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Eleventh Circuit clarifies procedural and appellate jurisdictional issues pertaining to CAFA's local controversy exception

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Takeaway: The Class Action Fairness Act (CAFA) provides class action defendants with the means to secure federal jurisdiction over putative class actions filed in state court, as well as a mechanism to appeal decisions by district courts remanding such actions to state court. Counsel for class action defendants typically take great care to show that CAFA jurisdiction exists and that none of the exceptions to CAFA jurisdiction applies. And, when faced with an adverse decision, defendants typically apply for permission to appeal under the CAFA provision providing for discretionary review. In a recent case, *Simring v. Greensky, LLC,* --- F.4th ----, No. 21-11913, 2022 WL 894206 (11th Cir. Mar. 28, 2022), the Eleventh Circuit confirmed that the putative class plaintiff (and not the defendant) has the burden of proving the applicability of CAFA's local controversy exception, and further that an appealing defendant need not comply with CAFA's discretionary appeal process to take an appeal of an adverse jurisdictional ruling. *Simring* provides class defendants with ammunition both to secure CAFA jurisdiction as well as to appeal an adverse ruling applying CAFA's exceptions to federal jurisdiction.

In that case, Joan Simring filed a putative class action in Florida state court alleging false advertising by a physician who advertised clinical stem cell treatments for neuropathy, as well as against GreenSky LLC (Greensky), a company that financed those treatments. She defined the putative class as "[a]ll persons over 64 years of age who visited Dr. Zuckerman after reading the False Advertisement and who received 'stem cell' treatments financed by GreenSky." *Id*. at *1.

GreenSky removed the case to the Southern District of Florida, asserting the federal court had jurisdiction under CAFA. Simring moved to remand, arguing that GreenSky had not established that the amount in controversy met CAFA's $5 million jurisdictional threshold, and further arguing that the court was required to decline the exercise of federal jurisdiction under CAFA's "home state" and "local controversy" exceptions.

The district court remanded the case on the basis of CAFA's local controversy exception, which applies if (among other grounds) "greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed." *Id*. (quoting 28 U.S.C. § 1332(d)(4)(A)(i)(I)).

Simring appealed the district court's remand order. But she did not file an application for permissive appeal under CAFA (28 U.S.C. § 1453(c)). Instead, she appealed under the general appellate jurisdictional statute – 28 U.S.C. § 1291 – authorizing direct appeals of "all final decisions."

On appeal, GreenSky argued that the Eleventh Circuit lacked appellate jurisdiction under the federal "jurisdiction stripping statute" for remand orders, 28 U.S.C. § 1447(d), as well as under the CAFA statute

providing for discretionary appellate review of remand orders, 28 U.S.C. § 1453(c), which Simring did not follow.

In relevant part, the "jurisdiction stripping statute" (28 U.S.C. § 1447(d)) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, …" The panel concluded, however, that this statute did not apply. Citing the Eleventh Circuit's decision in *Hunter v. City of Montgomery*, 859 F.3d 1329 (11th Cir. 2017), the panel ruled that the statute did not apply because "the district court did not remand for a procedural 'defect' or for 'lack of subject matter jurisdiction.'" *Id*. at *2. Instead, the district court's decision under CAFA's local controversy exception amounted to final, abstention-like ruling: "We have also held that the local controversy exception is 'akin' to abstention because it requires courts to decline jurisdiction that otherwise exists." *Id*. Accordingly, the panel ruled that "[w]e have appellate jurisdiction under Section 1291 alone" and, for that reason, GreenSky was not required to file an application for permissive appeal under 28 U.S.C. § 1453(c).

Simring further argued that CAFA's $5 million jurisdictional threshold was not satisfied, given that "she stipulated to accept no more than $4,999,999 in damages." Id. at *3. But the panel rejected that argument, citing the Supreme Court's decision in *Standard Fire Ins. Co. v. Knowles,* 568 U.S. 588 (2103), holding that a class representative may not bind other putative class members through such a stipulation, and given that GreenSky had submitted evidence that the putative class claims put more than $5 million at stake.

Finally, the panel reversed the district court's decision to remand based on CAFA's local controversy exception, which requires that "greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed." *Id*. at *3. Although GreenSky made no showing on the make-up of the class, it was Simring (and not GreenSky) who had the burden to prove the applicability of the exception, and the panel further emphasized that the exception is a "narrow one, with all doubts resolved 'in favor of exercising jurisdiction over the case.'" *Id*. at *3 (quoting *Evans v. Walter Indus., Inc.,* 449 F.3d 1159, 1163 (11th Cir. 2006)). Simring's argument failed, the panel concluded, because her class definition was not limited to Florida citizens, and she did not otherwise meet her burden of proof: "Here, Simring introduced no evidence at all in support of her factual contention that two-thirds of the class are citizens of Florida." *Id*. at *4 (citing *Smith v. Marcus & Millichap, Inc.*, 991 F.3d 1145 (11th Cir. 2021)). Accordingly, "the district court erred by applying the local controversy exception as a basis for remanding to state court." *Id*.