Best Practices for the Settlement of Class Actions When You Have Parallel U.S. and Canada Proceedings

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The Pella Settlements

A Tale of Two Countries

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Pella Class Action Allegations

- Water could penetrate Pella's Architect, Designer and ProLine ranges of windows
- Water penetration caused wood rot and damage to property where installed
- Pella was aware of defect and drafted limited warranties

Posner Rejects Settlement

- **Pella Class-Action Settlement Is So Bad Court Tosses Lawyer -- And His Father-In-Law Lead Plaintiff**
  - Forbes
- **Posner Savages 'Scandalous' Settlement in Pella Case**
  - The National Law Journal
- **Posner tosses 'scandalous' settlement, says judge didn't heed danger signs**
  - ABA Journal

Canada

Settlement Approved

WHY?

Settlement Approval in Canada

- Approved by Judge
- Settlement Terms
- Affidavit Explaining Settlement
- Notice to Class
- Objectors
- Typically Approved

Pella Settlement U.S.A. v. Canada - Similarities

- Compensation to Named Plaintiffs – Same
- Maximum Damage Award per 'Structure" – Same
- Maximum Damages per Window and Installation – Same
- Coupons Part of Settlement – Same
- Warranties Extended Where Applicable – Same
- Counsel Fees to be Paid Before Process Complete – Same

Pella Settlement
U.S.A. v. Canada – Similarities (Cont'd)

- Length and Complexity of Notice – Same
- Length of Claim Forms – Same
- Significant Information Required to Complete Claim – Same
- Claim Could be Rejected if From not Filled out Completely and Correctly – Same
- Reduction in Legal Fees Reverts to Pella Rather then Class – Same

Pella Settlement
U.S.A. v. Canada - Differences

Value of Settlement

U.S.A. – Plaintiff Estimate $90,000,000

- Defendant Estimate – Between $8,500,000 to $22,500,000

Canada – No Estimate of Value of Settlement Given

Pella Settlement
U.S.A. v. Canada – Differences (Cont'd)

Class Counsel Fees

- **U.S.A.** – $11,000,000
- **Canada** – $650,000

Pella
U.S.A v. Canada – differences

Representative Plaintiff

- Canada – Independent
- U.S.A. – father-in-law

Objectors

- Canada – no
- U.S.A. – yes, including original representative plaintiffs

Implications

Canada – lower certification threshold

- Less scrutiny of class action settlements?

U.S.A. – class action reform

- Forum Shopping – moving actions to Canada?
- Migration of U.S.A. plaintiff's bar north?
- Potentially larger classes and claims in Canadian class actions

Update on Dart Cherokee: Supreme Court Confirms Easier Standard for CAFA Removal Notices
By Christopher M. Mason and Daniel Deane

If you believe that all closely decided United States Supreme Court decisions divide along supposedly "liberal" and "conservative" lines, the 5–4 decision in Dart Cherokee Basin Operating Co. v. Owens, No. 13-719 (Dec. 15, 2014), announced this morning, will cause you to have second thoughts. By a narrow margin, a majority of the court, consisting of Justices Ginsburg as the author, joined by Chief Justice Roberts and Justices Breyer, Alito, and Sotomayor, held that the court had jurisdiction in that case to review the question of whether a notice of removal must contain evidence to support the claimed removal, and concluded that such a notice need not contain evidence, but only—as 28 U. S. C. §1446(a) provides on its face—"a short and plain statement of the grounds for removal." Dart Cherokee, No. 13-719, slip op. at 5 (emphasis added). Justice Scalia, joined by Justices Breyer and Kennedy in dissent, would have dismissed the case as an improvident grant of certiorari (or would have affirmed the refusal of the Tenth Circuit to review the case). Justice Thomas would simply have dismissed for lack of jurisdiction. (In fact, based on the court's questioning during oral arguments in October, many of us believed that the court would likely choose one or the other of these paths to avoid deciding the merits. See Alert, Supreme Court Oral Arguments: Tenth Circuit Aberration on CAFA Removal Likely to Evade Review, October 9, 2014.)

The Dart Cherokee decision arose out of an oil and gas royalty class action in Kansas, as did the famous class action case of Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). Unlike Shutts, however, which came to the United States Supreme Court on certiorari from the state supreme court, the Dart Cherokee case arrived from the federal side of the ledger—which was, as explained below, largely the reason the court split 5–4 over an arcane appellate review question not involving the actual removal in the district court.

The plaintiff in Dart Cherokee commenced a putative class action in Kansas state court (as had the plaintiff in Shutts). He sought damages for alleged underpayment of royalties on oil and gas leases. (The plaintiff in Shutts had sought damages for underpayment of interest on such royalties.) But, unlike Shutts, the defendants in Dart Cherokee, using amendments to diversity jurisdiction (unavailable in Shutts) created by the 1995 Class Action Fairness Act ("CAFA"), removed the putative class action to federal court on grounds that the class, which contained at least one member of diverse citizenship, was larger than 100 members and that the amount in controversy exceeded $5 million, 28 U.S.C. § 1332(d)(2), (5)(B).

In particular, the defendants alleged that the purported underpayments addressed by the complaint would total more than $8.2 million. They did not, however, provide any evidence to support that allegation.

The plaintiff moved to remand the case to state court, arguing that this lack of evidence made the removal notice "deficient as a matter of law." Dart Cherokee, No. 13-719, slip op. at 2. The defendants countered by submitting a declaration from an executive, calculating that the amount in controversy actually exceeded $11 million. Not swayed by this later-filed declaration, the district court remanded the case, holding that evidence of the amount in controversy had to appear in the notice of removal itself.

