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LEGAL ALERT

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Eleventh Circuit Lifts Barriers to Federal Removal

A June 8 opinion by the Eleventh Circuit unravels at least two key aspects of the Eleventh Circuit's controversial anti-removal decision in *Lowery v. Alabama Power Co*., 483 F.3d 1184 (11th Cir. 2007). The new opinion, issued in *Pretka v. Kolter City Plaza II, Inc.*, 2010 WL 2278358, does not overrule *Lowery*, but dismisses significant parts of its analysis as unpersuasive, non-binding *dicta*.

First, *Pretka* rejects *Lowery's* "receipt from the plaintiff" rule that limited a district court's jurisdictional amount analysis in a removed diversity case to the four corners of the complaint and to information provided by the plaintiff on the amount in controversy. *Pretka* holds, to the contrary, that "[d]efendants may introduce their own affidavits, declarations or other documentation." (*Id*. at 7.) *Pretka* also observes that "as far as we can tell, it has never been the jurisdictional rule that a defendant may remove a diversity case seeking unliquidated damages only when the plaintiff is the source of facts or evidence on the value of the case." (*Id*. at 15.)

Second, *Pretka* holds that a district court, contrary to language in *Lowery*, may consider evidence filed after removal in making its jurisdictional determination. The court found that *Lowery's* language to the contrary appeared to conflict with the court's earlier decision in *Sierminski v. TransSouth Financial Corp.*, 216 F.3d 945 (11th Cir. 2000), but that the *Lowery* language was again mere *dicta*. The court also noted that its post-*Lowery* decision in *Thomas v. Bank of America Corp.*, 570 F.3d 1280 (11th Cir. 2009) should not be read as endorsing *Lowery's* "receipt from the plaintiff" rule, but instead as turning on the deficiencies in the evidence presented by the defendant in that case in support of jurisdiction.

The foundation for the court's analysis in *Pretka* is a reading of the removal procedure statute, 28 U.S.C. § 1446(b). As the Eleventh Circuit explained, that subsection contemplates two opportunities for removal. The first paragraph deals with civil actions that are removable at the time of commencement and provides for a 30-day removal window. The second paragraph of the same subsection concerns civil actions that are not originally removable, but become so after receipt by the defendant of a paper "from which it may first be ascertained that the case is one which is or has become removable." (*Id.)* The court pointed out that *Lowery* was a "second paragraph" removal, effected long after the case was initiated. *Pretka,* on the other hand, was a first paragraph removal of a putative class action filed in Florida state court over a failed condominium project. The defendant in *Pretka* removed the case based on the Class Action Fairness Act. With its notice of removal, the defendant filed a declaration concerning the amount in controversy, which was not specified in the complaint, and later filed additional evidence in opposition to the plaintiffs' motion to remand. The district court held that it could not consider the declarations filed by the defendant because none of them was a document received from the plaintiffs. The district court also held that it was impermissible under *Lowery* to consider evidence of the amount in controversy not submitted with the notice of removal. The Eleventh Circuit rejected both of these holdings.

Judge William Pryor fully concurred with Judge Ed Carnes's opinion for the court, but wrote separately to take on another holding of *Lowery*, that district courts may not allow post-removal discovery regarding the amount in controversy. Judge Pryor noted that the discovery question was not presented by *Pretka*, but will eventually have to be revisited. Judge Pryor pointed to critical commentary on the anti-discovery holding and quoted from an article in the *Mercer Law Review* by our own Tom Byrne to that effect.

Pretka is an important opinion that restores balance to removal procedure within the Eleventh Circuit. It also offers an interesting exegesis of the meaning of "*dicta*" that is likely to be consulted in the future by Eleventh Circuit practitioners.

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