

JACK R. MORISON, Plaintiff, vs. RAND McNALLY & CO., Defendant.

No. C 97-0963 FMS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1997 U.S. Dist. LEXIS 13575

September 2, 1997, Decided

September 4, 1997, Filed; September 4, 1997, Entered in Civil Docket

SUBSEQUENT HISTORY:

[*1] Counsel Amended February 9, 1999.

DISPOSITION:

Plaintiff's motion to remand granted and case REMANDED to Superior Court of San Francisco.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff brought a false advertising claim on behalf of himself, other consumers, and the general public as a "representative" action under the California Unfair Business Practices Act, Cal. Bus. & Prof. Code § § 17200 et seq., 17500 et seq. Defendant removed the case to the court, asserting diversity jurisdiction under 28 U.S.C.S. § 1332. Plaintiff sought to remand because the amount in controversy did not exceed \$ 75,000.

OVERVIEW: The issue on appeal was whether the damages of plaintiff, other consumers, and the public should have been aggregated for purposes of determining the amount in controversy. Plaintiff's amended complaint asserted a "representative" action against defendant under the California Unfair Business Practices Act (Act). After defendant removed the case to this court, asserting diversity jurisdiction, plaintiff filed a motion for remand, arguing that the amount in controversy was insufficient to support diversity jurisdiction. The court granted the motion. Under the Act, restitution could have been awarded in favor of absent parties, and, in the event that some of the absent purchasers could not be identified, plaintiff could also have received damages reflecting the injuries to them. Whatever windfall plaintiff might possibly have received, however, under the Act he only

had a legal right to compensation for his own injuries. Those were worth an amount insufficient to create diversity jurisdiction. Because the claims in this case were "separate and distinct," they could not be aggregated for purposes of the amount in controversy.

OUTCOME: Plaintiff's motion to remand the representative action brought against defendant under the California Unfair Business Practices Act was granted and case was remanded to the superior court.

CORE TERMS: class action, aggregation, California Unfair Business Practices Act, aggregated, purchaser, diversity, amount in controversy, et seq, coupon, tank, diversity jurisdiction, software, packages, general public, common law, restitution, shrinkwrap, removing, consumers

LexisNexis(TM) HEADNOTES - Core Concepts

Civil Procedure > Removal > Removal Proceedings

[HN1] In a removal action, a district court must remand a case to state court if it determines that it lacks subject matter jurisdiction. 28 U.S.C.S. § 1447(c). To avoid a remand, the removing party bears the burden of proving that the court has jurisdiction. Uncertainties are resolved in favor of remand.

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Amount in Controversy

[HN2] Diversity jurisdiction requires complete diversity and \$ 75,000 in controversy. See 28 U.S.C.S. § 1332.

Torts > Business & Employment Torts > Unfair Business Practices

[HN3] In "representative" actions under the California Unfair Business Practices Act, restitution may be awarded in favor of absent parties.

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Amount in Controversy

[HN4] The aggregation rules for class actions are no different from the aggregation rules for other multiple plaintiff actions. Multiple plaintiffs can aggregate their claims against a single defendant only when the claims are "common and undivided." "Separate and distinct" claims by multiple plaintiffs cannot be aggregated.

COUNSEL:

For JACK R. MORISON, Plaintiff: Andrew A. August, BAYER, EVERETT, AUGUST & BELOTE LLP, San Francisco, California. Dean A. Alper, ALPER & McCULLOCH, San Francisco, California.

For RAND MCNALLY & COMPANY, defendant: Nathan Lane, III, David S. Elkins, Graham & James LLP, Palo Alto, CA.

For RAND MCNALLY & COMPANY, defendant: David K. Callahan, Kirkland & Ellis, Chicago, IL.

JUDGES:

FERN M. SMITH, United States District Judge.

OPINIONBY:

FERN M. SMITH

OPINION:

ORDER GRANTING MOTION TO REMAND

INTRODUCTION

Plaintiff moves to remand on the basis that the amount in controversy in this diversity case does not exceed \$ 75,000. Plaintiff is bringing a false advertising claim on behalf of himself, other consumers, and the general public as a "representative" action under the California Unfair Business Practices Act. Cal. Bus. & Prof. Code § § 17200 et seq., 17500 et seq. The legal issue is whether the damages of plaintiff, other consumers, and the public should be aggregated for purposes of determining the amount in controversy.

BACKGROUND

Defendant Rand McNally produces two travel-related CD-ROM software packages, TripMaker and Streetfinder. In 1996, Rand McNally [*2] promoted the software by affixing to some packages coupons that read "get a free tank of gas," along with the phrase "see back for details." The back of the coupon stated that the offer

was for up to \$ 15 off the price of a tank of gas. The coupons were sometimes located inside the package's shrinkwrap, making it impossible to read the information on the back of the coupon without removing the shrinkwrap. (Pl.'s Mem. Supp. Remand at 3.)

Plaintiff filed suit in San Francisco Superior Court on September 18, 1996, on behalf of himself, all other purchasers of the software, and the general public. The suit sought an injunction against future misleading promotions, and either restitution of the purchase price or reimbursement of the difference between the \$ 15 offer and the actual cost of a tank of gas. The original complaint was filed as a class action under the California Unfair Business Practices Act ("the Act"), Cal. Bus. & Prof. Code § § 17200 et seq., 17500 et seq., and under various common law causes of action. After two rounds of demurrers, plaintiff filed a Second Amended Complaint, which dropped the common law claims. The new complaint also abandoned the attempt for formal [*3] class action certification; instead, plaintiff chose to pursue a "representative" action under the Act.

