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7th Circuit (Posner) Examines CAFA Amount in Controversy in Light of *Knowles* & Rooker-Feldman Doctrine

As a general rule, if the Seventh Circuit hand down a class action decision, it has a solid chance of finding its way onto the Hoosier Litigation Blog. If that decision is authored by Judge Richard Posner, then it is almost a certainty. Some of you might wonder why I have an apparent obsession with decisions by Judge Posner. The answer is quite simple: he writes his own opinions and does so in a way that seems to convey an authentic attempt to show the thought process that led to the decision. This style of writing produces more than the run-of-the-mill legal insight. It has the tendency to add minor issues to the case law that have never before been considered, let alone explored. A good example of this was the *Hughes v. Kore of Ind. Enterprise, Inc.* decision this past fall that tossed out the idea of seeking class action recovery for a designated charitable purpose instead of for individual persons where the recovery would be too small to justify individual recovery. Judge Posner seems to have created this concept out of whole cloth and wrote it into the opinion for the sole purpose of "the possibility of it for future reference."

Ever since I was a law clerk while still a student, I have described class action law as sitting on the cutting edge of the law. Class action law itself is constantly evolving at a rapid pace and covers a vast spectrum of legal concepts and methods of recovery. That coupled with the fact that the potential for very lucrative

recoveries, sees class actions at the forefront of novel and ingenious legal arguments. That brings us to today's case for discussion: *Johnson v. Pushpin Holdings, LLC*.

The *Pushpin Holdings* case brings us back to a topic we've previously discussed: removal of a case from state court to federal court under the Class Action Fairness Act (CAFA). This case also touches upon a case we discussed a little over a year ago: *Standard Fire Insurance Co. v. Knowles*. Like most every interesting CAFA case, the story begins with a filing of a case in state court. Here, that state court was Illinois. The defendant, as they are apt to do, invoked CAFA to pull the case out of what are perceived to be plaintiff friendly state courts into federal court. The underlying decision that went up on appeal to the Seventh Circuit was the federal trial court's determination that the case did not meet the requirements of CAFA and therefore that the trial court lacked subject matter jurisdiction over the case. The single issue was whether the case met the threshold amount in controversy requirement of CAFA.

CAFA, like many federal laws, did not smoothly slide into the U.S. Code. It altered numerous existing sections. One of those sections is 28 U.S.C. § 1332, the section most well known for permitting diversity jurisdiction. Section 1332(d)(2) sets the amount in controversy to exceed $5 million. This means simply that the stakes of the case for the defendant is at least $5 million – well, technically a penny more than $5 million, for at $5 million even, the amount in controversy does not "exceed" $5M. Exactly how, when, and to what degree of certainty this amount needs to be shown has been the topic of much debate and was the catalyst for the *Knowles* decision last year. We'll take a look at that a little bit later on.

First, we need to look at the amount in controversy in the *Pushpin Holdings* case to get a grasp on the facts we are working with. The claim alleged that the defendant filed approximately 1,100 fraudulent lawsuits the penalty for which must be at most $1,000 each. The opinion does not explain this point, and since the underlying legal claim is a violation of Illinois law, I am not personally familiar with the legal mechanism for recovery. However, the court, quoting from the class action complaint, recognizes that no more than $1.1 million was sought in compensatory damages – i.e. $1k per fraudulent suit. The complaint also stated that the class sought $2 million in punitive damages and that the attorneys' fees – this, like many consumer protection statutes, apparently permits recovery of attorneys fees and costs – would not exceed $400,000. All told, the plaintiffs claimed to be seeking $3.5 million. A hefty sum no doubt, but only 70% of the way to the $5 million needed to meet CAFA.

The defendant had a different interpretation of the amount in controversy. The defendant took the position that its exposure could exceed $5 million. It, oddly enough, argued that the class was actually bigger than the plaintiff alleged at 1,300 potential members and that the compensatory damages are actually upward of $3.3 million. I'm going to pause for a second here. I know lawyers are notoriously bad at math, but where in the world did this $3.3 million number come from? I am willing to believe that the applicable Illinois statute has a trebling provision (a quick peak at the Illinois Consumer Fraud Act shows that it does) that would allow three times the compensatory damages amount. But if the defendant argues that there are actually 1,300 potential class members, shouldn't the number be $3.9 million not $3.3 million? Either way, if the plaintiff seeks $2 million in punitive damages and there can be at least $3.3 million in compensatory damages on the line, the amount in controversy could plausibly exceed $5 million.

Judge Posner continued the analysis with a poignant recognition of what one might expect where the complaint specifically rejects recovery above the threshold amount.

> One might suppose that whatever potential damages the class *might* have sought, remand is required because the complaint forswears any claim for more than $3.5 million. The district judge said, however, that "once the proponent [of removal, and hence opponent of remand—Pushpin] has plausibly suggested that the relief exceeds $5 million, then the case remains in federal court unless the plaintiff can show it is *legally impossible* to recover that much." The term we've italicized appears in many cases, as does the older formula that to prevent removal the plaintiff must demonstrate to a "legal certainty" that his claim is for less than the jurisdictional amount. Neither "legal impossibility" nor "legal certainty" seems descriptive of what is after all just a party's commitment not to seek damages above an amount specified by him, whether to avoid removal or for some other reason. A court can't force a plaintiff to accept greater damages than he wants; and it might seem that class counsel in this case had made a commitment, in the passages that we quoted from the complaint, not to seek a judgment for more than $3.5 million.

