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Eighth Circuit Clarifies Defendant's Removal Burden Under CAFA

Yesterday, Bryan Cave helped obtain a favorable ruling from the United States Court of Appeals for the Eighth Circuit in *Raskas v. Johnson & Johnson*, No. 13-1996, which clarified the removal burden facing corporate defendants under the Class Action Fairness Act ("CAFA"). The Court reiterated that the removal burden under CAFA is "a pleading requirement, not a demand for proof." Specifically, it held three pharmaceutical manufacturers satisfied CAFA's $5 million jurisdictional amount by presenting affidavits demonstrating their products' total retail sales, notwithstanding that the affidavits included some sales that would fall out of relevance once discovery was complete, or that the data might be hearsay.

Plaintiffs collectively filed three separate putative class actions in Missouri state court alleging pharmaceutical manufacturers violated consumer fraud laws by deceiving customers into discarding over-the-counter medications after their expiration dates. The defendants removed each suit with affidavit evidence that set forth the total retail sales of the products in Missouri over the applicable limitations period since data on the value of discarded medications was unknown and could not be determined without discovery from individual putative class members. Plaintiffs asked the district court to remand the cases on the grounds that the affidavits were over-inclusive, as plaintiffs sought only to recover damages for the value of medications discarded and replaced, and because the sales data was hearsay. The district court remanded all three cases because defendants had failed to present a "formula or methodology" from which the court could calculate plaintiffs' targeted damages allegations.

The Eighth Circuit reversed, and in doing so, emphasized that CAFA's removal burden does not require putative class defendants to prove class damages with specificity. The Court rejected plaintiffs' hearsay arguments, without considering their merits, because CAFA does not limit the types of evidence that defendants may use to establish the jurisdictional amount. Further, the Court held that plaintiffs' over-inclusive argument had been properly rejected by sister circuits, and that the district court's requirement that defendants present a "formula or methodology" to avoid remand would improperly require defendants to "confess liability"—that is, admit that customers had discarded and replaced more than $5 million in medication—in order to avail themselves of federal jurisdiction.

The Court's ruling provides corporate defendants favorable clarification and application of CAFA's removal burden. The case is a strong example of the limited evidentiary burden placed upon defendants at the remand stage and the liberal type of evidence necessary to satisfy that burden. It should dramatically curtail a common tactic used by plaintiffs' counsel to challenge CAFA jurisdiction, which is to claim that a removing defendant failed to conclusively establish the jurisdictional amount because it relied upon overall revenue or sales data from which the putative class will be drawn. Further, the ruling comes on the heels of recent decisions by the Eighth Circuit and United States Supreme Court that protect the ability of putative class defendants to access federal courts.

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