

CLASS ACTION BLOG

The Seventh Circuit Parts Company with the Eleventh—“Limited Discovery” Ordered to Determine if Minimal CAFA Diversity Exists

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Groupon used Christine Dancel’s Instagram photograph from her public Instagram account to promote a voucher for a restaurant. Dancel then filed a class action suit under the Illinois Right of Publicity Act seeking \$1,000 in statutory damages for each class member. When Dancel filed an amended state court complaint expanding the class (after two years of litigation), Groupon filed a notice of removal. Plaintiff filed a motion to remand, which was denied by the district court. The district court thereafter denied Dancel’s motion to certify a class. After the certification denial, Dancel’s attorneys filed a Rule 23(f) appeal. The Seventh Circuit remanded to allow the district court to oversee limited discovery to determine whether minimal CAFA diversity existed. In doing so, the Seventh Circuit pointed out (in an unnumbered footnote) that its ruling differed with an Eleventh Circuit holding, which “prohibited jurisdictional discovery in cases removed under the CAFA.”

The Seventh Circuit began its opinion by chiding Dancel’s attorneys for proceeding “as though we gave her a free ticket to redo her opposition to the removal of her suit from state court,” rather than solely appealing the denial of class certification. The court also made clear its frustration with Groupon’s attorneys for failing to try to supplement the record for over a year once the minimal diversity issue was raised. Instead, Groupon insisted “that it could easily cure the deficiency, if pressed, but thought it unnecessary to do so.” Based upon its earlier rulings, the Seventh Circuit ruled that as long as “subject matter jurisdiction was apparent from the record ... or cured through amendment of notice of removal” the court could decide the class certification issue. Because the record failed to “reveal the existence of jurisdiction...Groupon must amend its allegations.”

Groupon argued that Dancel had waived her opportunity to contest its jurisdictional allegations, but the Seventh Circuit pointed out that Groupon read its precedents too broadly. The waiver rule upon which Groupon relied was that a party waives a district court's "unchallenged factual determination that supports jurisdiction." But in this case, Groupon's "allegations ... do not have the necessary factual content for Dancel's waiver to permit an inference of jurisdiction." Since Groupon stated at oral argument that it needed to conduct discovery before it could supplement the record to identify a specific, diverse class member, the court elected to give it that opportunity. The Seventh Circuit had suggested that avenue was a possibility in strong *dicta* in *Miller v. Southwest Airlines Co.*, 926 F.3d 898 (7th Cir. 2019). The court was very specific regarding the parameters of the limited remand and noted that it would "retain ... jurisdiction over this appeal pending resolution of this issue."

In the footnote referred to above, the court noted that its ruling conflicts with *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1215 (11th Cir. 2007). In addition to noting that circuit split, the three judge panel had "circulated this opinion to all active judges," none of whom voted to hear the case *en banc*.

The *Dancel* case is noteworthy because it splits with the Eleventh Circuit in allowing minimal CAFA jurisdiction to be determined by a limited remand for the sole purpose of conducting discovery to determine whether CAFA's minimal diversity jurisdiction exists. The court did not address whether it would be appropriate to conduct limited discovery to determine whether the amount in controversy prong was satisfied, or whether CAFA exceptions apply. Class action litigators need to be aware of this circuit split and this limited discovery mechanism available in the Seventh Circuit.

Case Citation: *Dancel v. Groupon, Inc.*, 940 F.3d 381 (7th Cir. 2019)