Arkansas Association of Defense Counsel

November 28, 2016

THE TWO-PART APPROACH TO DEFEATING THE "LOCAL CONTROVERSY" EXCEPTION TO CAFA

Arkansas class action attorneys have developed an arsenal of tactics designed to avoid the Class Action Fairness Act ("CAFA"). Among those tactics is to name an Arkansas employee of a non-Arkansas defendant corporation as a defendant in Arkansas-only class actions in an attempt to satisfy the "local controversy" exception of CAFA.

The "local controversy" exception to CAFA requires Arkansas federal courts to remand a class action to state court if three conditions are satisfied. First, more than two-thirds of the class members are Arkansas citizens. Second, "at least 1 defendant is a defendant – (aa) from whom *significant relief* is sought by members of the plaintiff class; (bb) whose alleged conduct forms a *significant basis* for the claims asserted by the proposed plaintiff class; and (cc) who is a citizen of the State in which the action was originally filed." Third, no factually similar actions have been filed against any of the defendants in the last three years. 28 U.S.C. § 1332(d)(4)(A). When satisfied, this exception can keep significant Arkansas-only class actions out of federal court.

Assuming the complaint has satisfied the first and third conditions, to keep the case in federal court the defendants must show that there is no non-diverse defendant that is "significant" to the case. To do this, defense counsel should use a two-part approach utilizing both CAFA's express language and the more basic jurisdictional doctrine of fraudulent joinder. While similar on their face, each contains important nuances that can work together to keep cases in federal court.

Defense counsel should first consider whether the Arkansas defendant has been fraudulently joined. A defendant is fraudulently joined if there is "no reasonable basis in fact and law" for the claims against him. *Block v. Toyota Motor Corp.*, 665 F.3d 944, 948 (8th Cir. 2011). "A plaintiff cannot defeat a defendant's right of removal by fraudulently joining a defendant who has no real connection with the controversy." *Wilkinson v. Whirlpool Corp.*, 2014 WL 98801, at *2 (W.D. Ark. Jan. 10, 2014). If the non-diverse defendant is fraudulently joined, CAFA may apply without need to consider whether the local controversy exception applies.

One important benefit of the fraudulent joinder doctrine is that a court may consider extrinsic evidence in making its determination. *Block*, 665 F.3d at 948. In two recent cases, Arkansas federal courts have relied upon undisputed affidavits from non-diverse employee defendants to hold that they had been fraudulently joined. In *Wilkinson* and *Atwood v. Peterson*, 2015 WL 11108981 (E.D. Ark. Sept. 10, 2015), the plaintiffs made certain allegations about the non-diverse employees that supposedly supported plaintiffs' claims against them. The defendants in each case submitted affidavits contradicting those allegations in support of their petitions for removal; the plaintiffs contended that the federal court should disregard the affidavits.

In *Wilkinson*, however, Judge P.K. Holmes held that "[i]n evaluating whether state law might impose liability on [the local defendant], the Court is not obligated to accept as true the facts alleged in the amended complaint when it is presented with undisputed evidence to the contrary." 2014 WL 98801, at *3. Judge Moody held similarly in considering the affidavits presented in *Atwood*. Both cases held that in the absence of any evidence put forth by

the plaintiffs to contradict the affidavits, fraudulent joinder had been established and federal jurisdiction was proper. *Atwood*, 2015 WL at *4.

In conjunction with this type of fraudulent joinder analysis, defense counsel should also attempt to demonstrate that the non-diverse defendant is either not a "significant basis" of the class claim or not a defendant from whom "significant relief" is sought. In making this argument, it is important to explain that "the local-controversy exception to CAFA jurisdiction is a narrow exception that was carefully drafted to ensure that it does not become a jurisdictional loophole." *Westerfeld v. Independent Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010).

The analysis of whether a defendant is "significant" is two-fold. First, whether a defendant's conduct is a "significant basis" for the claims "cannot be decided without comparing it to the alleged conduct of all the Defendants." *Id.* at 825 (quoting *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 151 (3d Cir. 2009)). In many circumstances, this will involve an analysis of the defendant's interactions with the class. A defendant who had limited interaction with the class as a whole (in *Westerfield*, the non-diverse defendant had serviced only 56 of the 3,894 loans as issue), is far more likely to be found insignificant. While courts have split over the extent to which extrinsic evidence can be used to conduct this analysis, the Eighth Circuit endorses at minimum the use of objective evidence demonstrating limited interactions. 621 F.3d at 823-24; *but see Rhodes v. Kroger Co.*, 2015 WL 5006070 (W.D. Ark. Aug. 24, 2015) (Holmes, J.) (holding that the plain language of CAFA bars the use of extrinsic evidence).

Second, the question of whether the complaint seeks "significant relief" against a defendant analyzes "whether the relief sought from a particular defendant amounts to a significant part of the total relief sought." *Green v. SuperShuttle Intern., Inc.*, 2010 WL 419964, at *3 (D. Minn. Jan. 29, 2010). A non-diverse defendant is not "significant" if the relief being sought from him is "small change" compared to what is truly being sought from the diverse defendant. *Coleman v. Estes Exp. Lines, Inc.*, 631 F.3d 1010, 1018 (9th Cir. 2011). This determination can often be made from the face of the complaint. The Ninth Circuit recognized in *Coleman*, where a putative class sued a trucking company and a non-diverse truck driver for millions of dollars in damages resulting from an accident, that "any experienced lawyer or judge reading the complaint would have known that 'significant relief' was not being sought against the truck driver." *Id.* at 1019-20.

It is important to consider both fraudulent joinder and the significance analysis of CAFA in order to cover all potential bases of federal jurisdiction. A non-diverse defendant who is potentially liable to only the class representative may not be fraudulently joined, but is insignificant to the class as a whole. On the other hand, a non-diverse defendant who interacted with many class members might be significant, yet fraudulently joined, if he or she had nothing to do with the allegations in the case. By making a two-part inquiry into class actions purporting to rely upon the "local controversy" exception, defense counsel stand a better chance of federal jurisdiction.

The thanks of the AADC go out to Chad W. Pekron of Quattlebaum, Grooms & Tull PLLC for writing this article.

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