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Getting it wrong – remanding a removed class action back to state court after the denial of class certification

by James F. Bogan III

Takeaway: According to the United States Supreme Court, federal district courts have "the virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976). One source of that jurisdiction is the Class Action Fairness Act (CAFA), which was enacted in 2005 and "dramatically expanded federal jurisdiction over class actions." *F5 Capital v. Pappas*, 856 F.3d 61, 81 (2d Cir. 2017) (citation omitted). Federal courts, however, sometimes lose sight of these legal principles and – perhaps as a docket-clearing mechanism – rush to remand actions to state court, especially where class certification is denied in a case removed to federal court based on CAFA. A New York federal court recently took that approach in a decision that appears to be erroneous and contrary to the duty of a federal court to exercise federal jurisdiction.

In *Haag v. Hyundai Motor America,* No. 12-CV-6521L, 2019 WL 1029002 (W.D.N.Y. Mar. 5, 2019), Plaintiff Anne Marie Haag alleged a consumer fraud claim under New York General Business Law §349 against Hyundai Motor America. She claimed that, at the time she bought her 2009 Hyundai Santa Fe, Hyundai concealed information about a defect in the car's brake system that would have caused her not to have purchased the car (and not to have incurred the expense of seeking to replace parts of the vehicle's braking system). Ms. Haag, seeking to represent a putative class of Hyundai car buyers, filed a complaint in New York state court. Hyundai removed the case to federal court under CAFA.

The district court denied Ms. Haag's motion for class certification based on her failure to present evidence "that the Class Vehicles' market value was in fact diminished by the alleged brake defect, and/or that the putative class members would have paid less for their Class Vehicles had they been informed of the potential for premature brake system corrosion." 2019 WL 1029002, at *4. "In short, plaintiff has produced no evidence of an injury common to the class, under the diminution in value/overpayment theory she now espouses." *Id*. at *5.

After this relatively straightforward certification ruling, the district court abruptly veered off course, remanding the action to New York state court because "there is presently no demonstrated alternative basis for the Court to continue to exercise jurisdiction over this matter." *Id*. In support of this ruling, the district court cited a single district court case for the proposition that "CAFA does not provide a basis for retaining subject matter jurisdiction after a court has denied class certification." *Id.* (citing *Chiropractic Neurodiagnostic, P.C. v. Allstate Ins. Co.*, No. 08-CV-2319 (SJF)(AKT), 2009 WL 210866 at *3–4, (E.D.N.Y. Jan. 26, 2009)). The *F5 Capital* case, however, a Second Circuit case decided in 2017 that was not cited by the *Haag* court, shows that CAFA absolutely provides a basis for retaining subject matter jurisdiction after a court denies class certification.

In *F5 Capital*, a corporate shareholder filed a derivative action on behalf of a global shipping company against numerous defendants in New York state court, asserting a direct class action claim for equity

dilution and several derivative claims under state law. The defendants removed the action, asserting that the federal court had diversity jurisdiction over the direct class action claim under CAFA, and supplemental jurisdiction over the derivative claims under 28 U.S.C. § 1367(a). The district court granted the defendants' joint motion to dismiss and dismissed the action with prejudice.

The plaintiff appealed. The Second Circuit first affirmed the district court's determination that the direct class action actually constituted a derivative claim and thus remained subject to the demand futility requirement of Rule 23.1. 856 F.3d at 75. Before turning to the dismissal of the other claims for failure to comply with the demand futility requirement, however, the Court of Appeals examined whether subject-matter jurisdiction remained despite dismissal of the class action claim, noting "[f]ederal courts have a duty to inquire into their subject matter jurisdiction *sua sponte*, even when the parties do not contest the issue." *Id*. at 75 (quoting *D'Amico Dry Ltd. v. Primera Mar. (Hellas) Ltd* ., 756 F.3d 151, 161 (2d Cir. 2014)).

Contrary to the district court's jurisdictional ruling in *Haag*, the *F5 Capital* court held "the district court properly retained jurisdiction over the case after it became clear that CAFA, 28 U.S.C. § 1332(d)(2), could no longer anchor jurisdiction." *Id*. at 71. In support of this holding, the Second Circuit noted that the Supreme Court has "consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Id*. at 76 (quoting *13 Freeport-McMoRan, Inc. v. K N Energy, Inc*., 498 U.S. 426, 428 (1991) (per curiam)). The court also cited its prior decision in *Touch Concepts, Inc. v. Cellco P'ship* , 788 F.3d 98, 102 (2d Cir. 2015), where it "concluded that the district court did not lose jurisdiction [under CAFA] even though the plaintiff amended its complaint to eliminate the class claim after removal." Id. Finally, the Second Circuit noted that "other circuits addressing the more closely related question of whether a failure of class certification prevents district courts from retaining jurisdiction over an individual claim that was originally brought as a class action under CAFA have uniformly held that 'federal jurisdiction under [CAFA] does not depend on certification.'" *Id*. at 76-77 (quoting *Cunningham Charter Corp. v. Learjet, Inc*., 592 F.3d 805, 806 (7th Cir. 2010), and citing additional cases from the Fifth, Eighth, Ninth, and Eleventh Circuits).

As noted above, the *Haag* court remanded the action following the denial of class certification without citing *F5 Capital* (or the Second Circuit's similar ruling in *Touch Concepts*). Despite the remand, the *Haag* plaintiff petitioned the Second Circuit for review of the order dismissing the direct class action claim under Rule 23(f). See *Haag v. Hyundai Motor Am*., Pet. for Leave to Appeal, No. 19-676 (2d Cir. filed Mar. 20, 2019). In its response to the petition, Hyundai argued Ms. Haag had blown her deadline to seek leave to appeal, because any challenge to the remand of a class action removed under CAFA must be filed within 10 days of the remand order. *Id*., Opp. to Pet. for Leave to Appeal, at 8-9 (2d Cir. filed Mar. 29, 2019) (discussing 28 U.S.C. § 1453(c)(1)). Hyundai also noted that the Petition did not appear to comply with the 14-day deadline of Rule 23(f), because it was file-stamped March 20, 2019 (15 days after the district court's May 5 dismissal order). *Id*. at 9-10. Given these claimed filing errors, the *Haag* petition may not provide a vehicle for examining the propriety of the district court's remand order.

For a defendant seeking the dismissal of class claims that serve as the federal jurisdictional anchor, *Haag* provides several lessons for those defendants who want to avoid the risk of facing a second bite at the class certification apple following remand to state court. For example, a defendant preemptively can address the "continuing jurisdiction" issue as part of its class certification-related briefing. And if a

district court improperly remands an action anyway, the defendant must strictly comply with the 10-day petition to appeal deadline of 28 U.S.C. § 1453(c)(1). Given the widespread agreement of the federal appellate courts as to a district court's continuing jurisdiction under CAFA, a timely petition challenging an improper remand should get the appellate court's attention.