

THE JOURNAL OF
APPELLATE PRACTICE
AND PROCESS

VOLUME 8/NUMBER 2
FALL 2006

APPEALING REMAND ORDERS UNDER THE
CLASS ACTION FAIRNESS ACT

David L. Horan

WILLIAM H. BOWEN SCHOOL OF LAW
UNIVERSITY OF ARKANSAS AT LITTLE ROCK

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ARTICLES

APPEALING REMAND ORDERS UNDER THE CLASS ACTION FAIRNESS ACT

David L. Horan*

Defendants generally may not appeal orders that remand cases once removed to federal court.¹ For parties in cases filed as class actions, however, Congress provided in February 2005 a new avenue for appellate review through 28 U.S.C. § 1453(c), a provision enacted in the Class Action Fairness Act of 2005.² Section 1453(c) provides for discretionary appellate review of any order denying or granting remand of a removed class action to state court.³

*David L. Horan is an associate with Jones Day in Dallas, Texas, where his focus is Issues and Appeals. He graduated from Yale Law School and served as a law clerk for the Honorable Janet C. Hall of the United States District Court for the District of Connecticut and the Honorable Patrick E. Higginbotham of the United States Court of Appeals for the Fifth Circuit. Mr. Horan and other Jones Day attorneys represented several defendants in *Bush v. Cheaptickets, Inc.*, 425 F.3d 683 (9th Cir. 2005). The views expressed in this article are solely the author's and are not intended to express the views of Jones Day or any of its past, present, or future clients.

1. 28 U.S.C. §1447(d) (available at <http://uscode.house.gov>).

2. 28 U.S.C. § 1453(c) (available at <http://uscode.house.gov>); Pub. L. No. 109-2, 119 Stat. 4 (2005).

3. 28 U.S.C. § 1453(c).

Though this discretionary appellate review offers some relief to parties in class actions, appeals under § 1453(c) present thorny procedural issues arising from imprecise and unclear language in the CAFA, which mostly concerns whether a party seeking to remove a class action to federal court must do so based on § 1453 and when the application for appeal must be filed. Thankfully, recent case law deciding the first round of appeals filed under this new provision sheds light on the procedural issues likely to confront litigants and courts of appeals in the near future.

Admittedly, filing deadlines, briefing formats, and other procedural requirements are not the stuff of most appellate lawyers' dreams. But, these matters can keep lawyers up at night, and getting them right is critical to presenting properly any substantive arguments to any appellate court. With that reality in mind, this article reviews the procedure—that is, the “who, what, where, when, and how”—for bringing a § 1453(c) appeal and concludes with several guidelines on navigating this statutory appeals process.

THE WHAT

Congress limits review of many remand orders through 28 U.S.C. §1447(d), which states that “[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.”⁴ In cases involving class actions, however, the CAFA provides a statutory procedure for reviewing such remand orders. Section 1453(a) provides that a “class action” is defined as

any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons.⁵

4. 28 U.S.C. §1447(d).

5. 28 U.S.C. §1332(d)(1)(B) (available at <http://uscode.house.gov>); see 28 U.S.C. § 1453(a) (providing that “[i]n this section, the terms . . . ‘class action’ . . . shall have the meanings given such terms under section 1332(d)(1)”).

Section 1453(b) provides for removal of a class action regardless of whether a defendant is a citizen of the forum state or whether all defendants consent to removal:

[a] class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.⁶

And, § 1453(c)(1) provides that an order concerning a motion to remand a class action back to the state court from which the case was removed is reviewable:

Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed.⁷

This last provision, § 1453(c)(1), raises two important interpretive issues as to the kinds of remand orders that are subject to CAFA's discretionary appeals and, thus, are excluded from the general prohibition on appellate review. First, § 1453(c)(1) may require parties seeking appellate review to have called upon this section and to have relied on particular jurisdictional statutes when the class action was removed to federal court. And this section may authorize appeals from orders remanding a removed class action sua sponte or as a result of a show cause order and, in either case, not based upon a party's motion to remand.

Section 1453(c)(1) authorizes discretionary appeals from an order granting or denying remand of a class action only if the case was removed pursuant to § 1453(b).⁸ The Fifth Circuit in *Wallace v. Louisiana Citizens Property Insurance Corp.*⁹ accordingly held that it lacked § 1453(c)(1) appellate

6. 28 U.S.C. § 1453(b).

7. 28 U.S.C. § 1453(c)(1); *see* 28 U.S.C. § 1447 (providing general removal procedures).

8. 28 U.S.C. § 1453(b).

9. 444 F.3d 697 (5th Cir. 2006).

jurisdiction to review a remand order, because the defendants failed to base their notice of removal on the CAFA, and because they “expressly disavowed any reliance on CAFA” when opposing the plaintiffs’ motion to remand, such that there was “no nexus with CAFA that would justify the exercise of appellate jurisdiction under § 1453(c)(1).”¹⁰ From the Fifth Circuit’s decision in *Wallace* and the language of § 1453(c)(1) itself, it is reasonable to conclude that any class action defendant filing a notice of removal must invoke § 1453(b) as a basis for removal to preserve the possibility of a remand appeal.

