OCTOBER 19, 2018

# Ninth Circuit rules that post-removal attorneys' fees count towards CAFA's $5 million threshold, creating split with Seventh Circuit

by Jay Bogan

**Takeaway**: When a plaintiff files a class action in state court, the first thing defense counsel will do is evaluate whether it can be removed to federal court. Most courts have long agreed that compensatory damages must be calculated on a "forward-looking" basis, in the sense that the amount of damages a plaintiff can recover at the end of the case (at trial) counts towards the jurisdictional threshold. But there has been much confusion as to whether ***future*** attorneys' fees – as opposed to the fees that have been incurred as of the moment of removal – count. The Ninth Circuit recently resolved this issue in favor of counting future attorneys' fees, creating a clear circuit split with the Seventh Circuit. Until this issue is resolved by the U.S. Supreme Court, practitioners evaluating removal in other circuits will continue to face uncertainty over whether future attorneys' fees (whether sought under a fee-shifting statute or contract) count towards the $5 million minimum. And whether future fees count, of course, can impact the removability of a number of cases that (not counting future fees) fall below CAFA's $5 million threshold.

The plaintiff in *Fritsch v. Swift Transp. Co. of Arizona, LLC*, 899 F.3d 785 (9th Cir. 2018), originally filed his wage-and-hour class action in California state court. The defendant (Swift) removed the case to federal court (the Central District of California), and the plaintiff (Fritsch) moved to remand.

To remove a case to federal court under the Class Action Fairness Act (CAFA), the amount in controversy must exceed the sum or value of $5 million, "exclusive of interest and costs." 28 U.S.C. § 1332(d)(2). This $5 million threshold can include compensatory damages, the costs of complying with an injunction, and attorneys' fees recoverable under either a statute or a contract. *Fritsch*, 899 F.3d at 793.

The district court determined that the amount of compensatory damages fell below the $5 million threshold, based in part on its determination that only the amount of fees incurred as of the time of removal could be counted, and remanded to state court. The Ninth Circuit then accepted Swift's petition to appeal the ruling under 28 U.S.C. § 1453(c).

Following the Court of Appeals' grant of the petition to appeal, Swift "re-removed" the previously remanded action to the district court, contending that another recent Ninth Circuit decision (*Chavez v. J.P. Morgan Chase & Co.*, 888 F.3d 413 (9th Cir. 2018)) "demonstrated beyond any doubt that the amount in controversy in this action exceeds the jurisdictional minimum." *Fritsch*, 899 F.3d at 791. This led Fritsch to move to dismiss Swift's appeal as "moot" (because Swift had brought the case back to the

district court). The Ninth Circuit first rejected this contention, explaining that Swift faced a "timeliness" challenge to the second removal that it would not face if the Court of Appeals upheld the initial removal. *Id.* at 791-92.

As for the merits, the parties' dispute centered entirely on the question of whether "future fees" should be counted in determining whether Swift could meet CAFA's jurisdictional threshold of $5,000,000. The parties agreed that, unless Swift properly could include future fees, the amount in controversy would be slightly below $5,000,000. *Id.* at 792 n.5.

The panel concluded that future attorneys' fees must be included in the jurisdictional amount, resolving a district court split (in the Ninth Circuit) on the issue. The Court of Appeals relied on *Chavez* – the same case Swift had cited in "re-removing" the case to district court – in which another Ninth Circuit panel had concluded that future wages in an employment case should count towards the $5 million amount (as opposed to only those wages lost at the time of removal). *Id.* at 793-94.

Rejecting Fritsch's arguments that *Chavez* should be limited to its specific facts, the *Fritsch* court pointed to *Chavez*'s broad language that "'the amount in controversy includes ***all relief*** claimed at the time of removal to which the plaintiff would be entitled if she prevails.'" *Fritsch*, 899 F.3d at 794 (quoting *Chavez*, 888 F.3d at 417–18) (emphasis in original). The *Fritsch* court further noted *Chavez*'s reasoning that "'the mere futurity of ***certain classes of damages***' does not preclude them from being part of the amount in controversy.'" *Id.* (quoting *Chavez*, 888 F.3d at 417) (emphasis in original). Because these broad phrases encompassed all aspects of the plaintiff's recovery, " *Chavez*'s reasoning clearly applies to attorneys' fees." *Id.*

In so ruling, the Ninth Circuit declined to follow a contrary line of authority from the Seventh Circuit, including the Seventh Circuit's decision in *Smith v. American General Life & Accident Insurance Co.*, 337 F.3d 888 (7th Cir. 2003). In that case, the Seventh Circuit held that post-removal attorneys' cannot count toward the amount in controversy requirement "because federal jurisdiction exists, if at all, at the time of [removal]." *Id*. at 896-897. *See also ABM Security Services, Inc. v. Davis*, 646 F.3d 475, 479 (7th Cir. 2011); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 512 (7th Cir. 2006). The *Fritch* court held the Seventh Circuit's reasoning could not be reconciled with *Chavez* and other Ninth Circuit authority requiring consideration of all relief to which a plaintiff would be entitled if the action succeeds. 899 F.3d at 795.

Having concluded future attorneys' fees should be included in the amount-in-controversy, the Court of Appeals remanded to the district court to do a calculation of the total amount of attorneys' fees at stake. *Id.* at 795-96. On this point, the panel rejected a bright-line rule calculating fees as a percentage of the total amount at stake, noting cases applying that rule have involved a "common fund" rather than wage-and-hour claims. *Id.* at 796. Instead, the district court should take into account any "statutory and contractual restrictions" that might apply to the ultimate fee award. *Id.*