

Class Notes

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Using Equitable Relief As The "Hook" To Invoke Federal Subject Matter Jurisdiction

Nationwide class action lawsuits venued in state courts, and the considerable settlements or judgments reached in those cases, have resulted in a call to action by the business and political communities. As famed plaintiffs attorney Dickie Scruggs (whose firm will earn about \$1.4 billion in legal fees from tobacco-related lawsuits) described, there exist certain state court "magic jurisdictions,"¹ in which:

the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money.... The cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is.²

Otherwise known as "judicial hellholes" by defendants, the American Tort Reform Association (ATRA) has identified and ranked several of these jurisdictions throughout the United States, and, for 2004, ranked Madison and St. Clair Counties, two small, neighboring counties located in southwestern Illinois, as the number one and two "judicial hellholes" in the country.³ Thus, for example, in Madison County alone, which has a population of approximately 250,000,

over 100 different companies were named in class action filings in 2004.⁴

REMOVAL TO FEDERAL COURT AND THE CLASS ACTION FAIRNESS ACT

Under Article III, Section 2, of the United States Constitution, Congress has authorized the federal courts to exercise diversity jurisdiction over "all civil actions where the matter in controversy exceeds...\$75,000...and is between...citizens of different States."⁵ And, in any such case originally filed against an out-of-state defendant in state court, Congress has authorized the defendant to "remove" the case to federal court.⁶

In the class action context, the congressional statutes governing diversity jurisdiction and removal have been interpreted in a way that has precluded access to the federal courts on diversity jurisdiction grounds. By way of one well-known example, the "non-aggregation" rule prohibits federal courts from aggregating the value of class members' claims when determining the requisite amount-in-controversy for diversity jurisdiction.⁷ Thus, when a defendant is faced with a nationwide class action consisting of 100,000 plaintiffs with claims of \$50 each, the jurisdictional amount in controversy is not \$5,000,000; rather, it is only \$50.00, and the defendant is forced to defend the action in state court.

In an attempt to avoid perceived abuses of the class action mechanism and to venue truly nationwide class actions in the federal courts, President Bush recently signed into law the Class Action Fairness Act of 2005 (the "Act").⁸ The Act, among other things, permits removal of class action lawsuits in which any member of a class of plaintiffs (whether a named plaintiff or not) is a citizen of a state different from any defendant and the aggregate amount in controversy exceeds \$5,000,000.⁹ Nevertheless, a district court may, "in the interests of justice and looking at the totality of the circumstances," decline to exercise juris-

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Supreme Court Rules Committee Hears Debate On New Proposed Class Action Rule

On January 24, 2005, the Illinois Supreme Court Rules Committee held a public hearing on the proposal to create a new Illinois Supreme Court Rule (Rule 225), regulating the certification and conduct of class actions. The highlights of the proposed new rule, and the one that generated the most lively debate, is a superiority requirement whereby the class action is allowed to proceed “only if the court determines that the putative class action is superior to other available methods for the fair and efficient adjudication of the controversy.” The rule further provides that the matters to be considered by the court in making the superiority determination shall include “the extent to which the claims are based on Illinois law and involve Illinois parties”—another provision which generated heated debate at the hearings. The proposed rule further provides that unless the parties agree otherwise, a new order certifying a class shall be issued before the court decides any pending motions to dismiss or for judgment on the pleadings. The rule also provides

that, except as required by the interest of justice, the court shall stay all discovery directed to the merits until the court has decided the class certification issue.

On balance, far more speakers opposed the proposed rule than supported it, even though, as the rule’s proponents point out, the superiority requirement is similar to that which exists in federal court under Federal Rule of Civil Procedure 23. In view of the strong opposition, some proponents of the rule offered a compromise whereby the provisions with respect to staying discovery and deciding dispositive motions first be deleted as long as the superiority requirement remained.

The Rules Committee will now further debate the proposed rule and ultimately vote on whether to send the current proposal, or a revised proposal, or any proposal at all, to the Supreme Court.

