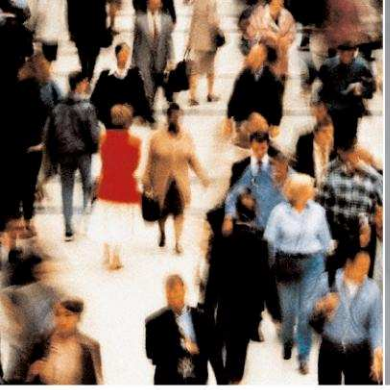

Class Action Alert
Recent developments in class action law

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The Supreme Court tightens up on CAFA—and on class plaintiffs

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Yesterday, the United States Supreme Court decided a deceptively important question of class action law in *Standard Fire Insurance Co. v. Knowles*, No. 11-1450, 2013 U.S. LEXIS 2370 (March 19, 2013). While the Court's conclusion—that a named plaintiff in a putative state court class action cannot, simply by disclaiming damages above $5 million at the start of the case, avoid the effect of the jurisdictional provisions of the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. 1332(d)(2), (5), allowing removal to federal court of actions involving more than $5 million in collective damages—seems procedural, in fact, it is a significant statement about the powers of representative plaintiffs generally.

Overview

As we have noted for many years, CAFA is a complex statute, and has perhaps not always accomplished as much reduction in state court class action litigation as President George W. Bush and the defense bar expected when it was signed into law as the first legislation of President Bush's second term of office. *See* Christopher M. Mason and Philip M. Berkowitz, *Decisions Begin To Interpret the Class Action Fairness Act* (March 21, 2005), available here; Christopher M. Mason, *A Giant Step Forward for the Class Action Fairness Act* (Feb. 14, 2005), available here; *see also* White House Transcript, *President Signs Class-Action Fairness Act of 2005* (Feb. 18, 2005), available here. This new decision, however, advances those expectations as well as providing guidance about the power of representative plaintiffs generally.

Background

The plaintiff in the *Standard Fire Insurance Co. v. Knowles* case, Greg Knowles ("Knowles"), filed a class action lawsuit in Arkansas state court against Standard Fire Insurance Company ("Standard Fire"). Knowles claimed that Standard Fire had breached the homeowners' insurance policy sold to him by underpaying claims for hail damage to Knowles' home. Knowles alleged that his policy, and the

policies of those similarly situated, provided for full reimbursement for such loss or damage, including for reasonable charges associated with retaining a general contractor to repair or replace the damaged property. Standard Fire, however, had refused to reimburse "general contractors' overhead and profit," or about 20% of the costs of a contractor making repairs. According to Knowles, there were likely "hundreds, and possibly thousands" of individuals in Arkansas who suffered similar damages in the form of underpayments. 2013 U.S. LEXIS 2370, at * 4 (internal citation omitted).

When Knowles filed his complaint, he stipulated that the Circuit Court of Miller County, Arkansas, had jurisdiction over the action because his recovery and that of any class member individually would not exceed $75,000.00, and his total damages and those of all class members in aggregate would be less than $5,000,000.00. The point of this stipulation, of course, was to try to avoid removal on CAFA's minimal diversity grounds (*i.e.*, given that the insurer was not from Arkansas, if the collective amount in controversy exceeded $5 million, federal jurisdiction would exist, *see* 28 U.S.C. §§ 1332(d)(2), (5)(B), (6)).

The Lower Courts' Decisions

Standard Fire, however, was not dissuaded by Knowles' stipulation. It removed the action to federal court, arguing that, regardless of Knowles' effort to limit his and the purported class' damages, his counsel never agreed that they would not seek attorney's fees that would bring total recovery beyond that amount. Standard Fire also claimed that Knowles lacked authority to limit other class members' damages through a stipulation.

There was good support for Standard Fire's position—other courts that had considered the issue were split on it. *Compare, e.g., Bell v. Hershey Co.*, 557 F.3d 953, 958 (8th Cir. 2009) *with Lowdermilk v. United States Bank Nat'l Assoc.*, 479 F.3d 994, 998 (9th Cir. 2007). But this meant that Knowles also had authority for his prompt motion to remand the action. In doing so, Knowles simply claimed that his stipulation was effective to limit the total recovery to below federal jurisdictional limits, and that as a plaintiff he had the right to craft his complaint in a way that would enable him to bring his action in the court of his choosing.

The District Court agreed with Knowles. It held that, by means of a binding stipulation, Knowles had shown in good faith that the aggregate damages claimed on behalf of the class would not exceed $5 million. It also held that if class members felt constrained by Knowles' limitation on recoveries, they could opt out of the class and pursue other remedies. It, therefore, remanded the case to state court.

Standard Fire sought an interlocutory appeal to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals, however, denied that request without explanation. Standard Fire then filed a petition for *certiorari* to the Supreme Court, which the Court granted on August 31, 2012.

The Supreme Court's Decision

The Supreme Court held that Knowles' stipulation could not avoid CAFA because the stipulation could not bind absent class members. The unanimous opinion by Justice Breyer asserts that the "reason is a simple one: Stipulations must be binding", 2013 U.S. LEXIS 2370, at * 7, but "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified", *id.* at * 7–8. At that point there would have been a decision as to whether, for example,

Knowles was an adequate class representative, Fed. R. Civ. P. 23(a)(4), and exactly what the class contained, Fed. R. Civ. P. 23(c)(1)(B).

Interestingly, while the opinion states that one characteristic of a binding stipulation is that it is "not subject to subsequent variation" and is "conclusive[ ]", 2013 U.S. LEXIS 2370, at * 7 (quoting *Christian Legal Soc. v. Martinez,* 130 S. Ct. 2971, 2983 (2010), and 9 J. Wigmore, Evidence § 2590, at 822 (J. Chadbourn rev. 1981)), Federal Rule of Civil Procedure 23(c)(1)(C) expressly recognizes that class certification orders may be altered or amended, thus undermining the assumption that a class representative's stipulation after certification will necessarily be as binding as one by an individual plaintiff. Indeed, the Court's own opinion recognizes that a court could "permit the action to proceed with a new representative" other than Knowles in the future. 2013 U.S. LEXIS 2370, at * 10. Thus, the deep structure of the Court's decision in *Standard Fire Insurance Co. v. Knowles* is not one based on rules of evidence or procedure, but doubt about the ultimate power of a class representative absent the oversight of a court. In effect, a stipulation limiting damages before class certification is a sort of settlement, and settlements require express court approval. *See, e.g.,* Fed. R. Civ. P. 23(e).

Conclusion

The Supreme Court's decision was welcomed by traditional class action defense lawyers as a win. But it may have effects beyond even the rigor it places on CAFA procedure. In particular, it emphasizes that named plaintiffs *cannot* assume that their general power to define their own case will withstand scrutiny when they appear to leave substantial issues without potential resolution to avoid a problem of jurisdiction—prior pending action—or greater authority by a regulator. We have, for example, seen named plaintiffs attempt to include in proposed classes entities that cannot be sued or that must be represented by other counsel besides the proposed class counsel. The *Standard Fire Insurance Co. v. Knowles* opinion indicates that such attempts should receive closer scrutiny than they often have been given in the past.

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