

Seventh Circuit Offers Useful Reminders about Removal

Publications

November 1, 2021

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In *Railey v. Sunset Food Mart, Inc.*, -- F.4th --, No. 21-2533, 2021 WL 4808222 (7th Cir. Oct. 15, 2021), the US Court of Appeals for the Seventh Circuit affirmed the district court's order remanding a class action asserting claims under the Illinois Biometric Information Privacy Act because the removal was untimely. Beyond the specific holding, the Court's opinion serves as a useful reminder about some of the contours around removal of class actions, including under the Class Action Fairness Act (CAFA). We discuss some of those key principles below, through the lens of the Court's decision.

Appellate courts can review remand orders in some situations. Though appellate courts typically lack jurisdiction to review remand orders, they have the discretion to do so for orders remanding a case removed under CAFA, 28 U.S.C. § 1453(c)(1), and are “free to consider any potential error in the district court's decision.” Slip op. 4-5, 9 (quoting *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 451 (7th Cir. 2005)).

Removal may be permitted based on “complete preemption.” The defendant in *Railey* first argued that removal to federal court was appropriate because the named plaintiff—an employee at one of the defendant's grocery stores—was represented by a union, and her claims were therefore preempted by the Labor Management Relations Act. See Slip op. 2. The court acknowledged that removal is appropriate if the plaintiff's claims are “completely preempted” by federal law and that one of its recent decisions indicated that the plaintiff's claims “may, in fact, be preempted by the Labor Management Relations Act.” Slip op. 9 (citing *Fernandez v. Kerry, Inc.*, No. 21-1067, 2021 WL 4260667, at *1–2 (7th Cir. 2021)).

A defendant's time to remove may be triggered by its own subjective knowledge or ability to learn key facts related to removal. The court held, however, that the defendant's November 2020 notice of removal was untimely because it was not filed within 30 days of the plaintiff serving her complaint in February 2019. Slip op. 11. Defendants can remove a class action within 30 days after the case is filed, or 30 days after “the defendant receives a pleading or other paper that affirmatively and unambiguously reveals that the predicates for removal are present.” *Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 824 (7th Cir. 2013) Though the defendant claimed that the 30-day clock was

triggered by the plaintiff confirming her union membership in an October 2020 interrogatory, it had acknowledged in oral argument that the complaint supplied enough information—the plaintiff’s name, dates of employment, job title, and job location—to ascertain that she was represented by a union. Slip op. 10. “Based on this information, diligent counsel had everything necessary to recognize that the Labor Management Relations Act may preempt [the plaintiff’s] or the class’s claims.” Slip op. 11.

The court was careful to caution that its opinion should not be read “to impose any meaningful burden on defendants” and it stood “fully by [its] prior determination that district courts are not required to engage in a ‘fact-intensive inquiry about what the defendant subjectively knew or should have discovered’ about the plaintiff’s case to assess the timeliness of a defendant’s removal.” Slip op. 11 (quoting *Walker*, 727 F.3d at 825. The court pointed out that the plaintiff was a union member working at the defendant’s store and “a defendant can be held to information about its own operations that it knows or can discern with ease.” *Id.* “That reality mean[t] that the 30-day removal clock in § 1446(b)(1) began to tick when [the plaintiff] served her complaint in February 2019” and the November 2020 notice of removal was therefore untimely. *Id.*

Still, the Seventh Circuit’s statement seems to be in at least some tension with the First Circuit’s categorical statement that “[t]he defendant has no duty, however, to investigate or to supply facts outside of those provided by the plaintiff.” *Romulus v. CVS Pharmacy, Inc.*, 770 F.3d 67, 75 (1st Cir. 2014). The First Circuit explained its view as follows: “The district court reasoned that information on damages is not ‘new’ if the defendant could have discovered it earlier through its own investigation. This is not how the statute reads and would produce a difficult-to-manage test. ... Determining what the defendant should have investigated, or what the defendant should have discovered through that investigation, rather than analyzing what was apparent on (or easily ascertainable from) the face of the plaintiff’s pleadings, will not be efficient, but will result in fact-intensive mini-trials.” *Id.* at 73-76 (surveying somewhat different approaches the circuits have adopted). According to the First Circuit, “[e]very circuit to have addressed this issue has ... adopted some form of a bright-line rule that limits the court’s inquiry to the clock-triggering pleading or other paper” provided by the plaintiff to the defendant. *Id.* at 74 (internal quotations omitted).

The 30-day deadline to remove is triggered (or not) based on the particular removal theory and related facts; “separate removal attempts are governed by separate removal clocks.” In January 2021, the defendant raised CAFA’s minimal diversity requirements as a second basis for removal to federal court. The court emphasized that the timeliness of this basis was unaffected by the timeliness of the earlier preemption argument because “[a] defendant may remove even a previously remanded case if subsequent pleadings or litigation events reveal a new basis for removal.” Slip op. 6. If they attempt to do so, “separate removal attempts are governed by separate removal clocks.” *Id.*

The court held that this minimal diversity basis for removal was not untimely. Slip op. 8. Though the plaintiff had moved out of Illinois and changed her domicile to Georgia in February 2020, the

defendant only discovered this fact through its own investigation in January 2021. Slip op. 7; *see* 28 U.S.C. § 1453(b) (eliminating § 1446’s one-year limitation on diversity-based removal for class actions); *cf. id.* § 1332(d)(7) (evaluating diversity when case is filed or when diversity becomes apparent later based on “an amended pleading, motion, or other paper”). The court noted that “[a] plaintiff may trigger a removal clock—and protect itself against a defendant’s strategic maneuvering—by affirmatively and unambiguously disclosing facts establishing federal jurisdiction in an initial pleading or subsequent litigation document.” Slip op. 7 (internal quotations omitted). But because the plaintiff had not done so here and the defendant discovered the federal jurisdiction basis independently, the defendant could “remove the case at whatever point it deems appropriate, regardless of whether the window for removal on another basis already opened and closed.” Slip op. 7.

CAFA’s exception for “home-state controversies” may bar even timely removals. The case still had to be remanded to state court, however, because the minimal diversity exception faced a different barrier. CAFA removal is subject to an exception for “home-state controversies,” where “two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.” 28 U.S.C. § 1332(d)(4)(B); *see* Slip op. 8. “By limiting the class to Illinois citizens, [the plaintiff] eliminated any concern that any [defendant] employees domiciled outside the state comprise greater than one-third of the class and all but ‘guaranteed that the suit would remain in state court.’” Slip op. 8 (quoting *In re Sprint Nextel Corp.*, 593 F.3d 669, 676 (7th Cir. 2010)).

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