

Amount in Controversy Presents Significant Barrier to Federal Jurisdiction in Consumer Class Action Cases

Until recently, the Circuit Courts were divided on the question of whether punitive damages in class action cases could be aggregated to establish the \$75,000 amount in controversy requirement for Federal diversity jurisdiction. Indeed, the Fifth Circuit had issued seemingly conflicting decisions on this question. However, in recent decisions the Fifth and Eleventh Circuits have resolved the controversy, deciding, with the Second and Seventh Circuits, that punitive damages cannot be aggregated for the purpose of determining the amount in controversy. A consequence of these decisions is that the vast majority of consumer class action cases cannot be heard in the Federal courts. Attorneys for defendants in State consumer class action cases should therefore exercise extreme caution in considering whether to remove the cases on diversity grounds. Otherwise, they may face sanctions for improper removal.

While the Supreme Court has held in general that separate and distinct claims of individual class members are not to be aggregated in determining the amount in controversy,¹ it has not yet considered specifically whether claims for *punitive* damages are separate and distinct in this sense, and so whether they may be aggregated when determining amount in controversy.² Until recently, the Circuit Courts were divided on this question. The Second and Seventh Circuits had ruled against aggregation of punitive damages.³ Analogously, the

¹*Snyder v. Harris*, 394 U.S. 332 (1969).

²*See Ard v. Transcontinental Gas Pipe Line Corp.*, 138 F.3d 596, 600 (5th Cir.1998).

³*See Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1430 (2d Cir. 1997); *Anthony v. Security Pacific Financial Services*, 75 F.3d 311, 315 (7th Cir. 1996).

Ninth Circuit did not allow aggregation of attorney's fees claimed by class members.⁴ By contrast, the Eleventh Circuit, in its 1996 decision in *Tapscott v. MS Dealer Service Corp.*⁵ held that punitive damages could be considered in the aggregate.

The Fifth Circuit until recently had issued seemingly conflicting precedents. In *Lindsay v. Alabama Telephone Co.*,⁶ that Court concluded that punitive damages should not be aggregated, and because the complaint in that case did not allege the number of members of the class, the Court held that each class member's pro-rata share of the punitive damages claim could not be determined, and so the amount in controversy requirement for diversity jurisdiction could not be established.⁷ In an apparently contrary decision, a panel of that Court in *Allen v. R & H Oil & Gas Co.*⁸ held that, because under Mississippi law (as in nearly every other State) the purpose of punitive damages is to punish the tortfeasor rather than compensate the plaintiff, punitive damage claims in Mississippi are "fundamentally collective" and so may be considered in the aggregate for purposes of determining the amount in controversy.⁹ However, in *Ard v. Transcontinental Gas Pipe Line Corp.*,¹⁰ without expressly reversing its decision in *Allen*, the Fifth Circuit deciding a case arising under

⁴See *Goldberg v. CPC International, Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982).

⁵77 F.3d 1353, 1358-59 (11th Cir. 1996).

⁶576 F.2d 593 (5th Cir. 1978).

⁷576 F.2d at 595.

⁸63 F.3d 1326 (5th Cir. 1995).

⁹63 F.3d at 1332-33, 1337.

¹⁰138 F.3d 596 (5th Cir. 1998).

Louisiana law, found no particularity in that State’s law to justify a similar conclusion as in *Allen*, holding instead that the punitive damage claims of the various plaintiffs could not be considered in the aggregate.¹¹ Interestingly, the Court in *Ard* found it “unclear to us what Mississippi law regarding punitive damages drove the *Allen* panel to depart from *Lindsay*’s rule, but we find no principle in Louisiana law regarding the nature of punitive damages that permits us to depart from *Lindsay*.”¹² Thus, as of the time *Ard* was decided, even the Fifth Circuit itself could not explain its seemingly conflicting rulings.

