

CLASS ACTION BLOG

Eighth Circuit Declares CAFA Removal Was Timely and The Amount in Controversy Allegations Were Not Speculative

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Mark Pirozzi and others sued Massage Envy for allegedly violating the Missouri Merchandising Practices Act (MMPA) by using advertisements which failed to disclose that each one hour massage session included ten minutes for consulting with the therapist, undressing and dressing. The first and amended complaints failed to clearly state the amount in controversy on the face of the complaint. For that reason, Massage Envy investigated and calculated the amount of compensatory damages, attorney's fees and punitive damages and concluded that the total of those sums was \$7,205,000, well in excess of the \$5 million statutory minimum.

Plaintiff moved to remand on grounds that the defendant's notice of removal was untimely, but the district judge did not address the timeliness issue. Rather, she concluded she had no subject matter jurisdiction because "Massage Envy offers nothing but speculation that potential awards of attorneys' fees and punitive damages push the amount in controversy over \$5 million." The Eighth Circuit disagreed, granted Massage Envy permission to appeal, reversed the district court's remand order, denied plaintiffs motion to remand to state court, and remanded to the district court.

After reviewing the policy goals for CAFA's adoption, the court noted that plaintiffs did not challenge Massage Envy's allegations regarding the amount in controversy. Instead, "plaintiffs' motion to remand affirmatively alleged aggregate claims that 'conservatively' put more than \$12 million in controversy." The district court judge exercised her "independent obligation to determine whether federal subject-matter jurisdiction exists" and found that Massage Envy's actual damages calculation was overstated and offered "nothing but speculation" regarding the potential attorney's fees and punitive damages awards. The district judge instead found that it was "more likely that a reasonable fact finder would not award several million dollars in punitive damages." Accordingly, based upon her findings, she remanded the case to state court.

The Eighth Circuit cited a ruling in *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81 (2014) that a district court could question a defendant's uncontested amount in controversy allegation, but further found that the district judge had adopted the wrong legal standard. Massage Envy's burden was to establish that "a fact finder might conclude" that the damages sought exceeded the statutory minimum, not that the damages "are greater than the statutory minimum," (citing *Hartis v. Chicago Title Ins. Co.*, 694 F.3d 935, 944 (8th Cir. 2012)). The Eighth Circuit's test is: "when 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.'" *Raskas v. Johnson & Johnson*, 719 F.3d 884, 888 (8th Cir. 2013). Following those precedents, the court concluded that if Massage Envy had plausibly alleged "that more than \$5 million is in controversy, the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much."

The court then examined whether it was legally impossible for the amount in controversy to exceed \$5 million. The court easily concluded that plaintiff's second amended petition had put \$3.6 million in aggregated compensatory damages and attorney's fees in controversy. It also reviewed whether Massage Envy had accurately calculated that \$3.6 million in punitive damages were in controversy. Looking at the MMPA and the Missouri Supreme Court's MMPA interpretation in *Lewellen v. Franklin*, 441 S.W.3d 136, 146-48 (Mo. 2014), the court found that it was "undisputed that punitive damages may be awarded for egregious violations of the MMPA." In fact, the Eighth Circuit had affirmed punitive damages awards "for egregious MMPA violations where 'the ratio of the collective punitive damages to the collective actual damages [was] approximately 27:1.'" *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir.) cert. denied, 531 U.S. 825 (2000).

Relying on the Seventh Circuit's case, *Keeling v. Esurance Ins. Co.*, 660 F.3d 273, 275 (7th Cir. 2011), the court found it was required to "accept the class's characterization" when determining the amount in controversy for CAFA removal purposes. Following *Keeling* and earlier Eighth Circuit precedent, the court concluded that the amount in controversy in Pirozzi exceeded \$5 million.

The court then addressed the timeliness issue. Plaintiffs argued that Massage Envy's notice of removal was "untimely because the class action allegations in their original petition ... put more than \$5 million in controversy." The Eighth Circuit concluded that contention was "without merit." The removal statute requires a removal petition be filed within thirty days, which begins to run "upon receipt of the initial complaint only when the complaint explicitly discloses the plaintiff is seeking damages in excess of the federal jurisdictional amount." *In re Willis*, 228 F.3d 896, 897 (8th Cir. 2000). When a complaint does not disclose the amount in controversy, the time for removal starts running once the removing defendant is served with "an amended pleading, motion, order, or other paper from which the defendant can unambiguously ascertain that the CAFA jurisdictional requirements have been satisfied." *Gibson v. Clean Harbors Envtl. Servs., Inc.*, 840 F.3d 515, 519 (8th Cir. 2016). In this case, Massage Envy had to do its own investigation and calculation to determine the amount in controversy. Once Massage Envy had completed its investigation and calculated the amount in controversy, it filed its notice of removal, a removal which the Eighth Circuit found "was not untimely."

The *Pirozzi* case is important to Eighth Circuit class action litigators for providing guidance on how to properly determine the amount in controversy when it is not clearly alleged by the plaintiff. Furthermore, we now know that the Eighth Circuit will allow defendants to perform their own investigation regarding the amount in controversy and, when concluded, remove the case to federal court. Although the Eighth Circuit did not clearly state what triggered Massage Envy's removal period, the opinion suggests that Massage Envy acted with dispatch. *Pirozzi* is a case worthy of attention by class action litigators nationwide.

Case citation: *Pirozzi v. Massage Envy Franchising, LLC*, 938 F.3d 981 (8th Cir. 2019)