The grant of a remand motion is not a final order that gives the loser a right to appeal, but under CAFA either party may seek leave to appeal any remand decision. See 28 U.S.C. §1453(c)(1) ("a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand.") (emphasis added). The defendants, therefore, asked the Tenth Circuit to grant a motion for permissive review of the district court's remand order.

Despite this permissive review provision, and despite the somewhat unusual interpretation the district court had given CAFA's removal provisions, the Tenth Circuit denied leave to appeal. When the defendants sought a rehearing en banc, an evenly divided court denied that as well. The defendants then sought a writ of certiorari on the question of "[w]hether a defendant seeking removal to federal court is required to include evidence supporting federal jurisdiction in the notice of removal, or is alleging the required 'short and plain statement of the grounds for removal' enough?" Dart Cherokee, No. 13-719, slip op. at 4.

The Supreme Court granted review and, following briefing and oral argument, reversed. The majority, relying on the language of the removal statute and on its parallel to the language of Federal Rule of Civil Procedure 8(a), held that the "short and plain statement" required for removal meant a statement in the form of allegations, not in the form of evidence. Id., slip op. at 5. With respect to amount in controversy in a diversity case, this analysis makes the burdens of establishing federal jurisdiction parallel for plaintiffs and defendants. If a plaintiff sues in federal court and alleges diversity jurisdiction, "the plaintiff's amount-in-controversy allegation is accepted if made in good faith." Id. The same should logically be true for a defendant claiming federal diversity jurisdiction by removal, unless the plaintiff contests the amount, in which case, then and only then does the district court need to "find[], by the preponderance of the evidence, [whether] …. the amount in controversy exceeds" the jurisdictional threshold. 28 U.S.C. § 1446(c)(2)(B) (cited in Dart Cherokee, No. 13-719, slip op. at 6). Thus,

> as specified in §1446(a), a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence establishing the amount is required by §1446(c)(2)(B) only when the plaintiff contests, or the court questions, the defendant's allegation.

Dart Cherokee, No. 13-719, slip op. at 7 (emphasis added); cf., e.g., Ashcroft v. Iqbal, 556 U.S. 662, 677–678 (2009) (plausibility standard under Fed. R. Civ. P. 8(a)(2)).

This holding has a very useful, practical significance for defendants, particularly defendants in class actions. It certainly makes removal easier. And even the justices who dissented from the decision would appear to agree that the majority has correctly interpreted the underlying removal statutes. See Dart Cherokee, No. 13-719, slip op. at 7 (Scalia, J. dissenting) ("Instead of correcting an erroneous district court opinion at the expense of an erroneous Supreme Court opinion, I would have dismissed this case as improvidently granted."). But the unusual posture of the case still led to a 5–4 split.

The split arose because the court was not reviewing "an erroneous district court opinion"; it was reviewing whether or not the Tenth Circuit had (according to the majority) abused its discretion in refusing to review that erroneous district court opinion. According to the majority, the matter was "in" the Court of Appeals and, therefore, the Supreme Court could review what the Court of Appeals did or did not do. Dart Cherokee, No. 13-719, slip op. at 8 (citing, e.g., 28 U.S.C. § 1254).

Furthermore, because the decision whether to grant review was permissive, it was a matter of discretion—"matters of discretion are reviewable for abuse of discretion"—and "a ruling based upon an erroneous application of the law is necessarily an abuse of discretion." Id., slip op. at 8–9 (internal quotation omitted). Under this standard, the majority could find only one possible explanation in the record for the Tenth Circuit's refusal to grant leave to appeal—an erroneous belief that a notice of removal must (as the district court had held) contain evidentiary support for the amount in controversy claimed. See id., slip op. at 9–10.

According to Justice Thomas, however, whatever was "in" the Court of Appeals (an application for permission to appeal) was not a "case." Id., slip op. at 1 (Thomas, J., dissenting). It therefore fell outside the grant of jurisdiction for "[c]asses in the courts of appeals." Id. (quoting 28 U.S.C. § 1254).
Justice Scalia, joined by the other dissenters, had a more understandable concern: there could have been many reasons the Tenth Circuit denied leave to appeal. As he put it, the Court of Appeals could have:

> Den[ied] permission to appeal for reasons not mentioned in the parties' briefing … [or] because it would be unable to resolve the issue within 60 days,

> as required by CAFA (absent an extension) … [or for] numerous other grounds for denial, including those applied by this Court in denying petitions for certiorari. There is, to tell the truth, absolutely nothing in the Tenth Circuit's order to suggest that it relied on the unlawful ground that the Court eagerly attributes to it, rather than one of many possible lawful grounds.

Id., slip op at 4 (Scalia, J., dissenting). Thus, either the record was not a good one for prudential review or, if it was a record to be reviewed, these other possibilities meant that "we have absolutely no basis for concluding that [the Tenth Circuit] abused its discretion." Id., slip op. at 8 (Scalia, J., dissenting).

There is some persuasive force to this dissent. In part to address the dissenters, Justice Ginsburg first cited with approval Judge Hartz, who had dissented from the Tenth Circuit's en banc decision on grounds that the issue would evade further review, absent attention from the Court of Appeals, because no "diligent attorney" would in the future seek removal under CAFA without submitting evidence in support of a notice of removal. Id., slip op. at 4 (quoting Dart Cherokee Basin Operating Co. v. Owens, 730 F. 3d 1234, 1235 (10th Cir. 2013)). She then noted that, if the Supreme Court were also to decline to correct the Tenth Circuit's failure to hear the matter, an incorrect standard for CAFA removal would have "be[en] frozen in place for all venues within the Tenth Circuit." Id., slip op. at 10.

