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Local Controversy Exception Requires All Principal Injuries To Have Been Sustained in the Forum

In *Cheapside Minerals, Ltd. v. Devon Energy Production Co., L.P.*, 94 F.4th 492 (5th Cir. 2024), the U.S. Court of Appeals for the Fifth Circuit addressed an unresolved question regarding the local controversy exception under the Class Action Fairness Act of 2005 (CAFA), which significantly expanded federal subject matter jurisdiction over interstate class actions. It also simultaneously expanded the appellate avenues for interlocutory appeal of a district court's order remanding a class action under that exception.

First, although the Fifth Circuit granted the defendant permission to appeal under Section 1453(c) — which is the provision of CAFA authorizing discretionary interlocutory appeals of remand grants and denials under CAFA and requires expedited resolution — the Court of Appeals also made clear that a remand under the local controversy exception may be appealed as a matter of right under the final judgment rule, 28 U.S.C. Section 1291, because such a ruling is technically rooted in abstention principles rather than a lack of jurisdiction.

Second, the Court of Appeals held that, to defeat jurisdiction under the “principal injuries” prong of CAFA's local controversy exception, the party opposing jurisdiction must prove that **all** class members were allegedly injured in the forum.

Both parts of the Fifth Circuit's ruling have the potential to significantly impact federal class action practice. Its holding on the merits significantly narrows the scope of the local controversy exception, while its ruling on the avenues for appealing will provide defendants with guaranteed appellate review of remand rulings in cases applying the exception.

District Court Proceedings

A group of 214 plaintiffs brought suit in Texas state court against the out-of-state defendant, alleging that their mineral royalties from Texas properties had been underpaid in excess of \$100 million. Although most of the plaintiffs were Texas citizens, some plaintiffs resided outside of Texas.

After the defendant removed the case to federal court pursuant to CAFA, the plaintiffs moved to remand under the local controversy exception, which mandates remand under certain circumstances even where the basic requirements for CAFA jurisdiction are otherwise satisfied.¹

¹ The plaintiffs also invoked, in the alternative, the local single event exclusion. The district court did not address that exclusion in its remand order.

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One of those circumstances is where the “principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed.” Notably, the sole injury in the case was about alleged underpaid royalties from mineral wells located in DeWitt County, Texas.

The district court held that all of the plaintiffs’ claims stated an injury to land, citing Texas case law for the proposition that recovery of royalty interest in minerals is interest in land. Thus, the court reasoned, all of the plaintiffs’ “principal injuries” were tied to those lands in Texas, and the local controversy exception required remand to state court.

The Appeal

The defendant appealed the order under 28 U.S.C. Section 1291 and also filed a request to challenge it under 28 U.S.C. Section 1453(c), contending that the local controversy exception does not apply because several of the payments were made to plaintiffs outside of Texas.

Before addressing the merits of the defendant’s appeal, the Fifth Circuit considered the question of appellate jurisdiction. Although the Court of Appeals initially granted the defendant’s petition for discretionary appeal under Section 1453(c), it made clear that a remand under the local controversy exception is also immediately appealable as a matter of right under 28 U.S.C. Section 1291 (the final judgment rule).

As the Fifth Circuit explained, while the final judgment rule generally precludes appeals of remand decisions for lack of subject matter jurisdiction or procedural defects, this limitation does not apply to orders like the one at issue in the case, which was “based on abstention principles” rather than jurisdiction. 94 F.4th at 496 (citing *Wallace v. La. Citizens Property Insurance Corp.*, 444 F.3d 697, 701 (5th Cir. 2006) and *Watson v. City of Allen*, 821 F.3d 634, 639 (5th Cir. 2016)).

In so holding, the court agreed with both the Eighth and Eleventh Circuits on this issue, greatly expanding the appellate avenues for challenging remand rulings under the local controversy exception in another federal circuit.

The Fifth Circuit then turned to two questions to address the merits of the appeal:

1. Whether the plaintiffs’ principal injuries were incurred in Texas.
2. Whether all injuries must have occurred in the forum state for the local controversy exception to apply.

With respect to the first question, the Court of Appeals disagreed with the district court’s reasoning, finding that underpayment of oil and gas royalties on sales of hydrocarbons that were previously severed from the land is an injury to personal property, not land.

And because the general rule is that a plaintiff sustains an economic injury where he or she resides, the Fifth Circuit concluded that the approximately 10% of plaintiffs who resided outside of Texas or requested that they be paid outside of Texas allegedly sustained injuries outside of the forum state.

