

# Class Action

COMMENTARY

REPRINTED FROM VOLUME 14, ISSUE 7 / AUGUST 2007

## 'See No Removal, Hear No Removal': The 11th Circuit's New Posture on Removal in *Lowery v. Alabama Power Co.*

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A recent 11th Circuit opinion, *Lowery v. Alabama Power Co.*,<sup>1</sup> affirms a District Court's remand of a toxic-tort "mass action" originally filed in Alabama state court, concluding that the District Court lacked jurisdiction to hear the case under the Class Action Fairness Act of 2005.<sup>2</sup> The court's interpretation of CAFA itself is sound and unsurprising. The surprise comes in the court's announcement of new ground rules for determining the amount in controversy in *all* diversity cases — rules designed to make removal more difficult whenever the plaintiff opposes it.

As the court summarized its holding, "We think it highly questionable whether a defendant could ever file a notice of removal on diversity grounds in a case such as the one before us — where the defendant, the party with the burden of proof, has only bare pleadings containing unspecified damages on which to base its notice — without seriously testing the limits of compliance with Rule 11."<sup>3</sup> The court seems to ban all post-removal discovery concerning the jurisdictional amount and to prohibit consideration of most evidence of the amount in controversy that does not originate with the plaintiff.

### State and District Court Proceedings

Nine plaintiffs originally brought *Lowery* in Alabama state court before CAFA's effective date against 12 corporations and 120 fictitious entities. The plaintiffs claimed that the defendants discharged particulates and gases into the atmosphere and groundwater and sought damages for personal injuries and loss of the use and enjoyment of their property. They also sought punitive damages. The original complaint included a per-plaintiff demand for compensatory and punitive damages of \$1.25 million each.

The plaintiffs amended their state court complaint three times, always asserting the same substantive claims and ultimately demanding unspecified compensatory and punitive damages in excess of the state court's jurisdictional limit. They added roughly 400 plaintiffs and additional defendants, including Alabama Power Co.

Alabama Power, added as a defendant after CAFA's effective date, removed the case to the U.S. District Court for the Northern District of Alabama as a "mass action" under 28 U.S.C. § 1332(d)(11).

The plaintiffs moved for remand, asserting, among other things, that Alabama Power did not meet its burden to establish federal jurisdiction under CAFA. Alabama Power responded by filing a supplement to its removal notice, pointing out that there were more than 400 plaintiffs whose claims need seek only \$12,500 apiece to reach \$5 million and that plaintiffs in recent Alabama mass-toxic-tort cases had received in excess of \$5 million.

Alabama Power also filed a motion to serve limited jurisdictional discovery in the event that the court found a question as to the presence of the requisite amount in controversy. The District court granted the motion to remand.

### 11th Circuit Proceedings

#### Preliminary Issues

Alabama Power appealed the remand order pursuant to 28 U.S.C. § 1453(c)(1). Before turning to the question of whether the case was properly remanded for lack of the requisite amount in controversy, the 11th Circuit addressed two preliminary questions.

First, the court held that Alabama Power's notice of removal effected the removal of the claims against *other* defendants, who were made parties to the action before CAFA's effective date: "Removal under the statute encompasses all the claims in the 'action' as a whole, not simply the claims against a removing defendant."<sup>4</sup>

Second, the court clarified that CAFA's definition of "mass action" requires, with respect to the amount in controversy, only that \$5 million be at stake in the action; it does not impose an additional requirement that each mass-action plaintiff have a \$75,000 claim, as the District Court had determined.

### **Amount in Controversy**

The court began its evaluation of the amount in controversy by reiterating the rule that the burden of proof to establish the amount in controversy lies with the defendant, noting that "in the removal context where damages are unspecified, the removing party bears the burden of establishing the jurisdictional amount by a preponderance of the evidence."<sup>5</sup>

While acknowledging the "peculiar implications of applying the preponderance of the evidence standard ... [to] naked pleadings," the court said it was bound to adhere to its prior decisions in adopting the standard.<sup>6</sup> Quickly following that nod to precedent, however, was the court's foreboding observation that "any attempt to engage in a preponderance-of-the-evidence assessment at this juncture would necessarily amount to unabashed guesswork, and such speculation is frowned upon."<sup>7</sup>

