Court Permits Plaintiffs to Evade CAFA Mass Action Reach

November 16, 2011 by Sean Wajert

Readers know that one of the effects of the Class Action Fairness Act has been to encourage plaintiff counsel to get creative in ways to defeat federal jurisdiction and keep mass torts and class actions in state courts. Last week, a federal court remanded several cases brought by individuals who claimed that they developed non-Hodgkins lymphoma as a result of exposure to PCBs, despite the "mass action" provisions of CAFA. Nunn v. Monsanto Co., No, 4:11-CV-1657(CEJ) (E.D. Mo. 11/7/11).

Under CAFA, federal courts have jurisdiction over class actions in which the amount in controversy exceeds $5,000,000 in the aggregate; there is minimal diversity among the parties; and there are at least 100 members in the class. 28 U.S.C. §1332(d). CAFA also provides federal jurisdiction over a "mass action," which is defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact . . ." 28 U.S.C. § 1332(d)(11)(B)(i).

The district court stated that for it to have jurisdiction under the mass action provisions, defendants must demonstrate that there really are 100 plaintiffs. Defendants made a clever and powerful argument, pointing out that in addition to the cases and these plaintiffs subject to the remand motion, plaintiffs' counsel filed two separate, largely identical, cases in the state court (St. Louis City Circuit Court), one with 95 plaintiffs and one with 96 plaintiffs. This clearly evidenced plaintiffs' counsel purposeful efforts to "splinter" a single mass tort case for the purpose of evading federal jurisdiction. That kind of rigging was rejected in cases like Freeman v. Blue Ridge Paper Prods., Inc., 551 F.3d 405 (6th Cir. 2008), and Westerfeld v. Independent Processing, LLC, 621 F.3d 819 (8th Cir. 2010), argued defendants.

The court felt obligated to disregard such manipulations, however. Defendants' contention that plaintiffs had deliberately divided their cases in order to avoid the mass action threshold was somehow "irrelevant." Reference to the other identical cases was, the court thought, akin to defendant "consolidating" the cases; by excluding cases in which the claims were consolidated on a defendant's motion, Congress appears to have contemplated that some cases which could have been brought as a mass action would, because of the way in which the plaintiffs chose to structure their claims, remain outside of CAFA's grant of jurisdiction. Citing Anderson v. Bayer Corp., 610 F.3d 390, 393 (7th Cir. 2010); see also Tanoh v. Dow Chem. Co., 561 F.3d 945 (9th Cir. 2009).

So, another example of the numerical loophole to removal of mass actions, evading the Congressional intent. Plaintiffs' attorneys continue to resort to dividing their clients into groups of 99 or fewer plaintiffs to try to avoid federal court.