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Fifth Circuit refuses to address non-CAFA grounds for remand where defendant petitioned to appeal remand decision under CAFA (28 U.S.C. §1453(c))

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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. This area of the law is by no means straightforward, and the appellate jurisdictional issues pertaining to appeals of CAFA remand orders can differ in important respects from circuit to circuit. In a recent article, we reported on an Eleventh Circuit decision (*Simring v. Greensky, LLC*, 29 F.4th 1262 (11th Cir. 2022)), holding that a remand order based on CAFA's "local controversy exception" amounts to a final, abstention-like order, thus authorizing an appeal *as of right* under 28 U.S.C. § 1291 without the need for an application for discretionary appeal under CAFA (28 U.S.C. § 1453(c)(1)). *See Eleventh Circuit clarifies procedural and appellate jurisdictional issues pertaining to CAFA's local controversy exception* (March 31, 2022). In *Stewart v. Entergy Corp.*, 35 F.4th 930 (5th Cir. 2022), the defendant petitioned for review of a remand order based on CAFA's local controversy and home state exceptions under 28 U.S.C. § 1453(c), and the Fifth Circuit did not address whether that remand order authorized a direct appeal under 28 U.S.C. § 1291. Instead, the Fifth Circuit rejected the appeal of the CAFA-related rulings on the merits, and then dismissed the appeal as to the non-CAFA issues.

In *Stewart*, a number of plaintiffs who experienced power outages in the wake of Hurricane Ida filed a putative class action in state court against the power provider (three Entergy entities), claiming Entergy "negligently designed, operated, and maintained the electricity transmission system, which led to power outages in the wake of the hurricane." 35 F.4th at 931. Entergy removed the complaint to federal district court, asserting three bases for federal jurisdiction: (1) federal question jurisdiction, (2) CAFA jurisdiction, and (3) federal bankruptcy jurisdiction. Plaintiffs moved to remand, and the district court granted the remand motion in an order that rejected all three asserted bases for federal jurisdiction, further concluding that CAFA's local controversy and home state exceptions required that the case be adjudicated in state court.

Entergy petitioned for a discretionary appeal under CAFA, and the Fifth Circuit accepted the appeal. *Id*. In resolving the appeal, however, the panel only resolved the CAFA jurisdictional issues – the propriety of remand based on CAFA's local controversy and home state exceptions. The panel dismissed the appeal as it pertained to the other jurisdictional grounds (federal question and federal bankruptcy jurisdiction). *Id*. at 936.

In support of its dismissal of the appeal as to the non-CAFA rulings, the panel cited the federal statute stripping appellate jurisdiction for most remand orders, 28 U.S.C. § 1447(d), which provides that "[a]n

order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." *See id*. at 931. The panel also cited Fifth Circuit precedent: "we are required to continue following the rule 'that our jurisdiction to review a CAFA remand order stops at the edge of the CAFA portion of the order.'" *Id*. at 936 (quoting *City of Walker v. Louisiana ex rel. Dep't of Transp. & Dev* ., 877 F.3d 563, 567 (5th Cir. 2017)).

Had the panel taken the approach endorsed by the Eleventh Circuit – treating a local controversy remand order as involving an abstention-type ruling and therefore reviewable as a final judgment – it could have reviewed the federal question and bankruptcy jurisdictional issues that were addressed (and rejected) in the district court's remand order. But nothing in Stewart addresses the issue of whether the remand order could have been appealed directly under 28 U.S.C. § 1291 as involving an abstention-type ruling. As noted above, the *Stewart* defendant filed an application to appeal under 28 U.S.C. § 1453(c) (which the Fifth Circuit accepted), thereby triggering the strict 60-day time limitation applicable to decisions of such appeals under Section 1453(c)(2). The Fifth Circuit panel then relied on these "very short and narrow time limits" in refusing to review the non-CAFA aspects of the district court's remand order. 35 F.4th at 935-36.

Practice tip: Parties should consider directly appealing CAFA exception remands under 28 U.S.C. § 1291 as involving abstention, in addition to seeking permission to appeal under CAFA.