Recent decisions by both the Fifth and Eleventh Circuits, citing *Lindsay* (decided before the Eleventh and Fifth Circuits split) as controlling precedent, have abrogated their post-*Lindsay* decisions allowing for aggregation of punitive damages. In *H & D Tire and Automotive-Hardware, Inc. v. Pitney Bowes, Inc.*,¹³ and *Cohen v. Office Depot, Inc.*,¹⁴ the Fifth and Eleventh Circuits, respectively, abrogated their *Allen* and *Tapscott* decisions as contrary to the controlling rule previously established in *Lindsay*.¹⁵ In particular, the Fifth Circuit in *H & D Tire* rejected the reasoning in *Allen*, observing that “*Lindsey*’s reasoning did not rely on a characterization of punitive damages under Alabama law, but was instead based on the principle that ‘the claims of several plaintiffs, suing as members of a class, cannot be

¹¹138 F.3d at 602.

¹²*Id.* (citations omitted).

¹³227 F.3d 326 (5th Cir. 2000).

¹⁴204 F.3d 1069 (11th Cir. 2000).

¹⁵227 F.3d at 330; 204 F.3d at 1357-59.

aggregated for the purpose of satisfying th[e] jurisdictional predicate.’”¹⁶ The Eleventh Circuit was not quite so unambiguous, resting its decision in part on a similarity between the Florida punitive damages law involved in *Cohen* and the Alabama applicable to the punitive damages claim *Lindsay*.¹⁷ But that Court also implicitly rejected the *Allen* panel’s reasoning, because it refused to aggregate even though in Florida (as in the Mississippi law applied in *Allen*) punitive damages are intended to serve a collective good by punishing egregious wrongdoing.¹⁸

It therefore appears that punitive damage claims of multiple plaintiffs or class members cannot be considered in the aggregate for purposes of establishing Federal diversity jurisdiction.¹⁹ As a consequence, few class action product liability actions will satisfy the \$75,000 amount in controversy requirement. This gives defense attorneys cause for extreme caution when considering whether to remove such an action. The statute governing removal plainly states that a notice of removal is subject to Rule 11.²⁰ Moreover, even if the plaintiffs make no jurisdictional challenge, the Federal courts are duty-bound to raise the issue *sua*

¹⁶227 F.3d at 329.

¹⁷*Cohen v. Office Depot, Inc., Supra* at 1075.

¹⁸*Id.*

¹⁹One District Court in the Eleventh Circuit has, in *dicta*, reasoned that the Eleventh Circuit’s *Cohen* decision is no longer valid, because it relies in part on the Supreme Court decision’s decision in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), which was overruled by a 1990 amendment to the supplemental jurisdiction statute, 28 U.S.C. § 1367. *Poore v. American-Amicable Life Ins. Co. of Texas*, ___ F.Supp.2d ___, 2000 WL 1901632, 9 (S.D.Ga. 2000). The problem with that reasoning is that the Eleventh Circuit decided *Cohen* 10 years after the amendment that overruled *Zahn*.

²⁰28 U.S.C.A. § 1446(a).

*spon*te.²¹ Thus, an attorney filing a notice of removal on the basis of diversity runs the risk of Rule 11 sanctions, unless the complaint or documentary evidence on record provides a basis to conclude at least that one representative plaintiff's actual damage claim, plus his or her pro-rata share of the punitive damage claim, exceeds the \$75,000 jurisdictional minimum.

Accordingly, attorneys considering removal should exercise extreme caution. However, in light of the turbulent history of this question, and the fact that the Supreme Court has still not squarely addressed it, attorneys should also closely monitor Circuit Court and Supreme Court decisions for possible new reversals in the future.

²¹See *H & D Tire and Automotive-Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d at 328 (citations omitted). See also *Bryceland v. AT&T Corp.*, 122 F.Supp.2d 703, 713 (N.D.Texas) (remanding on plaintiffs' motion and *sua spon*te dismissing Federal action for lack of subject matter jurisdiction).