CAFA - Not With Standing?

Thursday, February 09, 2012

We were just reading an interesting, relatively new, decision from our home Circuit, Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011), and our reaction to it wasn't quite what most readers would expect. The defendant won, but we were still troubled.

Sometimes defendants can lose by winning – as we discussed that some time ago on the question of punitive damages and choice of law, pointing out that while having all punitive damages issue decided under a single state's law sounds great as long as you like that state's law, it's not so great when the next plaintiff brings a class action – or the next client is headquartered in a state with less favorable law.

While that particular problem has faded, largely due to the Supreme Court's constitutional punitive damages jurisprudence virtually precluding class actions for such damages, the truth of the general proposition remains.

As a defendant, be careful what you ask for, you might just get it.

Which brings us back to Reilly. It's not a drug/device case – indeed, it could hardly be farther afield. Reilly involved illegal hackers possibly (maybe? conceiveably?) getting their hands on the personal/financial information of the users of an internet financial outfit. The plaintiffs had no proof whatever that the information had actually been misused, or that anybody actually suffered any harm.

Of course, that doesn't stop the class action lawyers. In they roared, claiming that even though nobody's account had actually been hacked, the supposed class of users was entitled to damages for the mere possibility that they might suffer financial loss in the future. Supposedly, the "class" members:

"(1) have an increased risk of identity theft, (2) incurred costs to monitor their credit activity, and (3) suffered from emotional distress."

664 F.3d at 40. Sounds sort of like something we've seen in our neck of the woods except instead of purported exposure to some supposed toxic substance, the claim here is purported

exposure to hackers.

The trial court said "are you kidding me?" and threw the case out for lack of Article III standing (more about the details of that later). Without a good, old-fashioned "case or controversy" – a constitutional requirement – these would-be litigants had no business in federal court. The Third Circuit affirmed:

"Constitutional standing requires an "injury-in-fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. . . . Allegations of "possible future injury" are not sufficient to satisfy Article III. . . . A plaintiff therefore lacks standing if his "injury" stems from an indefinite risk of future harms inflicted by unknown third parties. . . . [W]e refuse[] to confer standing when plaintiffs fail to allege an imminent injury-in-fact."

6645 F.3d at 42.

Interestingly, the Reilly court spotted the same analogy to medical monitoring that we did. It took pains to distinguish risk of physical injury from risk of financial harm:

"[S]tanding in medical-device and toxic-tort cases hinges on human health concerns. Courts resist strictly applying the "actual injury" test when the future harm involves human suffering or premature death."

Id. at 45.

Sigh of relief.

What the hey – why?

It comes down to what do we fear more? Would we rather have a transparently bogus no-injury class action kicking around a little longer (particularly in this post-Dukes world) in federal court, or would we rather be litigating the exact, same claims in the much less comfortable venue of the plaintiff's favorite state-court judge?

Usually, when it comes down to defending claims in federal rather than state court, we'll choose federal court.

So what does Article III standing have to do with that? Unfortunately, the answer may well be

"everything."

Remember CAFA, the Class Action Fairness Act, the vehicle through which all these class actions are moved to federal court in the first place?

Well, it turns out that, if there's no Article III standing (in, say, a "no injury" product liability class action for economic loss), there is a significant risk that CAFA can't keep that litigation in federal court. A lack of constitutional standing in such cases could, as a practical matter, repeal CAFA for "no injury" class actions. Plaintiffs would be free to file these cases in state court and, when defendant removed, plaintiffs could seek remand because of the patent weakness of their own claims, because absent standing there is no subject matter jurisdiction.

That's the problem. Now for the technical stuff.

The starting point is the difference between old-fashioned removal under 28 USC §1441 and removal under CAFA. Section 1441 provides generally that civil actions "of which the district courts of the United States have original jurisdiction" may be removed. However, if Article III standing is lacking, the district courts do not have original jurisdiction, and a case would not be removable under this section. Under these circumstances (where there's no subject matter jurisdiction in federal court), remand, rather than dismissal, is what 28 U.S.C. §1447(c) dictates.

Is CAFA different? In CAFA, 28 U.S.C. §1453 provides that "a class action [as defined in 28 USC §1332(d)(1)] may be removed." Thus, on its face CAFA creates removal jurisdiction for "class actions," as defined, without regard to subject matter jurisdiction. But what good is the right to remove if there's no subject matter jurisdiction once the case lands in federal court?

Arguably, not much.