Another aspect of this procedural issue is whether a party invoking § 1453(b) to remove a class action also must satisfy class action diversity jurisdiction under 28 U.S.C. § 1332(d).¹¹ Section 1332(d)(2), which was enacted in the CAFA along with § 1453, generally grants federal district courts original jurisdiction if the amount in controversy exceeds five million dollars, and the dispute is a “class action” in which any member of the plaintiff’s class is a citizen of a state different from any defendant.¹²

While there is no doubt that § 1453(b) removal of a class action can be based on §1332(d) class action diversity jurisdiction, § 1453(b) does not limit removal of class actions only to those that could be brought under a federal court’s §1332(d) class action diversity jurisdiction. Although some courts have implied in dicta that removal under § 1453(b) is limited to cases that meet the §1332(d) diversity requirements, such a reading of § 1453(b)’s scope is not supported by its text.¹³ There is no explicit limitation, because Congress did not

10. 444 F.3d at 700 (noting in addition that “[t]he plain language of [§ 1453(c)(1)] indicates that its terms apply ‘to any removal of a case *under this section*,’ referring to § 1453, the provision of CAFA which permits the removal of class actions” (emphasis in original)).

11. See generally *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681-82 (9th Cir. 2006) (per curiam) (discussing the operation and scope of 28 U.S.C. § 1453(b) in comparison to 28 U.S.C. §1441 and 28 U.S.C. §1446).

12. 28 U.S.C. §1332(d)(2).

13. See Adam N. Steinman, *Sausage-Making, Pigs’ Ears, and Congressional Expansions of Federal Jurisdiction: Exxon Mobil v. Allapattah and its Lessons for the Class Action Fairness Act*, 81 Wash. L. Rev. 279, 332-34 (2006) (citing *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1092 (10th Cir. 2005) and *Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161, 166-67 (D. Mass. 2005), *aff’d on other grounds*, 424 F.3d 43 (1st Cir. 2005) (per curiam)).

explicitly limit § 1453(b)'s applicability, as it did in other CAFA provisions.¹⁴ And there is no implicit limitation, because § 1453(b) allows removal of a class action “in accordance with section 1446,”¹⁵ which generally prescribes the removal procedures for civil actions and criminal prosecutions and also does not restrict its applicability to any particular federal jurisdictional statute.¹⁶ Because § 1453(c)(1) relies on § 1453(b), which plainly relies on § 1446, § 1453(c)(1) authorizes appeals from *any* order remanding or refusing to remand a class action so long as it is removed pursuant to § 1453(b), regardless of the basis for the federal court's subject matter jurisdiction.

Some courts have rejected this view, however.¹⁷ The Eighth Circuit has concluded that “the review provisions of 28 U.S.C. § 1453(c) are limited to class actions brought under CAFA, 28 U.S.C. § 1332(d).”¹⁸ That court reasoned that, while § 1453(c)(1)'s appeal provision applies by its own terms “to any removal of a case under this section,” § 1453(a) defined “‘class action’ . . . by reference to § 1332(d)(1), the diversity jurisdiction provision added by CAFA.”¹⁹ By this reasoning, the court found that it lacked appellate jurisdiction over the appeal

14. See 28 U.S.C. § 1453(d)(1)-(3) (providing that discretionary appellate review does not apply to any class action solely involving a claim concerning a covered security as defined under specific sections of securities acts, a claim relating to internal affairs or governance of a business enterprise and arising under or by virtue of the laws of the State in which such business enterprise is incorporated or organized, or a claim relating to the rights, duties, and obligations relating to any security); see also Steinman, *supra* n. 12, at 294-98, 323 (noting that “the text of CAFA’s removal provision . . . allow[s] removal of all state court class actions except certain specifically exempted categories of securities and corporate governance class actions”).

15. 28 U.S.C. § 1453(b).

16. 28 U.S.C. § 1446(a)-(b) (generally providing that defendants wanting to remove shall file in the district court a notice of removal within thirty days of receiving the initial pleading).

17. *Saab v. Home Depot U.S.A., Inc.*, 469 F.3d 758, 760 (8th Cir. 2006); cf. *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1020 (9th Cir. 2007) (noting that “[a]lthough remand orders generally are not appealable, . . . § 1453(c) confers discretionary appellate jurisdiction to review remand orders in actions that were removed *under* CAFA” (emphasis added)); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326 (11th Cir. 2006) (noting in a parenthetical explanation of § 1453(c) that, in relation to § 1453(c)(1), “notwithstanding 28 U.S.C. § 1447(d), [a] court of appeals may review [a] remand order where case was removed *under* CAFA” (emphasis added)).

18. *Saab*, 469 F.3d at 760.

19. *Id.* at 759.

of an order denying remand based on §1332(a) traditional diversity jurisdiction, because § 1453(c) applies only to class actions removed based on § 1332(d) class action diversity jurisdiction simply because Congress incorporated by reference § 1332(d)(1)'s definition of "class action." Limiting § 1453's applicability through this reasoning seems tenuous at best, because § 1332(d)(1)'s definition of "class action" could easily apply to class actions that satisfy the requirements for, for example, federal question jurisdiction. Nevertheless, practitioners should note the Eighth Circuit's ruling.