Regardless of whether the majority's analysis of the jurisdictional question is intellectually honest, the majority's analysis of the merits of the remand issue is very persuasive. At worst, therefore, the Dart Cherokee decision involves the somewhat unusual result of a possibly bad case making rather good law to avoid other future bad cases. Parties seeking to remove to federal court should make good use of that good law in the future.

Supreme Court holds post-shift security screenings are not wage theft

By Oswald Cousins and Jessica S. Jewell

Many employers breathed a collective sigh of relief last week when the United States Supreme Court issued a unanimous decision in Integrity Staffing Solutions, Inc. v. Jesse Busk et al. that the Fair Labor Standards Act ("FLSA") did not require an employer to pay its warehouse employees for the time they spent waiting for and undergoing security checks before leaving work. This is an important decision for employers in the many states where the FLSA controls the definition of "work." It will have less impact in the roughly 25% of jurisdictions that have their own laws defining compensable work or hours.

The Supreme Court addressed whether the employer, Integrity Staffing Solutions, Inc. (which provides staffing for Amazon.com warehouses), was required to pay its employees for the roughly 25 minutes they spent each day waiting for or undergoing antitheft screenings. The employees claimed that, under the FLSA, they should have been paid for this time because the screenings were required by, and for the sole benefit of, the employer. They also argued that Integrity Staffing could have reduced the screening time to a de minimis amount by hiring more screeners or staggering shifts. Integrity Staffing countered that it was not obligated to pay the employees for the screening process because the Portal-to-Portal Act created an exemption for "preliminary" or "postliminary" activities that are not "integral and indispensable" to the employees' principal activities.

The Court agreed with Integrity Staffing, holding that the screenings were not "principal activities," nor were they "integral and indispensable" to any principal activities. The employees' primary activity was to retrieve products from warehouse shelves and package them for shipment to Amazon.com customers. Because the employees could have done this without going through the screenings, the Court held they were not "integral and indispensable" to the primary activity. The Court contrasted this with meat cutters who were required to sharpen knives before or after work. The time they spent sharpening knives was integral and indispensable because they need sharp knives to perform the principal activity of cutting meat. The Court rejected the employees' proposed "required by the employer" and "for the benefit of the employer" tests because they were overbroad and would "sweep in" activities that the Portal-to-Portal Act was designed to exclude. The Court also held that the employees' argument that Integrity Staffing should have reduced the time spent in screenings by hiring more screeners or staggering shifts was not relevant to whether the screenings were integral and indispensable to the principal activity. The Court noted that this is an issue for the bargaining table and not for an FLSA lawsuit.

This decision may provide comfort to many employers that require employees to perform activities before or after work that are not essential to the employees' primary activities. Other employers may decide to change their practices and stop paying employees for various preliminary or postliminary activities. However, employers should proceed with caution because this decision only clarifies how the Portal-to-Portal

Act exemption applies under federal law. It may have little or no application in jurisdictions that define compensable work differently than federal law. In California, for example, employers must compensate employees for all hours worked, which includes "the time during which an employee is subject to the control of an employer." A California court may find that an employee who waits 25 minutes to pass through an employer-required security screening is entitled to compensation for that time. Thus, a California employer should either record and pay for the time or it should implement measures to expedite the screenings so that the time is de minimis. Thus, all employers should carefully review the applicable state law and consult with counsel before requiring employees to participate in activities before or after work.

Supreme Court oral arguments: Tenth Circuit aberration on CAFA removal likely to evade review

By Scott O'Connell and Dan Deane

One bizarre turn deserves another . . . and another. Following oral arguments Tuesday, the United States Supreme Court appears poised to dismiss as improvidently granted the writ of certiorari previously granted in Dart Cherokee Basin Operating Co. v. Owens, Case No. 13-719, a case that considers the proof necessary to establish the amount in controversy required for removal to federal court under the Class Action Fairness Act ("CAFA").

The controversy started with an unexpected ruling in the United States District Court for the District of Kansas that remanded back to state court a class action concerning allegedly deficient royalty payments.[1] Under CAFA, a defendant may remove a class action to federal court when (1) there are at least 100 putative class members, (2) at least one class member is a citizen of a different state than the defendant, and (3) there is at least $5 million in controversy in the aggregate.[2] Congress passed CAFA in 2005 based on concerns that class action defendants were not getting a fair day in court in state court class actions.

Almost every federal court in the country has accepted the premise that removal to federal court is accomplished through "notice pleading" similar to that required for a complaint under Rule 8. Under the removal statute, 28 U.S.C. § 1446(a), a defendant may remove to federal court simply by filing a notice of removal signed under Rule 11 "and containing a short and plain statement of the grounds for removal." The notice of appeal in Dart Cherokee asserted an amount in controversy in excess of $8 million and provided a short and plain explanation for that calculation.

The plaintiffs nevertheless argued that, under 28 U.S.C. § 1446(c)(2)(B), the district court must find the amount in controversy by a "preponderance of the evidence." The district court agreed with the plaintiffs and ruled that the evidence required for such a finding must be included with the notice of appeal. The district court remanded the case to the state court despite the fact that defendants submitted evidence, subsequent to the notice of appeal, establishing an amount in controversy exceeding $14 million. The district court's decision places a significant evidentiary burden on defendants at a very early stage in proceedings as a notice of removal ordinarily must be filed within 30 days of the complaint.[3]

