

## CLASS ACTION BLOG

# The Third Time is the Charm — Two Judge Panel Rules That CAFA's Local Controversy Exception Did Not Apply.

AUTHOR: ANTHONY MARTIN

Arkansas citizen Douglas Atwood filed his class action complaint against Illinois corporation Walgreen Company and two of its Arkansas district managers in Arkansas state court. Atwood claimed that Walgreens' balance rewards program violated an Arkansas price discrimination statute. The defendants removed the case under CAFA, but Atwood moved to remand based on the "local controversy exception to CAFA." After the district court denied Atwood's motion to remand while granting the defendants' motion to dismiss, Atwood appealed. He argued on appeal that the district court improperly considered extrinsic evidence. The Eighth Circuit disagreed and affirmed.

In the notice of removal, the defendants argued that the local controversy exception did not apply and further argued that "the district managers had been fraudulently joined to defeat diversity jurisdiction." To support that position, defendants attached affidavits from the district managers and "a Walgreens vice president. The vice president averred that district managers do not decide which products to offer in the program, nor do they decide the extent of the discount. "Those decisions ... are made at the corporate level, with the district managers having no discretion to vary the products or the prices." The district managers' affidavits made similar representations.

Plaintiff's counsel objected to the affidavits as improper extrinsic evidence which the district court could not consider, arguing that the district court could "consider only the allegations in the complaint." The district court considered the affidavits, found that the district managers "were not significant defendants under CAFA" and concluded "that they had been fraudulently joined in an attempt to defeat diversity jurisdiction." Later in the proceedings the court dismissed the case because plaintiff Atwood had "refused to sign up for the free [rewards] program, essentially declining the discounted price." Basically the court found that Atwood was attacking the application of a program in which he was not involved.

This blog post only addresses the two judge panel's ruling regarding the extrinsic evidence used to find that the local exception did not apply. Unquestionably, CAFA's \$5 million amount in controversy and 100 member class with minimal diversity requirements had been met. The only issue was whether the local controversy exception applied. The burden of proof regarding the local controversy exception rested with plaintiff Atwood. In order to succeed, he had to establish all four prongs of the local controversy exception. The prong of concern in *Atwood* was whether the district managers were significant defendants in the case.

The Eighth Circuit reasoned that “[c]onsidering only the allegations in the complaint would not enable us to complete the comparative analysis required to determine whether the district managers’ conduct forms a significant basis for Atwood’s claim. Atwood argues that the district managers implemented the unlawful program, but the complaint does not allege any substantive distinctions between the conduct of the district managers and the conduct of Walgreens... rather, it alleges that the district managers acted on behalf of Walgreens, as its agents or officers, and that Walgreens ‘independently and by and through’ the district managers violated Arkansas law.” According to the Eighth Circuit, those vague allegations failed to allege conduct which was “an *important* ground for the asserted claims in view of the alleged conduct of all the Defendants.” Contrasted with the allegations of the complaint, the affidavits made “clear that the ‘the real target in this action’ is Walgreens and that the district managers’ conduct does not form a significant basis for Atwood’s claim.” Relying on a 1949 Supreme Court opinion, the panel ruled that whenever a district court’s jurisdiction is being determined, the court is allowed to “inquire by affidavits or otherwise, into the facts as they exist.” For that reason, the panel held that the district court properly considered the affidavits.

The *Atwood* case establishes an Eighth Circuit rule that extrinsic evidence can be used to establish whether CAFA jurisdiction exists. In addition, such evidence can be used to determine whether an exception to CAFA jurisdiction applies.

Case Citation: *Atwood v. Peterson*, 936 F.3d 835 (2019)