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U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHAD RHOADES; LUIS URBINA,

Plaintiffs - Appellees,

v.

PROGRESSIVE CASUALTY  
INSURANCE COMPANY, INC.,

Defendant - Appellant.

No. 10-17129

D.C. No. 2:10-cv-00763-GEB-  
KJM

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
Garland E. Burrell, District Judge, Presiding

Argued and Submitted November 3, 2010  
Stanford, California

Before: THOMAS and IKUTA, Circuit Judges, and RESTANI, Judge.\*\*

Progressive Casualty Insurance Company (“Progressive”) appeals an order of the district court remanding a class action lawsuit to state court. We reverse.

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

Because the parties are familiar with the factual and procedural history of this case, we need not recount it here.

I

This appeal was taken pursuant to the Class Action Fairness Act (“CAFA”), Pub.L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.). CAFA authorizes the removal of class action lawsuits from state to federal court where the amount in controversy exceeds \$5 million, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2). Under CAFA, as in other diversity cases, “the party asserting federal jurisdiction has the burden of showing the case meets the statutory requirements for the exercise of federal jurisdiction and therefore belongs in federal court.” Lewis v. Verizon Communications, Inc., \_\_\_ F.3d \_\_\_, 2010 WL 4645465, 4 (9th Cir. 2010). However, “[o]nce the proponent of federal jurisdiction has explained plausibly how the stakes exceed \$5 million, . . . then the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much.” Id. (quoting Spivey v. Vertrue, Inc., 528 F.3d 982, 986 (7th Cir. 2008)). In assessing whether the defendant has established that the amount in controversy exceeds \$5 million, “we expressly contemplate the district court's consideration of some evidentiary record.” Id.

In this case, as in Lewis and Spivey, the complaint did not allege a specific amount sought in recovery. Progressive tendered credible, and unrebutted, evidence that the amount sought exceeded \$5 million due to the claim for unpaid overtime and attorneys fees. It has “plausibly explained how the stakes exceed \$5 million,” and it is legally possible for the plaintiffs to recover that much. Thus, the district court erred in determining that Progressive had not established that the amount in controversy exceeded the statutory requirement.

## II

The plaintiffs contend that we lack appellate jurisdiction because of events that have occurred subsequent to the district court’s remand order. However, that assertion is in error. See, e.g., News-Texan, Inc. v. City of Garland, 814 F.2d 216, 218 (5th Cir. 1987) (noting that appellate jurisdiction over remand orders exists despite the occurrence of events subsequent to the remand). In addition, federal courts retain power to enforce removal jurisdiction against state court proceedings. Mitchum v. Foster, 407 U.S. 225, 234 & n. 12 (1972); see also Quackenbush v. Allstate Ins. Co., 121 F.3d 1372, 1378 (9th Cir. 1997); Lou v. Belzberg, 834 F.2d 730, 740 (9th Cir. 1987).

III

The district court erred in remanding the removed case. We vacate the order of removal and remand for further proceedings consistent with this decision. We need not, and do not, decide any other issue urged by the parties.

**REVERSED AND REMANDED.**

**FILED**

*Rhoades v. Progressive Cas. Ins. Co.*, No. 10-17129  
IKUTA, J., dissenting.

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In concluding that we have jurisdiction over the district court's June 10, 2010 remand order, even though events after the remand have made any controversy regarding that remand order moot, the majority relies on a Fifth Circuit case, *News-Texan, Inc. v. City of Garland*, 814 F.2d 216, 218 (5th Cir. 1987). Our precedent, however, is otherwise: it indicates that when a properly removed case is remanded, and then "becomes moot in the course of litigation," a federal court no longer has jurisdiction over the case. *United Steel Workers Int'l Union v. Shell Oil Co.*, 602 F.3d 1087, 1092 n.3 (9th Cir. 2010).

Here, Progressive's appeal of the district court's June 10, 2010 remand order is moot. After the June 10th remand, Progressive could have taken one of a number of procedural steps to maintain the status quo, including seeking a stay of the district court's June 10th remand order pending resolution of this appeal. Had Progressive done so, our jurisdiction over this appeal would have been unaffected. *See id.* But instead, Progressive decided to remove the case again, resulting in a second remand order that is now both final and unreviewable. *See Seedman v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 837 F.2d 413, 414 (9th Cir. 1988) (per curiam).

When the party appealing a decision participates in conduct that moots its

case while it is on appeal, we are not authorized to provide that party with appellate relief. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25–26 (1994). Under the circumstances present here, we should not take the extraordinary steps of vacating a district court remand order that Progressive elected not to appeal, and unwinding subsequent state-court proceedings undertaken pursuant to a final remand order. *See* 28 U.S.C. § 1447(c) (directing that, after the final order of remand has been mailed to the clerk of the State court, “[t]he State court may thereupon proceed with [the] case”). Therefore, I respectfully dissent.

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings (December 2009)

#### **Judgment**

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### **Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)**

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### **Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)**

#### **Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)**

#### **(1) A. Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### **B. Purpose (Rehearing En Banc)**

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

#### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at under *Forms*.

#### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at under *Forms* or by telephoning (415) 355-7806.

#### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at

#### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**United States Court of Appeals for the Ninth Circuit**

**BILL OF COSTS**

**Note:** If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

The Clerk is requested to tax the following costs against:

| Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1 | REQUESTED<br>Each Column Must Be Completed |                      |                         |                         | ALLOWED<br>To Be Completed by the Clerk |                      |                         |                         |                         |
|--|--|----------------------|-------------------------|-------------------------|---|----------------------|-------------------------|-------------------------|-------------------------|
|  | No. of Docs.                               | Pages per Doc.       | Cost per Page*          | TOTAL COST              | No. of Docs.                            | Pages per Doc.       | Cost per Page*          | TOTAL COST              |                         |
| Excerpt of Record  | <input type="text"/>                       | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/>                    | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> |                         |
| Opening Brief  | <input type="text"/>                       | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/>                    | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> |                         |
| Answering Brief  | <input type="text"/>                       | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/>                    | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> |                         |
| Reply Brief  | <input type="text"/>                       | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/>                    | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> |                         |
| Other**  | <input type="text"/>                       | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/>                    | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> |                         |
| <b>TOTAL:</b>  |  |                      |                         | \$ <input type="text"/> | <b>TOTAL:</b>                           |                      |                         |                         | \$ <input type="text"/> |

\* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

\*\* Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

*Continue to next page.*

**Form 10. Bill of Costs - Continued**

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

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(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk