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## 2nd Circ. Case Highlights CAFA Home State Exception Trend

Law360, New York (February 26, 2014, 5:53 PM ET) -- On Sept. 18, 2013, the United States Court of Appeals for the Second Circuit affirmed a district court ruling dismissing a putative class action under the Class Action Fairness Act's home state exception, even though the defendant did not raise the exception until three years after the complaint was filed.

Specifically, a unanimous Second Circuit panel in *Gold v. New York Life Insurance Co.*, 730 F.3d 137 (2nd Cir. 2013) held that: (1) CAFA's home state exception is not jurisdictional and must be raised within a reasonable time and (2) that the district court's discovery schedule, which required the defendant to complete individual discovery before commencing class discovery, excused the defendant's three-year delay in pursuing dismissal under the home state exception.

The Second Circuit's opinion, however, is phrased in cautionary terms, suggesting that this case straddles the outer limits of the permissible time range for raising CAFA's home state exception. While the defendant in this case was allowed to raise the exception three years into the litigation, the Second Circuit warned that, in most instances, a three-year delay would be unreasonable. Accordingly, a party that wishes to invoke CAFA's home state exception should do so "at the earliest practicable time," keeping in mind that reasonableness is a moving target that will vary from case to case.

This case began in 2009 when Avraham Gold, a former insurance agent, filed a putative class action against New York Life Insurance Company in the United States District Court for the Southern District of New York, seeking recovery of unpaid overtime and wage reductions under New York's labor laws. Gold claimed that, because he and similarly situated New York Life employees made investment recommendations to prospective clients, they were misclassified as outside salesmen and thereby unlawfully denied overtime wages. Gold alleged jurisdiction was proper under CAFA.

Gold requested a bifurcated discovery plan, whereby individual discovery would occur first, followed by class discovery. The district court approved this plan, and consequently class discovery did not start until 2011 — three years after the complaint was filed.

In May 2011, the district court granted summary judgment in favor of New York Life on Gold's overtime claims, finding there was no genuine issue of material fact that Gold was an outside salesman and thus lawfully excluded from overtime pay under New York labor laws and the Fair Labor Standards Act.

After this summary judgment ruling and as class discovery progressed, New York Life realized that more than two-thirds of the putative class members were New York citizens. It, therefore, filed a motion to dismiss, or alternatively for the court to decline jurisdiction, under CAFA's home state exception.

The district court granted New York Life's motion and declined to exercise jurisdiction, finding that the company's three-year delay in raising the exception was excusable in light of the case's unique discovery schedule. On appeal, the Second Circuit affirmed.

First, the Second Circuit held that CAFA's home state exception is not a jurisdictional requirement. Under this exception, a district court shall "decline to exercise" jurisdiction over class actions in which two-thirds or more of the class, and the primary defendants, are citizens of the state in which the action was filed.

The court noted that the Seventh and Eighth Circuits have expressly held that the home state exception is not jurisdictional because the "decline to exercise" language inherently recognizes that the district court has subject matter jurisdiction, but must actively decline to exercise that jurisdiction if the exception's requirements are satisfied. Siding with these circuits, the Second Circuit concluded that Congress's targeted use of the phrase "decline to exercise" means that CAFA's home state exception is not a jurisdictional prerequisite.

Gold, however, argued that if the exception was not jurisdictional, then it must be raised within a reasonable time, which New York Life did not do. The Second Circuit agreed that, because CAFA does not specify a time limit for filing a motion to remand, a motion to dismiss under the home state exception must be filed within a reasonable time.

While the definition of a "reasonable time" will vary from case to case, the Second Circuit cautioned that a motion to dismiss under the home state exception should be made "at the earliest practicable time." But the Second Circuit ultimately rejected Gold's argument that New York Life's motion was untimely.

The Second Circuit stated that under most circumstances a three-year delay would be unreasonable, but here, the application of the home state exception was complicated by the district court's bifurcated discovery schedule. Because of this unique discovery plan, the district court found New York Life's three-year delay excusable, as it could not uncover the citizenship of the putative class members until individual discovery was complete.

The Second Circuit was incredulous that New York Life could not determine the citizenship of its sales force within three years, but the court was constrained to review the district court's decision under a deferential, abuse-of-discretion standard. As the district court was more familiar with pretrial scheduling and discovery matters, it was in a better position to evaluate when New York Life could have raised the home state exception, and therefore the Second Circuit left the district court's ruling undisturbed.

Apart from these class action issues, the Second Circuit also affirmed the district court's earlier ruling, granting summary judgment in favor of New York Life on Gold's overtime claims. "Outside salesmen" are exempted from the overtime requirements under New York labor law.

Moreover, the analysis of an employee's primary duty must be based on the totality of the circumstances. Under these principles, the Second Circuit found that Gold's primary duty at New York Life was selling insurance: Gold was hired to sell insurance; his compensation and continued employment was contingent on his sales; he maintained his own client list; he was not compensated on a salary; and he regularly engaged clients outside, away from New York Life's place of business.

But Gold insisted he was a financial advisor, not a salesperson, because he was a registered representative and thereby subject to the Financial Industry Regulatory Authority's regulations, which mandate that Gold offer products suited to his clients' financial needs.

The Second Circuit disagreed for two reasons. First, while Gold, as a registered representative, was required to recommend suitable insurance policies based on his clients' finances, New York Life compensated him for selling insurance, not for offering financial advice. Second, even after Gold became a registered representative, 90 percent of his sales involved traditional life insurance policies; these transactions neither required Gold to be a registered representative nor to comply with FINRA regulations.

In sum, the Second Circuit's decision in favor of New York Life highlights that a growing number of federal circuit courts (the Second, Seventh, Eighth and Ninth Circuits) have expressly held that CAFA's home state exception is not a jurisdictional prerequisite. Rather, it is akin to an abstention doctrine. Accordingly, a party must raise the exception within a reasonable time or else run the risk of waiving it.

This opinion also underscores the importance of raising CAFA's home state exception at the earliest practicable time. While New York Life was allowed to invoke the exception three years into the litigation, the Second Circuit emphasized that this is an aberration, not the norm.

Ultimately, the district court must decide what constitutes a reasonable time for raising CAFA's home state exception on a case-by-case basis, but, as indicated by the Second Circuit, only under unusual or extraordinary circumstances will a three-year delay be considered reasonable.

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