A final and related aspect of the applicability of § 1453(c)(1) concerns whether a court of appeals is limited upon review of the remand order. Here, the circuit courts are split. The Seventh Circuit found in *Brill v. Countrywide Home Loans, Inc.*,²⁰ that

[b]ecause § 1453(c)(1) permits appellate review of remand orders "notwithstanding section 1447(d)", [a court of appeals is] free to consider any potential error in the district court's decision, not just a mistake in application of the Class Action Fairness Act.²¹

As Judge Easterbrook explained for the Seventh Circuit panel, where an "appeal is proper because the district judge reject[s] a defendant's] argument that the Class Action Fairness Act allows removal," and where § 1453(c)(1) thus "authorizes interlocutory appellate review, it is the district court's entire decision that comes before the court for review."²² From this court's rationale, potential class action parties can conclude that a court of appeals can reverse a remand order on the basis of arguments not limited to challenging mistakes in applying CAFA provisions.

As *Wallace* suggests, the Fifth Circuit, however, has taken a contrary view. Specifically in *Patterson v. Dean Morris, L.L.P.*,²³ the Fifth Circuit observed that

[t]hough CAFA also provides that we "may accept an appeal from an order of a district court granting or denying

20. *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005).

21. *Id.* at 451 (quoting 28 U.S.C. § 1453(c)(1)).

22. *Id.* at 451-52 (citing *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996)).

23. 448 F.3d 736 (5th Cir. 2006) (*Patterson II*).

a motion to remand a class action,” this precatory language cannot serve as a mandate for us to reach otherwise non-reviewable remand decisions once we determine that CAFA is inapplicable.²⁴

The court went on to hold that CAFA limits discretionary review of a remand order “premised on the prerequisites of § 1453 or on claims with an adequate nexus to CAFA.”²⁵

The Eleventh Circuit for its part adopted the conclusion implicit in the reasoning of both the Fifth and Seventh Circuits. In *Tmesys, Inc. v. Eufaula Drugs, Inc.*, the Eleventh Circuit found that it has jurisdiction to review a remand order “when that order is based on a determination that CAFA does not apply, at least to the extent of reexamining that *jurisdictional* issue.”²⁶ Thus, potential class action parties in cases within the Eleventh Circuit can conclude that a court of appeals will examine whether it has jurisdiction to review the remand order and may or may not examine the order in its entirety, depending on whether the court finds CAFA applicable to the case.

Another important interpretative issue as to the kinds of remand orders that are subject to CAFA appeals concerns whether § 1453(c)(1) authorizes appeals from orders remanding a removed class action sua sponte or as a result of a show cause order and, in either case, not based on a party’s motion to remand. By its plain terms, § 1453(c)(1) authorizes appeals of district court orders “granting or denying a *motion to remand* a class action.”²⁷ While perhaps academically interesting, this semantic issue should not block any appeals in practice, because a court remanding a case sua sponte or based on a show cause order is properly understood to be acting “on its own motion.” Thus, its order will fit within the letter of the statute.

Indeed, at least one court of appeals is apparently unmoved by this possible issue. The Ninth Circuit in *Abrego Abrego v. Dow Chemical Co.*²⁸ and *Bush v. Cheaptickets, Inc.*²⁹ accepted

24. *Id.* at 742 (quoting 28 U.S.C. § 1453(c)(1)).

25. *Id.*

26. *Tmesys, Inc. v. Eufaula Drugs, Inc.*, 462 F.3d 1317, 1319 (11th Cir. 2006) (emphasis in original).

27. 28 U.S.C. § 1453(c)(1) (emphasis added).

28. 443 F.3d 676 (9th Cir. 2006).

29. 377 F. Supp. 2d 807 (C.D. Cal. 2005).

§ 1453(c)(1) appeals from orders remanding putative class actions based on the district courts' own orders to show cause.³⁰

THE WHO AND THE WHERE

The CAFA permits the filing of a discretionary appeal either by a plaintiff whose motion for remand of a class action is denied or by a defendant against whom an order remanding a removed class action is entered.³¹ The appeal must be filed in the court of appeals for the circuit in which the district court issuing the order sits.³² That court has discretion to accept such an appeal.³³ Section 1453(c) neither requires nor permits any involvement by the district court regarding the appeal.³⁴

THE WHEN

Congress included in the CAFA a timing provision that restricts when an appellant can file an application to appeal an order granting or denying a motion to remand with the court of appeals. Section 1453(c)(1) provides that this application may be accepted if the “application is made to the court of appeals *not less than 7 days after* entry of the order.”³⁵ This timing provision raises several tricky issues regarding the timing for seeking such a discretionary § 1453(c) appeal.

First, the statute is clear that the period for filing an “application” is triggered by the “entry” on the district court’s

30. See *Abrego Abrego*, 443 F.3d at 678 (noting that the district court ordered a party to show cause concerning the amount in controversy); *Bush*, 377 F.Supp. 2d at 808 (noting that the district court ordered the parties to “show cause why this action should not be remanded to the state court for lack of federal subject matter jurisdiction”), *aff’d*, 425 F.3d 683 (9th Cir. 2005).

31. 28 U.S.C. § 1453(c)(1).

