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Analysis & Perspective

CAFA

Seventh Circuit Rejects Effort to Bypass Class Action Fairness Act in Mass Action

By Mark A. Behrens and Christopher E. Appel

The Seventh Circuit's decision in *Bullard v. Burlington Northern Santa Fe Railway Co.*--that the removal requirements for "mass actions" under the Class Action Fairness Act may be met "at any time"-- "thwarts an attempt by plaintiffs' counsel to avoid federal court through a class-action substitute," write attorneys Mark A. Behrens and Christopher E. Appel.

The Seventh Circuit's decision, the authors say, "provides a useful beacon for other courts."

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In August, the U. S. Court of Appeals for the Seventh Circuit in *Bullard v. Burlington Northern Santa Fe Railway Co.* ¹ held as a matter of first impression that the removal requirements for "mass actions" under the Class Action Fairness Act of 2005 ("CAFA") may be met "at any time" ² the monetary relief claims advanced by 100 or more persons are proposed to be tried jointly and CAFA's other jurisdictional threshold requirements are met.

The court rejected plaintiffs' argument that the "eve of trial is the *only* time when a 'mass action' can be detected." ³ Chief Judge Easterbrook, writing for the court, explained: "The question is not whether 100 or more plaintiffs answer a roll call in court, but whether the 'claims' advanced by 100 or more persons are proposed to be tried jointly." ⁴ The Seventh Circuit's common sense reading of CAFA thwarts an attempt by plaintiffs' counsel to avoid federal court through a "class-action substitute." ⁵

Congress enacted CAFA to allow more interstate class actions to be heard in federal court ⁶ and address class action abuse. ⁷ "Mass actions" were recognized as "simply class actions in disguise" ⁸ and specifically included in CAFA to prevent the statute's objectives from being undermined by "close substitutes that escape the statute's application." ⁹ At the time of CAFA's enactment, two enormous asbestos trials that had recently occurred in West Virginia and Virginia highlighted the potential that some state courts resistant to federal removal of interstate class actions might permit large numbers of individual cases to be joined. ¹⁰ Congress also appreciated that mass actions needed to be included within CAFA to address

permissive joinder in Mississippi, which does not have class actions but was known at the time as the "lawsuit capitol of the world."¹¹ Mississippi has since adopted substantial reforms to repair that image.¹²

In *Bullard*, 144 plaintiffs sought damages in a Chicago court from four corporations that had designed, manufactured, transported, or used chemicals that allegedly escaped from a wood-processing plant and injured people living nearby. The defendants relied on CAFA's "mass action" provision to remove the case to federal court. Plaintiffs challenged the removal on the novel theory that not all of the 144 plaintiffs were likely to be active at any eventual trial-- "They'd be happy to win by summary judgment or settlement"¹³ --so the suit could not be identified as a "mass action" of 100 or more claims until close to trial.

The Seventh Circuit rejected plaintiffs' argument that a mass action may only be removed if a trial covering 100 or more plaintiffs "actually ensues."¹⁴ "[T]he statutory question," the court said, "is whether one [trial] has been proposed."¹⁵ The court noted that plaintiffs' interpretation would essentially render CAFA's mass action provision "defunct," adding that "[c]ourts do not read statutes to make entire subsections vanish into the night."¹⁶ The circuit court then upheld the district court's decision to deny plaintiffs' motion to remand the case to state court. The circuit court concluded, "This complaint, which describes circumstances common to all plaintiffs, proposed one proceeding and thus one trial."¹⁷

The circuit court also provided useful guidance to district courts as to when cases may be removed to federal court under CAFA. The court explained "that litigation counts as a class action if it is either filed as a representative suit or becomes a 'mass action' at any time. That could be long after filing," but does not have to wait until the eve of trial.¹⁸ For example, "Think of 15 suits, with (say) 10 plaintiffs each, that are proposed to be tried jointly. The prospect of a single trial with 150 plaintiffs would convert all 15 suits into one 'mass action' ... and allow removal within 30 days after the proposal for a joint trial."¹⁹ Similarly, a "trial of 10 exemplary plaintiffs, followed by application of issue or claim preclusion to 134 more plaintiffs without another trial, is one in which the claims of 100 or more persons are being tried jointly... ." ²⁰

The Seventh Circuit's decision in *Bullard* provides a useful beacon for other courts.

¹ 2008 WL 2941359 (7th Cir. Aug. 1, 2008).

² *Id.* at *2.

³ *Id.* (emphasis in original).

⁴ *Id.*

⁵ *Id.* at *1.

⁶ See Class Action Fairness Act of 2005, S. Rep. No. 109-114 (2005).

⁷ See, e.g., Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call For Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. on Legis. 483 (2000); John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 Harv. J.L. & Pub. Pol'y 143 (2001).

⁸ S. Rep. No. 109-114, at 47.

⁹ *Bullard*, 2008 WL 2941359 at *1.

¹⁰ See *State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 793 (W. Va. 2002) (approving mass consolidation involving more than 8,000 plaintiffs suing more than 250 defendants); *In re Hopeman Bros., Inc.*, 569 S.E.2d 409 (Va. 2002) (rejecting mandamus petition arising from consolidation of 1,300 asbestos claims against 25 defendants, even though the trial court found that "consolidation of all of the cases would adversely affect the rights of the parties to a fair trial").

¹¹ See Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 Miss. C. L. Rev. 393, 393 (2005).

¹² See *id.*; see also David Maron & Walker W. (Bill) Jones, *Taming an Elephant: A Closer Look at Mass Tort Screening and The Impact of Mississippi Tort Reforms*, 26 Miss. C.L. Rev. 253 (2007).

¹³ *Bullard*, 2008 WL 2941359, at *1.

¹⁴ *Id.* at *2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* 

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