The second bizarre turn occurred at the United States Court of Appeals for the Tenth Circuit. Ordinarily, a district court decision to remand to state court is not reviewable. But again, CAFA intervenes on behalf of class action defendants by providing that "a court of appeals may accept an appeal from an order granting" a motion to remand in a CAFA removal.[4] But, despite this permissive review provision, and despite the district court's unusual interpretation of the removal statute, a Tenth Circuit panel, and then the full en banc Tenth Circuit, denied the defendants' application to hear their appeal without explanation. Four Tenth Circuit judges filed an opinion vigorously dissenting from the en banc court's decision.[5] The dissenters noted that the district court's ruling "imposes an evidentiary burden" at the notice of removal stage that "is foreign to federal-court practice" and that "has never been imposed by a federal appellate court."[6] Moreover, the dissenters predicted that the Tenth Circuit may not get another chance to correct the erroneous ruling as "any diligent attorney . . . would submit to the evidentiary burden rather than take a chance on remand to state court."[7]

Thus, it appeared the Supreme Court was poised to reverse the Tenth Circuit decision to allow an outlier district court ruling to stand. But oral arguments almost immediately revealed that yet a third twist, this time a procedural one, would prevent the correction of this error. During questioning of defense counsel, the justices made clear that they had carefully reviewed Public Citizen's amicus brief on behalf of plaintiffs, which argues that the Supreme Court lacks

1 See Owens v. Dart Cherokee Basin Operating Co., Case No. 12-4157, 2013 WL 2237740 (D. Kan. May 21, 2013).

2 28 U.S.C. § 1332(d).

3 28 U.S.C. § 1446(b).

4 28 U.S.C. § 1453(c) (emphasis added).

5 Dart Cherokee Basin Operating Co. v. Owens, 730 F.3d 1234 (10th Cir. 2013) (en banc dissenting opinion).

6 Id. at 1235.

7 Id.

jurisdiction to review the merits of the district court's remand order because the Tenth Circuit's decision to decline hearing the appeal was a purely discretionary decision under § 1453(c). Several of the justices likened the Tenth Circuit's discretionary CAFA review to the Supreme Court's own certiorari process. Justice Scalia rhetorically quipped: "I guess it's an abuse of discretion whenever we fail to correct a clear error of law on a petition for certiorari. Right? . . . . I thought we had the power to say we don't feel like taking it."

Thus, while the justices all but declared their agreement with the defendants' arguments on the merits, due to an obscure procedural quirk, it appears that the Supreme Court will likely dismiss the case without reaching merits. As a consequence, and as the Tenth Circuit dissenters feared, the Tenth Circuit will remain an outlier on CAFA removal. Defendants of class actions arising in Wyoming, Utah, Colorado, Kansas, New Mexico and Oklahoma must be alert to the fact that, under the law of the Tenth Circuit, it is at least arguable that defendants must attach evidence to their notice of removal establishing by a preponderance of the evidence that the amount in controversy is at least $5 million. Failure to do so risks remand to state court.

State of the FLSA
By Joseph A. Carello

As Labor Day approached, we reviewed the state of the American labor movement and labor law in our August 29 client alert. Continuing our Labor Day reflections, it also seems a fitting time to reflect on the state of the Fair Labor Standards Act ("FLSA"), one of the hallmarks of Franklin D. Roosevelt's New Deal that was designed, in part, to provide minimum levels of compensation to U.S. workers. At bottom, the FLSA's premise is simple and uncontroversial—it requires all employees to be paid the minimum wage for all hours worked up to forty in a week, and one and one-half times their regular rate of pay for any hours worked over forty per week. The FLSA contains numerous exemptions to these minimum wage and overtime requirements, the most common of which are known as the "white collar" exemptions.

Unfortunately, in recent years many plaintiffs' attorneys have taken advantage of ambiguities in the FLSA and its implementing regulations, which have not been updated to conform to today's modern workforce. The number of lawsuits filed under the FLSA increased by 10% from 2012 to 2013. The number of FLSA collective actions—the statute has its own special type of group action that requires employees to affirmatively opt into a case—has increased over 400% since 2000. The reasons behind these marked increases in filings are many. First, the FLSA contains an attorneys' fees provision for prevailing parties, which often permits plaintiffs' attorneys to recover most of their fees, even if the claim they bring is not completely successful. Second, some courts have set a relatively low bar for conditional certification of a FLSA collective action—permitting notice of the lawsuit to be issued based on very little evidence of alleged widespread violations. Third, the FLSA has only become a compliance priority for the U.S. Department of Labor in the recent past. Wage-hour violations that went unchecked for years have recently drawn the attention of government regulators. Fourth, the FLSA was passed in 1938, and has not undergone any significant updates or revisions since that time, which makes compliance for modern employers that much more difficult.

The updates to the FLSA that are on the horizon do not appear to bring any relief to the onslaught faced by employers in recent years. Effective January 1, 2015, nearly two million home health care workers will become subject to the minimum wage and overtime requirements of the FLSA, as the Department of Labor recently narrowed the scope of the home health care worker exemption to the FLSA.

In April, President Obama indicated that the white collar exemptions "have not kept up with our modern economy" and that, "because these regulations are outdated, millions of Americans lack the protections of overtime and even the right to the minimum wage." Accordingly, President Obama directed Labor Secretary Perez to "propose revisions to modernize and streamline the existing overtime regulations." These revised regulations are likely to narrow the duties that qualify as exempt from the FLSA's overtime requirements, as well as increase the minimum weekly salary (currently $455 per week) that employees must earn in order to qualify for these exemptions.

As many states, counties and cities increase the minimum hourly wage paid to employees working within their confines, a growing coalition is advocating for an increased minimum wage (currently $7.25 per hour) at the national level as well. Many advocates, including the president, have stated that, in light of the growing number of individuals working in low wage jobs after the Great Recession, the minimum wage should be increased to $10.10 per hour.

Given the continued focus on FLSA suits by the plaintiffs' bar and the coming changes aimed at increasing the number of workers covered by the FLSA, this Labor Day is as good a time as any for employers to review their timekeeping

policies and practices and audit the duties of their exempt employees.