32. *Id.*

33. *Id.*; see also *Patterson II*, 448 F.3d 736; *Patterson v. Dean Morris, L.L.P. (Patterson I)*, 444 F.3d 365 (5th Cir. 2006); *Amalgamated Transit Union 1309 v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140 (9th Cir. 2006); *Prime Care of N.E. Kan., LLC v. Humana Ins. Co.*, 447 F.3d 1284 (10th Cir. 2006); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090 (10th Cir. 2005); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159 (11th Cir. 2006).

34. See 28 U.S.C. § 1453(c).

35. 28 U.S.C. § 1453(c)(1) (emphasis added).

docket sheet of the order at issue, rather than the filing or signing of the order.³⁶

The second timing issue concerns when a party to a class action seeking review of a remand order must file his appeal. One theory as to when to file simply relies on the plain text of § 1453(c)(1)'s timing provision and requires a party to a class action seeking review of a remand order to file his appeal seven days *after* entry of the remand order, *not before*.³⁷

Courts confronted with the issue of application timeliness have refused to find that Congress's folly is the courts' pain, however, even though the plain language of the statute suggests both that six days is too early to file a petition and that there is no time limitation as to when an application must be filed. The Tenth Circuit noted in *Pritchett v. Office Depot, Inc.*³⁸ that according to the plain language of § 1453(c)(1), an "appeal from an order granting or denying remand *cannot* be taken within seven days of the order," and that "[o]nce that period passes, . . . the statute would permit an appeal . . . at any time thereafter."³⁹ Relying on the report of the Senate Judiciary Committee accompanying the CAFA, however, the court reasoned that,

[g]iven Congress' stated intent to impose time limits on appeals of class action remand orders and the limited availability of appeals prior to the statute's enactment, we can think of no plausible reason why the text of [the CAFA] would instead impose a seven-day waiting period followed by a limitless window for appeal.⁴⁰

The court in *Pritchett* found that § 1453(c)(1)'s timing provision is the result of "a typographical error" and that "[t]he statute should read that an appeal is permissible if filed '*not more than*' seven days after entry of the remand order."⁴¹

36. *Id.*; accord *Patterson I*, 444 F.3d at 368, 368 n. 1; *Bush*, 425 F.3d at 685; *Pritchett*, 420 F.3d at 1093; *Miedema*, 450 F.3d at 1326.

37. 28 U.S.C. § 1453(c)(1).

38. 420 F.3d 1090 (10th Cir. 2005)

39. *Pritchett*, 420 F.3d at 1093 n. 2 (emphasis in original).

40. *Id.*, at 1093 n. 2; see Sen. Rpt. 109-14 (Feb. 28, 2005).

41. 420 F.3d at 1093 n. 2 (emphasis added) (quoting Sen. Rpt. 109-14, at 49: "parties must file a notice of appeal within seven days after entry of a remand order").

The Ninth Circuit when confronted in *Amalgamated Transit Union 1309 v. Laidlaw Transit Services, Inc.*,⁴² with § 1453(c)(1)'s timing provision, expressed misgivings about being “faced with the task of striking a word passed on by both Houses of Congress and approved by the President, and replacing it with a word of the exact opposite meaning.”⁴³ Although not without controversy, it did so anyway, to hold that

there is no apparent logical reason for the choice of the word “less” in the statute, use of the word “less” is, in fact, illogical and contrary to the stated purpose of the provision, and the statute should therefore be read to require that an application to appeal under § 1453(c)(1) must be filed—in accordance with the requirements of [Rule 5 of the Federal Rules of Appellate Procedure]—not *more* than 7 days after the district court’s order.⁴⁴

The Fifth Circuit has also interpreted the timing provision in the same manner without any discussion or analysis.⁴⁵

Like these circuits, the Eleventh Circuit has made clear that a § 1453(c)(1) appeal must be filed “*within* 7 days of the district court’s remand order.”⁴⁶ This court explained in *Miedema v. Maytag Corp.* that to read the statute’s language

literally would produce an absurd result: there would be a front-end waiting period (an application filed [six] days after entry of a remand order would be premature), but there would be no back-end limit (an application filed 600 days after entry of a remand order would not be untimely).⁴⁷

42. 435 F.3d 1140 (9th Cir. 2006).

43. *Union 1309*, 435 F.3d at 1146.

44. *Id.* (emphasis in original); *accord Abrego Abrego*, 443 F.3d at 677 n. 1 (ruling that a petition filed on the seventh day following entry of the remand order is timely); *Serrano*, 478 F.3d at 1020 n. 2 (indicating that a petition filed on the sixth court day after entry of the remand order is timely).

45. *See Patterson I*, 444 F.3d at 368 n. 1 (rejecting an argument that an application filed nine calendar days after the entry of the order was untimely, because the application was filed within seven court days after the order’s entry and, therefore, was timely pursuant to Fed. R. App. P. 26(a)(2)).

46. *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326 (11th Cir. 2006) (quoting *Evans*, 449 F.3d at 1162) (emphasis in original).

47. *Id.* at 1326.