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Prescreening Without Liability

Prescreening, the process in which creditors provide credit criteria to credit reporting agencies and request lists of individual consumers meeting those criteria, is a common marketing tool for automobile dealers and financiers. A prescreened list may include only the following: (1) a consumer’s name and address; (2) an identifier which is not unique to the consumer; and (3) other information that does not identify the relationship or experience of the consumer to a creditor. While often an effective means of direct marketing, prescreening frequently leads to class actions based upon consumer credit statutes such as the Fair Credit Reporting Act (the “FCRA”). Fortunately, the FCRA and case law provide guidance which should allow a creditor to use prescreening as a marketing tool without exposing itself to liability for violations of the FCRA.

The FCRA regulates not only consumer reporting agencies that furnish consumer credit reports used for determining eligibility for credit, but also those who obtain and use credit reports for any purpose, including prescreening. The FCRA prohibits obtaining and using credit report information without a “permissible purpose.” For example, a creditor could not seek to obtain consumer reports for the sole purpose of creating a list of potential marketing targets. However, making a “firm offer of credit” is a permissible purpose for obtaining a consumer report under the FCRA. Therefore, a creditor may obtain consumer credit reports in order to reach potential car buyers so long as the solicitation includes a firm offer of credit.

...a “firm offer” means that the offer of credit will be honored if the consumer meets the criteria used to select the consumer for the offer.

Under the FCRA, a “firm offer” means that the offer of credit will be honored if the consumer meets the criteria used to select the consumer for the offer. The FCRA offers no more detail as to what constitutes a firm offer, and various courts have interpreted the meaning of that term differently. Certain courts focus simply on whether an offer is firm in terms of a creditor’s intention to honor an offer of credit in accordance with the creditor’s own undisclosed, predetermined criteria. These courts do not require that a firm offer include specific terms of credit such as a particular amount of credit, rate of interest, or duration of credit.

Other courts, however, have found this focus too narrow. While agreeing that whether an offer would be honored is an element of a firm offer, these courts look more broadly to determine whether the offer was merely a guise to obtain consumer credit information for mere advertising purposes rather than a legitimate credit product with any real value to a consumer. These more discriminating courts look for specific terms in the offer, such as whether a specific and reasonable amount of credit was offered, the rate of interest and length of repayment period. The inquiry seeks to determine whether credit terms may be so onerous or ambiguous as to deprive the offer of any “real value” to a consumer.

Whether an offer has “real value” is a subjective examination, because at this time there is no clear, uniform standard for what qualifies as an offer of value. Nonetheless, creditors can protect

Liability - continued on page 4

diction over a class action in which greater than one-third but less than two-thirds of the members of the putative class and the primary defendants are citizens of the forum state.¹⁰

Class action lawsuits seeking less than \$5,000,000, of course, cannot be removed under the Act. Further, it is anticipated that many district courts will exercise their discretion to decline jurisdiction in cases where the plaintiffs and defendants are predominantly from the same state. Finally, in addition to the “loopholes” expressly provided under the Act, recent history would strongly suggest that talented and creative plaintiffs attorneys will develop numerous arguments to avoid application of the the Act to keep their cases in state court. Thus, in such situations, some additional “hook” must be found upon which to remove the action to federal court.

THE EQUITABLE RELIEF “HOOK”

One such “hook” that may exist arises where the complaint includes a count that seeks equitable relief from the defendant. In such cases, “the amount in controversy is measured by the value of the object of the litigation.”¹¹ In several judicial circuits, the “value of the object of the litigation” can be determined by looking at the requested relief from either the plaintiff’s or the defendant’s viewpoint.¹² Frequently, from the plaintiff’s viewpoint, the value of the injunction will not exceed \$75,000. From the defendant’s perspective, however, the value will be significantly higher. For instance, the minimum amount-in-controversy might be present if the injunction sought “would require some alteration in the defendant’s method of doing business that would cost the defendant at least the statutory minimum amount.”¹³ Similarly, the requisite amount-in-controversy may be met where the defendant would be forced to “forgo a benefit to him that is worth more than the threshold amount specified in the diversity statute.”¹⁴ Still another scenario that might carry a case across the amount-in-controversy threshold is where the defendant’s “clerical or ministerial costs of compliance” with the injunction or declaratory judgment would exceed \$75,000.¹⁵