Ninth Circuit says PAGA claims are not class actions under CAFA

By Dale A. Hudson and Rachel L. Fischetti

Bringing us one step closer to understanding California's Private Attorneys General Act ("PAGA"), which allows employees to enforce the state's Labor Code by pursuing civil penalties on behalf of the state's Labor and Workforce Development Agency, the United States Court of Appeals for the Ninth Circuit recently held that an action under PAGA is not a "class action" under the Class Action Fairness Act ("CAFA") and subsequently cannot be removed to federal court on the basis of that statute.

In Baumann v. Chase Investments Service Corp., Joseph Baumann sued his employer, Chase Investment Services Corporation ("Chase"), under PAGA in a California superior court, alleging that Chase had failed to pay him and employees for overtime, to provide meal and rest periods and to timely reimburse business expenses. The complaint sought PAGA civil penalties for each alleged violation and asserted that Baumann's potential share of any penalties recovered, together with attorneys' fees, would be less than $75,000.

Chase filed for removal to federal court, invoking diversity jurisdiction by alleging that the amount in controversy would exceed $75,000 if all potential penalties and attorneys' fee awards were aggregated.

Chase also alleged jurisdiction under CAFA, which authorizes removal to federal court if there is minimal diversity, a class of more than 100 members and the amount in controversy exceeds $5,000,000. The district court found the action could be removed under traditional diversity jurisdiction by aggregating the potential PAGA penalties against Chase. The district court did not address CAFA jurisdiction.

While the Baumann appeal was pending, the Ninth Circuit decided Urbino v. Orkin Services, which held that PAGA penalties against an employer may not be aggregated to meet the minimum amount in controversy requirement for traditional diversity. Thus, the sole question remaining on appeal was whether a PAGA action is a "class action" under CAFA. CAFA defines a class action as "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or a similar state statute . . . authorizing an action to be brought by one or more representative persons. . . ." Thus, the question boiled down to the PAGA suit "was 'filed under' a state statute . . . 'similar' to Rule 23 that authorizes a class action."

The court concluded that PAGA actions are not sufficiently similar to Rule 23 class actions to trigger CAFA jurisdiction. Unlike Rule 23, PAGA has no notice requirements for unnamed aggrieved employees, nor may such employees opt out of a PAGA action. In a PAGA action, the court does not inquire into the ability of plaintiff and class counsel to fairly and adequately represent unnamed employees—critical requirements in federal class actions. PAGA also contains no requirements of numerosity, commonality or typicality.

In addition, the finality of PAGA judgments differs from that of class action judgments. Federal and state rules governing class actions generally provide that class members who receive notice of the action, and decline to opt out, are bound by any judgment. In contrast, PAGA provides that employees retain all rights "to pursue or recover other remedies available under state or federal law, either separately or concurrently with" a PAGA action. If the employer defeats a PAGA claim, the nonparty employees, because they were not given notice of the action or afforded an opportunity to be heard, are not bound by the judgment as to remedies other than civil penalties. The nature of PAGA penalties are also markedly different than damages sought in class actions, where damages are typically restitution for wrongs done to class members. The court concluded that a PAGA action is "at heart a civil enforcement action filed on behalf of and for the benefit of the state, not a claim for class relief."

The court declined to decide whether a federal court may allow a PAGA action otherwise within its original jurisdiction to proceed under Rule 23 as a class action.

Looking ahead: While this case means more PAGA claims will be kept out of federal court, a preferred venue for employers, it does provide much needed guidance for courts and litigants. As PAGA actions become more common, employers should expect to see more decisions defining the parameters of that law.

Changes to the Fair Labor Standards Act will increase overtime pay to millions
By Neal McNamara

President Barack Obama signed a Presidential Memorandum earlier this month that the White House states is aimed at "updating and modernizing" certain overtime eligibility rules for employees. Specifically, expected changes will result in broadening the category of workers eligible to receive overtime compensation under the Fair Labor Standards Act ("FLSA"). Under the FLSA, employees working more than forty (40) hours per week must receive overtime pay, unless they are exempt under the FLSA and its regulations. This means that certain employees are ineligible for overtime pay, regardless of how many hours per week they work. Currently, one of the ways in which an employee becomes exempt from receiving overtime pay is if they are so-called "white collar" employees who earn at least $455 per week.

President Obama stated that the United States Department of Labor, which enforces the FLSA, will revisit the overtime pay threshold. The White House noted that the $455 per week cap has not been updated in a decade and needs to be revamped. Sources are speculating that the new threshold could be anywhere from $550 to $1,000, although the exact amount of the increase is unknown. An increase to $984 per week would mean that white collar workers earning approximately $50,000 per year would now be eligible for overtime pay. Depending on the new threshold, roughly 5 to 10 million workers could be eligible for overtime compensation, shifting billions of dollars of income to these newly eligible workers.

The Presidential Memorandum also instructs the Department of Labor to consider simplifying the overtime rules to make them easier for both businesses and employees to understand and apply. It is likely that any changes to these rules will become effective in 2015.

Supreme Court interprets SLUSA narrowly, allowing state law class actions to proceed against advisors ensnared in frauds
By Christopher M. Mason, Carolyn G. Nussbaum, Constance M. Boland and Kate A.F. Martinez

On Wednesday, the United States Supreme Court affirmed the Fifth Circuit and held that state law class actions against investment advisors, insurance brokers and law firms alleging that they helped Allen Stanford and his companies perpetrate a fraud were not subject to, and therefore were not precluded by, the Securities Litigation Uniform Standards Act (commonly referred to as "SLUSA").[1] The Court's less expansive interpretation of SLUSA led the dissent, authored by Justice Kennedy, to warn of a corresponding limitation on the enforcement authority of the SEC, which the majority painstakingly dispelled.