The Third Circuit reached the same conclusion in *Morgan v. Gay*,⁴⁸ citing *Miedema* with approval.⁴⁹ In an unpublished decision, the Seventh Circuit in *Natale v. General Motors Corp.*⁵⁰ likewise found that § 1453(c)(1) requires filing “within seven days of the district court’s remand order.”⁵¹ The panel also found that a § 1453(c)(1) appeal is timely if filed within seven days of an order denying a motion to reconsider a remand order, relying on Rule 4(a)(4) of the Federal Rules of Appellate Procedure.⁵² Accordingly, in the Third, Fifth, Ninth, Tenth, and Eleventh Circuits, and likely in the Seventh Circuit,⁵³ a § 1453(c)(1) application must be filed on the seventh day or sooner from the entry of the remand order, despite contrary textual direction in the statute.

Guidance on the proper timing of a § 1453(c) application is less easy to come by outside these circuits. The First and Eighth Circuits have not expressly addressed this “drafting” issue but have accepted appeals through applications filed on a widely varying number of days after entry of the remand order. The First Circuit has acted on an application filed seven calendar days from the remand order’s entry.⁵⁴ The Eighth Circuit has acted on an application filed eight calendar days from the remand order’s entry⁵⁵ and an application filed eleven calendar days from entry of the order denying remand.⁵⁶

Thus, the experience in courts of appeals precludes a firm conclusion on whether each court will interpret § 1453(c)(1)’s

48. *Morgan v. Gay (Morgan I)*, 466 F.3d 276 (3d Cir. 2006).

49. 466 F.3d at 279.

50. 2006 WL 1458585 (7th Cir. May 8, 2006) (unpublished).

51. *Id.* at *1.

52. *Id.*; see Fed. R. App. P. 4(a)(4).

53. Unpublished opinions such as *Natale v. Gen. Motors Corp.*, 2006 WL 1458585, are not considered precedent and generally have value only to the issuing court and the parties involved.

54. See *Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161 (docket sheet for 1:05-CV-10590 noting that the “application for leave to appeal” was filed with the court of appeals seven days after entry of the remand order), *aff’d*, 424 F.3d 43 (1st Cir. 2005).

55. See *Plubell v. Merck & Co.*, 434 F.3d 1070 (8th Cir. 2006) (docket sheet for 05-8020 noting that the “petition for permission to appeal” was filed eight days after entry of the remand order), *aff’g* 2005 WL 2739036 (W.D. Mo. Oct. 20, 2005) (unpublished).

56. See *Saab v. Home Depot U.S.A., Inc.*, 2006 WL 1877077 (W.D. Mo. July 6, 2006) (unpublished), *petition dismissed by* 469 F.3d 758 (docket sheet for 06-8014 noting that the petition for permission to appeal was filed eleven days after entry of the remand order).

timing provision to provide that an appeal is timely if the application is filed (1) *not less than* seven days after the remand order's entry, which follows a literal reading of § 1453(c)(1) and requires filing on the eighth day or later; (2) *not more than* seven days after the remand order's entry, which follows the Third, Fifth, Ninth, Tenth, and Eleventh Circuits' holdings and requires filing on the seventh day or earlier; or (3) *less than* seven days after the remand order's entry, which follows at least the Ninth, Tenth, and Eleventh Circuits' reasoning but not their precise reading of the statute and requires filing on the sixth day or earlier.

The third issue regarding § 1453(c)(1)'s timing provision arises because the statute does not specify what type of day Congress intended to apply: a *calendar* day or a *court* day. Rule 26(a)(2) of the Federal Rules of Appellate Procedure, which provides that, where the filing "period is less than 11 days" and is not "stated in calendar days," the time period excludes "intermediate Saturdays, Sundays, and legal holidays."⁵⁷ By applying Rule 26(a)(2) to § 1453(c)(1), if the application must be filed in "not more than seven days" from the order's entry, the petitioner must file within seven *court*, not *calendar*, days. The Fifth and Ninth Circuits squarely addressed this issue, followed Rule 26(a)(2), and construed the statutory language to mean *court* days, thereby excluding intermediate weekends and holidays.⁵⁸ The Third and Eleventh Circuits likewise held that § 1453(c)(1)'s time limit is measured in *court*, not *calendar*, days.⁵⁹

No other circuit has expressly decided this issue, and the experience in courts of appeals outside the Third, Fifth, Ninth, and Eleventh Circuits precludes a firm conclusion as to what type of day Congress intended § 1453(c)(1) to refer. The timing provisions of § 1453(c)(1) thus present thorny and unsettled issues for petitioners in circuits that have not yet explicitly interpreted the statute. Petitioners in these courts must guess whether § 1453(c)(1) requires filing not less than seven calendar or court days, not more than seven calendar or court days, or less

57. Fed. R. App. P. 26(a)(2).

58. See *Patterson I*, 444 F.3d at 368 n. 1; *Union 1309*, 435 F.3d at 1146.

59. See *Morgan I*, 466 F.3d at 277 n. 1; *Miedema*, 450 F.3d at 1326.

than seven calendar or court days after entry of the appealed order.

