SEPTEMBER 14, 2020

Ninth Circuit: two pro-defendant decisions clarify burdens regarding CAFA's $5 million jurisdictional threshold

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Takeaway: Class defendants prefer federal court. In any putative class action filed in state court, the first issue to analyze is whether the case can be removed to federal court, and any such analysis typically involves whether the case satisfies the $5 million jurisdictional threshold of the Class Action Fairness Act (CAFA). While CAFA largely has eliminated the judicial anti-removal bias that prevailed prior to its enactment, district courts are still tempted – sometimes as a docket-clearing mechanism – to kick cases back to state court. In two recent Ninth Circuit cases, the appellate court overturned decisions remanding putative class actions to state court, on the ground that the district courts applied overly strict standards relative to the establishment of CAFA's jurisdictional threshold. These decisions serve as a reminder a class defendant need only make a plausible case that $5 million or more is at stake to remove under CAFA.

In *Greene v. Harley-Davidson, Inc*., 965 F.3d 767 (9th Cir. 2020), Matthew Greene purchased a Harley-Davidson motorcycle from a California dealership for roughly $23,800. In connection with that purchase, he paid a $1,399 freight and prep charge. After the purchase, he allegedly discovered the services represented by the charge were already included in the $23,800 list price, such that the charge was duplicative and fraudulent.

He filed a putative class action against Harley-Davidson in California state court, asserting a number of claims, including a claim under California's Consumer Legal Remedies Act (CLRA) and a claim for fraud and deceit. In terms of monetary relief, he sought compensatory damages, statutory attorneys' fees, and punitive damages.

Harley-Davidson removed the case to federal court, invoking federal jurisdiction under CAFA and asserting that the alleged damages satisfied CAFA's $5 million amount in controversy requirement, Harley-Davidson contended the complaint sought (1) more than $2 million in compensatory damages (based on the prayer for relief in the complaint), (2) the same amount (more than $2 million) in punitive damages (based on a 1:1 punitive damages/compensatory damages ratio); and (3) more than $1 million in attorneys' fees (based on a 25 percent multiplier of the total amount of compensatory and punitive damages). Further, the complaint alleged that all applicable statutes of limitation were subject to equitable tolling, due to Harley-Davidson's alleged fraudulent conduct.

Greene moved to remand. In opposition, Harley-Davidson submitted evidence California juries had awarded punitive damages in excess of a 1:1 ratio in four prior CLRA cases, as well as evidence class counsel had sought attorneys' fees consisting of 35 percent of the recovery in a similar class action. The district court granted the motion to remand, but the Ninth Circuit granted Harley-Davidson's petition to

pursue an interlocutory appeal under 28 U.S.C. § 1453, the rule of appellate procedure applicable to CAFA removals.

Focusing on the issue of punitive damages, the Ninth Circuit concluded the district court held Harley-Davidson to an overly strict burden of proof in terms of showing the amount of punitive damages in controversy. To prove jurisdiction, "a defendant needs to plausibly show that it is reasonably possible that the potential liability exceeds $5 million." 965 F.3d at 772. The amount in controversy is the "amount at stake" in the case, meaning "possible liability" as opposed to "likely or probable liability." *Id*. The district court, however, ruled Harley-Davidson could not simply cite cases involving awards of punitive damages on the same types of claims. Instead, the district court required Harley-Davidson to delve into the facts of those other CLRA cases to show they were truly analogous, to support its position a 1:1 punitive/compensatory damages ratio was truly in controversy. But, according to the panel, this required Harley-Davidson to prove "likely or probable liability" on punitive damages, as opposed to showing the amount at stake, or "possible liability" for punitive damages. The panel concluded that Harley-Davidson's showing – simply citing the other CLRA cases showing 1:1 or greater punitive damages awards – was sufficient.

Harley-Davidson also appealed the district court's ruling on the amount of attorneys' fees in controversy, which (according to Harley-Davidson) was appropriately calculated at 25% of the total amount in controversy (more than $1 million, based on compensatory and punitive damages exceeding $4 million). On this point, the district court accepted at face value Greene's argument that, due to the statute of limitations defense set up by Harley-Davidson in response to his tolling allegations, the limitations statutes could only be could be tolled with respect to his individual claims. In other words, a 1:1 ratio on his individual claim meant that the punitive damages claim could only be $1,399 (the amount of the freight and prep charge that he individually paid), vastly reducing the amount of attorneys' fees subject to Harley-Davidson's 25% multiplier.