Against that backdrop, *Lowery* held that the "scope of evidence" to be considered by a court assessing the propriety of removal includes the "removing documents," which in turn necessarily include at least one document from each party: the defendant's notice of removal and whatever document the defendant "received from the plaintiff" that led the defendant to conclude that the case was removable.<sup>8</sup>

In a footnote the court noted that in situations where damages arise "from a source such as a contract provision," the defendant might also attach the contract to its notice of removal "whether or not the defendant received the contract from the plaintiff."<sup>9</sup>

A defendant's hope of establishing the jurisdictional amount in a breach-of-contract action by reference to the contract, however, may be limited to cases in which the relevant potential damages figure is liquidated or otherwise discernible without dispute from the contract itself.<sup>10</sup>

Next the court held that despite its prior reference to the preponderance-of-the-evidence standard, that the

"removing documents" themselves must "unambiguously establish" the existence of federal jurisdiction.<sup>11</sup> It also foreclosed any post-removal jurisdictional discovery:

Post-removal discovery disrupts the careful assignment of burdens and the delicate balance struck by the underlying rules. A district court should not insert itself into the fray by granting leave for the defendant to conduct discovery or by engaging in its own discovery. Doing so impermissibly lightens the defendant's burden of establishing jurisdiction. A court should not participate in a one-sided subversion of the rules. The proper course is remand.<sup>12</sup>

Applying this framework, the 11th Circuit affirmed the remand order. The original complaint, with its \$1.25 million per-plaintiff demand, could not be said to unambiguously establish jurisdiction because it was superseded by the later complaints. The operative complaint, which substituted a nonspecific demand for the \$1.25 million figure, did not establish jurisdiction, according to the court, because the revision to the demand necessarily indicated a revision of the plaintiffs' good-faith estimation of the amount at issue.

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Evidence of results in other cases also did not support removal — that evidence was not only "not received from the plaintiffs," but also "tell[s] us nothing about the value of the claims in this lawsuit."<sup>13</sup> Further, Alabama Power's commonsense argument that each of the 400 plaintiffs need have only \$12,500 at stake for the mass action to meet the \$5 million threshold would require "impermissible speculation: evaluating without the benefit of any evidence the value of individual claims."<sup>14</sup>

### **Critique**

*Lowery* holds that if a diversity case is to be successfully removed to federal court, the "removing documents" — including some document "received from the plaintiff,"

likely the complaint — must “unambiguously establish” jurisdiction. Can this standard be met, at least in tort cases, absent a concession from the plaintiff that the requisite amount is at stake? Indeed, the court’s remand in *Lowery* itself illustrates that in the case of dueling allegations on the amount in controversy, the defendant, as the party with the burden of proof, faces long odds.

### **Does Section 1446(b) Prescribe the Substantive Standard for Removability?**

The *Lowery* holding is the result of the court’s importation of the standard for “ascertainment” that a case is removable (the triggering event for the 30-day removal window under the second paragraph of 28 U.S.C. § 1446(b)) as the only permissible standard for assessing removability. In adopting the unambiguous-without-discovery standard, the court focused on the notion of “ascertainability” included in Section 1446, subsection (b), the “procedure for removal”:

The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by Section 1332 of this title more than one year after commencement of the action.<sup>15</sup>

*Lowery* also cites, in footnote 63, two cases involving the second paragraph of Section 1446(b), that is, the one that applies “if the case stated by the initial pleading is not removable.” Both cases, *Bosky v. Kroger Texas*<sup>16</sup> and *Huffman v. Saul Holdings*,<sup>17</sup> involved challenges to the timeliness of removal after the receipt of a post-complaint “other document.” Both held that under the second paragraph of Section 1446(b), some “unequivocal” indication of removability must be present before removability is “ascertainable” and the defendant’s 30-day clock therefore begins to run.<sup>18</sup>