Under these circumstances, the vigilant petitioner should file *within six calendar days* to ensure that the application will be timely under any possible reading of the statute. At worst, filing *on the sixth calendar day* will be premature if a court of appeals strictly interprets § 1453(c)(1) to prohibit filing less than seven days after the order's entry. In that instance, the petitioner would run no real risk if the application can be filed again after the seventh court day has passed, because, as the Tenth Circuit has noted, this reading of § 1453(c)(1) "would permit an appeal . . . at any time thereafter."⁶⁰ The careful petitioner thus will hedge against the risk of filing late and the risk of filing prematurely.⁶¹ This strategy accounts for both the likelihood that more courts of appeals will follow the Third, Fifth, Ninth, and Eleventh Circuits' statutory interpretation that § 1453(c)(1) requires filing in seven or less court days and also the possibility that a court could instead interpret Congress to have intended § 1453(c)(1) to prohibit filing in less than seven calendar or court days or to require filing in less than seven calendar days after entry of the order.

THE HOW

Courts of appeals have not settled which federal rules of appellate procedure govern § 1453 appeals: Rules 3 and 4 or Rule 5. Rule 3 generally concerns an "appeal permitted by law as a right from a district court to a court of appeals."⁶² Rule 3(a) requires an appellant to file a "notice of appeal with the district clerk within the time allowed by Rule 4."⁶³ In general, under

60. *Pritchett*, 420 F.3d at 1093 n. 2.

61. *Cf.* James M. Garner, *The Class Action Fairness Act: Has the Party Just Begun?*, 80 Tul. L. Rev. 1669, 1693 (2006) (suggesting than one file "both before and after seven days from entry of the remand order, or . . . on the seventh day after the district court orders remand"); Gregory P. Joseph, *Federal Class Action Jurisprudence after CAFA*, Exxon Mobil, and Grable, 8 Del. L. Rev. 157, 185 (2006) (recommending that one file on the seventh day after the remand order's entry).

62. Fed. R. App. P. 3(a)(1).

63. *Id.*

Rule 4, an appellant must file a notice of appeal within “30 days after the judgment or order appealed from is entered.”⁶⁴

According to the Second, Fifth, Seventh, Ninth, and Eleventh Circuits, Rule 5 governs “the How” for filing § 1453(c) appeals.⁶⁵ Rule 5 generally governs appeals from a district court order by permission. Under Rule 5(a), the appellant must file an application for permission to appeal, rather than a notice of appeal, with the clerk of the court of appeals within the time specified by § 1453.⁶⁶ Under Rule 5(b), a non-petitioning party “may file an answer in opposition or a cross-petition within 7 [court] days after the petition is served,” and “[t]he petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.”⁶⁷ If the application for permission to appeal is granted, the petitioner must satisfy the requirements of Rule 5(d)(1) to perfect the appeal, including paying the district clerk all required fees.⁶⁸

Although most circuits have not discussed directly whether § 1453(c)(1) appeals should proceed under Rules 3 and 4 or under Rule 5, the First, Eighth, and Tenth Circuits have accepted appeals filed as applications or petitions for leave or for permission to appeal.⁶⁹ Because these courts have not concluded which rules of appellate procedure govern § 1453(c)(1) appeals, the careful practitioner will file both a notice of appeal,

64. Fed. R. App. P. 4(a)(1)(A); *but see* Fed. R. App. P. 4(a)(1)(B) (providing that if either party is the U.S. or its officer or agency, the notice of appeal may be filed within 60 days of the order’s or judgment’s entry).

65. *See DiTolla v. Doral Dental IPA of NY*, 469 F.3d 271, 274 (2d Cir. 2006); *Patterson I*, 444 F.3d at 368-69; *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 678-79 (7th Cir. 2006); *Union 1309*, 435 F.3d at 1142-45; *Evans*, 449 F.3d at 1162-63.

66. Fed. R. App. P. 5(a) (providing that a party must file a petition for permission to appeal within time specified by the statute authorizing the appeal); *see* Fed. R. App. P. 5(b)-(c) (providing the required contents and form of the petition for permission to appeal); *accord Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1232 (11th Cir. 2007) (detailing the required contents of a Rule 5 petition for permission to appeal).

67. Fed. R. App. P. 5(b)(2), (3).

68. Fed. R. App. P. 5(d)(1).

69. *See Natale v. Pfizer, Inc.*, 424 F.3d at 43 (noting that the court accepted the appeal from the remand order pursuant to the CAFA.); *Plubell*, 434 F.3d at 1071 (concluding that the court has jurisdiction under § 1453(c)(1) to consider the appeal of the remand order); *Pritchett*, 420 F.3d at 1093-94 (concluding that the court accepts the appeal from the remand order to consider whether it has jurisdiction to consider its jurisdiction to grant the relief requested).

complying with Rules 3 and 4, and a petition for permission to appeal, complying with Rule 5.⁷⁰

The limited decisions on § 1453(c) appeals only offer some guidance for drafting the required application. The application should address both why the appeal should be allowed and why the petitioner should prevail on the merits.⁷¹ The petitioner should draft the application assuming that the court of appeals will decide the appeal entirely on the basis of the application and the answer thereto, without further briefing. Petitioners in the Seventh Circuit, in particular, should heed this advice, because that circuit has already decided several § 1453(c) appeals on the basis of only the application, answer, and, in a few cases, a reply in support of the application.⁷²

