Class Dismissed: Supreme Court Declines to Resolve Circuit Split on Class Action Jurisdiction

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The United States Supreme Court declined a petition for certiorari on Monday, January 9, in the matter of *Ascira Partners, LLC v. Daniel*, dashing hopes that the Justices would resolve conflicting federal law on jurisdiction under the Class Action Fairness Act. The petition involved a massive medical malpractice action in Ohio which originated from medical care provided by a single doctor working at multiple medical care facilities. Originally, plaintiffs filed 226 individual lawsuits against the doctor and various medical providers in several different Ohio counties before the cases were consolidated before a single judge. At that point, the various plaintiffs requested that the court set all of the cases for one combined trial, or several smaller group trials. The court ultimately set four smaller trials and one large group trial which combined the claims of over 400 plaintiffs into a single case.

Following this consolidation, defendants sought to have the case removed from Ohio state court to federal court under 28 U.S.C. § 1332(d), otherwise known as the "Class Action Fairness Act." Among other provisions, this statute gives federal courts jurisdiction over certain monetary relief claims of 100 or more persons so long as the plaintiffs' claims involve common questions of law or fact. The Ohio state court, however, determined that the case should stay in state court, as the "100 plaintiff" element of the statute was not satisfied. Under the state court's view, federal jurisdiction under the statute is proper only when a single complaint contains at least 100 plaintiffs, not when where multiple suits are combined for trial to encompass the claims of more than 100 plaintiffs. Defendants asked the federal Sixth Circuit Court of Appeals to review this interpretation, arguing that the Seventh, Eighth, and Ninth Circuits had all previously determined *exactly the opposite*, that the 100 plaintiff threshold was, in fact, satisfied when plaintiffs decide to combine multiple cases for trial. When the Sixth Circuit implicitly adopted the state court's interpretation by declining to weigh in, defendants sought review from the United States Supreme Court.

These "Circuit splits", where Circuit Courts disagree on the interpretation of the law, are not uncommon. And it is certainly not uncommon for the Supreme Court to deny a party's petition for review. The Supreme Court receives approximately 7,000 petitions each year, and accepts roughly 80 for oral argument and review. The Supreme Court's denial of review in *Ascira Parnters* is nevertheless significant for mass tort defendants across the country.

It is no secret that, in many instances, injured tort plaintiffs would prefer to file their cases in state court as opposed to federal court. One of the many reasons for this preference is that the Federal Rules of Civil Procedure place express limits on the amount of discovery available to both parties. Further, the Federal Rules of Evidence tend to be more stringent, as are requirements for expert witnesses. These, and the notion that federal courts tend to grant motions to dismiss and motions for summary judgment more frequently and award lower verdicts, means that plaintiffs would often rather file their cases in state court.

Part of the rationale behind the Class Action Fairness Act was to keep large, multi-state, multi-plaintiff cases, which are better suited for federal court, from being litigated in state courts, despite what some plaintiffs may prefer. The Sixth Circuit's interpretation of the "100 plaintiff" threshold, however, essentially creates a loophole for large groups of plaintiffs to bring claims in state court that are subject to federal jurisdiction pursuant to the Act. As the *Ascira Partners* petitioners stated in their brief, this interpretation would seemingly allow a group of 100 plaintiffs to "artificially split a large lawsuit into smaller actions involving fewer than 100 plaintiffs but consolidate them for trial…all without triggering removal under the CAFA." In other words, 100 plaintiffs who want the cost and strategic benefits of filing together in a single action but want to avoid federal court could theoretically agree to bring two 50-plaintiff suits in state court, and then consolidate them on the eve of trial. Under the Sixth Circuit's interpretation, the defendants in

this hypothetical case would have no grounds to remove to federal court, and would be forced to defend the case in a state court of the plaintiffs' choosing.

While it is unknown what the long term effects of this Circuit split may be, it is not unreasonable to assume that mass tort plaintiffs will flock to the states that make up the Sixth Circuit (Michigan, Ohio, Kentucky and Tennessee) to file their claims. With a little clever pleading, they know that they can avoid the pitfalls of removal to federal court that they may face in the states that make up Seventh, Eighth, and Ninth Circuits. But until the Sixth Circuit changes course or the Supreme Court takes up a new petition, national mass tort defendants shouldn't be surprised to find an uptick in complaints coming out of these four states.

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