7th Circ. Ruling Forms Split On CAFA Jurisdictional Discovery

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A recent decision by the U.S. Court of Appeals for the Seventh Circuit left in its wake a circuit split affecting the class action bar.

The issue dividing the circuits is whether federal courts can permit discovery to determine diversity jurisdiction in cases removed under the Class Action Fairness Act of 2005, also known as CAFA. The Seventh Circuit says yes. The U.S. Court of Appeals for the Eleventh Circuit says no.

The Seventh Circuit recently severed the split in Dancel v. Groupon Inc.[1] In that case, an Instagram user alleged that Groupon, an e-commerce company, violated a state publicity statute when it pulled photos from her Instagram account for advertising purposes.

The plaintiff filed the action in state court, but Groupon later removed the matter to federal court. In doing so, Groupon was required to comply with the provisions of CAFA.

One such provision concerns diversity jurisdiction.[2] Traditionally, diversity jurisdiction exists when all plaintiffs are diverse from all defendants.[3] But CAFA relaxes that requirement by recognizing diversity jurisdiction when one member of the plaintiff class is a citizen of a state different from any one defendant. Groupon, a citizen of Illinois and Delaware, attempted to meet this lower bar by stating in its notice of removal that the plaintiff class "undoubtedly would include at least some undetermined number of non-Illinois and non-Delaware citizens as class plaintiffs."[4]

Underwhelmed by this allegation, the Seventh Circuit found Groupon's assertion of so-called negative citizenship factually insufficient to satisfy CAFA's minimal diversity requirement.[5] While the burden to demonstrate diversity is lower in CAFA cases, the Seventh Circuit said that Groupon must still identify at least one class member who is a citizen of a state other than Illinois and Delaware.[6] Because Groupon could not supplement the record to identify a specific, diverse class member, the Seventh Circuit remanded to the district court for purposes of jurisdictional discovery.[7]

In so holding, the Groupon panel noted that its ruling "may be creating a split with the present position of the Eleventh Circuit."[8] Indeed, Eleventh Circuit precedent prohibits jurisdictional discovery in diversity cases removed under CAFA — which is otherwise silent on the matter.[9]

In Lowery v. Alabama Power Co., the Eleventh Circuit said that such discovery cannot be squared with the parties' obligations to set forth the factual basis for jurisdiction under Federal Rule of Civil Procedure 8, as well as their obligation to make such allegations in good faith under Rule 11.[10] For these reasons, the Lowery panel decided that a district court has no discretion to either permit the parties to conduct jurisdictional discovery or to engage in it sua sponte.[11] To hold otherwise, the Lowery court said, would result in "fishing expeditions" that could "clog the federal judicial machinery."[12]

While the Eleventh Circuit has since limited Lowery's sweep,[13] the ban on jurisdictional discovery in CAFA cases remains intact. The Eleventh Circuit position is therefore at odds with the Seventh Circuit outcome in Groupon. Comparing the circuit positions side by side, the Seventh Circuit has it right.

First, the Seventh Circuit approach is in line with U.S. Supreme Court precedent. The Supreme Court has repeatedly recognized that district courts can use discovery to assess jurisdiction. For instance, the court held in Oppenheimer Fund Inc. v. Sanders that "where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues."[14]

In U.S. Catholic Conference v. Abortion Rights Mobilization, the court has also noted that:

Nothing we have said puts in question the inherent and legitimate authority of the court to issue process and other binding orders, including orders of discovery ... as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter.[15]

Against this backdrop, the Eleventh Circuit's categorical rule disallowing jurisdictional discovery is out of step with Supreme Court precedent.

Second, the Seventh Circuit position is flexible and avoids the Eleventh Circuit's one-size-fits-all approach. Discovery is not an all-or-nothing process. Courts can place limits on discovery.

The Seventh Circuit recognized as much in Groupon when it ordered the district court "to permit discovery to whatever extent the court deems necessary."[16] Similarly, the U.S. Courts of Appeals for the Fifth and Ninth Circuits have said that district courts can tailor discovery to avoid undue delay in resolving jurisdictional disputes.[17] The Lowery court feared that discovery would "clog the federal judiciary," but thoughtful guidelines on the scope of discovery can ease this concern.

Finally, the Seventh Circuit approach promotes fairness. Typically, a plaintiff's right to file in state court is offset by the defendant's right to remove to federal court. But Lowery's flat ban on jurisdictional discovery incentivizes plaintiffs to tailor their complaints so that removing defendants face challenges in establishing diversity jurisdiction.

As a result, a defendant's right of removal could be burdened by legal gamesmanship. The Seventh Circuit approach evens the playing field by giving defendants the opportunity to demonstrate jurisdiction.

To be sure, district courts may be skeptical to grant post-removal discovery requests. That is understandable. After all, discovery is time- and labor-intensive. It often involves back-and-forth negotiations between parties.

And when class actions are involved, discovery can be complex. But these hurdles do not justify a wholesale ban on jurisdictional discovery. As the Seventh Circuit approach demonstrates, jurisdictional discovery should be employed — when appropriate — so that the parties can resolve the merits of their case in the proper forum.

Moving forward, practitioners should be mindful of what Groupon and Lowery mean for their clients. Groupon is an important reminder that removing defendants should put forth allegations sufficient to satisfy diversity jurisdiction, and if unable to do so, move

expeditiously for limited discovery. Even though CAFA lowered the bar for establishing minimal diversity, Groupon demonstrates that bare assertions of fact will not suffice — at least without discovery.

That point should resonate with the practicing bar in the Eleventh Circuit. With Lowery's prohibition still in effect, defendants do not have an opportunity post-removal to use discovery as a tool to establish jurisdiction. Defendants should therefore have a well-founded belief, before filing for removal, that the requirements for diversity jurisdiction are satisfied.

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[1] 940 F.3d 381 (7th Cir. 2019).

[2] See 28 U.S.C. § 1332(d).

[3] See Id. § 1332(a).

[4] Groupon, 940 F.3d at 383.

[5] Id. at 385.

[6] Id. at 386.

[7] Id.

[8] Id.

[9] See Lowery v. Ala. Power Co., 483 F.3d 1184, 1215 (11th Cir. 2007).

[10] Id. at 1216.

[11] Id. at 1218.

[12] Id. at 1217.

[13] See Pretka v. Kolter City Plaza II, Inc., 608 F.3d 744, 762 (11th Cir. 2010).

[14] 437 U.S. 340, 351 n.13 (1978).

[15] U.S. Catholic Conference v. Abortion Rights Mobilization, 487 U.S. 72, 79 (1988).

[16] Groupon, 940 F.3d at 386.

[17] See Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc., 485 F.3d 804, 820 (5th Cir. 2007) (finding jurisdictional discovery appropriate even if it is not "exhaustive"); Abrego

Abrego v. The Dow Chem. Co., 443 F.3d 676, 691 (9th Cir. 2006) ("The deference owed to district courts in managing jurisdictional discovery is tempered by concern regarding the time pressure imposed by the general removal provisions of § 1446(b).").

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