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GORSUCH ON RULE 23 AND CAFA

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President Trump has nominated Tenth Circuit Judge Neil M. Gorsuch to replace Justice Antonin Scalia on the United States Supreme Court, and we expect that his nomination will eventually be confirmed. Since 2006, Judge Gorsuch has issued a limited set of decisions concerning Rule 23 and the Class Action Fairness Act ("CAFA"). Here is our take on his class action jurisprudence:

Judge Gorsuch addressed the interplay of Rule 23(b)(2) (governing injunctive relief classes) and the general requirements for injunctive relief under Rule 65(d) in upholding an order denying class certification in Shook v. Board of County Commissioners, 543 F.3d 597 (10th Cir. 2008). The Shook plaintiffs sought to certify a class consisting of all present and future mentally ill inmates at Colorado's El Paso County Jail. Gorsuch ruled that "[a]t the class certification stage, the injunctive relief sought must be described in reasonably particular detail such that the court can at least 'conceive of an injunction that would satisfy [Rule 65(d)'s] requirements,' as well as the requirements of Rule 23(b)(2)." Id. at 605 (quoting Monreal v. Potter, 367 F.3d 1224, 1236 (10th Cir. 2004)). Analyzing the different types of class members suffering from mental illness as well as "the fluid nature of the class" (given that it included not only current but future inmates), he found that any injunction would have to distinguish class members "based on individual characteristics and circumstances" rather than "prescribing a standard of conduct applicable to all class members." Id. at 605 (emphasis in original). Moreover, while the problems inherent in formulating appropriate class-wide injunctive relief could have been "mitigated, or perhaps avoided, by the use of subclasses," the district court did not sua sponte create any subclasses and was under no obligation to do so. Id. at 606-607. Accordingly, Gorsuch ruled that the district court did not abuse its discretion in declining to certify an injunctive relief class under Rule 23(b)(2).

In a 2010 opinion, Judge Gorsuch allowed a corporate defendant to appeal a federal district court order remanding a "mass action" to state court – one that that had been removed to federal district court under CAFA. BP America, Inc. v. Oklahoma ex. rel. Edmondson, 613 F.3d 1029 (10th Cir. 2010). BP raised two issues: (1) whether the appellate court had jurisdiction to consider the appeal (given that appellate courts are generally prohibited from reviewing district court remand orders under 28 U.S.C. § 1447), and (2) whether, if the order was appealable under CAFA's exception to this general rule (28 U.S.C. § 1453), the appellate court should accept the interlocutory appeal. On the issue of appellate jurisdiction, Judge Gorsuch found that Congress had authorized appellate courts in § 1453(c)(1) to review district court remand orders of "mass actions." Accordingly, the appellate court had jurisdiction over the appeal. On the issue of whether the appellate court should take the appeal, Gorsuch considered the factors listed by

the First Circuit in terms of whether to grant leave to appeal under CAFA. Gorsuch ruled that the appellate court should accept the appeal, because (among other reasons) the "case raise[d] the important and unsettled legal questions whether CAFA's mass action provision applies to suits by a state attorney general; . . ." Id. at 1035.

Just two months ago, Judge Gorsuch addressed how to prove the amount "in controversy" in terms of determining CAFA's $5 million jurisdictional threshold in Hammond v. Stamps.com, Inc., 844 F.3d 909 (10th Cir. 2016). Hammond involved a class of Stamps.com subscribers who allegedly had been deceived into paying a monthly subscription fee. Stamps.com removed the case to federal court, asserting that the putative class sought damages that well exceeded $5 million. The district court remanded the case to state court, however, noting that the class consisted of persons who were "actually deceived," and that, without proof as to how many class members were so deceived, Stamps.com could not satisfy the $5 million "in controversy" requirement. Examining the historical meaning of the term "in controversy," Gorsuch ruled that Stamps.com need only show what a fact finder "might legally conclude," as opposed to what the "factfinder would (or probably would) find" on the issue of damages. Id. at 912 (emphasis in original). Because the district court applied the wrong standard, it abused its discretion and improperly remanded the case to state court.

Takeaways:

*All three of these Gorsuch opinions are pro-defendant decisions. In Hammond, Judge Gorsuch joined the Seventh, Eighth, and Ninth Circuits in holding that a party may satisfy the amount "in controversy" requirement under CAFA by showing what a fact-finder **could** award in damages, as opposed to proving up the likely outcome, a decision that makes it easier for a defendant to remove a case under CAFA. See also Jay Bogan and Allen Garrett, Establishing CAFA Jurisdiction in the Face of Contradictory Allegations, January 4, 2017. BP was another pro-defendant removal decision. Finally, in Shook, Judge Gorsuch used the general injunctive relief requirements under Rule 65 to affirm the denial of certification of an injunctive relief class under Rule 23(b)(2). Shook should prove useful to any corporate defendant opposing Rule 23(b)(2) certification, especially in the Tenth Circuit.*