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9th Circuit ensuring federal courts remain open for class action defendants

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The Class Action Fairness Act (CAFA) provides federal jurisdictions over class actions where there is minimal diversity of citizenship between the parties, a putative class with at least 100 members, and at least $5 million in controversy. *See* 28 U.S.C. Section 1332(d)(2), (d)(5) (B).

Historically, the 9th U.S. Circuit Court of Appeals had approached removal to federal court under CAFA with skepticism, applying a general "presumption against federal jurisdiction," and even requiring proof of the CAFA elements (like the amount in controversy requirement) to a "legal certainty." *E.g.*, *Lowdermilk v. U.S. Bank N.A.*, 479 F.3d 994, 999 (9th Cir. 2007).

However, recent U.S. Supreme Court precedent makes clear that "no antiremoval presumption attends cases invoking CAFA," overruling much of the 9th Circuit's prior precedents that established roadblocks to CAFA removal. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014). Although "some remnants of [the 9th Circuit's] former antiremoval presumption seem to persist" in district courts (*Arias v. Residence Inn by Marriott*, — F.3d —, 2019 WL 4148784, at *1 (9th Cir. Sept. 3, 2019), two cases decided by the 9th Circuit in recent weeks indicate that the court is intent on changing that.

In *Ehrman v. Cox Communications*, Inc., 932 F.3d 1223 (9th Cir. 2019), the plaintiff sued Cox in California state court for fraud and violations of California consumer protection laws. The complaint stated that the plaintiff was a California "resident" and was silent about the residency or citizenship of the putative class members. *Id.* at 1226. Cox removed the lawsuit under CAFA, asserting that the diversity of citizenship requirement was satisfied because it was a citizen of Delaware and Georgia and because "on information and belief ... [plaintiff] and all class members are citizens of California." *Id.*

The district court granted a motion to remand, finding insufficient evidence that the plaintiff and putative class members were California citizens. *Id.* at 1227. The 9th Circuit reversed, holding that on removal, "a short and plain statement" alleging that the CAFA elements are satisfied is sufficient to establish jurisdiction. *Id.* at 1228. *Ehrman* appears to be the first 9th Circuit authority holding that the defendant "should not ... be[] required to present evidence" where the plaintiff has not factually challenged the defendant's allegations. *Id.*; *compare Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015) (quoting *Dart*, 135 S. Ct. at 554 (where plaintiff makes a factual challenge to defendant's jurisdictional allegations, "'both sides submit proof and the court decides, by a preponderance of the evidence,'" whether jurisdiction exists)).

Similarly, just a few weeks after the *Ehrman* decision, the 9th Circuit in *Arias* vacated an order remanding a case to state court, explaining that the defendant was entitled to rely on reasonable assumptions grounded in the allegations of the complaint to prove that the complaint placed $5 million in controversy. The plaintiffs in that case brought several wage and hour claims against Marriott, alleging that Marriott "routinely" failed to pay its employees overtime wages and "routinely" failed to provide employees with uninterrupted rest periods and to compensate employees for missed rest periods, and that "none" of the paystubs that Marriott provided complied with the California Labor Code. *Arias*, 2019 WL 4148784, at *2-3.

To prove $5 million in controversy, Marriott started with the allegations in the complaint about how frequently violations occurred, and made conservative assumptions that that translated those (somewhat vague) allegations into violation rates. Thus, because plaintiffs alleged that Marriott "routinely" failed to pay conservative assumptions that that translated those (somewhat vague) allegations into violation rates. Thus, because plaintiffs alleged that Marriott "routinely" failed to pay overtime, Marriott assumed that this placed in controversy an average of 30 minutes of unpaid overtime per employee per week. Because plaintiffs also alleged that Marriott "routinely" failed to provide rest periods, Marriott assumed that this placed in controversy one rest break violation per employee per week. And because plaintiffs alleged that "none" of Marriott's paystubs were compliant, it assumed that every 100% of the paystubs it issued in the relevant period were violations. Applying these assumptions to time and payroll data, Marriott argued that the $5 million amount in controversy requirement was easily satisfied. *Id.* at *2-3.

The district court disagreed and remanded the case, finding that it was "reasonably possible that the damages at issue might be less than $5 million." *Id.* at *5. However, the 9th Circuit rejected the district court's conclusion, holding that the defendant need not "provide evidence proving the assumptions correct," because doing so would require the defendant to "prove it actually violated the law at the assumed rate." *Arias*, 2019 WL 4148784, at *5. Thus, it vacated the district court's order so that the district court could consider whether Marriott's assumptions had "'some reasonable ground underlying them.'" *Id.* (quoting *Ibarra*, 775 F.3d at 1199). While the 9th Circuit has previously approved removals that assume a 100% violation rate where the plaintiff alleges "universal violations" (*La Cross v. Knight Transp. Inc.*, 775 F.3d 1200, 1202 (9th Cir. 2017)), this appears to the be the first time the court has stated that a defendant can make up its own estimate, provided that estimate is reasonable in light of the complaint's allegations.

These recent 9th Circuit decisions demonstrate a renewed commitment to eliminating any vestiges of the court's prior skepticism toward CAFA removal. Accordingly, class action defendants considering removal to federal court under CAFA should scrutinize the complaint for reasonable, common-sense facts that can be alleged on information and belief, or for language that is consistent with conservative assumptions that would tend to show that jurisdictional elements, like the amount in controversy, are satisfied. ■

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