

How Much is Enough to Remove? Considerations that Shouldn't be "Smuggled into the Judicial Inquiry."



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A plaintiff filed a class-action complaint in state court alleging a potential liability of \$2.9 million to the class, plus fees and punitive damages. The defendant conducted its own calculation and determined that the amount in controversy in the case could plausibly top \$5 million, thus crossing the threshold for federal diversity jurisdiction under the Class Action Fairness Act ("CAFA") and justifying removal of the case to Federal Court. Who is the Court to believe? The Eighth Circuit Court of Appeals recently took up this issue and clarified its rule for determining the amount in controversy for establishing federal diversity jurisdiction over a class action lawsuit.

While the complaint itself only contained the number \$2.9 million, the plaintiff also alleged entitlement to attorney's fees and punitive damages, which the defendant calculated could themselves be an additional \$4.3 million. This would render the whole case amount in controversy more than \$5 million. The Plaintiff did not disagree with defendant's calculation, but the district court raised the issue on its own, citing its "independent obligation to determine" issues of subject matter jurisdiction. The district court struck the defendant's calculation, characterizing it as "nothing but speculation." In doing so, the district court explained that a reasonable factfinder would likely not award several million dollars in punitive damages. The Eighth Circuit reversed, explaining that a defendant "need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." To inquire further gets to the merits of the plaintiff's claims, and the Eighth Circuit cautioned that such a prediction of the outcome "should not be smuggled into the jurisdictional inquiry."

This case proves useful in that it sheds light on what constitutes a "plausible allegation" as to the amount in controversy. Although the Court clearly admonished making a merits inquiry into a plaintiff's allegation, this opinion also stands for the proposition that some level of judicial inquiry can be made. The standard is not "facial inquiry." Here, the Eighth Circuit looked at the underlying cause of action, and looked at other similar cases where punitive damages had been awarded. In one such case, the Eighth Circuit pointed out that it had affirmed a punitive damages award in a ratio of 27:1 when compared to actual damages. Thus, when the plaintiff in the instant case alleged \$2.9 million actual damages and punitive damages in an unstated aggregate amount, such open ended allegation could legally exceed \$5 million. The Court distinguished other case law where recovery of punitive damages was not plead and not possible, meaning that there was no open ended allegation in the complaint that could result in a higher recovery. Stating the rule another way, "[w]hen the notice of removal plausibly alleges that the class might recover actual damages, punitive damages, and attorneys' fees aggregating more than \$5 million, then the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much."

For a business that finds itself the defendant in a class action lawsuit pending in state court, this case appropriately sets a low hurdle to clear for removing the case to federal court. A plaintiff could attempt to close this exit ramp to federal court by not pleading punitive damages, or otherwise structuring a complaint such that the recovery of damages above the jurisdictional threshold is a legal impossibility. However, plaintiff's counsel typically is unwilling to cap its potential recovery at the start of a lawsuit, so skilled class action defense counsel can work within the law to paint a worse case scenario with a high recovery being awarded to the plaintiffs. While it might initially seem counterintuitive that this would be in a defendant's best interest, such a litigation strategy cannot later be used as an admission or concession, and it is often to a business defendant's advantage to choose its court forum when litigating a high-stakes class action such as the one at issue here.

Especially in a jurisdiction like Arkansas where class action litigation has been liberalized to the point of being heavily weighted in favor of the plaintiff, the predictability and fairness of the Federal Rules of Civil Procedure and the practices of the federal courts offer a respite. For example, at the certification stage alone, where Arkansas' procedure has often been described as "certify now, worry later"—decisions such as the one described herein renew and clarify the process by which a strategically-minded business can avoid such an expensive and protracted class action battle in an unfavorable forum.

Case reference: *Pirozzi v. Message Envy Franchising, LLC*, No. 19-8014 (8th Cir. Sept. 17, 2019) (citations and quotations omitted).