THE WHAT THEN

After a petitioner files an application with the court of appeals, Congress set forth in the CAFA a timeframe within which the court must render its decision. Section 1453's language unfortunately is unclear as to when this timeframe begins: the date the application is filed or the date the application is accepted.⁷³ Section 1453(c)(2) does not specify which date starts the clock running and instead only provides that

70. See Garner, *supra* n. 61, at 1693.

71. Fed. R. App. P. 5(b).

72. See Phillips, 435 F.3d 785; *Knudsen v. Liberty Mut. Ins. Co. (Knudsen II)*, 435 F.3d 755 (7th Cir. 2005); *Brill*, 427 F.3d 446; *Schillinger v. Union Pacific R.R.*, 425 F.3d 330 (7th Cir. 2005); *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748 (7th Cir. 2005); *Pfizer, Inc. v. Lott*, 417 F.3d 725 (7th Cir. 2005); *Knudsen v. Liberty Mut. Ins. Co. (Knudsen I)*, 411 F.3d 805 (7th Cir. 2005); *accord Patterson I*, 444 F.3d at 369 n. 5 (noting that “[t]he Seventh Circuit apparently either often or always considers the petition for permission to appeal and the merits of the appeal simultaneously”).

73. The timing issue of when the clock starts could be resolved easily if a § 1453(c) appeal must be filed by means of a Rule 3 “notice of appeal,” because the initial sixty-day clock would run from the date on which the notice of appeal was filed. *But see Union 1309*, 435 F.3d at 1145 (concluding that a party seeking to appeal under § 1453(c)(1) must comply with the requirements of Fed. R. App. P. 5 and need not file a notice of appeal, because “Congress chose in the language of the statute to require the filing of an ‘application,’ . . . not a ‘notice of appeal,’ and further required that the application be ‘made to the court of appeals,’ . . . whereas a notice of appeal is filed in the district court”).

[i]f the court of appeals accepts an appeal under [§ 1453(c)(1)], the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under [§ 1453(c)(3)].⁷⁴

The CAFA grants a court of appeals the discretion to extend its timeframe within which to render its judgment.⁷⁵ And the CAFA provides that an appeal may be deemed denied if the court fails to render a “final judgment” before time expires under § 1453(c)(2) and (c)(3).⁷⁶

At first glance, by applying Rule 5(a) to the pertinent CAFA provisions, the appeal could be deemed “filed” on the day the party files its application or petition for permission to appeal.⁷⁷ Following this theory, a court must complete all action on a CAFA appeal within sixty days, or within the extended timeframe granted under § 1453(c)(3), from the date on which the petition was filed, or the appeal is deemed denied.⁷⁸

The theory that the clock begins on the date the petition is filed conflicts, however, with the plain language of Rule 5(d)(2), which provides that that “[t]he date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.”⁷⁹ By applying Rule 5(d)(2) to the relevant CAFA provisions, the court must render its judgment within sixty days of accepting the application, or within the time agreed upon under a § 1453(c)(3) extension, or the appeal is deemed denied. This reading is more practical than the first theory and has been adopted by the

74. 28 U.S.C. § 1453(c)(2).

75. 28 U.S.C. § 1453(c)(3).

76. 28 U.S.C. § 1453(c)(4) (providing that “[i]f a final judgment on the appeal under [§ 1453(c)(1)] is not issued before the end of the period described in [§ 1453(c)(2)], including any extension under [§ 1453(c)(3)], the appeal shall be denied”).

77. Fed. R. App. P. 5(a) (providing that a party must file a petition for permission to appeal within the time specified by the statute authorizing the appeal).

78. *See Patterson I*, 444 F.3d at 369 (noting that “[i]f the period begins with the filing of the motion for permission to appeal, a court of appeals might choose just to ‘sit’ on the motion without ever ruling, content in the knowledge that after sixty days, the appeal will disappear by operation of law, and the court will never have to consider the merits.”).

79. Fed. R. App. P. 5(d)(2).

Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits.⁸⁰

The second reading of when the clock begins under § 1453(c)(2) also provides the more sensible and practical interpretation of an already stringent requirement.⁸¹ If a court of appeals seeks additional briefing beyond the application and answer thereto, as the First, Fifth, and Ninth Circuits have, the court will face a Herculean challenge to complete briefing, oral argument, and a decision on the merits within sixty days of the filing of the application.⁸² The challenge is exacerbated, because the court of appeals seemingly cannot simply issue an order reversing or affirming the remand order within the sixty-day period with a more complete decision to follow later, because § 1453(c)(2) specifically mandates that the court of appeals “shall complete *all action* on such appeal, including rendering judgment,” within the prescribed period.⁸³ If the court of appeals fails to do so, the application will be deemed denied as a matter of law.⁸⁴

This Herculean challenge may be eased through the use of § 1453(c)(3)’s time extension. Section 1453(c)(3) provides that the

court of appeals may grant an extension of the 60-day period described in [§ 1453(c)] (2) if—(A) all parties to the proceeding agree to such extension, for any period of time;

80. See *DiTolla*, 469 F.3d at 273-75; *Morgan v. Gay (Morgan II)*, 471 F.3d 469, 471-72 (3d Cir. 2006); *Patterson I*, 444 F.3d at 368, 369 n. 5, 370; *Hart*, 457 F.3d at 679; *Bush*, 425 F.3d at 685-86, 686 n. 2; *Pritchett*, 420 F.3d at 1093; *Evans*, 449 F.3d at 1162.