*Lowery* adopts the standard enunciated in *Bosky* and *Huffman* to circumscribe the universe of evidence to be considered in assessing federal jurisdiction. In other words, under *Lowery*, Section 1446(b)’s requirements for the *timeliness* of removal, as construed in cases like *Bosky* and *Huffman*, supply the “unambiguous establishment” requirement for the *propriety* of removal.<sup>19</sup>

But *Bosky* and *Huffman* focus on the first event after which to start the 30-day clock for removal, not the first event that makes a case removable. The distinction is a real one. The 5th Circuit in *Bosky* explicitly stated that its requirement of an “unequivocal” demonstration of removability was unique to the *second* paragraph of Section 1446, the one that applies only “if the case stated by the initial pleading is not removable”:

“Setting forth” the key language of the first paragraph [of Section 1446(b)], encompasses a broader range of information that can trigger a time limit based on notice than would “ascertained,” the pivotal term in the second paragraph. To “set forth” means to “publish” or “to give an account or statement of.” “Ascertain” means “to make certain, exact or precise” or “to find out or learn with certainty.” The latter, in contrast to the former, seems to require a greater level of certainty or that the facts supporting removability be stated unequivocally.<sup>20</sup>

The 5th Circuit also clarified that its holding with respect to the 30-day time limit for removability did not change the substantive standard for removability:

Nor do we believe the standard we adopt today conflicts with our cases holding that a defendant can still show a case to be removable on the basis of a state court complaint which does not explicitly state a demand for damages exceeding the threshold amount in controversy. Those holdings are not relevant here because the timeliness requirement of the second paragraph of Section 1446(b) does not play unless “the case stated by the initial pleading is not removable.”<sup>21</sup>

Under *Lowery*, however, a case apparently cannot be removed unless the “ascertainability” standard is met.

### **Does Rule 11 Require Unambiguous Establishment Of Jurisdiction by the ‘Removing Documents’?**

The *Lowery* court also brought Rule 11 to bear in support of its holding, discussing the rule’s application to both a plaintiff’s complaint and a defendant’s notice of removal.

With respect to the plaintiffs' complaint in *Lowery*, the court rejected Alabama Power's argument that the plaintiffs' third amended complaint could be read consistently with their earlier \$1.25 million per-plaintiff demand for the same claims and that reading the two complaints together therefore revealed the requisite amount in controversy.

The court reasoned that the two complaints could *not* be read consistently, that is, that the third amended complaint could not be read as merely a less detailed version of the first, because the plaintiffs, mindful of Alabama's Rule 11, must have substantively re-valued the damages at stake. The unstated premise is that Alabama's Rule 11, which tracks the prior version of the federal rule, somehow requires not only that a plaintiff's allegations have a good-faith basis, but also that a plaintiff affirmatively include in his complaint the most precise damages demand consistent with the good-faith standard.

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With respect to a removing defendant, the *Lowery* court reinforced its holding that the removing documents must "unequivocally establish" jurisdiction by suggesting that Rule 11 already required as much:

Indeed, the defendant, by removing the action, has represented to the court that the case belongs before it. Having made this representation, the defendant is no less subject to Rule 11 than a plaintiff who files a claim originally. Thus, a defendant that files a notice of removal prior to receiving *clear evidence* that the action satisfies the jurisdictional requirements and then later faces a motion to remand is in the same position as a plaintiff in an original action facing a motion to dismiss. The defendants' request for discovery is tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exists.<sup>22</sup>

But Rule 11 requires only that factual allegations "have evidentiary support or if specifically so identified, are

likely to have evidentiary support after a reasonable opportunity for further investigation or discovery," not that they be supported from "clear evidence" when the notice of removal is filed.

### ***Do the Federal Rules of Civil Procedure Preclude Post-Removal Discovery?***

*Lowery* pairs its requirement that the removing documents themselves "unambiguously establish" federal jurisdiction if the case is to stay in federal court with a prohibition on jurisdictional discovery in federal court. The origins of the court's bar on jurisdictional discovery are inscrutable. The court refers to Rules 8(a) and 11 in support of its holding but cites no precedent for prohibiting jurisdictional discovery after removal and there is available precedent to the contrary.<sup>23</sup>

The absolute bar on discovery runs counter to the unmistakable emphasis of the Federal Rules of Civil Procedure and accompanying jurisdictional statutes on reaching the merits of an issue, rather than relying on code-pleading-era wordsmithing of pleadings. The court's refusal to engage in what it termed "speculation" concerning the jurisdictional amount seems to be an entirely contrived dilemma.