This kind of conundrum has arisen before with respect to 28 U.S.C. §1442(b), which bestows on federal officers a right to any action brought against them, regardless of the existence of subject matter jurisdiction. This difference led some courts to hold that when federal officers remove a case in which Article III standing is lacking, the appropriate remedy is dismissal rather than remand, because 28 USC §1447(c) required remand only where the action was

"removed improvidently and without [removal] jurisdiction." See, e.g., Maine Ass'n of Interdependent Neighborhoods, Inc. v. Petit, 644 F. Supp. 81, 84 (D. Me. 1986). Well, that's just the opposite, you say. Petit supports a conclusion that, where Article III standing is lacking (as in a "no injury" class action removed to federal court), the case should not be remanded under §1447(c) and should instead be dismissed. Bang! You're dead.

Trouble is, it doesn't work that way any longer. Section 1447(c) was amended in 1988 to remove the "improvidently removed without jurisdiction" language that was the key to Petit and its ilk. Now, §1447(c) expressly provides:

"If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

"Shall" is usually considered rather mandatory. Hello state court.

Thus, on its face, §1447 now requires remand of any removed action in which it appears that subject matter jurisdiction – not removal jurisdiction – is lacking. No less of an authority than the Supreme Court has pointed out that "the literal words of §1447(c) . . . on their face, give . . . no discretion to dismiss rather than remand an action." International Primate Protection League v. Administrators of Tulane Education Fund, 500 U.S. 72, 89 (1991). Accord University of South Alabama v. American Tobacco Co., 168 F.3d 405, 410 (11th Cir.1999) (§1447(c) "is mandatory and may not be disregarded"); Roach v. West Virginia Regional Jail & Correctional Facility Authority, 74 F.3d 46, 48-49 (4th Cir. 1996) ("plain language of §1447(c) gives no discretion to dismiss rather than remand an action removed from state court over which the court lacks subject-matter jurisdiction"); but see Maine Ass'n of Interdependent Neighborhoods v. Commissioner, 876 F.2d 1051, 1054 (1st Cir. 1989) (dismissing rather than remanding).

Back to CAFA. Federal officer cases may be analogous, but CAFA is expressly made subject to §1447(c). 28 U.S.C. §1453(c)(1) ("Section 1447 shall apply to any removal of a case under this section"). There isn't much law on the subject, but in Mirto v. Amerian International Group, Inc., 2005 WL 827093 (N.D. Cal. Apr. 8, 2005), the court held that §1447(c) required remand, not dismissal, of a "no injury" class action where Article III standing did not exist. The case involved – SURPRISE! – the infamous California Unfair Business Practices Act:

"[Plaintiff's] action against [defendant] stems from his right under California law to challenge the company's allegedly unfair business practices as a private attorney general even if he suffered no individualized injury. .

. . Article III of the Constitution, however, limits the jurisdiction of the federal courts to "cases and controversies," a restriction that has been held to require a plaintiff to show, inter alia, that he has actually been injured by the defendant's challenged conduct. So a plaintiff whose cause of action is perfectly viable in state court under state law may nonetheless be foreclosed from litigating the same cause of action in federal court.

Clearly the court cannot hear this case; the only question is what to do with it. . . . The question boils down to whether a lack of standing is a "lack[of] subject matter jurisdiction" within the meaning of 28 USC §1447(c)."

Id. at *2. The court in Mirto then listed no fewer than six reasons why standing equalled subject matter jurisdiction: (1) that result was "doctrinally conventional"; (2) treatises agreed that remand was the appropriate result; (3) the aforementioned amendment to §1447(c); (4) dictum in an earlier Ninth Circuit case; (5) the dismissal would be without prejudice, so the plaintiffs could refile, then the defendants re-remove, and so on – infinite do loop style; and (6) a peculiar timing issue of no longstanding relevance. Id. at *3.

What's the answer? We don't know. But it sure looks like to us that CAFA incorporates §1447(c). And it's also hard to argue, given the amendment, that remand isn't the relief mandated by the statute.

So defendants really need to be careful where Article III standing intersects with removal under CAFA. These "no injury" class actions were one of the chief reason (there were other reasons as well, certainly) that the defense community wanted CAFA in the first place. We can't let "standing" become a vehicle for rendering CAFA – the most important federal tort reform initiative of this century – a nullity in "no injury" cases.

Thus while, arguing lack of Article III standing may look like a great way to get rid of a particular case, our side needs to be careful not to sacrifice the forest to get rid of a couple of rather scraggly trees that would probably die of other causes in any event.

Thanks to John Thomas of Dykema for sharing his insights into this knotty problem with us.