In these cases, the non-aggregation rule need not be violated to obtain removal, so long

as the court properly analyzes the claim for equitable relief. As provided by the Seventh Circuit, [w]hatever the form of relief sought, each plaintiff’s claim must be held separate from each other plaintiff’s claim from both the plaintiff’s and the defendant’s standpoint. The defendant in each case is deemed to face multiple claims for declaratory relief, each of which must be separately evaluated. * * * *The test, we repeat, is the cost to each defendant of an injunction running in favor of one plaintiff; otherwise the nonaggregation rule would be violated.*¹⁶ (emphasis supplied)

In other words, if the defendant can show that the cost of equitable relief running in favor of the named plaintiff, alone, would exceed \$75,000, the jurisdictional amount-in-controversy has been met.

A useful illustration of this approach was presented in the opinion of Judge Barker in *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 256 F. Supp. 2d 884 (S.D. Ind. 2003). There, the owners of sports utility vehicles (SUVs) filed class actions in state courts against tire and automobile manufacturers, seeking compensatory damages and declaratory and injunctive relief for alleged defects in the SUVs’ tires. After the cases were removed to federal court, the Judicial Panel on Multidistrict Litigation issued an order consolidating the proceedings, and the owners filed motions for remand to state court. The defendants responded by arguing, among other things, that the value of the declaratory and injunctive relief sought by the class met the requisite amount-in-controversy because their cost of compliance would exceed \$75,000.

In considering the arguments, Judge Barker began with well-settled law: “[A]s a general rule, the value of the relief requested on behalf of the class cannot be aggregated to reach the jurisdictional minimum.”¹⁷ She then explained that “this means that the value of the relief to a single plaintiff or the cost, from the defendant’s perspective, of that relief as to a single named plaintiff must be at least \$75,000.”¹⁸ In other words, if the cost “is not apportionable or divisible, that is, if the cost will not increase incrementally if the injunction runs in favor of additional plaintiffs, then the Court can view that total cost

as the amount put in controversy by the request for equitable relief.”¹⁹

With that analytical framework in place, Judge Barker proceeded to evaluate the plaintiffs’ requests for equitable relief to determine whether any of them satisfied the requisite amount-in-controversy. Several of the complaints, including one brought by named plaintiff Lawrence Kaufman, asked the court “to require a recall and replacement of the subject tires.”²⁰ Judge Barker considered “the likely cost to Firestone or Ford of complying with such an order running in favor of, say, Lawrence Kaufman.”²¹ She determined that such cost would not exceed \$75,000, because it was “apportionable among the individual plaintiffs.”²² In doing so, Judge Barker reasoned that the cost to the defendants of the recall “would depend on the number of claimants as to whom the relief was awarded,” or, put another way, “the cost will incrementally increase based on the number of purchasers covered by the award.” As a result, the plaintiffs’ request for a recall could not satisfy the amount-in-controversy requirement.

Some of the complaints, however, also included requests for an injunction that would “prohibit the defendants’ ‘manufacturing, distributing, advertising and marketing [of] ATX, ATX II and Wilderness tires as currently manufactured and designed.’”²³ In those cases, Judge Barker concluded, the defendants’ cost of compliance *would* be “the same (or nearly the same) whether the injunction runs in favor of [the named plaintiff] or in favor of the entire class of California purchasers he seeks to represent.”²⁴ That cost appeared to a reasonable certainty to exceed \$75,000, and thus supported the court’s exercise of federal diversity jurisdiction.²⁵

As demonstrated by Judge Barker’s opinion, a key for defendant in obtaining federal diversity jurisdiction on the basis of the equitable relief hook is persuading the federal judge that the cost of compliance with plaintiff’s request for equitable relief will not increase incrementally with additional plaintiffs. Instead, the court must be shown that the cost of compliance will exceed \$75,000, regardless of whether the suit was brought on behalf of a single individual or a class consisting of thousands. In short, therefore, where a plaintiff’s attorney has managed to craft a complaint

in such a way as to avoid application of the Act, one manner in which federal diversity jurisdiction may still be obtained is through this equitable relief hook and analysis.

