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11th Circ. Told Dismissal Of Ritz Tips Class Suit Didn't Fit Bill

By **Nathan Hale**

Law360 (April 2, 2020, 7:14 PM EDT) -- A New York man told the Eleventh Circuit Thursday that a Florida federal court wrongly tossed his proposed class action accusing Ritz-Carlton of deceptively adding automatic gratuities on dining bills at its Florida hotels after the judge improperly limited his claims.

Michael Fox said during oral arguments that the district court concluded he could not satisfy the $5 million threshold to establish federal jurisdiction under the Class Action Fairness Act based on the erroneous finding that he was not in a position to assert claims on behalf of other diners who visited different Ritz-Carlton Hotel Co. restaurants on different days than he did.

By limiting its focus to the three restaurants Fox dined in at the Ritz-Carlton Key Biscayne hotel in Miami during the two days of his April 2017 stay, the district court ignored his detailed claims that the inadequate disclosure of the automatic 18% gratuity was a corporate-wide practice consistently propagated over a four-year period, 10 hotels and 49 restaurants, Fox's counsel James A. Francis of Francis & Mailman PC told the panel, which was originally scheduled to sit in Miami but held the session over the phone due to the coronavirus pandemic.

"This was not a case where a plaintiff sought to extrapolate and guess and/or speculate as to a defendant's corporatewide practice based upon his own isolated individual experiences." Francis said. "All of the Ritz restaurants at issue here committed the same inadequate disclosure and, therefore, it doesn't matter whether Mr. Fox went to one restaurant or he went to all of them."

Francis also argued that the district court failed to view the facts in the light most favorable to the plaintiff, as required at this stage, when it limited Fox's claims to two days based on "improper suppositions and speculation" that the menus may have changed during the proposed class period.

Fox also contested the court's determination that his damages claim should be limited to the amounts of the disputed charges minus what each diner would have paid as a gratuity in the absence of the automatic tip.

In response, Rodolfo Sorondo of Holland & Knight LLP, representing Ritz-Carlton, argued that Francis failed to distinguish between claims Fox raised from his actual experiences at the three restaurants and those made on "information and belief," and he said the district court's decision to limit Fox's claims to those restaurants was consistent with prior case law.

Sorondo pushed back against suggestions from U.S. Circuit Judges Robert Luck and Ed Carnes that Fox's claims of a corporate-wide practice point to him having similar injuries as diners at Ritz-Carlton's other properties. The attorney argued that Fox's claims about his experiences at the three restaurants he attended — Key Pantry, Cantina Beach and Lightkeepers — disproved his assertion of a consistent practice.

The complaint said that Key Pantry's menu had no notice of the automatic gratuity, while Cantina Beach's menu featured fine print stating, "A suggested 18% gratuity will be added to your check for your convenience." Lightkeepers' menu allegedly featured similar fine print plus added language that diners could "raise, lower or remove this gratuity at your discretion."

"One didn't have any notice, one said one thing, the other said another," Sorondo said. "Clearly even within the one hotel there was no consistency or whole hotelwide practice."

He conceded under questioning from the panel's third member, U.S. Circuit Judge Stanley Marcus, that to establish standing on the front end of the litigation, Fox simply has to claim that he has been personally injured and that the injury is redressable by the court, and not yet prove that other potential members of the proposed class have been injured.

But Ritz-Carlton's counsel returned to his point that the district court properly limited Fox's claims to the three restaurants. Based on their sales of approximately $27.8 million and the district court's finding that class members, if successful, would be entitled only to the difference between the 18% automatic gratuity and the amount they would have tipped — which he noted is commonly at least 15% of the bill — then there was "no plausible interpretation of what is pled that would reach the $5 million jurisdictional threshold," he said.

Fox's counsel concluded the day's arguments by suggesting the district court's ruling could throw a roadblock in the way of a broad swath of consumer class actions.

"These allegations are more than sufficient to plead CAFA jurisdiction, which we did, and the reality is if this decision is upheld, it'll effectively preempt any class actions from going forward that are based upon a corporatewide misrepresentation," Francis argued. "Because unless the consumer can prove that he went to every Best Buy that misrepresented a TV or went to every store, there is no way that the pleading stage that the consumer would ever be able to prove that type of standing that the district court is looking for at this at this level."

Judges Ed Carnes, Stanley Marcus and Robert Luck sat on the panel for the Eleventh Circuit.

Fox is represented by David M. Marco of SmithMarco PC, James A. Francis and David A. Searles of Francis & Mailman PC, and Lewis J. Saul and Edward A. Coleman of Lewis Saul & Associates PC.

Ritz-Carlton is represented by Rodolfo Sorondo Jr., Richard C. Hutchison, Scott D. Ponce and Rebecca M. Plasencia of Holland & Knight LLP.

The case is Fox v. The Ritz-Carlton Hotel Co., case number 19-10361, in the U.S. Court of Appeals for the Eleventh Circuit.

--Editing by Adam LoBelia.