The Fifth Circuit then turned to the novel question of whether all of the plaintiffs must have sustained their injuries in the forum state to satisfy the “principal injuries” prong of CAFA. Because CAFA does not define the term “principal,” the panel looked to U.S. Supreme Court precedent, the structure of CAFA and congressional intent, and ultimately rejected the plaintiffs’ contention that “principal” means “most” rather than “all.”

And because some of the class members were purportedly financially injured outside of Texas, the Court of Appeals held that the principal injuries prong of the local controversy exception was not satisfied.

Takeaways

The Fifth Circuit’s ruling is noteworthy for multiple reasons.

First, the Fifth Circuit’s decision makes clear that a defendant who has lost an argument under the local controversy exception at the district court level does not have to roll the dice on a discretionary petition for interlocutory appeal under CAFA. This is significant given the relative infrequency with which such discretionary petitions are granted.

Moreover, even where a motion to remand does not implicate this particular requirement of the local controversy exception, the Fifth Circuit’s decision creates a nondiscretionary appellate avenue for challenging a remand ruling that incorrectly interprets any of the other requirements of the local controversy or any other CAFA exception (*e.g.*, the home state exception) for that matter. And because appeals of right under Section 1291 are not subject to the 60-day deadline for resolving CAFA appeals, circuit courts will have more time to ensure that any dispute over the requirements of the CAFA exception at issue is sufficiently briefed, considered and adjudicated.

Second, the Fifth Circuit’s decision on the merits — *i.e.*, that the “principal injuries” prong of the local controversy exception is only satisfied if **all** class members allegedly sustained their injuries in the forum state — will likely make it more difficult

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for plaintiffs to evade jurisdiction under CAFA. While the Fifth Circuit's decision was issued in the context of oil and gas royalties, the court's holding will have general applicability far beyond that category of cases, including in virtually any putative class action in which the complained-of harm is economic in nature.

For example, under the logic of the Fifth Circuit's holding, the "principal injuries" requirement of the local controversy exception would only be satisfied in a deceptive-marketing product-liability class action if every single proposed class member purchased the product and resided in the forum state.

In short, the Fifth Circuit's decision is likely to help keep even more cases of interstate importance in federal court — as Congress intended in enacting CAFA — while affording defendants an alternative (and far more preferable) path for appealing remand rulings under any of that statute's exceptions.

Other Recent Class Action Decisions of Note

A California District Court Certifies State False and Deceptive Advertising Class in the Face of Typicality and Predominance Arguments

Rushing v. Williams-Sonoma, Inc., No. 16-cv-01421-WHO, 2024 WL 779601 (N.D. Cal. Feb. 21, 2024)

In a decision issued by Judge William Orrick, the U.S. District Court for the Northern District of California certified a class of all persons in California who purchased the defendant's bedding products from 2007 to the present. The case concerned allegedly false and deceptive advertisements of the thread count in certain bedding products. In granting the motion for class certification, the court rejected the defendant's various arguments that the named plaintiff, Elizabeth Perlin, was atypical of the absent class members under Federal Rule of Civil Procedure 23(a)(3), and that individual questions predominated over common ones under Rule 23(b)(3).

First, the court disagreed with the defendant that the potential applicability of a statute of limitations defense to Perlin was unique and rendered her atypical. To the contrary, the court reasoned that such a potential defense weighed in favor of class certification because the lengthy class period suggested that a significant portion of the class likely faced similar defenses.

Second, the court determined that any issues concerning the arbitrability of class members' claims also did not render Perlin atypical. Rather, the court explained that because Perlin successfully contested the arbitrability of her claim **in arbitration**, she would be well suited to make the same arguments on behalf of all class members. Given this procedural nuance, the court found unpersuasive case law that held a named plaintiff is not typical where she opts out of or is not covered by an arbitration agreement.

Third, the court also rejected the defendant's arguments regarding predominance. It reasoned that consumer deception under California law was not an individualized inquiry because it was governed by the reasonable consumer test — requiring only a showing that members of the public are likely to be deceived. The court next reasoned that exposure to false advertising was amenable to a common answer even though claims concerning thread count did not appear prominently on all bedding packaging.

In so holding, the court pointed out that the plaintiffs had presented common evidence of exposure to consistent and uniform misstatements through myriad avenues. The court similarly held that consumer reliance was a common question because materiality, like deception, is an objective inquiry.