Limited jurisdictional discovery would allow the court to resolve jurisdictional facts and still avoid resorting to guesswork. The court even acknowledged that "post-removal jurisdictional discovery may appear to present a viable option for a court examining its jurisdiction," but still concluded that "sound policy and notions of judicial economy and fairness ... dictate that we not follow this course."<sup>24</sup> The court seemed to rest its fairness assessment on a hypothetical diversity case in which a plaintiff filed a complaint that the defendant challenged for lack of jurisdiction:

Despite the plaintiff's representation and our assumption of good faith, if a material element required for either the substantive claim or the court's subject matter jurisdiction is missing from the complaint, the defendant may move to dismiss. If the plaintiff's counsel concedes that the plaintiff lacks the *evidence* necessary to cure the deficiency, the court may dismiss the action for failure to state a claim or want of jurisdiction. In either case, without further discovery, counsel cannot in good faith amend the complaint to provide the missing element.

In our hypothetical diversity case, should the plaintiff request leave to conduct discovery to support its assertion that the case is properly

before the court, the court would deny such a request. In such a situation, the court would not reserve ruling on the motion to dismiss in order to allow the plaintiff to look for what the plaintiff should have had, but did not, before coming through the courthouse doors, even though the court would have the inherent power to do so. In deciding if dismissal is proper, a court would look only to the facts as alleged in the complaint and would not waste limited judicial resources by directing its inquiry elsewhere.<sup>25</sup>

Reinforcing the point, the court asserted that to allow a removing defendant jurisdictional discovery would be to “impermissibly lighten ... the defendant’s burden of establishing jurisdiction,” amounting to a “one-sided subversion of the rules” by the district court.<sup>26</sup>

The problem with contrasting a plaintiff facing a motion to dismiss, which is the source of the court’s observation that it would somehow be “one-sided” to allow a removing defendant jurisdictional discovery, is the conflation of a motion to dismiss for lack of *subject matter jurisdiction* with a motion to dismiss for failure to *state a claim*. A plaintiff facing a motion to dismiss for lack of subject matter jurisdiction arguably would have to produce “evidence” to avoid dismissal, but, contrary to *Lowery’s* suggestion, generally would be allowed some jurisdictional discovery, at least where the jurisdictional facts challenged by the defendant were entirely within the defendant’s knowledge, such as the facts concerning the defendant’s citizenship.

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A plaintiff facing a motion under Federal Rule of Civil Procedure 12(b)(6) might not be allowed discovery to cure deficiencies in his complaint, but also would not be required to produce evidence to withstand the motion; all that is required is allegations consistent with Rule 11 and any other applicable pleading standard, even the most stringent of which does not require production of evidence, much less unambiguous evidence, at the pleading stage. By considering the two kinds of motions to dismiss together, the *Lowery* panel is suggesting that plaintiffs must establish jurisdiction without discovery.

That is not, in fact, the general rule. This faulty hypothetical, however, appears to have been the foundation for the court’s invocation of “fairness” in rejecting post-removal discovery.

The court also characterized post-removal discovery as “fishing expeditions [that] would clog the federal judicial machinery.”<sup>27</sup> With due respect to the court, this is an overstatement at best. This and other rhetoric in the opinion suggest a frustration with current removal practice — a reaction, perhaps, to CAFA’s expansion of a defendant’s removal rights.

Faced with the fact that the judge himself asked for the *Lowery* plaintiffs to confirm certain jurisdictional facts, the court went so far as to bar a district court from conducting such discovery “on its own initiative.”<sup>28</sup> In tacit acknowledgment of the awkwardness of this direction, the court was constrained to add a footnote clarifying that “questioning a plaintiff’s counsel in open court about the value of the plaintiff’s claims” was still permissible,<sup>29</sup> with no explanation of any principle distinguishing permissible questions about jurisdictional facts from impermissible judicial discovery into them. If the facts are relevant to an issue before the court, then either option should be at the court’s disposal.

