
Preemptive Motion to Deny Class Certification Approved

BY TODD FULLER

In *Vinole v. Countrywide Home Loans, Inc.*, the Ninth Circuit ruled that a defendant may file a preemptive motion to deny class certification before the plaintiffs move for class certification. The plaintiffs had sought to represent a class of current and former Countrywide employees who were employed as “External Home Loan Consultants.” The plaintiffs alleged that Countrywide had misclassified the employees as “exempt” outside sales employees and had failed to pay them overtime and other wages in violation of the Fair Labor Standards Act and state law. Several months before discovery and pretrial motion cutoffs, and prior to the plaintiffs filing any motion for class certification, Countrywide moved to deny class certification. The plaintiffs argued that the motion was “not ripe” and was procedurally improper because they had yet to file a class certification motion. The trial court disagreed and granted Countrywide’s motion, holding that it could decide the motion under Rule 23 notwithstanding its timing. The trial court determined that certification was not proper because determining each consultant’s exempt status would require individualized analysis of how each consultant spent his or her time at Countrywide.



Motion to deny allowed regardless of “ripeness”

On appeal, the Ninth Circuit affirmed, holding that the plain language of Rule 23, which requires only that certification be addressed “[a]t an early practicable time,” itself defeated the plaintiffs’ argument that there is some per se rule that precludes preemptive motions to deny class certification. The court observed that this view was in accord with other federal courts that have granted similar motions, and it rejected the argument that the motion was “fundamentally unfair” because it was filed before the discovery and pretrial motion cutoff dates. The court concluded that the plaintiffs had failed to demonstrate any “procedural prejudice from the timing of the consideration” of Countrywide’s motion, and they had conceded that they did not intend to conduct any additional discovery on class certification issues. The court also affirmed the trial court’s ruling on the merits, holding that a highly factual, individualized analysis would be needed for each class member to determine whether that employee was properly characterized as “exempt.”

What Happens Pre-CAFA Stays Pre-CAFA in the Fifth Circuit

BY MICHAEL WOLGIN

In *Admiral Insurance Co. v. Abshire*, a 17-year old case between the State of Louisiana (among others) and insureds and investors of three defunct financial firms, the Fifth Circuit rejected Louisiana’s argument that an amended complaint with new class allegations and a demand for attorney’s fees permitted removal to federal court under the Class Action Fairness Act. The case was originally filed in Louisiana state court by 1,383 plaintiffs, many of whom were subsequently dismissed. In 2008, the state court allowed an amendment to the complaint that included class allegations and a demand for attorney’s fees. Louisiana removed the case under CAFA, notwithstanding its application only to “civil action[s] commenced on or after February 18, 2005.” Louisiana argued that the amended complaint “commenced” a new lawsuit because it “resurrected” in the proposed class certain dismissed plaintiffs and claims and because it sought attorney’s fees. The district

court remanded the case, and the Fifth Circuit affirmed, holding that under Louisiana law a civil action is “commenced” when the original petition is filed, and that, unlike a newly-added defendant, Louisiana had sufficient notice of “resurrected” plaintiffs and claims such that no exception was warranted. The court also held that class allegations do not per se “commence” a new “civil action,” and that no authority supported the position that a new action is “commenced” with a demand for attorney’s fees. The Fifth Circuit disagreed with the Seventh, Eighth, and Tenth Circuits’ use of “relation-back” analysis under Rule 15 of the Federal Rules of Civil Procedure to determine when a case is “commenced” for CAFA’s purposes, explaining that CAFA is jurisdictional and primarily concerns sufficiency of notice, whereas “relation-back” of a proposed amended complaint primarily concerns fairness and the statute of limitations.