

Eleventh Circuit Takes Aim At CAFA Removals

BY JONATHAN HART

The Eleventh Circuit's recent decision in *Thomas v. Bank of America Corp.* evidences the wide gap that has developed between that Circuit and other federal circuits regarding removals under the Class Action Fairness Act. The *Thomas* court relied on *Lowery v. Ala. Power Co.*, and held that "[a] case does not become removable as a CAFA case until a document is 'received by the defendant from the plaintiff — be it the initial complaint or a later received paper ... that unambiguously establishes federal jurisdiction.'" The court clarified: "In other words, a defendant may not simply file a notice of removal thirty days after the filing of the complaint unless that document shows that the CAFA's jurisdictional requirements ... are met."

The *Thomas* complaint sought recovery of premiums paid for credit protection plans, as well as treble damages and attorney's fees under RICO, but did not estimate the number of class members or the amount in controversy. Bank of America's removal was supported by a declaration



Eleventh Circuit diverges from other circuits' decisions

stating that it had enrolled 77,787 customers and collected \$4,825,809 in fees for the credit protection plans. It argued that the estimated number of class members and total premiums collected, coupled with the claims for treble damages and attorney's fees, established CAFA's requirements. The district court ordered the case be remanded and the Eleventh Circuit affirmed, finding that Bank of America failed to satisfy CAFA's amount in controversy and size requirements.

Under the Eleventh Circuit's approach, CAFA removals are likely to become very rare, if not extinct, standing Congress' purpose in enacting CAFA on its head. The Eleventh Circuit's standard also is in stark contrast to that of other circuits. For example, the Seventh Circuit recently held in *Spivey v. Verture, Inc.*, that "[o]nce the proponent of federal jurisdiction has explained plausibly how the stakes exceed \$5 million, then the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much."

Assumptions Sink CAFA Removal

BY JAMES KIRTLEY, JR.

In *Bartnikowski v. NVR Inc.*, a wage and hour employment class action brought under state law, the Fourth Circuit Court of Appeals held that the employer/defendant failed to satisfy the amount in controversy requirement for federal removal jurisdiction under the CAFA because the employer relied upon unsupported assumptions as to the average hours of overtime worked per week by the putative class of employees. The *Bartnikowski* plaintiffs had not specified the amount of damages in their complaint, and therefore the employer had the burden of showing the jurisdictional threshold was met. In attempting to do so, the employer extrapolated the number of overtime hours class members allegedly worked by looking to one plaintiff's declaration in an unrelated lawsuit that he had worked an average of five extra hours per week. The employer argued that if all class members had worked an average of five hours of overtime per week, then the amount in controversy would be satisfied. The court of appeals rejected this approach, reasoning that the employer's "calculations" were wholly unsupported, as there were no records or other evidence suggesting the five-hours-per-week average was a reasonable assumption. The court pointed out that the employer might be able to remove the case at a subsequent stage in the litigation because Congress eliminated the one-year time limitation on removals under CAFA. One member of the panel dissented, arguing that "the five-hour estimate is not so speculative as to not even require a response from [the plaintiffs]." The dissenting judge took the view that the employer had made a prima facie showing removal was proper and it was now up to the plaintiffs to come back with rebuttal evidence demonstrating otherwise.



Unsupported assumptions of overtime approach rejected