Although *Lowery’s* CAFA interpretations are themselves non-controversial, the court’s foray into general removal procedure wanders far from the mainstream. The court’s refusal to permit any jurisdictional discovery and its “four corners of the pleadings” approach are an unwelcome relapse into legal formalism.

Judge Acker, the judge who issued the remand order in *Lowery*, has since opined “that the day of the knee-jerk removal of diversity tort cases from state to federal court within the three states comprising the 11th Circuit came to an end on April 11, 2007,” when *Lowery* was decided.<sup>30</sup> “Knee-jerk” or not, removals based on diversity jurisdiction are likely to be more difficult after *Lowery*. A petition for rehearing *en banc* is pending, which will allow the full 11th Circuit an opportunity to reconsider.

### Notes

- <sup>1</sup> 483 F.3d 1184 (11th Cir. 2007). Judge Gerald B. Tjoflat wrote the opinion, joined by Judges Rosemary Barkett and Stanley Marcus.
- <sup>2</sup> Pub. L. No. 109-2, 119 Stat.4 (codified in scattered sections of 28 U.S.C.).
- <sup>3</sup> *Lowery*, 483 F.3d at 1213 n.63.
- <sup>4</sup> *Id.* at 1196.
- <sup>5</sup> *Id.* at 1208 (citations omitted).

<sup>6</sup> *Id.* at 1209-10.

<sup>7</sup> *Id.* at 1211 (citations omitted).

<sup>8</sup> *Id.* at 1211-13.

<sup>9</sup> *Id.* at 1214 n.66.

<sup>10</sup> See *id.* (“When a plaintiff seeks unliquidated damages and does not make a specific demand, therefore, the factual information establishing the jurisdictional amount must come from the plaintiff.”).

<sup>11</sup> *Id.* at 1213.

<sup>12</sup> *Id.* at 1218 (footnotes omitted).

<sup>13</sup> *Id.* at 1221.

<sup>14</sup> *Id.* at 1220.

<sup>15</sup> 28 U.S.C. § 1446(b).

<sup>16</sup> 288 F.3d 208 (5th Cir. 2002).

<sup>17</sup> 194 F.3d 1072 (10th Cir. 1999).

<sup>18</sup> See *Huffman v. Saul Holdings LP*, 194 F.3d 1072, 1078 (10th Cir. 1999) (“If the statute is going to run, the notice ought to be unequivocal.”) (quoting *DeBry v. Transamerica Corp.*, 601 F.2d 480, 489 (10th Cir. 1979); *Bosky v. Kroger Tex. LP*, 288 F.3d 208, 211 (5th Cir. 2002) (quoting this portion of *Huffman*).

<sup>19</sup> *Lowery*, 483 F.3d at 1213 (citing Section 1446 as providing the standard for “assessing the propriety of removal”).

<sup>20</sup> *Bosky*, 288 F.3d at 211 (footnote omitted).

<sup>21</sup> *Id.* at 212 (footnotes omitted).

<sup>22</sup> *Lowery*, 483 F.3d at 1217 (emphasis added and footnote omitted).

<sup>23</sup> See, e.g., *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (“where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues”); *Majd-Pour v. Georgiana Cmty. Hosp. Inc.*, 724 F.2d 901, 903 (11th Cir. 1984) (district court abused discretion in dismissing complaint for lack of subject matter jurisdiction without first allowing discovery in support of plaintiff’s claimed jurisdictional bases, including diversity. “Although the plaintiff bears the burden of proving the court’s jurisdiction, the plaintiff should be given the opportunity to discover facts that would support his allegations of jurisdiction.”); see also 6 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 26.41[11][a] (3d ed. 2007).

<sup>24</sup> *Lowery*, 483 F.3d at 1216.

<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> *Id.* at 1218.

<sup>27</sup> *Id.* at 1217.

<sup>28</sup> *Id.* at 1221.

<sup>29</sup> *Id.* at 1218 n.75.

<sup>30</sup> See *Constant v. Int’l House of Pancakes*, 487 F. Supp. 2d 1308, 1308 (N.D. Ala. 2007).

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