

Eleventh Circuit Clarifies Removal Procedure: Defendants Now Permitted to Provide Jurisdictional Facts

BY FARROKH JHABVALA

In *Pretha v. Kolter City Plaza II, Inc.*, the Eleventh Circuit Court of Appeals rectified a disturbing uncertainty introduced into the law of removals by *Lowery v. Alabama Power Co.* *Pretha* effectively restores the ability of state court defendants in the 11th Circuit region to remove cases from state court within 30 days of service of the complaint based on information that the defendants may possess but which was not included in the complaint or otherwise provided by the plaintiff. Both *Pretha* and *Lowery* concern CAFA removals, but set forth propositions applicable to non-CAFA cases as well.

The removal statute, 28 U.S.C. § 1446(b), addresses removals in two situations. The statute's first paragraph permits removals within 30 days of the service of the "initial pleading setting forth the claim for relief," and the statute's second paragraph concerns the removal of cases when "the case stated by the initial pleading is not removable." Second-paragraph removals are triggered by "receipt by the defendant . . . 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 . . ." *Lowery* was a second-paragraph case, but it included dicta that many district courts in the Circuit interpreted to severely limit first-paragraph removals to cases in which the removal was based on evidence the defendant had received from the plaintiff. Subsequent to *Lowery*, a first-paragraph removal in many district courts within the 11th Circuit became virtually impossible. As noted by *Pretha*, *Lowery* presented "plaintiffs with a trick by which they could make federal jurisdiction disappear. A diverse plaintiff could defeat federal jurisdiction simply by drafting his pleadings in a way that did not specify an approximate value of the claims and thereafter provide the defendant with no details on the value of the claim. That would subject the defendant's right to remove to the caprice of the plaintiff . . ."

Pretha contains a tour de force of removal law marshaled to refute *Lowery's* dicta. It concludes that to compel a defendant "to tarry in state court when he has evidence establishing his right to be in federal court, and to force state courts to waste their resources on cases that will eventually be decided in federal court, cannot be what Congress had in mind when it enacted § 1446." Thus, if the dicta in *Lowery* became law, "it would undermine the statutory scheme, which was designed to encourage expeditious removals from state to federal court." *Pretha* holds that in first-paragraph cases, "the evidence the defendant may use to establish jurisdictional facts is not limited to that which it received from the plaintiff or the court," and properly includes affidavits as to an estimate of the amount in controversy based on defendant's records. The decision also holds that evidence submitted after removal should be considered to establish the facts present at the time of removal. The *Pretha* opinion restores the conformity of 11th Circuit removal law with the law of other federal circuits.

Third Circuit Latest to Require Detrimental Reliance Under TILA

BY MICHAEL SHUE

The Third Circuit recently joined a growing consensus of Circuit Courts holding that detrimental reliance must be shown to recover actual damages for Truth in Lending Act (TILA) violations. In *Vallies v. Sky Bank*, a borrower brought a putative class action on behalf of consumers who obtained motor vehicle loans from the defendant lender, claiming that the lender violated TILA's disclosure requirements. The district court granted the lender's motion for summary judgment, holding that the plaintiff could not recover actual damages because he failed to plead and could not prove detrimental reliance. The Third Circuit affirmed, holding that TILA's "plain meaning . . . requires causation to recover actual damages. In the context of TILA disclosure violations, a creditor's failure to properly disclose must cause actual damages; that is, without detrimental reliance on faulty disclosures (or no disclosure), there is no loss (or actual damage)." While *Vallies* was a case of first impression in the Third Circuit, the opinion follows every Circuit Court that has considered this issue, including the First, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits.