Ninth Circuit REFUSES TO APPLY Class Action Fairness Act (CAFA) to Subrogated Insurers' MASS TORT CASE

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THE UNITED STATES COURTS OF APPEALS FOR THE NINTH CIRCUIT has now rendered the first published appellate decision addressing the application of the Class Action Fairness Act ("CAFA")[1] to a mass tort action brought by subrogated insurers.

THE PLAINTIFFS ALLEGED THAT THE **PLASTIC COUPLING NUTS** THAT ATTACHED THE LINES TO THE BALLCOCKS ON TOILETS WERE **DEFECTIVELY DESIGNED AND MANUFACTURED,** CAUSING THEM TO FRACTURE AND BREAK, TRIGGERING 145 SEPARATE WATER LOSSES. THE SIZE OF THE LOSSES RANGED FROM **$897 TO $403,000,** WITH **$6.5 MILLION IN TOTAL LOSSES.**

The Ninth Circuit rejected an argument that CAFA required removal of a mass tort action brought by subrogated insurers against a product manufacturer to the federal district court. The case is *Liberty Mut. Fire Ins. Co. et al. v. EZ FLO Int'l, Inc.* No. 17-56523, Slip Op. 9th Cir., Dec. 14, 2017.

In this case, twenty-six insurers filed an action in the Superior Court of the State of California for the County of San Bernardino against EZ FLO International, Inc. ("EZ FLO"), a manufacturer of toilet water supply lines domiciled in Ontario, California. The plaintiffs alleged that the plastic coupling nuts that attached the lines to the ballcocks on toilets were defectively designed and manufactured, causing them to fracture and break, triggering 145 separate water losses. The size of the losses ranged from $897 to $403,000, with $6.5 million in total losses.

EZ FLO removed the case to the United States District Court for the Central District of California, arguing that the case was a "mass action" under CAFA. Under CAFA, a defendant in a civil action may remove a "mass action" to federal court if the aggregate amount in controversy exceeds $5 million. A "mass action" is defined as "any civil action… in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact..."[2]

Plaintiffs' motion to remand was granted, with the

court holding that it lacked jurisdiction because the amended complaint did not include more than 100 named plaintiffs. EZ FLO sought permission to appeal the ruling to the Ninth Circuit, which was granted. After full briefing and oral argument, the Ninth Circuit, in an unanimous opinion, affirmed the lower court's ruling.

Central to the determination of the appeal was the argument made by EZ FLO that the CAFA numerosity requirement was satisfied because the twenty-six insurers as subrogees "stood in the shoes" of their insureds as subrogors, and therefore, in reality, there were 145 plaintiffs, and not twenty-six. The outcome of the appeal turned on how the court would interpret and apply *Mississippi ex rel. Hood v. AU Optronics Corp.*[3]

In *Hood*, the state of Mississippi sued manufacturers of liquid crystal displays (LCDs) for alleged violations of Mississippi's antitrust and consumer protection statutes. The suit was brought *ex rel.* (i.e. on the relation of) its citizens in state court. Although the citizens were not named plaintiffs, the defendants removed the case to federal court, arguing that under CAFA, those citizens should be counted toward the "100 or more persons" required for a mass action.

The United States Supreme Court disagreed, holding the suit was not a mass action, because it did not involve monetary claims brought by 100 or more persons "who propose to try those claims jointly as named plaintiffs."[4] The Supreme Court also rejected the defendant's arguments that real parties in interest should count for the purpose of ascertaining CAFA jurisdiction.

EZ FLO argued that *Hood* was distinguishable because, in the subject litigation, the insureds were actually named in the caption, whereas in *Hood*, the Mississippi citizens were unnamed. The Ninth Circuit rejected the argument, stating that even though the plaintiffs were technically "named" in the complaint, that did not make them "named plaintiffs" as *Hood* requires. The court also noted that this conclusion is supported by the fact that the insureds had not brought the lawsuit, had no right to control its prosecution, and had no interest in its outcome.

The Court also rejected EZ FLO's argument that the insureds should be considered as plaintiffs for the purpose of analyzing jurisdiction under CAFA's "mass action" provision because the insurers "stand in the shoes" of their insureds in subrogation suits. The court noted that whereas this may be the case, such a concept was hardly unique to subrogation suits, and was, in fact, a defining feature of *ex rel.* suits as well.

Finally, the Ninth Circuit noted that even if EZ FLO was in effect urging the application of a real party in interest test, *Hood* made clear that the court cannot look past the case caption to determine the identity of the named plaintiffs. Accordingly, the court affirmed the ruling of the District Court, remanding the matter back to the Superior Court in San Bernardino.

In effect, the court found that one insurer can pursue recovery of an indefinite number of subrogated claims without running afoul of CAFA's 100-person limit. The result is, presumably, the same even if one insuring group's claims are spread amongst multiple underwriting companies. As long as the number of insuring entities does not exceed 100, the numerosity requirement is not met and removal will not lie. Accordingly, the ruling preserves the important choice of jurisdiction for mass tort actions brought on behalf of multiple insurers seeking to recover losses arising out of a common defect.

Endnotes:

1 28 U.S.C. § 1332(d)(2).
2 *See* 28 U.S.C. §1332(d)(11)(B)(i).
3 134 S.Ct.736 (2014).
4 *Id.* at 739. (emphasis added).