

The Expert's Corner

FEE-SHIFTING FOR WRONGFUL REMOVALS: A DEVELOPING TREND?

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A relatively small but not insignificant issue in class action attorney fee awards concerns fee-shifting in cases wrongfully removed under the Class Action Fairness Act of 2005 (“CAFA”). The governing statute, 28 U.S.C. §1447(c), long pre-dates CAFA: it applies generally to cases that are removed and then remanded to state court when removal was improper for lack of subject matter jurisdiction in the federal court; it permits plaintiffs to seek fees from the defendant for time spent on the

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errant removal petition. As CAFA greatly expanded removal opportunities for defendants, it also therefore increased the probability of wrongful removals and the opportunities for plaintiffs to seek fees upon remand. As set forth in more detail below, in early CAFA cases, courts generally tended to deny fee-shifting unless the removal motion contradicted clearly established precedent. However, a series of recent cases – decided since removal standards under CAFA have been more clearly established by federal circuit decisions – suggests that courts have begun to shift fees more regularly.

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§1447(c) GENERALLY

The operable section of the federal code states that “An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” 28 U.S.C. §1447(c). Prior to 1985, the circuits had split in their interpretation of this rule, with some maintaining a presumption in favor of plaintiff recovery of attorney’s fees and others utilizing a reasonableness test. In *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005), the Supreme Court settled the circuit split, adopting the rule that “attorney’s fees should not be awarded when the removing party has an objectively reasonable basis for removal.” *Id.* at 136. In so holding, the Court reasoned that, “the appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress’ basic decision to afford defendants a right to remove[.]” *Id.* at 140.

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Because the *Martin* standard is objective reasonableness, lower courts’ application of it have been highly fact dependent and have generally been fairly taciturn in their reasoning beyond the *Martin* standard. Fees are

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(1) cases remanded because the action was not “commenced” before CAFA’s effective date and

(2) cases remanded because the aggregate amount in controversy did not exceed the CAFA \$5 million threshold.

CAFA CASES

Courts in CAFA cases have tended to follow the general interpretation of *Martin*, namely to permit fee-shifting only when defendants rely on legal arguments that are obviously disproven by precedent. Thus, while fee-shifting has often been discussed in CAFA cases, it has been granted much more sparingly. Only one reported case adjudicates the proper level of fees to be shifted, finding that “[f]or the costs of attorneys’ time, [the Court multiplies] the hours reasonably expended contesting removal by a reasonable rate[.]” and that the Court “must exclude hours spent on other issues or hours wasted on excessive or redundant tasks.” *Simenz v. Amerihome Mortg. Co., LLC*, 2008 WL 859206 at *3 (E.D.Wis. 2008).

Plaintiffs have generally made fee-shifting motions in two sets of CAFA cases: cases remanded because the action was not “commenced” before February 18, 2005 — CAFA’s effective date — and hence the federal subject matter jurisdiction requirements of CAFA were inapplicable; and cases remanded because the aggregate amount in controversy did not exceed the CAFA \$5 million threshold. There are no reported cases permitting fees in the former category of cases, but in the past few months cases have begun cropping up ordering fees in the latter.

DATE OF COMMENCEMENT REMANDS

These suits concerned cases which were initiated prior to CAFA’s enactment, but in which some subsequent development — e.g., service of process, an amended complaint, class certification approval, or addition of a new party — prompted defendants to seek removal on the grounds that the case had actually therefore “commenced” after CAFA’s effective date. In the fee-shifting situations, courts had rejected the removal petitions, but none permitted fees because each essentially took the position that definition of “commencement” constituted a case of first impression such that the fee-shifting standard of removal (“against established precedent”) could not be met.

In March, the Ninth Circuit decided such a case that is illustrative. *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062 (9th Cir. 2008). This Oregon-based wage and hour case was filed prior to CAFA’s effective date, but the defendants were not served until after that date. They removed, arguing that the case “commenced” for CAFA purposes only upon service and hence after the law’s effective date. The district court remanded, holding that the case commenced for CAFA purposes upon filing. Plaintiffs moved for fees. The district court denied the fee petition, holding that the commencement question was one of first impression and concluding that the defendant’s attempt to remove was not unreasonable and therefore not sanctionable. Applying an “abuse of discretion” standard, the Ninth Circuit affirmed.¹

¹ See also *Lally v. Country Mut. Ins. Co.*, 2006 WL 2092610 (D. Colo. 2006) (rejecting fees because defendant’s removal petition, though unsuccessful, was objectively reasonable); *Gall v. Government Employees Ins. Co.*, 2006 WL 2092611 (D. Colo. 2006) (same); *In re Methyl Tertiary Butyl Ether (“MTBE”) Products Liability Litigation*, 2006 WL 1004725 (S.D.N.Y. 2006) (rejecting fees because defendants “had objectively reasonable basis for seeking removal” and “an award of costs, disbursements, and attorneys’ fees would not serve ‘the purpose of deterring improper removal’”); *Prime Care of Northeast Kansas, LLC v. Blue Cross and Blue Shield of Kansas City, Inc.*, 2005 WL 6090554 (D.Kan. 2005), *rev’d on other grounds*, 447 F.3d 1284 (10th Cir. 2006) (rejecting fees because defendant’s removal argument not objectively unreasonable); *Lott v. Pfizer, Inc.*, 492 F.3d 789 (7th Cir. 2007) (rejecting fees using “objective” standard because the definition of what constituted commencement was a case of first impression); *Carpanelli v. American Standard Companies Inc.*, 2006 WL 568307 (N.D.Cal. 2006) (rejecting fees because removal motion proceeded on an objectively reasonable basis in that “the law of removal under the CAFA is in its developmental stages” and case presented “a unique situation”).

