

v. Phillip Morris, the Second Circuit will decide whether Judge Weinstein of the Southern District of New York properly certified a class of smokers claiming economic injury as a result of defendants' allegedly deceptive practices in marketing light cigarettes. Specifically, the appellate court's review will likely focus on whether Judge Weinstein abused his discretion in holding that common issues predominated because both causation and injury could be proven on a classwide basis using expert testimony.

I. THE RISE OF FLUID RECOVERY AS A THEORY OF PROOF

The term "fluid recovery" is generally used to refer to a variety of equitable procedures designed to allow a group of plaintiffs to recover based on alleged "aggregate" damages suffered by the class as a whole—rather than the harm suffered by each individual plaintiff.¹ Fluid recovery most often concerns the process of determining whether a defendant's conduct caused injury to an entire group of people, calculating the worth of that group injury on an aggregate basis, and then distributing the "classwide" recovery to individual class members through an equitable process.² Thus, under a fluid recovery system, a defendant may be forced to compensate an entire group of plaintiffs

without any one of those plaintiffs having to prove that she or he was actually injured or that his or her injury occurred as a result of the defendant's conduct.

There are three steps to fluid recovery. First, the defendant's total liability to the entire group is calculated by a jury in a single, class-wide adjudication, normally based on expert testimony or statistical evidence that the defendant's conduct caused injury to the group generally, as well as the amount of the group's damages. That amount is paid into a class fund. Second, individual class members are able to collect a portion of the fund by proving the amount of their specific damages through a non-jury "proof of claim" process. Finally, the leftover money in the fund is distributed equitably by the court to a cause that the court believes is in the interest of the class members. The theory behind fluid recovery was that a class action could be tried to assess the defendant's liability to the "class as a whole," without first forcing plaintiffs to go through the costly and time-consuming process of identifying the individuals who make up that class. But courts rejected even this limited use of fluid recovery. For example, in *Eisen v. Carlisle & Jacquelin*, plaintiffs attempted to use a theory of fluid recovery to

continued page 9

Has the Eleventh Circuit Set a New Standard for Federal Diversity Jurisdiction?

by Kenneth J. Reilly & Frank Cruz-Alvarez

On April 11, 2007, the Eleventh Circuit Court of Appeals issued its decision in *Lowery v. Alabama Power Co.*¹ Unless it is withdrawn or revised, *Lowery* may significantly delay a defendant's ability to remove a case to federal court absent a "clear statement" by the plaintiff establishing the necessary jurisdictional amount in controversy.

Lowery involved the removal of a "mass action" under the Class Action Fairness Act ("CAFA"), which permits removal of "mass actions" when at least one plaintiff is diverse from any one defendant, and the aggregate value of the plaintiffs' claims is at least \$5,000,000.² Here, the claims were brought by 400 plaintiffs against fourteen manufacturers alleging that the defendants discharged particulates and gases into the atmosphere and the ground water, which caused them to "suffer personal injuries, physical pain and mental anguish, and the loss of the use and enjoyment of their property."³ Because at least one plaintiff was diverse from one defendant, CAFA's "minimal diversity" requirement was met.

Among other issues raised by plaintiffs in support of their motion to remand, they argued that defendants had failed to establish the requisite amount in controversy to maintain federal diversity jurisdiction (*i.e.*, defendants failed to demonstrate that plaintiffs' aggregate claims exceeded \$5,000,000, which required a showing that each plaintiff's claim exceeded \$12,500) and sought to have the case remanded back to Alabama Circuit Court.⁴ In the Eleventh Circuit, as in most circuits, "where the damages are unspecified, the removing party bears the burden of establishing the jurisdictional amount by a preponderance of the evidence."⁵ As such, defendants sought to meet their burden with the type of evidence that has routinely been deemed sufficient to meet the "preponderance of the evidence" standard: (a) plaintiffs' initial complaint which sought \$1.25 million in damages per plaintiff; (b) the fact that the case involved 400 plaintiffs requesting unlimited punitive damages; and (c) judgments in "similar" mass tort cases.⁶ The district court, however, dismissed defendants'

evidence as insufficient, and found that they had failed to establish federal diversity jurisdiction. The district court entered an order remanding the case back to Alabama Circuit Court. Defendants took an appeal pursuant to CAFA.⁷

On appeal, the Eleventh Circuit acknowledged its prior adoption, in *Tapscott*, of the “preponderance of the evidence” standard for establishing the jurisdictional amount in removal actions.⁸ Nonetheless, the court questioned the correctness of the prior precedent, and, without expressly overruling *Tapscott* and its progeny, indicated a more stringent burden for establishing the amount in controversy in removed actions.⁹ The court held that the amount in controversy is only established “[i]f the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them....”¹⁰ Otherwise, “the court must remand.”¹¹ Moreover, the court held that any “factual information establishing the jurisdictional amount must come from the plaintiff.”¹² The court’s holding suggests that anything short of an admission by plaintiff will require that the case be remanded. In fact, the court noted that it was “highly questionable whether a defendant could ever file a notice of removal on diversity grounds in a case... where the defendant... has only bare pleadings containing unspecified damages... without seriously testing the limits of compliance with Rule 11.”¹³ Applying this higher “clear statement” standard, the court rejected defendants’ evidence on the amount in controversy, and affirmed the District Court’s order remanding the case back to Alabama Circuit Court.

The court also considered whether it was appropriate to remand the case to the federal district court to give the defendants an opportunity to conduct post-removal discovery into the amount in controversy. Contrary to established Eleventh Circuit and United States Supreme Court precedent,¹⁴ the court held that post-removal discovery on amount in controversy is never appropriate, and a district court does not have the discretion to grant such discovery.¹⁵ A motion for rehearing is pending.