81. See *Patterson I*, 444 F.3d at 369.

82. *Id.*

83. 28 U.S.C. § 1453(c)(2) (emphasis added); accord *Bush*, 425 F.3d at 685-86, 686 n. 2; but see *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 54 (2d Cir. 2006) (noting that “[b]ecause appeals from an order denying a motion to remand under CAFA must be decided ‘not later than 60 days after the date on which such appeal was filed,’ 28 U.S.C. § 1453(c)(2), ... we vacated the district court’s denial by summary order and remanded the case to that court”); *Galeno v. Blockbuster, Inc.*, 171 Fed. Appx. 904, 904 (2d Cir. 2006) (This court issued a “judgment” within seventy days after a ten-day extension granted *nunc pro tunc* with the caveat that “[a] detailed opinion of the court will follow.”); cf. Joseph, *supra* n. 61, at 185 (noting that “the statute does not require an opinion from the court of appeals, only a final judgment”).

84. 28 U.S.C. § 1453(c)(4); cf. *Patterson I*, 444 F.3d at 371 n. 1 (Garza, J., dissenting) (noting that “[w]henver the sixty-day period begins, the appellate court can choose to drag its feet and allow the period to lapse”).

or (B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.⁸⁵

However, this section raises a few interesting questions itself. First, the statute provides no clue as to what constitutes “good cause” for an extension. Second, § 1453(c)(3) may not permit a court of appeals to grant itself *sua sponte* a ten-day extension “in the interests of justice” because a court can grant such an extension only “for good cause shown.” The possibility of an extension granted *sua sponte* raises the troublesome questions of to whom and by whom good cause could be shown if the court is acting on its own motion. The Ninth Circuit offers some guidance in interpreting § 1453(c)(3) and provides that the court of appeals

may grant an extension of the 60-day period where (1) all parties to the proceeding agree to an extension and a given period for the extension, or (2) the extension is for good cause shown and in the interests of justice.⁸⁶

That court noted that the extension granted “for good cause shown and in the interests of justice” should be limited to ten days.⁸⁷

A court may nevertheless avoid this issue where necessary by either seeking the parties’ input on a possible extension, as the Ninth Circuit has, or by granting itself a ten-day extension where it is convinced that the extension is necessary “in the interests of justice” and for “good cause” that could be shown to whomever may care to look.⁸⁸ The Fifth Circuit has in fact expressly stated that, after accepting a CAFA appeal, it “retains the statutory authority . . . *sua sponte* to extend, for good cause shown, the date for rendering judgment.”⁸⁹ Thus, the careful practitioner should continue to monitor the case in the court of appeals after filing an application to appeal and, if necessary,

85. 28 U.S.C. § 1453(c)(3).

86. *Bush*, 425 F.3d at 686 n. 2.

87. *Id.*; accord *Lowdermilk v. U.S. Bank Natl. Assn.*, 479 F.3d 994, 996-97 (9th Cir. 2007).

88. *Bush*, 425 F.3d at 686.

89. *Patterson I*, 444 F.3d at 370; cf. *Galeno v. Blockbuster, Inc.*, 171 Fed. Appx. at 904 (suggesting that a court could “extend the deadline for decision by ten days, *nunc pro tunc*” in order to “issue our judgment within the applicable time period” after the court grants permission for leave to appeal).

file a motion invoking § 1453(c)(3) to extend the court's time to render a final decision and avoid the risk of having the application be deemed denied because the court failed to act.

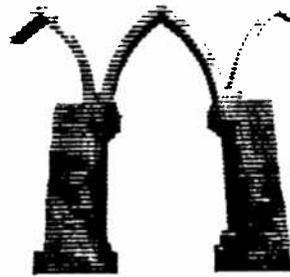
28 U.S.C. § 1453(C) APPELLATE PROCEDURE IN A NUTSHELL

As discussed above, several interpretative issues linger for parties seeking to appeal a class action remand order under § 1453(c). In the face of this procedural uncertainty in most circuits, the best practical advice for parties seeking to “appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed” can be summarized as follows, unless the relevant court of appeals has expressly held otherwise:

- File in the court of appeals for the circuit in which the district court sits an application that complies with the requirements of Rule 5 of the Federal Rules of Appellate Procedure as well as a notice of appeal that complies with the requirements of Rules 3 and 4 of the Federal Rules of Appellate Procedure;
- File the application and notice not more than six calendar days after the entry of the order granting or denying remand and, if necessary, file again after the seventh court day after the entry of the order granting or denying remand;
- Draft the application to address both why the appeal should be allowed and why the petitioner should prevail on the merits, assuming that further briefing before the court of appeals will not be permitted; and
- Seek an extension, preferably by agreement with the other side, if necessary to permit the court of appeals to complete any necessary action on the appeal and to avoid the appeal being rejected as a matter of law.

Following these guidelines does not guarantee success, of course, but it would appear to give the appeal its best chance of being heard and favorably decided.





WILLIAM H. BOWEN SCHOOL OF LAW
University of Arkansas at Little Rock
1201 McMath Avenue
Little Rock, Arkansas 72202-5142