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AMOUNT IN CONTROVERSY REMANDS

CAFA confers federal jurisdiction over suits with minimal diversity and \$5 million in controversy. In a series of recent cases, plaintiffs have asserted that the value of their claims did not amount to \$5 million. Defendants have nonetheless attempted removal, arguing that the true value of the case did meet the jurisdictional threshold. There has been some question about how to calculate the amount in controversy in these situations, whose burden it is, and what standards apply — often unsettled questions making defendant's removal efforts seemingly not unreasonable. Removal petitions were therefore generally regarded as not unreasonable; but as the legal standards have become more established, courts have recently found removal petitions unreasonable and awarded fees accordingly.

These three recent cases should not suggest that fees are invariably granted, as a series of other recent decisions deny them.

Three recent district cases awarded fees on these grounds. *See Geismann v. Aestheticare, LLC*, 2008 WL 961272 (D.Kan. 2008); *Simenz v. Amerihome Mortg. Co., LLC*, 2008 WL 859206 (E.D.Wis. 2008); *Alicea v. Circuit City Stores, Inc.*, 534 F. Supp.2d 432 (S.D.N.Y. 2008). In *Geismann*, a federal court in Kansas awarded fees on April 9 in the failed removal of a Telephone Consumer Protection Act case alleging the communication of unwanted faxes. The defendant first argued for subject matter jurisdiction on the grounds that at least one plaintiff had \$75,000 in controversy and the others could be brought along under the supplemental jurisdiction statute; when that argument failed, the defendant attempted to establish subject matter jurisdiction under CAFA, alleging more than \$5 million in controversy and the requisite numerosity (100 claimants). The court rejected these arguments as being without factual support, writing that:

[defendant] has not set forth an objectively reasonable basis for removal under Section 1332(d). Specifically, the amended notice of removal contained only speculation regarding the amount in controversy and did not even attempt to establish that the class was sufficiently numerous to satisfy [CAFA]. As explained in *Martin*, the “failure to disclose facts necessary to determine jurisdiction” may justify attorney’s fees under Section 1447(c). Because [defendant] has not made a colorable argument that this case satisfies the statutory criteria for removal under [CAFA], the Court finds that it lacked an objectively reasonable basis for removing the case under that provision.

In *Simenz*, a federal court in Wisconsin awarded fees on March 28 in the failed removal of a case alleging mortgage fee over-charges under Wisconsin law. The complaint alleged a statewide class and did not specify damages; in seeking removal, defendant claimed that the compensatory and punitive damages would exceed \$5 million and ignored the fact that because the class and it were both Wisconsin residents, the case fell into CAFA’s local controversy jurisdictional exception. The court found the removal petition unreasonable on both grounds, writing that:

[The \$5 million claimed amount] is not an objectively reasonable basis for removal given that the complaint sought compensatory damages low enough that only a very large punitive damages award could get defendant over the jurisdictional hurdle and, regardless, defendant is a Wisconsin citizen and the proposed class consisted only of individuals who purchased property in Wisconsin—a group that was very likely to consist primarily of Wisconsin citizens.

The fees defendant was required to pay to plaintiffs’ firm amounted to more than \$19,000.

In *Alicea*, the district court found that the amount in controversy did not meet the \$5 million threshold and that the three arguments that the removing defendant offered were each objectively unreasonable — specifically, (1)

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the argument that the plaintiffs' damages would be trebled was undermined by the complaint (which did not seek treble damages) and New York law (which does not permit treble damages in class actions); (2) the argument that the plaintiffs' class might become a nationwide one was undermined by the plaintiffs' choice of New York law which would only apply to a New York class; and (3) the argument that the defendant's cost of compliance might top \$5 million was undermined by Second Circuit law requiring the case be valued, in these circumstances, from the plaintiffs' perspective. The court concluded that it was:

imposing fees not because Circuit City incorrectly removed this case. Rather, the Court is imposing fees because the removal was not objectively reasonable. If Circuit City had conducted a reasonable investigation of the facts, it would have been apparent, under well-settled law, that the amount in controversy did not exceed \$5 million.

Plaintiffs were instructed to submit a fee petition on a lodestar basis.

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deny them.² That said, as the circuit courts have now settled many of the original questions CAFA posed, the rules of removal have become more certain and thus errant removals are more likely sanctionable than they might have been when the law was developing. In short, if there is a trend, it is likely to be in the direction of fee-shifting. Defendants beware.

² See, e.g., *Spivey v. Vertrue, Inc.*, 2008 WL 961561 (S.D.Ill. 2008) (rejecting fees because defendant's method of calculating amount in controversy, though wrong, was not unreasonable); *Brooks v. GAF Materials Corp.*, 532 F.Supp.2d 779 (D.S.C. 2008) (rejecting fees where plaintiff's amended complaint specified that less than \$5 million was sought because removal petition, though not sustainable, was not unreasonable); *Ortiz v. Menu Foods, Inc.*, 525 F. Supp.2d 1220 (D. Hawai'i 2007) (rejecting fees because defendants' arguments, although incorrect, were not objectively unreasonable); *Morgan v. Gay*, 2006 WL 2265302 (D.N.J. 2006) (same), *aff'd* 471 F.3d 469, (3rd Cir. 2006).