Analysis
The decision in Chadbourne & Parke is viewed as a rare win for the plaintiffs' securities bar, allowing state law claims to proceed against secondary actors, such as advisors, accountants and counsel, which the federal securities laws would otherwise bar.[2] On the other hand, the Court took great pains to limit its holding to this case, repeatedly stressing that its decision would not disturb a single case that the SEC has brought in 80 years, or the Court's own precedent, and that it applies only to fraud involving securities not traded on national exchanges.

Defendants facing securities claims can only hope that the Court will adopt a similarly strict reading of the securities laws in Halliburton Co. v. Erica P. John Fund, Inc.,[3] when it may reconsider the contours of the "fraud-on-the-market" doctrine that the Court created twenty-five years ago in Basic, Inc. v. Levinson.[4] Commentators agree that the elimination or significant limitation of that doctrine could sound the death knell for securities class actions, and (perhaps with some hyperbole) have labelled Halliburton as the most important case to come before the Supreme Court in years, if not decades. With the Court having now given plaintiffs two class action "wins" (in the sense of permitting more, rather than fewer, class actions) this year, the arguments scheduled for next week may provide some insight into whether the Court will continue its trend of imposing a high bar for securities class actions, or will use Halliburton to provide some relief from marginal securities fraud class actions and the high costs they impose.

Background
Allen Stanford and his companies were convicted of running a multibillion dollar Ponzi scheme. Plaintiffs here alleged that Stanford sold certificates of deposit in the Stanford International Bank (the "Bank") and falsely represented that the investments were safe and secure because the Bank

1 15 U.S.C. § 78bb(f)(1)(A). See Chadbourne & Parke LLP v. Troice, No. 12-79 (U.S. Feb. 26, 2014). This is the second decision from the Court to favor more state class actions. A little more than a month ago, the Court reversed the Fifth Circuit and held, in Mississippi ex rel. Hood v. AU Optronics Corp., No. 12-1036, 2014 U.S. LEXIS 645 (Jan. 14, 2014), that a lawsuit by a state attorney general on behalf of state citizens is not a "mass action" for purposes of federal removal jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(11)(B). See Christopher M. Mason, Dan Deane, and Melisa E. Gerecci, The Supreme Court Restricts the Scope of "Mass Action" Removals Under CAFA (Jan. 15, 2014), available at http://www.nixonpeabody.com/Supreme_Court_restricts_scope_of_mass_action_removals_under_CAFA.

2 See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 189 (1994) (cited in, e.g., Chadbourne & Parke LLP, slip op. at 5 (Kennedy, J., dissenting)).

3 No. 13-317 (to be argued on March 5, 2014).

4 485 U.S. 224 (1988).

would invest the proceeds in high-quality stocks and bonds, which it did not. Stanford is presently serving an extended prison sentence and was ordered to forfeit $6 billion. The SEC also successfully pursued a civil case against Stanford and his associates.

Plaintiffs filed four class actions in Texas federal court and Louisiana state court against various entities that provided Stanford with investment, trust, legal, insurance and accounting services, alleging the defendants helped the Bank perpetrate the fraud or conceal it from regulators. The Louisiana cases were removed to federal court, consolidated and transferred to the Northern District of Texas.

The lower courts' decisions

Defendants in each case moved to dismiss, arguing that SLUSA required dismissal. SLUSA precludes state law class actions alleging "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security."[5] Covered securities include stocks and bonds traded on national exchanges. The district court granted the motions to dismiss, concluding that because each complaint alleged misrepresentations relating to the Bank's ownership of covered securities and plaintiffs relied on these statements in purchasing the CDs, the claims were within the scope of SLUSA.

On appeal, the Fifth Circuit reversed. It held that claims that defendants facilitated Stanford's sale of CDs (which are not covered securities) by falsely representing that the CDs were to be backed by covered securities were outside the scope of SLUSA. The Fifth Circuit reasoned that the "crux" of the fraud was the false portrayal of the CDs, and the claimed misrepresentations about the Bank's ownership of covered securities were only "tangentially related" to this fraud. Thus, the court concluded that the claims were not covered by SLUSA.[6] Defendants in each of the class actions sought certiorari, which the Supreme Court granted.[7]

The Supreme Court's decision

Perhaps as a signal of the Court's independence, Justice Breyer rejected the almost-universal acronym of "SLUSA" used by the securities bar and bench and opened his opinion with a declaration that "we shall refer to [it] as the 'Litigation Act.'"[8] Ultimately, the decision turned on the Court's interpretation of the extent to which the claimed fraud was "in connection with" the purchase or sale of a "covered security." Writing for a seven-member majority, Justice Breyer held that the language and intent of SLUSA require that the claimed misrepresentations make "a significant difference" to the purchase or sale of a covered security.[9] In addition, the person who "took, tried to take, or maintained an ownership position in the statutorily relevant securities through 'purchases' or 'sales' induced by the fraud," must have been someone other than the fraudster.[10] Here, the alleged misstatements were alleged to have been material to the purchasers of uncovered securities (the CDs) and only the Stanford affiliates purchased or sold covered securities. However, as the dissent aptly notes, SLUSA does not include the word or concept of an "ownership position," and does not specify who must be the buyer or seller of a covered security.