The court’s holding in *Lowery*, if not reversed or limited on rehearing, could significantly delay a defendant’s ability to remove a case to federal court in those instances where the jurisdictional amount is not readily deducible from the complaint, and the defendant is unable to identify a “clear statement” from the plaintiff on the amount in controversy. Moreover, plaintiffs will contend that this “clear statement” standard should be interpreted as essentially eliminating a district court’s ability to examine circumstantial evidence, such as the

nature of the claim(s), the number of plaintiffs involved, the type(s) of damages sought, and judgments obtained in similar actions, to determine if the amount in controversy meets the jurisdictional limit. Arguably, the court’s holding does not go that far.

Despite the new “clear statement” standard that the court purports to establish in *Lowery*, the panel does not (and could not) overrule any of the court’s prior decisions addressing amount in controversy, including the court’s decision in *Williams v. Best Buy*.¹⁶ In *Williams*, the court held that the amount in controversy is satisfied when it is “facially apparent” from the complaint that the amount in controversy exceeds the jurisdictional requirement.¹⁷ The holdings in these two cases seem to be at odds, and how the court will ultimately resolve these apparent inconsistencies will remain unknown until the pending motion for rehearing is decided. Arguably, the court can reconcile *Williams* and *Lowery* because even under *Lowery*, the amount in controversy can be satisfied if the plaintiff does not allege a specific amount in damages, but there are sufficient factual allegations from which it is readily deducible that the amount in controversy is satisfied. Regardless, until the issue is conclusively decided, defendants should continue to rely on *Williams* as the standard for assessing the amount in controversy in those instances where the plaintiff’s factual allegations make it “facially apparent” that the amount in controversy exceeds the jurisdictional amount.¹⁸

Furthermore, the “clear statement” standard as articulated by the court is incompatible with the notice-pleading standard found in most states. That is to say, in most states all a plaintiff is required to plead with respect to damages (and, typically, all that *is* plead) is that the value of the case exceeds the state court jurisdictional amount.¹⁹ As such, in some instances, defendants will not be able to initially remove a case. Rather, defendants will have to engage in expensive and time consuming “amount in controversy” discovery (*e.g.*, interrogatories and requests for admission) in order to establish that a plaintiff’s claims meet or exceed the jurisdictional amount. Presumably, once a plaintiff’s discovery responses demonstrate that a plaintiff’s claims meet the jurisdictional amount, then the defendant will be able to remove the case. Needless to say, this presupposes that plaintiffs do not engage in gamesmanship by delaying meaningful discovery responses past the one year “deadline” set forth in 28 U.S.C. § 1446(b).

As such, the court’s decision to limit a defendant’s ability to remove cases only in those instances where “the jurisdictional amount is... stated on the face of the

[removing] documents..., or readily deducible from them” could dictate that jurisdiction will be decided by the artfulness of a plaintiff’s pleadings and discovery responses in state court for one year.²⁰ If successful on both fronts, plaintiffs may preclude defendants from meeting this new “clear statement” standard, and in effect make their cases removal-proof. This result would be contrary to the intent of 28 U.S.C. § 1332 and CAFA.

In sum, *Lowery* could potentially delay a defendant’s ability to remove a case to federal court, even where the “preponderance of the evidence” demonstrates that federal jurisdiction is proper. Its effects are already being felt in the Eleventh Circuit.²¹

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Endnotes

1 483 F.3d 1184 (11th Cir. 2007).

2 See 28 U.S.C. § 1332(d)(11); see also *Lowery*, 483 F.3d at 1198 (“CAFA does not apply exclusively to class actions certified under Rule 23 or state analogues. CAFA’s mass action provisions extend federal diversity jurisdiction to certain actions brought individually by large groups of plaintiffs.”)

3 See *Lowery*, 483 F.3d at 1187-88.

4 *Id.* at 1189.

5 *Id.* at 1208 (citing *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, which adopted the preponderance of the evidence standard in the removal context).

6 *Id.* at 1189.

7 28 U.S.C. § 1453(c)(1) (allows appeal of district court order granting remand to state court when the case falls within the ambit of CAFA).

8 See *Lowery*, 483 F.3d at 1209.

9 *Id.* at 1210-11.

10 *Id.* at 1211.

11 *Id.*

12 *Id.* at 1213.

13 *Id.*, 483 F.3d at 1215, n.63.

14 See, e.g., *Gibbs v. Buck*, 307 U.S. 66 (1939); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978); *U.S. Catholic Conference v. Abortion Rights Mobilization*, 487 U.S. 72 (1988); *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005).

15 *Id.* at 1215-19.

16 269 F.3d 1316 (11th Cir. 2001).

17 *Id.* at 1319.

18 See *Cargill v. Turpin*, 120 F.3d 1366, 1286 (11th Cir. 1997) (“The law of [the Eleventh Circuit] is ‘emphatic’ that only the Supreme Court or this court sitting en banc can judicially overrule a prior panel decision.”).

19 E.g., Florida Circuit Court jurisdictional amount is \$15,000; Alabama Circuit Court jurisdictional amount is \$3,000.

20 28 U.S.C. § 1446(b) states that “a case may not be removed on the basis of [diversity] jurisdiction... more than 1 year after commencement of the action.

21 See, e.g., *Constant v. Int’l House of Pancakes, Inc.*, 487 F. Supp. 2d 1308 (N.D. Ala. 2007); *Jackson v. Peoples South Bank*, 2007 U.S. Dist. LEXIS 47062 (M.D. Ala. June 27, 2007); *Ellis Motor Cars, Inc. v. Westport Ins. Corp.*, 2007 U.S. Dist. LEXIS 48517 (M.D. Ala. July 5, 2007).