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CAFA: in opinion potentially at odds with two recent pro-removal decisions, Ninth Circuit rules that putative class action must be remanded to state court

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Takeaway: In a prior article – *Ninth Circuit: two pro-defendant decisions clarify burdens regarding CAFA's $5 million jurisdictional threshold* (September 14, 2020) – we examined two recent Ninth Circuit cases where the appellate court overturned remand orders on the ground that the district courts applied overly strict standards regarding proof of the $5 million jurisdictional threshold under the Class Action Fairness Act (CAFA). Together, these rulings – *Greene v. Harley-Davidson, Inc*., 965 F.3d 767 (9th Cir. 2020), and *Salter v. Quality Carriers, Inc*., 974 F.3d 959 (9th Cir. 2020) – confirm a class defendant need only make a plausible case the amount in controversy exceeds $5 million to remove under CAFA. In *Harris v. KMI Industrial, Inc*., --- F.3d ---, No. 20-16767, 2020 WL 6689638 (9th Cir. Nov. 13, 2020), however, the Ninth Circuit appeared to pull back from these pro-removal rulings, faulting the defendant for not submitting enough evidence showing an amount in controversy in excess of $5 million.

In *Harris*, Levone Harris filed a putative class action in California state court against his former employer, KM Industrial, Inc. ("KMI"), claiming that KMI had violated several provisions of the California Labor Code by (among other things) failing to provide meal and rest breaks and pay overtime wages. KMI filed a notice of removal, alleging that Harris's complaint put more than $5 in controversy.

In particular, KMI asserted that the amount in controversy exceeded $7.1 million, which it calculated by totaling the value it assigned to the various causes of action (plus attorneys' fees) set out in the complaint, including Harris's claims for failing to provide meal and rest breaks. To support the calculation set out in its removal notice, KMI submitted a declaration from its human resources (HR) director.

In his declaration, the HR director estimated that, in the four-year period prior to the filing of the complaint, KMI had "employed approximately 442 putative class members" who "worked an aggregate of 39,834 workweeks." 2020 WL 6699638, at *2. Based on Mr. Harris's allegations that KMI engaged in "regular" and "consistent" violations of the California Labor Code, the HR director assumed that these 442 class members missed one meal break and two rest breaks each week throughout the class period. But he assumed that all 442 class members worked shifts qualifying them for meal and rest breaks throughout the class period (i.e., he did not identify the number or length of shifts actually worked by those employees).

Harris moved to remand, arguing that KMI's allegations and evidence rested on unreasonable assumptions, thereby exaggerating the amount in controversy. In response, KMI submitted a second declaration from the HR director, which addressed some of Harris's arguments but which still did not specify the number or length of shifts

worked by those employees.

The district court agreed with Harris and remanded the action to California state court. The district court focused its analysis on the values assigned by KMI to the meal and rest break classes, because the estimated value of the claims of those two classes put KMI's calculation above the $5 million threshold. According to the district court, KMI's evidence failed to prove the amount in controversy, because KMI unreasonably assumed that all 442 employees worked shifts that qualified them to earn meal and rest breaks even though KMI could have proven those facts from its employment records (as opposed to simply estimating them).

On appeal, the parties disputed whether Harris had mounted a facial or a factual attack on KMI's amount in controversy showing (the issue addressed in *Salter*), as well as KMI's burden to show the amount actually at stake in the case (the issue addressed in *Greene*). According to the majority, Harris had mounted a *factual* attack on KMI's evidence, requiring KMI to demonstrate the $5 million amount in controversy by a preponderance of the evidence. KMI's showing on this point, moreover, required the submission of competent evidence satisfying a summary judgment standard. *Id*. at *3-4. The majority (Richard K. Eaton, Judge of the United States Court of International Trade, sitting by designation, and Judge Kim McLane Wardlaw) further held KMI's evidence insufficient, because Harris had attacked the basis of KMI's factual assumptions and KMI failed to plug the gaps in its evidentiary showing, even though it had access to the employment data enabling it to prove the number of qualifying shifts. *Id*. at *4-5.

Judge Daniel P. Collins dissented, questioning whether Harris truly had mounted a factual (rather than facial) attack and arguing that, even assuming Harris mounted a factual attack, KMI made reasonable assumptions given Harris's allegations that KMI engaged in "regular" and "consistent" violations of the California Labor Code. *Id*. at *6-11 (Collins, J., dissenting). According to Judge Collins, both the district court below and the majority held KMI to an overly rigid standard in establishing the amount in controversy. *Id*. at *9-10. KMI, said Judge Collins, should not have been required to prove actual class-wide damages, based on a meticulous shift-by-shift evidentiary showing. All KMI was required to do was demonstrate the *amount in controversy* by a preponderance of the evidence. *Id*. at *10.

The Ninth Circuit's decision in *Harris* shows that, even though reasonable assumptions may support a showing that $5 million is at stake in many cases, a defendant may not predicate its amount-in-controversy on a reasonable assumption where it has access to underlying evidence that could potentially disprove that assumption.