

CLASS ACTION BLOG

The Ninth Circuit Clarifies Its Class Action Fairness Act of 2005 (CAFA) Amount in Controversy Removal Rules

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Swift Transportation removed plaintiff's Third Amended Class Action Complaint alleging that the federal court had CAFA subject matter jurisdiction. The district court remanded finding Swift failed to prove the amount in controversy exceeded \$5 million. The court ruled that only the amount of attorneys' fees incurred to the date of removal was part of the amount in controversy. The Ninth Circuit reversed and remanded after concluding that the amount in controversy included all attorneys' fees which the plaintiff was entitled to recover under the law.

Fritsch's wage and hour class action complaint contended that Swift failed to pay him and his co-employees properly for overtime and meal periods and failed to provide appropriate wage statements. Fritsch sought multiple categories of damages under California law including equitable relief, statutory damages, back wages, prejudgment interest, statutory penalties, and attorneys' fees. After Fritsch served a mediation brief on Swift detailing claimed damages totaling more than \$5 million, Swift filed a notice of removal. Swift relied upon the detailed damages chart which Fritsch included in the mediation brief to support its amount in controversy allegation. Swift estimated that the amount in controversy exceeded \$6.5 million, but the district court found that slightly less than \$4.8 million was at stake. The court deducted from the damages chart a sum for which no recovery was alleged in the complaint and limited the recalculated attorneys' fees to those actually incurred. The district court refused to consider future attorneys' fees that would be incurred. With those reductions, the court concluded that Swift had only established that \$4,778,585.00 were at stake.

Accordingly, the district court remanded the case to state court. Thereafter, Swift timely petitioned the Ninth Circuit for permission to appeal that remand order. Before the Ninth Circuit acted on that petition, the Ninth Circuit issued its opinion in *Chavez v. J.P. Morgan Chase & Co.*, 888 F. 3d 413,414-15 (9 Cir. 2018). Based upon the *Chavez* ruling, Swift filed a second notice of removal arguing that the *Chavez* decision "demonstrates beyond any doubt that the amount in controversy in this action exceeds the jurisdictional minimum."

The Ninth Circuit quickly dispatched with plaintiff's contention that Swift's appeal (which had been accepted between the date it issued the *Chavez* opinion and Swift's second removal), was now moot. The court stated the only substantive issue on appeal was whether the district court properly concluded that Swift had failed to prove by a preponderance of evidence that the CAFA amount in controversy standard had been met. In evaluating whether Swift had met its burden, the court considered the allegations in the complaint and in the removal petition "as well as 'summary-judgment-type evidence relevant to the amount in controversy at the time of the removal.'" The amount in controversy is the amount at stake in the litigation which would include any litigation result requiring a payment to the plaintiff, excluding interest and cost. Among the items included in the amount in controversy were all forms of "damages (compensatory, punitive, or otherwise), the costs of complying with an injunction, and attorneys' fees awarded under fee-shifting statutes or contract."

The Ninth Circuit noted that in the *Chavez* case, it decided whether the "amount in controversy" determination made at the time of removal included only sums lost as of the time of the removal, but not sums that would be lost after the time of removal. In that case, the plaintiff argued that her damages were less than \$75,000.00 as of the time of removal, while conceding that her ultimate damage award could be over \$300,000.00 under California law. The Ninth Circuit had rejected that argument and held the "amount in controversy includes all relief claimed at the time of removal to which the plaintiff would be entitled if she prevails." Although *Chavez* had not expressly ruled that future attorneys' fees that would be incurred after removal were properly included in the amount in controversy, the Ninth Circuit held in the *Fritsch* case that all potentially recoverable attorneys' fees should be included in the amount in controversy rather than only those incurred before the date of removal. The court noted that when it is necessary to "assess the amount in controversy at the time of removal, the court must include all relief to which a plaintiff is entitled if the action succeeds." In the *Fritsch* case, that included future attorneys' fees.

The Ninth Circuit rejected a 1998 Seventh Circuit opinion that ruled future attorneys' fees should not be included in determining the amount in controversy "because they are inherently speculative and can be avoided by the Defendant's decision to settle an action quickly." The Ninth Circuit rejected the Seventh Circuit's ruling in favor of its 2016 holding in *Gonzales v. CarMax Auto Superstores, LLC*, 840 F. 3d, 644, 648 (Ninth Circuit 2016). The Ninth Circuit further noted that district courts are uniquely qualified to determine whether claimed future attorneys' fees are too speculative and whether the defendant satisfied its burden of proof. District court judges have experience in evaluating litigation expenses and are knowledgeable about customary hourly rates and are often called upon to determine reasonable and proper fees. The appeals court then vacated the remand order and returned the case to the district court to determine the amount of the attorneys' fees at stake in the litigation.

The *Fritsch* case is significant because it further demonstrates the rules to be observed by district court judges in the Ninth Circuit when determining the amount in controversy at the time of removal. Although it applies specifically to CAFA removals, the *Fritsch* case also applies generally to amount in controversy removal issues. The case is important to the class action bar because other circuit courts may very well adopt the same rules for CAFA removals.