Securities Regulation Daily Wrap Up, VIRTUAL CURRENCIES—N.D. Cal.: Consolidation orders upend plaintiffs' efforts to keep Ripple XRP securities cases in California state court, (Mar. 1, 2019)

Securities Regulation Daily Wrap Up

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By Mark S. Nelson, J.D.

The combined effect of two California state court consolidation orders meant that several consolidated cases against Ripple became eligible for removal to federal court under the Class Action Fairness Act.

A judge in the Northern District of California has, in her third such case involving Ripple, Inc., ruled this time that a series of state court consolidation orders rendered the combined state cases removable to federal court under the Class Action Fairness Act (CAFA). The plaintiffs in each of the three cases involved in this latest matter had separately alleged either only Securities Act claims or only California claims. Despite the efforts of the plaintiffs in two of the three cases to carefully draft their complaints in order to keep their cases in California courts, the combination of those cases with another case that lacked geographic limits allowed for removal to federal court (*Zakinov v. Ripple Labs, Inc.*, February 28, 2019, Hamilton, P.).

For the third time. This is the third case U.S. District Court Judge Hamilton has decided in which plaintiffs made virtually the same securities fraud allegations against Ripple. One of those cases (*Coffey*) was successfully removed to federal court under CAFA because, among other things, it alleged both Securities Act and California claims (the plaintiff later voluntarily dismissed the case). A second case (*Greenwald*) was remanded to California court because it alleged only Securities Act claims. (Although the instant case discussed only the Ninth Circuit's *Luther* opinion with respect to remand, underlying all of these cases are hints of the Supreme Court's *Cyan* decision in which the justices held that state cases alleging only Securities Act claims cannot be removed under the Securities Litigation Uniform Standards Act.).

Moreover, the instant case, dubbed Ripple III by the district court, began as two separate cases (*Zakinov* and *Oconer*) each filed about a month apart in California court. These two cases would soon become three consolidated state cases. *Zakinov* and *Oconer* alleged only California claims, a class composed of only California purchasers of XRP, and named only Ripple defendants who were California citizens.

The California state court consolidated *Zakinov* and *Oconer* "for all purposes." This latter phrase is important because under California law, as explained by the California's Supreme Court (citation by the federal district court omitted), cases can be consolidated just for trial (the cases themselves remain separate) or they can be consolidated "for all purposes," which results in a "complete consolidation" such that the consolidated cases merge into one case.

Ripple III, the case presently before the federal district court, arose from a second California court consolidation order that consolidated *Zakinov-Oconer* with the previously remanded *Greenwald*. Ultimately, the district court would interpret the California court's orders that produced the consolidated *Zakinov-Oconer-Greenwald* case as bringing that case within CAFA's ambit.

"For all purposes." In deciding the instant case, the district court had to examine what "for all purposes" meant with respect to the state court judge's authority to consolidate *Zakinov, Oconer*, and *Greenwald*, and then what the effect of that consolidation was for purposes of CAFA. The court began by looking at the state judge's authority.

The plaintiffs made three principal arguments against the state judge's authority to consolidate the three cases on that court's own motion. First, the plaintiffs said such order required a noticed motion or stipulation. The district court looked to the California Civil Procedure Code and a prominent treatise on California law and found

ample support for the proposition that a California state court judge can, on his own motion, consolidate cases, even if there is a "preference" for more formal consolidation procedures (e.g., stipulation or acquiescence).

The court also rejected the plaintiffs' second theory (that CAFA's "mass action" limits were implicated) because the combined *Zakinov-Oconer-Greenwald* case undeniably met CAFA's numerical threshold, so worries about the defendants' potential to game that threshold were inapt (the district court also rejected the plaintiffs' proposed application of the "voluntary-involuntary" rule—applicable to 28 U.S.C. §1332—because removal here was not prompted by a merits decision or evidence proffered by the defendants).

Third, the district court examined whether the consolidation was "for all purposes." Here, the district court rebuffed the plaintiffs' argument that consolidation was for trial only and that the pleadings in the several cases would be kept separate; the district court noted that consolidation of the cases by the state court under a single case number was a complete consolidation. The district court also observed that the state court order consolidating *Zakinov, Oconer*, and *Greenwald* stated that it was "pursuant to" the prior order consolidating *Zakinov* and *Oconer* (they were consolidated "for all purposes"); this reference, said the court, made it more likely the consolidation of *Zakinov, Oconer*, and *Greenwald* was, likewise, "for all purposes."

Lastly, the district court rejected the plaintiffs' argument that the state court's consolidation orders collectively "extinguish[ed]" the *Greenwald* complaint. The district court said language contained in the first consolidation order (e.g., "herein") meant that the *Zakinov* or *Oconer* complaints (or a consolidated complaint) would supersede one or the other, but it did not mean that the first consolidation would extinguish all future complaints. Still, under Ninth Circuit precedent, the district court treated the *Greenwald* complaint and the consolidated complaint in *Zakinov-Oconer* to be "merged" for purposes of deciding whether federal court jurisdiction existed under CAFA.

Moreover, the district court rejected the plaintiffs' final two theories for remand: (1) CAFA's local controversy exception was inapt because *Greenwald* had no geographic limitation (i.e., the court could not conclude that two-thirds of the proposed class would be California residents); and (2) the securities exception was inapplicable because the underlying cases asserted fraud and the proposed class was directed at "purchasers" rather than "holders" of XRP.

The case is No. 18-cv-06753.

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