expand substantially federal court jurisdiction over class actions,'' and ''[i]ts provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court''), quoting S.Rep. No. 109–14, at 43 (2005), 2005 U.S.C.C.A.N. 3, 41; *Lewis v. Verizon Commc'ns, Inc.*, 627 F.3d 395, 398 (9th Cir. 2010) (explaining that CAFA ''significantly expanded federal jurisdiction in diversity class actions''); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952 (9th Cir. 2009) (noting Congress enacted CAFA in part to ''restore the intent of the framers . . . by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction''). It follows that courts should at least permit defendants to present evidence of reasonably anticipated attorneys' fees (when recovery of such fees is authorized by statute or contract), and that courts should consider such evidence in determining the amount in controversy. Indeed, it is difficult to reconcile CAFA's primary objectives with a rule that significantly limits the consideration of recoverable attorneys' fees. But until the Ninth Circuit finally resolves this issue, practitioners in this circuit should endeavor to remind district courts that consideration of prospective attorneys' fees directly aligns with CAFA's overarching goal of removing obstacles to federal adjudication of class actions.