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Sixth Circuit's Bright-Line Rule for Removal Deadline under CAFA Embraces Trend

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On April 6, 2016, the U.S. Court of Appeals for the Sixth Circuit held that the 30-day period for a defendant to use the Class Action Fairness Act of 2005 ("CAFA"), Pub.L. 109–2, 119 Stat. 4 (2005), to remove a case to federal court begins to run only after the defendant learns from a plaintiff's pleading or other document that the claim is unambiguously subject to CAFA, irrespective of whether the case was originally removable under a different theory. *Graiser v. Visionworks of America, Inc.*, No. 16-3167, 2016 WL 1359048, at *9 (6th Cir. Apr. 6, 2016). In so holding, the court approved the bright-line approach to the CAFA removal timeline adopted by the First, Seventh, and Ninth Circuits.

The jurisdictional provisions in CAFA seek to shift large class actions from state to federal court by giving federal courts jurisdiction over a class action with more than 100 class members if *any* class member is diverse from *any* defendant and the *total amount* in controversy is greater than $5 million. *See* 28 U.S.C. § 1332(d)(2). By contrast, diversity jurisdiction is conferred on class actions not subject to CAFA only if all defendants are diverse from all plaintiffs and at least one named plaintiff satisfies the $75,000 amount-in-controversy requirement generally applicable to diversity cases. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 549 (2005). CAFA's jurisdictional provisions were enacted in response to abuses in class-action cases in which lawyers would "'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." S. Rep. No. 109 -14 at 4 (2005).

Pursuant to the general removal rules, a defendant must file a notice of removal for a case under CAFA within 30 days after "receiving a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." 28 U.S.C. § 1446(b)(1). If, however, "the case stated by the initial pleading is not removable," the defendant may file a notice of removal within 30 days of receiving "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." *Id.* § 1446(b)(3). As the *Graiser* court noted, neither provision specifies "what information must be included in a plaintiff's initial pleading or other paper to trigger the 30–day periods or how a defendant should 'ascertain' removability." *Graiser*, 2016 WL 1359048, at *4 (internal quotations and alterations omitted). The Sixth Circuit court noted further that it is not clear from the statute whether a defendant who has missed the initial 30-day window to file a notice of removal under one theory of federal jurisdiction has another 30-day window to remove the case after ascertaining that CAFA removal is available.

In *Graiser*, the plaintiff filed a class action in Ohio state court asserting violations of Ohio consumer-protection law on account of a "Buy One, Get One Free" promotion run by the defendant. The plaintiff sought only declaratory and injunctive relief. *Id.* at *1. The defendant removed the case to federal court under ordinary diversity jurisdiction, but the district court remanded it to state court, holding that the defendant lacked standing in federal court, but not necessarily state court, to seek injunctive relief. *Id.* at *2. Following the remand, the

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state court dismissed the case for lack of standing, too. Thereafter, the plaintiff amended his complaint to include demands for actual and punitive damages. On September 18, 2015, about five months after the plaintiff filed the amended complaint, plaintiff's counsel sent defendant's counsel a letter regarding settlement that calculated the total damages at around $4 million, below the $5 million CAFA removal threshold. Ten days later, on September 28, plaintiff's counsel sent defendant another letter that requested "up-to-date sales figures." *Id.* at 3. According to the defendant, after receiving this letter, it applied plaintiff's proposed damages formula to the updated sales figures and first ascertained that the potential damages exceeded $5 million. Within 30 days of learning its potential damages exposure, the defendant removed the case to federal court pursuant to CAFA.

The plaintiff again sought remand to state court, asserting that removal was untimely. The plaintiff argued that the 30-day clock began running when the defendant should have known that the suit was removable under CAFA, and because the defendant was in possession of sales information that should have made clear that the potential damages exceeded $5 million, the clock had started running more than 30 days before the defendant filed the notice of removal. The plaintiff also contended that the case was removable under normal diversity jurisdiction upon the filing of the amended complaint and ascertainment of CAFA removability did not initiate another 30-day removal period. The district court again remanded the case, and defendant appealed.

The Sixth Circuit court first considered the question of the types of documents and information that would trigger the 30-day removal period. Both parties had relied on a rule, set forth in *Holston v. Carolina Freight Carriers Corp.*, No. 90–1358, 1991 WL 112809 (6th Cir. June 26, 1991), which starts the 30-day clock when "a defendant has solid and unambiguous information that the case is removable, even if that information is solely within the defendant's own possession." *Graiser*, 2016 WL 1359048, at *5 (internal quotations and alterations omitted). The court, however, declined to follow the *Holston* rule, noting that *Holston* was neither published, and therefore not precedential, nor involved CAFA removal, and so was not controlling. The court also found it significant that *Holston* based its holding on a presumption against removability, a presumption that does not exist under CAFA. *Id.* (citing *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014)*).

With *Holston* out of the way, the court sought to impose an administrable rule, rather than one that "requires guesswork and involves ambiguity" in which a court would be "saddled with the unenviable task of determining what the defendant should have previously discovered or did discover through the course of the litigation." *Id.* at *6 (internal quotations and alterations omitted). Accordingly, the court imposed a "bright-line rule" that the 30-day period "begin[s] to run only when the defendant receives a document *from the plaintiff* from which the defendant can unambiguously ascertain CAFA jurisdiction." *Id.* at *7 (emphasis in original). Because the plaintiff did not identify a document he sent to the defendant from which the defendant "could ascertain that the case was clearly removable under CAFA," the 30-day window had not yet begun when the defendant filed the notice of removal.

Turning to the second question, the court held that "once a defendant ascertains that a case is removable under CAFA, a defendant may remove the case ... even if the case was originally removable under a different theory of federal jurisdiction." *Id.* at *9. To reach this holding, the court looked to congressional intent—which was to expand federal jurisdiction for class actions and to give class-action defendants an independent source of federal jurisdiction.

The *Graiser* court's holdings, matching the holdings of three other circuits, create simple and workable rules that limit the need for judicial inquiry into what defendants knew and when they knew it (or should have known it). When presented with the opportunity to continue this sensible trend, other federal circuits should embrace the Sixth Circuit's reasoning.

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* Ed. Note: Washington Legal Foundation filed an *amicus* brief in *Dart Cherokee* that successfully advocated the Court's reversal of the presumption against removability.

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