Endnotes

- 1 THE AMERICAN TORT REFORM ASSOCIATION, JUDICIAL HELLHOLES 2004, at <http://www.atra.org/reports/hellholes/report.pdf>. See also, Dickie Scruggs, THE SUN HERALD, Oct. 7, 2002, at <http://www.sunherald.com/mld/thesunherald/news/local/4228366.htm>.
- 2 See Asbestos for Lunch, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in INDUSTRY COMMENTARY (Prudential Securities, Inc., N.Y., New York), June 11, 2002, at 5 (transcript of comments of Richard Scruggs). See also William Tucker, Tort Reform's Ground Zero, THE AMERICAN SPECTATOR, January 5, 2005, at http://www.spectator.org/dsp_article.asp?art_id=7586.
- 3 THE AMERICAN TORT REFORM ASSOCIATION, JUDICIAL HELLHOLES 2004, at <http://www.atra.org/reports/hellholes/report.pdf>.
- 4 Steve Gonzalez, Companies Named in Class Action Complaints in '04, THE MADISON COUNTY RECORD, Dec. 27, 2004, at

- <http://www.madisonrecord.com/news/newsview.asp?c=137259>.
- 5 28 U.S.C. § 1332(a).
- 6 28 U.S.C. § 1441(b)
- 7 See, e.g., Snyder v. Harris, 394 U.S. 332, 336 (1969)
- 8 S.5, 109th Cong.
- 9 S.5, 109th Cong. § 4 (codified at 28 U.S.C. § 1332(d)(2)).
- 10 S.5, 109th Cong. § 4 (codified at 28 U.S.C. § 1332(d)(3)).
- 11 Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 347 (1977).
- 12 See, e.g., In re Brand Name Prescription Drugs Antitrust Litig. ("Brand Name Drugs"), 123 F.3d 599, 609 (7th Cir. 1997).
- 13 Brand Name Drugs, 123 F.3d at 610.
- 14 Brand Name Drugs, 123 F.3d at 610.
- 15 Brand Name Drugs, 123 F.3d at 610.
- 16 Brand Name Drugs, 123 F.3d at 610.
- 17 Bridgestone/Firestone, 256 F. Supp. 2d at 895.
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- 24 Bridgestone/Firestone, 256 F. Supp. 2d at 895.
- 25 Bridgestone/Firestone, 256 F. Supp. 2d at 895.

themselves by including as much detail as possible in an offer of credit. For example, the offer could include the method by which interest will be compounded. Also, though the offer need not necessarily firmly state the amount of credit a consumer is pre-approved for, it should at least offer a reasonable minimum amount of credit. Whether an amount is reasonable can be determined based upon the goods sought to be purchased with the credit. For example, an offer of credit in the amount of \$300 for goods priced at \$20,000 is unlikely to be considered of value to the consumer by an inquiring court.

Fortunately, much of the risk in stating more precise terms in an offer of credit made based upon prescreening is alleviated by "postscreening" steps authorized by the FCRA. Under the FCRA, a creditor who makes a firm offer of credit is permitted to further qualify a consumer's creditworthiness following extension of the firm offer in order to verify that the consumer continues to meet the specific criteria used to select the consumer for the offer. The creditor may use a credit report or consider any other information about the consumer's creditworthiness and revoke an offer of credit should the consumer fail to meet the criteria used to select the consumer for the offer.

As for the solicitation itself, firm offers frequently are made by direct mailing to consumers. One common form approved by various courts is a flyer announcing that the consumer is pre-approved for an auto loan. The flyer may include a purchase voucher styled as a check. However, regardless of form, all written solicitations for firm offers of credit based upon prescreened lists must include the following information in a "clear and conspicuous" statement: (a) the consumer received the offer because he/she met the criteria for creditworthiness and that information in his/her consumer report was used for this determination; (b) if

applicable, information obtained in post-screening or collateral requirements may determine that the consumer does not in fact qualify for the offer; and (c) the consumer has the right to opt-out of prescreening by contacting a notification system established for this purpose. The disclosures must include the address and telephone number of the notification system. The precise language of the required disclosures is clearly laid out in the FCRA, and should absolutely be included in a clear and conspicuous manner with any solicitation making a firm offer of credit.

