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Establishing CAFA Jurisdiction in the Face of Contradictory Allegations

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It is a bedrock principle of American jurisprudence that you can't have your cake and it eat too.

In class action litigation, plaintiffs often strive to avoid removal to federal court because they perceive state courts as more plaintiff-friendly. So class action plaintiffs frequently advance allegations designed to frustrate CAFA removals to federal court.

But plaintiffs also want to recover as much money as possible, so they naturally want to include allegations preserving the ability to recover the maximum amount of damages.

Courts in "fuel surcharge" class actions recently have grappled with this tension in addressing motions to remand CAFA removals. In these cases, plaintiffs allege the defendants collect unreasonable or excessive fees or surcharges, such as fuel charges, environmental charges, or delivery charges. To avoid removal to federal court, however, a plaintiff might argue that it is only challenging the portion of these charges that ***exceed*** the defendants' related costs (claiming, for example, that a defendant collected more in fuel charges than it incurred in fuel costs).

In 2015, a Georgia federal court granted a motion to remand a class action challenging the reasonableness of various surcharges. The defendant presented evidence of the total amount of its charges and offered arguments (but not evidence) as to the amount of such charges that should be considered "unreasonable" under the theory articulated in the class action plaintiff's complaint. But the defendant also refused to produce evidence of the costs that allegedly offset the collected charges. The federal court, distinguishing federal appellate authorities holding that the ***entire amount*** of the disputed charges should be considered under CAFA's $5 million jurisdictional threshold, remanded the case to state court, reasoning that the defendant's removal evidence did not show that $5 million was at stake, in light of plaintiff's allegations. *All-South Subcontractors, Inc. v. Sunbelt Rentals, Inc.*, No. 1:14-CV-124-WLS, 2015 WL 4255781 (M.D. Ga. July 14, 2015).

A Florida federal court recently reached a different result in 2016, denying a motion to remand a class action challenging fuel and environmental surcharges. In that Florida case, the complaint advanced contradictory allegations. On the one hand, the complaint challenged the fuel and environmental charges in their entirety, arguing the surcharges constituted "double dipping" by the defendant (under the theory the defendant was already reimbursed for its fuel and environmental costs through its base price). On the other hand, the complaint alleged the plaintiff sought only to recover the "excessive portion" of the charges, rather than the entire amount of those charges.

The federal court rejected this purported limitation and denied the plaintiff's motion to remand. Pointing to the "double dipping" allegations, which attacked the charges in their entirety, the court ruled that the defendants' evidence – which showed that the charges in their entirety exceeded $5 million – supported removal under CAFA. *Vision Construction Ent., Inc. v. Argos Ready Mix, LLC*, No. 3:15cv00534-MCR/CJK, 2016 WL 6987009 (N.D. Fla. Nov. 7, 2016).

Takeaway: CAFA has changed the jurisdictional analysis. It used to be that removal jurisdiction was strictly construed and that all jurisdictional doubts were to be resolved in favor of remand. No longer. The U.S. Supreme Court confirmed in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014), that "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." *See also Dudley v. Eli Lilly and Co.*, 778 F.3d 909, 912 (11th Cir. 2014) ("we may no longer rely on any presumption in favor of remand in deciding CAFA jurisdictional questions.")

In this context, "it must appear ***to a legal certainty*** that the claim is really less than the jurisdictional amount to justify dismissal." *Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805, 807 (11th Cir. 2003) (emphasis added). Accordingly, when faced with a complaint that purports to challenge only the "unreasonable" or "excessive" portion of an alleged fee or charge, while at the same time preserving the ability to attack the fee or charge in its entirety, the defendant should emphasize the allegations that put all of the charges at issue and submit detailed evidence showing the charges well exceed CAFA's $5 million threshold.