The most interesting part of the decision may be the debate between the majority and dissenters over the implications of the Court's ruling. The majority stressed that its ruling was fully consistent with precedent, claiming that every securities case to come before the Court has "involved victims who took, who tried to take, who divested themselves of, who tried to divest themselves of, or who maintained an ownership interest" in securities. However, the narrow interpretation applied here of the "in connection with" phrase may seem inconsistent with language in prior decisions of the Court that expressly state the phrase should be given a "broad interpretation" and read "flexibly." The dissent (echoing the position of the Government) warned that the restrictive application of the phrase (found throughout the securities statutes) will impinge on the enforcement powers of the SEC, and may also limit investors' rights. But the majority gives short shrift to that prediction of dire consequences, claiming that its interpretation would not preclude a single case that the SEC has brought in 80 years, and noting that the decision actually will "also preserve the ability for investors to obtain relief under state laws when the fraud bears so remote a connection to the national securities market that no person actually believed he was taking an ownership position in that market." Justice Breyer pointed out that that the Government, invoking the provisions of the federal securities laws that reach fraud in connection with the purchase or sale of all securities, had managed to convict Stanford, obtain a 110-year sentence, and obtain billion-dollar fines.

Conclusion

While assertedly based on statutory interpretation methods, the Chadbourne & Parke decision reads very much like a straight common law opinion, picking and choosing among a number of reasonably possible arguments to achieve an outcome that a particular jurist or set of jurists considers appropriate to this time, place and circumstance. In truth, this is only the warm-up to the main act of Halliburton. Perhaps the oral arguments in that case will provide some clue of whether a majority of the Court will revisit its 25-year

5 See 15 U.S.C. § 78bb(f)(5)(E).

6 Roland v. Green, 675 F.3d 503, 520, 522 (5th Cir. 2012).

7 Chadbourne & Parke LLP v. Troice, 133 S. Ct. 977 (2013); Willis of Colo. Inc. v. Troice, 133 S.Ct. 977 (2013); Proskauer Rose LLP v. Troice, 133 S. Ct. 978 (2013).

8 Chadbourne & Parke LLP, No. 12-79, slip op. at 1.

9 Chadbourne & Parke LLP, No. 12-79, slip op. at 8.

10 Id., slip op. at 10 (emphasis added).

old precedent of Basic, Inc. v Levinson.

The Supreme Court restricts the scope of "mass action" removals under CAFA

By Christopher M. Mason, Dan Deane, and Melisa E. Gerecci

Less than a year ago, the United States Supreme Court strengthened removal jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(2), (5), by holding that a plaintiff could not avoid the jurisdictional minimum for removal simply by disclaiming damages above $5 million.[1] Monday, the Court again clarified one of the outer edges of CAFA removal jurisdiction by holding unanimously that a lawsuit by a state attorney general on behalf of state citizens is not a "mass action" for purposes of such removal jurisdiction.[2]

Overview

From its enactment seven years ago, CAFA has presented interesting questions about its scope and procedures.[3] While such questions continue to be raised, it unclear to what extent the Act has succeeded in its primary purposes—lessening the quantity of litigation in state courts while moving cases to federal court to reduce perceived local biases. Whatever the overall effects of CAFA, the Hood v. AU Optronics decision will not reduce state caseloads.

Background

In 2011, Mississippi Attorney General Jim Hood sued certain makers of liquid crystal display ("LCD") panels in Mississippi state court, alleging that those companies had formed an international cartel in violation of state antitrust laws to restrict competition and raise prices in the LCD market. (Full disclosure: Nixon Peabody LLP successfully represented a major purchaser against some LCD manufacturers in a different, but somewhat similar antitrust suit in California earlier this year.) Shortly after commencement of the lawsuit, the manufacturer defendants removed the case to federal court under CAFA as a "mass action" pursuant to 28 U.S.C. § 1332(d)(11).

To qualify as a "mass action," a case must be one "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a "mass action" each satisfy the $75,000 amount in controversy requirements of 28 U.S.C. § 1332(a).[4] There are many nuances to this requirement. For example, unlike the class action provisions of CAFA, jurisdiction does not exist under the mass action provisions of the Act unless the "mass action" definition is first satisfied.[5] But the principal issue for Attorney General Hood's claim was not when jurisdiction existed, but whether it existed at all given that only one plaintiff (the state) was identified.

The lower courts' decisions

To some extent, an issue like that in Hood v. AU Optronics has been addressed in the private context in cases such as Anwar v. Fairfield Greenwich Ltd.[6] There, a claim made by two funds did not satisfy the "mass action" provisions of CAFA because, even though the funds had members totaling more than 100, those members were not proposed to be joined as plaintiffs themselves (just as the citizens of Mississippi were not proposed to be joined as plaintiffs in Attorney General Hood's case).[7]

In Hood v. AU Optronics, the district court held on a motion to remand that the state court proceedings initially qualified as a "mass action" because, under controlling Fifth Circuit precedent,[8] the words "persons" and "plaintiffs" in CAFA's "mass action" definition mean "real parties in interest."[9] The district court pierced the pleadings to conclude that more than 100 Mississippi consumers were the real parties in interest under Attorney General Hood's restitution claim.[10] But the district court still granted the motion to remand on the grounds that the "general public exception" to CAFA's "mass actions" definition applied.[11] On appeal, the Fifth circuit reversed, upholding the district court's conclusion that the Attorney General's action satisfied the definition of "mass action," but rejecting the district court's application of the "general public exception." The Fifth circuit's application of a "real parties in interest" test thus underscored an existing split in circuit authority.[12] The Ninth, Fourth, and Seventh

1 See Standard Fire Ins. Co. v. Knowles, No. 11-1450, 2013 U.S. LEXIS 2370 (Mar. 19, 2013), explained in Christopher M. Mason, Sara E. Farber and Scott O'Connell, The Supreme Court Tightens Up on CAFA—and on class plaintiffs (Mar. 20, 2013), available here.

2 Mississippi ex rel. Hood v. AU Optronics Corp., No. 12-1036, 2014 U.S. LEXIS 645 (Jan. 14, 2014).

3 See, e.g., Christopher M. Mason and Philip M. Berkowitz, Decisions Begin To Interpret the Class Action Fairness Act (Mar. 21, 2005), available here.

