

## The Expert's Corner

### FEE-SHIFTING FOR WRONGFUL REMOVALS: A DEVELOPING TREND?

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A relatively small but not insignificant issue in class action attorney fee awards concerns fee-shifting in cases wrongfully removed under the Class Action Fairness Act of 2005 (“CAFA”). The governing statute, 28 U.S.C. §1447(c), long pre-dates CAFA: it applies generally to cases that are removed and then remanded to state court when removal was improper for lack of subject matter jurisdiction in the federal court; it permits plaintiffs to seek fees from the defendant for time spent on the

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errant removal petition. As CAFA greatly expanded removal opportunities for defendants, it also therefore increased the probability of wrongful removals and the opportunities for plaintiffs to seek fees upon remand. As set forth in more detail below, in early CAFA cases, courts generally tended to deny fee-shifting unless the removal motion contradicted clearly established precedent. However, a series of recent cases – decided since removal standards under CAFA have been more clearly established by federal circuit decisions – suggests that courts have begun to shift fees more regularly.

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#### §1447(c) GENERALLY

The operable section of the federal code states that “An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” 28 U.S.C. §1447(c). Prior to 1985, the circuits had split in their interpretation of this rule, with some maintaining a presumption in favor of plaintiff recovery of attorney’s fees and others utilizing a reasonableness test. In *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005), the Supreme Court settled the circuit split, adopting the rule that “attorney’s fees should not be awarded when the removing party has an objectively reasonable basis for removal.” *Id.* at 136. In so holding, the Court reasoned that, “the appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress’ basic decision to afford defendants a right to remove[.]” *Id.* at 140.

*Fees are usually denied unless the removal motion contradicted clearly established precedent – but with such precedent increasing under CAFA, fee-shifting has begun to perk up as well.*

Because the *Martin* standard is objective reasonableness, lower courts’ application of it have been highly fact dependent and have generally been fairly taciturn in their reasoning beyond the *Martin* standard. Fees are

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