BUY ONE, GET ONE FREE: APPELLATE COURT STRIKES DEAL TO PERMIT DEFENDANT'S SECOND ATTEMPT AT REMOVING CLASS ACTION BEYOND INITIAL THIRTY-DAY REMOVAL WINDOW

Date: 18 April 2016

Financial Institutions and Services Litigation Alert

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Addressing an issue of first impression, the Sixth Circuit Court of Appeals in *Graiser v. Visionworks of America, Inc.*, recently upheld a defendant's second attempt at removing a class action to federal court under the Class Action Fairness Act ("CAFA"), long after the thirty-day removal deadline applicable to traditional diversity jurisdiction expired. The *Grasier* decision confirms that the defendant does not have a duty to perform any significant investigation of facts relevant to federal jurisdiction independent of the information received from the plaintiff, and that the thirty-day removal period set forth in 28 U.S.C. § 1446(b) applies only after the plaintiff's pleadings or documents provide the defendant with a clear statement of the damages sought or with sufficient facts from which damages can be readily calculated. As such, a defendant may remove a case under CAFA even if the initial thirty-day removal window has closed where that defendant later receives a document from the plaintiff from which it could be first ascertained that the case was removable under CAFA, thereby providing the defendant with "a new window for removability."[1]

THE FIRST REMOVAL

In *Graiser*, the plaintiff filed a class action in state court, claiming Visionworks' "Buy One, Get One Free" eyeglasses advertisement was deceptive in that the second pair of glasses was not truly "free." The plaintiff sought only declaratory and injunctive relief, in addition to statutory attorney's fees, and specifically disclaimed monetary damages. Visionworks removed the case under traditional diversity jurisdiction principles, arguing that the relief sought by the named plaintiff was valued in excess of $75,000. In granting the plaintiff's motion to remand, the district court found that the plaintiff lacked standing in federal court to seek injunctive relief and that an injunction would not remedy any cognizable harm to the plaintiff.[2]

THE SECOND REMOVAL

On remand, and following dismissal of the complaint in state court, the plaintiff filed an amended complaint, adding requests for actual and punitive damages, in addition to re-pleading the original claim for injunctive relief. Visionworks did not remove the amended complaint within 30 days of service. As part of discovery, the plaintiff sent Visionworks a settlement letter, wherein the plaintiff set forth his formula of damages arising from the

purportedly deceptive advertising. In advance of a mediation settlement conference, the plaintiff requested that Visionworks supplement its discovery and disclose updated sales figures for the buy one, get one free promotion. Following the production of the updated sales figures with a specified cut-off date, Visionworks applied the plaintiff's proposed damages formula set forth in the settlement letter, and calculated that the damages for the putative class would exceed $5 million in the aggregate.[3]

Visionworks removed the case again — this time under CAFA — six months after the amended complaint was filed and over a year after the initial removal, but within 30 days after the sales figures first reflected over $5 million in controversy. In the removal, Visionworks asserted that it was first able to ascertain that the case was removable under CAFA only after running the updated sales figures requested by the plaintiff and applying those figures to plaintiff's damages formula. The district court again remanded the case, finding that the case was originally removable under traditional diversity jurisdiction such that Visionworks should have removed the case within 30 days of service of the amended complaint. The court stated that because Visionworks possessed its own sales data at the time the amended complaint was filed, it could have ascertained that CAFA jurisdiction existed from the filing of the amended complaint, making the removal untimely.[4]

SIXTH CIRCUIT FINDS SECOND REMOVAL PERMISSIBLE BEYOND INITIAL REMOVAL PERIOD

On appeal, the Sixth Circuit sought to determine (1) what papers, if any, were received by Visionworks to trigger the thirty-day removal window, and (2) whether a defendant is only provided with one thirty-day time period to remove the action, even if the defendant later learns that the case is removable under CAFA beyond the initial thirty-day window.

In upholding the removal under CAFA, the Sixth Circuit followed the lead of several other circuit courts of appeal that have considered this issue[5] and adopted a "bright-line rule" that the thirty-day period for removal begins to run "only when the defendant receives a document *from the plaintiff* from which the defendant can unambiguously ascertain CAFA jurisdiction."[6] The Sixth Circuit clarified that while a defendant "is not required to search its own business records or 'perform an independent investigation into a plaintiff's indeterminate allegations to determine removability,'" a defendant "does have a duty to apply a reasonable amount of intelligence to its reading of a plaintiff's complaint or other document."[7] According to the Sixth Circuit, a defendant would not be permitted to prevent the winding of the removal clock "by refusing to multiply figures in a complaint," but if the complaint or subsequent documents from the plaintiff do not make it apparent that the case is removable, the removal clock would not be triggered.

With respect to Graiser's amended complaint, the Sixth Circuit reasoned that the thirty-day period to remove under CAFA never began because the plaintiff did not serve a pleading or other paper from which Visionworks could unambiguously ascertain that CAFA jurisdiction existed. Specifically, the complaint did not identify the number of class members and did not set forth a theory of damages, and the plaintiff's settlement letter applied a damages theory to prior sales figures, and calculated approximately $4 million in damages, less than CAFA's jurisdictional threshold. Consequently, Visionworks "was free to conduct its own investigation and remove the case" outside of Section 1446(b)'s thirty-day window, making its removal timely upon the application of the updated sales figures to the plaintiff's proposed damages formula.

The Sixth Circuit also held that when a defendant unambiguously ascertains that a complaint is removable under CAFA, a removal would be proper if filed within thirty days of making that determination, even if the case was initially removable under a different theory federal jurisdiction. The court reasoned that CAFA jurisdiction serves different policy purposes than traditional diversity jurisdiction or federal question jurisdiction and was intended to strongly favor the exercise of federal court jurisdiction over class action litigation.[8] Thus, Visionworks' decision not to seek removal under traditional diversity principles did not act as a waiver of the right to later seek removal under CAFA.

CONCLUSION

While the *Graiser* decision may not remove all doubt about whether a particular pleading or "other paper" meets CAFA's jurisdictional requirements and thus opens the removal window, it serves to expand the scope of cases removable pursuant to CAFA and arguably, to diversity jurisdiction generally. By adopting the "bright line" rule that the removal window only opens when a plaintiff provides the defendant with the document that allows the defendant to unambiguously ascertain that federal court jurisdiction exists, and by confirming that the defendant does not have a duty to independently investigate the removability of an action absent such document, the decision should narrow disputes about when the defendant knew or should have known enough to seek removal, notwithstanding class action plaintiffs' attempts to find creative ways to avoid CAFA jurisdiction.

NOTES:

[1] *Graiser v. Visionworks of America, Inc.*, No. 16-3167, Slip Op. at 2 (6th Cir. April 6, 2016).

[2] *Id.* at 2-3.

[3] *Id.* at 4.

[4] *Id.* at 4-5.

[5] *See, e.g.*, *Romulus v. CVS Pharmacy, Inc.*, 770 F.3d 67 (1st Cir. 2014); *Cutrone v. Mortgage Electronic Registration Sys., Inc.*, 749 F.3d 137 (2d Cir. 2014); *Roth v. CHA Hollywood Med. Ctr., L.P.*, 720 F.3d 1121 (9th Cir. 2013).

[6] *Grasier*, Slip. Op. at 10 (emphasis in original).

[7] *Id.*

[8] *Id.* at 12-13.

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