4 See id. § 1332(d)(11)(B)(i).

5 Compare, e.g., id. § 1332(d)(5)(A) (jurisdiction exists, but then may be defeated if it is established that the total number of class members "is less than 100") with id. § 1332(d)(11) (jurisdiction created only if "claims of 100 or more persons are proposed to be tried jointly," and then only as to those who meet the jurisdictional minimum) (emphasis added).

6 676 F. Supp. 2d 285 (S.D.N.Y. 2009)

7 See Anwar, 676 F. Supp. 2d at 293-94, 296.

8 See Louisiana ex rel. Caldwell v. Allstate Ins. Co., 536 F.3d 418 (5th Cir. 2008).

9 See Mississippi ex rel. Hood v. AU Optronics Corp., 876 F. Supp. 2d 758, 771 (S.D. Miss. 2012).

10 Id., 876 F. Supp. 2d at 769.

11 See 28 U.S.C. § 1332(d)(11)(B)(ii)(III) (excluding from "mass action" definition all claims asserted on behalf of the general public).

12 Compare Nevada v. Bank of Am. Corp., 672 F.3d 661 (9th Cir. 2012) (holding that state, as real party in interest, asserted deceptive trade practices claims on behalf of Nevada citizens) with AU Optronics Corp. v. South Carolina, 699 F.3d 385 (4th Cir. 2012) (holding that state, as real party in interest, asserted antitrust claims on behalf of South Carolina citizens) and LG Display Co. v.

circuits have all held, contrary to the Fifth circuit, that these similar, state-initiated lawsuits are not "mass actions" removable under CAFA.

The Supreme Court's decision

Writing for a unanimous Supreme Court, Justice Sonia Sotomayor held that, according to the plain language of CAFA, a "mass action" must involve monetary claims brought by 100 or more persons who propose to try those claims jointly as named plaintiffs. But in the case before it, the State of Mississippi (in the person of its attorney general) was the only named plaintiff. The Court held on that basis that the case must be remanded to state court.[13]

In reaching this conclusion, the Court sharply rejected the Fifth circuit's use of a "real parties in interest" test to define the meaning of the words "persons" and "plaintiffs" in the definition of a "mass action." First, Justice Sotomayor noted that Congress could have, but did not, use more expansive language, such as "100 or more named or unnamed real parties in interest."[14] Second, the terms "persons" and "plaintiffs" have well established and specific meanings in the law, neither of which include "anyone, named or unnamed, whom a suit may benefit."[15] To the contrary, Congress most likely intended "persons" and "plaintiffs" to have the same meanings in Section 28 U.S.C. § 1332(d)(11)(B)(i) as they do in Rule 20 of the Federal Rules of Civil Procedure, which similarly provides that "[p]ersons may join in one action as plaintiffs if they assert any right to relief jointly…and any question of law or fact common to all plaintiffs will arise in the action."[16] The most logical reading of both joinder provisions would therefore be that "persons" "refers to the individuals who are proposing to join as plaintiffs in a single action."[17]

The Court also observed that applying the Fifth circuit's "real parties in interest" definition to the word "plaintiffs" would cause absurdities in interpreting other facets of the "mass action" provision and consequently create an "administrative nightmare" for courts that "Congress could not possibly have intended."[18] Finally, because it was flatly rejecting the Fifth circuit's "real parties in interest" analysis, the Court deemed it unnecessary to address the "general public exception" issue, which might have also mandated remand to the state court.

Conclusion

The Supreme Court's decision was not unexpected to some of us in the private bar and will be welcomed by state attorneys general. Because suits like those brought by Attorney General Hood will remain in state court, companies likely to worry about class action exposure will also continue to face that issue in the context of potential proceedings in multiple jurisdictions, and thus will require greater strategic foresight to reach successful resolutions.

Madigan, 665 F.3d 768 (7th Cir. 2011) (holding that state, as real party in interest, asserted antitrust claims on behalf of general Illinois public and not individual claimants or members of purported class).

13 Hood, 2014 U.S. LEXIS 645, at *6.

14 Id. at *13-14.

15 Id. at *14-16.

16 Id. at *15 (quoting Fed. R. Civ. P. 20).

17 Id.

18 Id. at *17.

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- Product Liability
- Business Crimes, Investigations & Compliance
- Energy
- Environmental Litigation & Enforcement
- Competition Litigation
- Aboriginal Law

Awards and Recognition

- Who's Who Legal: Canada (Product Liability Defence - "Highly Recommended" for his advice to corporate clients regarding the prevention of product liability claims and his "fabulous abilities" at defending leading manufacturers in the courts)
- The Lexpert Guide to the Leading US/Canada Cross-border Litigation Lawyers in Canada (Class Actions - the only British Columbia lawyer so recognized)
- Lexpert's Special Edition on Litigation in Report on Business Magazine, December 2014 (recognized as one of Canada's highest-ranked business-focused litigation lawyers)
- Benchmark Canada: The Definitive Guide to Canada's Leading Litigation Firms and Attorneys (Canada's Class Action Litigator of the Year 2013)
- Benchmark Canada: The Definitive Guide to Canada's Leading Litigation Firms and Attorneys (a litigation star in British Columbia and a litigation star in Class Actions, Competition and Environmental Law)
- Chambers Global: The World's Leading Lawyers for Business (Dispute Resolution, describing Jim as "an excellent advocate - very customer focused and good at figuring out what clients need")
- Legal Media Group's Guide to the World's Leading Litigation Lawyers
- Who's Who Legal: Canada (Life Sciences, Product Liability)
- The Canadian Legal Lexpert Directory (Class Actions)
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