Defendant removed the case to this Court, asserting diversity jurisdiction under 28 U.S.C. § 1332. Plaintiff has moved for remand, arguing that the amount in controversy is insufficient to support diversity jurisdiction.

DISCUSSION

I. Legal Standard

[HN1] In a removal action, a district court must remand a case to state court if it determines that it lacks subject matter jurisdiction. See 28 U.S.C. § 1447(c). To avoid a remand, the removing party bears the burden of proving that the court has jurisdiction. See *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1371 (9th Cir. 1987), cert. denied, 484 U.S. 850 (1987). Uncertainties are resolved in favor of remand. See *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1393 (9th Cir. 1988).

II. Analysis

[HN2] Diversity jurisdiction requires complete diversity and \$ 75,000 in controversy. See 28 U.S.C. § 1332. The parties agree that there is complete diversity, (Def.'s Mem. Opp. Remand at 4), but dispute whether there is a sufficient amount in controversy.

Plaintiff's personal claim [*4] is only for the difference in value between \$ 15 and a tank of gas. It is true that [HN3] in "representative" actions under the California Unfair Business Practices Act, restitution may be awarded "in favor of absent parties," see *Dean Witter*

Reynolds, Inc. v. Superior Court, 211 Cal. App. 3d 758, 259 Cal. Rptr. 789, 799 (Cal. Ct. App. 1989), and that in the event that some of the absent purchasers cannot be identified, plaintiff might also receive damages that reflect the injuries to them. Whatever windfall plaintiff might possibly receive, however, under the Act he only has a legal right to compensation for his own injuries. Those are worth a few dollars at most, an amount insufficient to create diversity jurisdiction.

This lawsuit can therefore satisfy the amount in controversy requirement only if plaintiff's claim is aggregated with those of all the other purchasers. In disputing the aggregation issue, the parties have focused on whether or not "representative" actions brought under the California Unfair Business Practices Act should be treated as class actions for the purpose of aggregating claims. This emphasis is misplaced. [HN4] The aggregation rules for class actions are no different [*5] from the aggregation rules for other multiple plaintiff actions. n1 See *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 714 (C.D. Cal. 1995) ("The doctrine of aggregation of claims [is] not and [has] never been based on the categories of Rule 23 ... Rather, the doctrine is in fact based on the Supreme Court's interpretation of 'matter in controversy,' within the meaning of the diversity statute."). Multiple plaintiffs can aggregate their claims against a single defendant only when the claims are "common and undivided." See *Snyder v. Harris*, 394 U.S. 332, 335, 22 L. Ed. 2d 319, 89 S. Ct. 1053 (1969). "Separate and distinct" claims by multiple plaintiffs cannot be aggregated. See *id.* at 338.

n1 In arguing for aggregation, defendant relies on *Mangini v. R.J. Reynolds Tobacco Co.*, 793 F. Supp. 925 (N.D. Cal. 1992). In that case, the district court aggregated the claims of absent parties in a similar suit under the California Unfair Business Practices Act on the ground that the suit was not a class action and did not "possess many of the defining characteristics of a class action." See *id.* Because the Court is not deciding whether the suit in this case is analogous to a class action, the reasoning of Mangini is not persuasive.

[*6]

The claims in this case are "separate and distinct." Defendant argues that plaintiff's use of the language "on behalf of all others similarly situated" in his complaint necessarily demonstrates that there is a common interest. Def.'s Mem. Opp. Remand at 8. For support, defendant cites this Court's decision in *In Re Citric Acid Antitrust*

Litigation, 1996 WL 116827 (N.D. Cal. 1996). That case does not support defendant's argument. Instead, plaintiffs' claims are better analyzed under *Snow v. Ford Motor Co.*, 561 F.2d 787 (9th Cir. 1977). The plaintiff in *Snow* brought a class action, seeking \$ 11 in damages for himself and for each other purchaser of a particular Ford product. See *id.* at 788. The court held that the damages sought were "separate and distinct." See *id.* at 789, n.3. Likewise in this case, plaintiff and the other purchasers have "separate and distinct" interests in any recovery; neither he nor any of them would have a right to the entire award. Under *Snyder*, therefore, the claims cannot be aggregated.

Nor can the damages be measured by the harm to defendant, as defendant argues. The "defendant's viewpoint" approach to damage measurement comes from [*7] *Ridder Bros., Inc. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944). *Ridder*, however, involved only a single plaintiff and a single defendant. The Ninth Circuit has refused to apply *Ridder* to class actions in which the plaintiffs' claims are separate and distinct, because doing so would allow parties to evade the anti-aggregation rule of *Snyder*. See *Snow*, 561 F.2d at 790. *Ridder* is therefore no longer good law in multiple plaintiff cases such as this one. Because plaintiff's claim alone does not meet the \$ 75,000 minimum amount in controversy, the Court lacks jurisdiction to hear the case.

CONCLUSION

For the foregoing reasons, the Court grants plaintiff's motion and REMANDS this case to the Superior Court of San Francisco.

SO ORDERED.

Dated: September 2, 1997

FERN M. SMITH

United States District Judge

JUDGMENT

For the reasons stated in the accompanying order, this case is REMANDED to the Superior Court of San Francisco. The Clerk of the Court shall close the file.

SO ORDERED.

Dated: September 2, 1997

FERN M. SMITH

United States District Judge