The meaning of "clear and conspicuous" however, is not so obvious, as the terms are not defined in the FCRA. Case law provides some guidance for complying with the clear and conspicuous requirement. For example, courts will consider the location of the disclosures within a solicitation. Ideally, the disclosures should be on the front side of a solicitation. A creditor should avoid placing the disclosures on the reverse side, especially if there is no other information that would draw the consumer to that part of the document. Type size of the disclosures is important. The disclosures should not be the smallest sized font in the document, or at least not disproportionately smaller than the rest of the document. Also, courts will look to whether the disclosures are set off in any way to draw the consumer's attention, such as all capitals, boldface, larger font size or unique font style. Any of these will weigh in favor of the creditor should a court perform a clear and conspicuous analysis. Finally, be certain that the notice is legible. Whether because too small, too light or simply unclear, an illegible disclosure will not satisfy the clear and conspicuous requirement.

Prescreening can lead to costly litigation, but with care and attention to the planning and implementation of a prescreening campaign, a creditor can use this form of direct marketing with confidence and a sense of security.

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Class Action Fairness Act Of 2005 Is Signed Into Law

On February 18, 2005, President Bush signed the Class Action Fairness Act of 2005 into law. The Act expands federal diversity jurisdiction for certain nationwide class actions and attempts to curb perceived abuses such as forum shopping and awarding attorneys' fees based on the face value of coupons for future purchases or discounts, and settlements allegedly involving large attorneys' fees and little of monetary value to the class members.

Among the Act's key provisions are:

- ◆ Expansion of diversity jurisdiction for certain class actions:
 - ◆ Amount in controversy: over \$5,000,000 in the aggregate, and
 - ◆ Any class member's citizenship (whether a named plaintiff or not) different from any defendant's.
- ◆ Exceptions for suits against defendants who are citizens of the forum state:
 - ◆ No federal jurisdiction where more than two-thirds of the plaintiff class and the primary defendants are citizens of the state where the suit was filed; or where at least one defendant from whom significant relief is sought and whose conduct forms a significant basis for the claims asserted is a citizen of the forum state, the principal injuries occurred in the forum state, and no other class action asserting the same claims has been filed for three years.
 - ◆ Discretionary federal jurisdiction "in the interests of justice," based on specified criteria aimed at determining the national versus local interest, where more than one-third and fewer than two-thirds of the class members and primary defendants are citizens of the state where the suit was filed.
 - ◆ Federal jurisdiction is non-discretionary where fewer than one-third of the class members are citizens of the forum state.
- ◆ Class actions meeting the jurisdictional requirements may be removed to federal court without the consent of all the defendants. The

one-year limitation on removal of actions as set forth in 28 U.S.C. § 1446 is inapplicable.

- ◆ Expanded federal jurisdiction for mass tort and other multiple plaintiff actions ("mass actions") involving 100 or more persons where the claims are to be tried jointly on the ground that plaintiffs' claims involve common questions of law and fact. Federal jurisdiction, however, extends only to those plaintiffs whose individual claims meet the \$75,000 amount-in-controversy requirement for federal diversity jurisdiction in non-class actions.

The Act may also prohibit altogether some nationwide class actions involving state law claims.

◆ Before approving a settlement involving non-cash benefits (e.g., coupons), federal courts must hold a hearing and make a written finding that the settlement is "fair, reasonable and adequate" for class members.

- ◆ Settlements cannot be approved where class members are required to pay class counsel a sum of money that results in a net loss without an express finding that non-monetary benefits to class members outweigh the monetary loss.
- ◆ Settling defendants must give not less than 10 days notice to appropriate state and federal officials of the proposed settlement; officials would have 90 days to intervene.

The Act exempts certain actions involving federal securities law violations and corporate governance issues.

Previously, it was difficult to remove class actions from state to federal court because the amount in controversy provision for invoking federal diversity jurisdiction was generally interpreted as requiring \$75,000 per class member and complete diversity of citizenship among class plaintiffs and defendants.

The Act may also prohibit altogether some nationwide class actions involving state law claims as the requirement that common questions of law predominate may preclude class certification where various states' laws would apply to the class members' claims.

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