According to the panel, the district court erred in "assum[ing] that Harley-Davidson would prevail on a statute of limitations defense against the rest of the class." *Id*. at 774. In doing so, the district court reached a merits question as opposed to analyzing the amount in controversy based on the allegations in Greene's complaint. Said the panel: "Greene put more than $5 million in controversy. Greene is the master of his complaint, and he owns the allegations that have landed him in federal court." *Id.* Accordingly, the Ninth Circuit reversed the district court's order granting Greene's motion to remand.

In the other Ninth Circuit case, *Salter v. Quality Carriers, Inc*., --- F.3d. ---, No. 20-55709, 2020 WL 5361459 (9th Cir. Sep. 8, 2020), Clayton Salter, a truck driver, filed a putative class action against Quality Carriers, Inc., and Quality Distribution, Inc. (Quality), alleging that Quality misclassified the truck drivers as independent contractors rather than employees. He further alleged that Quality failed to provide the putative class members with (among other things) reimbursement for necessary expenditures, as required under California law.

Quality removed the case to federal court, alleging the amount in controversy exceeded $5 million. Salter moved to remand, and Quality responded by submitting a declaration. The district court ruled the declaration was inadequate proof of the amount in controversy and granted the motion to remand. The declaration, provided by Quality's Chief Information Officer, focused on Salter's allegation that the class was not reimbursed for necessary expenditures. According to that declaration, Quality deducted over $14 million from the truck drivers' weekly settlements during the class period, including over $11.5

million for fuel purchases alone.

The district court found the declaration inadequate because it was based on conclusory statements, given that it did not attach any business records or other supporting documents to corroborate the testimony, and also given that the declaration assumed Salter's complaint sought all of the expenses identified in the declaration. The Ninth Circuit disagreed.

Citing prior Ninth Circuit cases, the panel distinguished between a "facial" attack and a "factual" attack. A facial attack, on the one hand, assumes the truth of allegations, while a factual attack, on the other, contests the truth of allegations (usually by introducing outside evidence). According to the panel, Salter merely mounted a facial attack. It did not mount a factual attack, which would have required Quality to submit evidence satisfying a summary judgment evidentiary standard.

Indeed, the panel treated Quality's declaration not as an evidentiary declaration but as a series of plausible allegations, and thus an extension of the allegations set out in the removal petition: "Here, Salter mounted only a facial attack, rather than a factual attack. In other words, he has not really challenged the truth of Quality's 'plausible allegations.' He did not question that there are over a hundred contractors who performed work for Quality between October 2015 and January 2020. Nor did he dispute that Quality deducted over $11 million from the weekly settlements for fuel purchases. Salter did not assert that Quality misinterpreted the thrust of his complaint and did not offer any declaration or evidence that challenged the factual bases of Quality's plausible allegations." 2020 WL 5361459, at *3.

The panel held "the district court erred by applying the standard for reviewing a factual attack on jurisdiction to Salter's facial attack on Quality's presentation. Salter did not challenge the rationality, or the factual basis, of Quality's assertions. Instead, he argued only that Quality 'must support its assertion with competent proof.' But such a challenge is foreclosed by the Supreme Court's decision in *Dart* [which requires only allegations and not evidence in support of a removal petition] and our opinion in *Arias* [which requires only plausible allegations in support of removal]." Id. at *4 (citing *Dart Cherokee Basin Operating Sys. Co., LLC v. Owens*, 574 U.S. 81 (2014), and *Arias v. Residence Inn by Marriott*, 936 F.3d 920 (9th Cir. 2019)).

Because Quality plausibly alleged the basis for CAFA jurisdiction, and because Salter mounted nothing more than a facial attack, Quality's opposition to Salter's motion to remand should have carried the day. Accordingly, the Ninth Circuit vacated the district court's order remanding the case to California state court.