Lastly, and echoing its prior rejection of the defendant's typicality arguments, the court held that there were ample tools to address any issues should the defendant raise statute of limitations defenses or move to compel arbitration — issues, the court determined, that would likely affect large swaths of the class and thus not defeat predominance.

Fourth Circuit Reaffirms Rule 23's Implicit Ascertainability Requirement in Case Concerning Unsolicited Fax Advertisements

Career Counseling Inc. v. AmeriFactors Financial Group, LLC, 91 F.4th 202 (4th Cir. 2024)

In an opinion for the U.S. Court of Appeals for the Fourth Circuit, Judge Robert B. King reaffirmed Fourth Circuit precedent adopting ascertainability as an implicit requirement for class certification. In particular, the panel affirmed the lower court's finding that the proposed class was not ascertainable in a case concerning an allegedly unsolicited fax advertisement sent in June 2016 to the named plaintiff and 59,000 others in violation of the Telephone Consumer Protection Act of 1991 (TCPA).

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The court first rejected the plaintiff's threshold argument that the requirement of ascertainability is not implicit in Rule 23. The panel acknowledged it was bound by prior panel decisions and declined to reexamine that precedent.

Next, in assessing whether this requirement was satisfied, the panel agreed with the lower court that the TCPA was properly limited only to traditional fax machines and did not reach unsolicited advertisements sent to online fax services. Thus, the critical issue was whether the class, which must be confined to only traditional fax machine users, was ascertainable.

The plaintiff proffered evidence that at least 20,000 recipients were not provided online fax services by the telephone carrier associated with their fax number. This evidence was obtained by subpoenaing the individual telephone carriers. However, there was additional evidence that showed that simply because an individual was not using online fax services from his or her subpoenaed carriers did not in turn mean he or she was only using traditional fax machines. Rather, the Fourth Circuit recognized that such users could have just as easily been using online fax services from a different provider.

Thus, the Fourth Circuit held that the district court did not abuse its discretion in finding ascertainability unmet, because determining who met the class criteria would have required an individualized inquiry as to what fax method was employed by each recipient at the relevant time in June 2016.

Colorado District Court Certifies Injunctive Relief Class but Denies Certification for a Money Damages Class Premised on Deceptive Acts

In re HomeAdvisor, Inc. Litigation, 345 F.R.D. 208 (D. Colo. 2024)

Chief Judge Philip A. Brimmer of the U.S. District Court for the District of Colorado certified a Rule 23(b)(2) misappropriation class and denied certification of a Rule 23(b)(3) deceptive practices class for failing to meet predominance.

The Rule 23(b)(3) claims centered on allegations that the defendant misrepresented the quality of leads it sold to service professionals who paid for memberships with the defendant. The Rule 23(b)(2) claims concerned the defendant's alleged unlawful retention of the service professionals' names and likenesses by refusing to remove their online profile pages after termination of membership.

With respect to the Rule 23(b)(2) misappropriation class, the court rejected the defendant's threshold argument that the request for injunctive relief was moot because the defendant had stopped engaging in the complained-of conduct. According to the court, the voluntary cessation exception to mootness applied because the defendant only removed the named plaintiffs' profile pages after initiation of the lawsuit.

The court then held that a Rule 23(b)(2) class was appropriate given that the requested injunctive relief — removal of class members' names and likenesses after membership termination absent express assent otherwise — could be applied generally to all class members without individual tailoring.

As for the Rule 23(b)(3) deceptive practices class, the plaintiffs sought to certify a nationwide class asserting claims for fraud, aiding and abetting fraud, and unjust enrichment as well as nine state subclasses asserting similar claims, breach of implied contract and violations of state-specific consumer protection statutes.

In denying certification, the court first determined, contrary to the plaintiffs' assertion otherwise, that it had to conduct a choice-of-law analysis to determine if predominance was met. In turn, the court found that the plaintiffs failed to meet their burden that variations in state law did not defeat predominance because the plaintiffs:

- only raised the choice-of-law analysis for the first time in reply, and
- entirely failed, in any event, to demonstrate that the significant variations in state law concerning their claims could be sufficiently addressed through creation of subclasses that grouped states with overlapping legal doctrines.

The court also found superiority lacking, raising serious questions over its ability to manage a nationwide class trial applying the laws of 50 states along with nine subclasses and coherently instruct a jury.

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