Judge Posner easily dispenses with this – let's call it a hypothetical. Under Illinois law, at least as interpreted by the Seventh Circuit, for a plaintiff's commitment to limit the amount he seeks "to be effective, [he must] file a binding stipulation or affidavit with the complaint." Indeed, the only similar statements from Illinois state cases is that a plaintiff is "not limited to the amount sought in the complaint."

So there is no binding stipulation, but what if there was one? Judge Posner phrases the problem eloquently: "there would remain a question whether a named plaintiff (class representative) should be allowed to discard, without explanation or notice to the other members of the class, 'what could be a major component of the class's recovery,' merely to 'ensure that the stakes fall under $5 million.'" Indeed, as the court recognizes, there may certainly be class members who would prefer to maximize the recovery and take the federal court gamble. In discussing the interplay between absent class member interest and legal strategy Judge Posner adds:

> But tugging against this type of objection to obtaining a remand in exchange for surrendering part of the class damages claim is the lack of realism in thinking that the class members can make an informed decision on whether the case should be litigated in federal or state court. What is required for such a decision is an expert legal judgment, and that is something that class counsel can provide but not class members—at least in a case like this; for remember that the members of the class are just small debtors who happen to have been sued by [the defendant] and many of whom, for lack of legal sophistication or lack of resources or because the amount of the alleged debt was too small to justify the expense of a lawyer, simply defaulted.

This is where the *Knowles* decision comes into play. Shockingly, neither the plaintiff nor defendant made any citation to *Knowles* in its briefing. Had they been followers of the HLB, they would've known better. In *Knowles* the Supreme Court determined that a stipulation to limit recovery prior to class certification can only apply to the named plaintiffs, not the absent class members. As such, a pre-certification stipulation cannot prevent removal under CAFA. There may be a minor wrinkle to this that we will discuss a bit later. Judge Posner offered an interesting critique of *Knowles*. He criticizes the decision for not looking to the effect of state law – there, Arkansas. He concludes, "If Arkansas limits damages by a procedural rule, the limitation would not affect removability under the Class Action Fairness Act; but if the limitation is substantive, it might." Peculiarly, his citation in support of this conclusion was to the Supreme Court case *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.* It is peculiar, because none of the opinions in the decision constituted a majority opinion. Thus, none of the opinions constitute binding authority.

After further criticizing the decision for not examining "the tradeoff between class counsel's giving up a part of the class damages claim and, by doing so, being

able to litigate in a forum believed to be more favorable to the class," the judge concedes that *Knowles* is a binding decision and it must be followed.

The little wrinkle that I alluded to above is that there is one aspect of a pre-certification stipulation that was not foreclosed by *Knowles*. Although the named plaintiff cannot bind any absent class member to take a lesser amount, there is a group with a stake in the case that he can bind: class counsel. If the amount in controversy is sufficiently close to the $5 million number, the class counsel may commit to limiting the class counsel fee so as to bring the amount under the threshold. That would not have changed things here: the complaint already acknowledged seeking $2 million in punitive damages, and the trebling effect upon the compensatory damages (regardless of whether the class was 1,100 or 1,300 persons) would exceed the $5 million threshold.

There was one last issue argued by the plaintiffs. Oddly, the court was comfortable handling the issue in a single paragraph. The plaintiff argued that the Rooker-Feldman doctrine – "that the Supreme Court is the only federal court that can entertain an appeal from a decision by a state court" – barred this particular case from being pulled into state court. It is a very interesting argument. Judge Posner dismisses it perhaps too flippantly. He, through citation, finds that "[t]he rule does not bar a federal suit that seeks damages for a fraud that resulted in a judgment adverse to the plaintiff." It is my recollection, though it has been years since I was faced with a Rooker-Feldman conundrum, that the analysis is really not that simple. Judge Posner couches it as not a violation of the doctrine to seek damages for fraud because "[s]uch a suit does not seek to disturb the judgment of the state court, but to obtain damages for the unlawful conduct that misled the court into issuing the judgment." This statement necessitates a subsequent one in which he insists that even though plaintiff also seeks to vacate the fraudulent judgments, such other relief "can be rejected without affecting the damages claim." The problem is that under the law of some states, perhaps not Illinois, any claim of fraud derived out of the judgment must be brought as an action to assault the judgment. This is my vague recollection.

There was one last insightful line added in the CAFA analysis. The federal trial judge stated that "'there is a strong presumption in favor of remand' when a case has been removed under the [CAFA]." Judge Posner found that "[t]here is not."

Join us again next time for further discussion of developments in the law.

Sources

- *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672 (7th Cir. 2013) (Posner, J.).
- *Johnson v. Pushpin Holdings, LLC*, ---F.3d---, No. 14-8006, 2014 WL 1383027 (7th Cir. Apr. 9, 2014) (Posner, J.).
- *Standard Fire Ins. Co. v. Knowles*, 568 U.S. ——, 133 S.Ct. 1345, 185 L.Ed.2d 439 (2013).
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- Class Action Fairness Act of 2005 – P.L. 109-2.
- 28 U.S.C. § 1332.
- Illinois Consumer Fraud Act codified at 815 ILCS 505/2.
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