Case Brief: Dominion Energy, Inc. v. City of Warren (4th Cir. 2019)*

INTRODUCTION

After Dominion Energy, Inc. agreed to acquire SCANA Corporation, disgruntled shareholders brought two class actions against the parties involved, alleging SCANA's Board of Directors breached a fiduciary duty and that Dominion aided and abetted that breach.[1] Although the district court remanded the class actions to state court after Dominion's motion to remove them to federal court, the United States Court of Appeals for the Fourth Circuit allowed Dominion to appeal those remand orders and held that the aiding and abetting claims did not satisfy one of the three exceptions to removal under the Class Action Fairness Act ("the Fairness Act").[2] Accordingly, the appeals court reversed the district courts' decisions and allowed the removal of the class actions into federal court, granting Dominion's motions.[3]

BACKGROUND LAW

The purpose of the Class Action Fairness Act of 2005 is to grant federal courts subject matter jurisdiction over "interstate" class actions "of national importance."[4] To avoid "bias against out-of-State defendants,"[5] in these actions, the Fairness Act amended the diversity jurisdiction statute, to extend federal jurisdiction over class action proceedings that meet three requirements: "(1) the putative class has more than 100 members (numerosity); (2) the amount in controversy exceeds five million dollars, exclusive of interest and costs (amount in controversy); and (3) the parties are minimally diverse in citizenship (minimal diversity)."[6] If a defendant can prove that these requirements are met, then there is a presumption of entitlement to remove the proceedings to federal court.[7]

1. Dominion Energy, Inc. v. City of Warren Police & Fire Ret. Sys., 928 F.3d 325, 331–32 (4th Cir. 2019).

2. *Id.* at 329, 335, 336.

3. *Id.* at 336.

4. *See* Class Action Fairness Act, Pub. L. No. 109-2 § 2(b)(2), 119 Stat. 4, 5 (2005); *see also* Standard Fire Ins. Co. v. Knowles, 568 U.S. 588, 595 (2013).

5. *See* Class Action Fairness Act, § 2(a)(4)(B), 119 Stat. at 5.

6. *Dominion*, 928 F.3d at 330 (citing 28 U.S.C. § 1332(d)(2), (5)(B)).

7. *See* 28 U.S.C. § 1453(b).

Exceptions to Removal

But the Fairness Act does not apply to certain types of class actions, even when the actions satisfy the Fairness Act's jurisdictional requirements.[8] A federal court will deny the petition for removal only if *all* of the class action claims meet at least one of the three exceptions to removal.[9] The statute specifies the three excepted types of class actions:

- a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

- a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

- a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).[10]

Respectively, these exceptions are generally called the "covered security" exception, the "internal affairs" exception, and the "securities-related" exception.[11] While a breach of fiduciary duty claims in these situations satisfy at least one of the exceptions,[12] the Fourth Circuit has previously never addressed whether aiding and abetting claims satisfy any of CAFA's removal exceptions.[13]

Petitions for Permission to Appeal

Generally, parties usually cannot appeal a district court's order denying a petition for removal.[14] The Fairness Act provides an exception that grants the court of appeals discretion to accept the appeal.[15] However, the Fairness Act

8. *See* 28 U.S.C. § 1332(d)(9).

9. *See* 28 U.S.C. § 1453(d) (providing that class action must "solely involve[]" claims that meet the exception in order to avoid removal to federal court).

10. 28 U.S.C. § 1453(d) (citation omitted).

11. *Dominion*, 928 F.3d at 330–31.

12. *Id.* at 334.

13. *Id.* at 335.

14. 28 U.S.C. § 1447(d); *See* AU Optronics Corp. v. South Carolina, 699 F.3d 385, 390 n.7 (4th Cir. 2012) (discussing 28 U.S.C. § 1447(d)).

15. *AU Optronics*, 699 F.3d at 390 n.7.

offers no guidance as to the legal standards that govern this discretion[16] and the Fourth Circuit has granted petitions for permission to appeal without specifying any relevant considerations for hearing these petitions.[17] Conversely, the First, Fifth, Ninth, and Tenth Circuits[18] have adopted a non-exhaustive list of factors for consideration when deciding whether to hear the appeal that includes the following:

- Whether the petition presents an important [Fairness Act]-related question;
- Whether the question presented by the [Fairness Act] appeal petition is unsettled;
- Whether the district court's jurisdictional decision under the [Fairness Act] is incorrect, or at least fairly debatable;
- Whether the [Fairness Act]-related question is consequential to the resolution of the particular class action;
- Whether that question is likely to evade effective review if left for consideration only after final judgment;
- Whether the [Fairness Act]-related question is likely to recur;
- Whether the petition arises from a decision that is sufficiently final to position the class action for intelligent review; and
- Whether the probable harm to the petitioners if an immediate appeal is denied outweighs the probable harm to the other parties should an immediate appeal be entertained.[19]

FACTS

Dominion Energy, Inc. is one world's largest utility companies, based in Richmond, Virginia, and operating in eighteen different states.[20] In early 2018, Dominion arranged for one of its subsidiaries, Sedona Corp. ("Sedona"), to

16. *See id.*

17. *See, e.g.*, Quicken Loans Inc. v. Alig, 737 F.3d 960, 962 (4th Cir. 2013) (granting petition to appeal under CAFA without announcing any specific standards).

18. *See Dominion*, 928 F.3d at 334 (4th Cir. 2019).

19. *Id.* (citing Coll. of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co., 585 F.3d 33, 38–39 (1st Cir. 2009)).

20. *Dominion*, 928 F.3d at 331; *see also* Justin Walton, *The World's Top 10 Utility Companies*, INVESTOPEDIA (updated Jan. 25, 2020), https://www.investopedia.com/articles/investing/022516/worlds-top-10-utility-companies.asp [https://perma.cc/V8MU-57XN].

merge with SCANA Corporation, a utility company based in South Carolina with about 25,000 stockholders.[21] In the reverse triangular merger,[22] the SCANA stockholders were to receive only 0.6690 shares of Dominion stock in exchange for each share of their SCANA common stock.[23] Conversely, SCANA's CEO and Board of Directors were to receive cash for some of their shares and were to gain other advantages not provided to the other SCANA stockholders.[24] Furthermore, because SCANA's stock fell about 45% during the last half of 2017,[25] Dominion was able to negotiate the purchase price, and ultimately acquire SCANA for significantly less than it would have a year earlier, and, perhaps, its true market value.

Believing the merger was "a bad deal" and a "financial boon" to Dominion and SCANA's Board Members, two groups of SCANA stockholders filed a class action complaint against Dominion and Sedona, as well as SCANA, SCANA's CEO, and nine of SCANA's Board Members in South Carolina state courts.[26] Specifically, the complaints alleged two causes of action under South Carolina law: (1) a claim against SCANA's Board Members for breach of fiduciary duty in negotiating the merger agreement; and (2) a claim against Dominion and Sedona for aiding and abetting that breach. Both complaints sought to force a rescission of the merger.[27]

Using the removal provisions of the Fairness Act,[28] Dominion and Sedona removed the class actions to the federal court in the District of South Carolina.[29] Warren and Metzler moved to remand their suits back to the state courts, claiming that one or more of the Fairness Act's three exceptions to removal barred their removal to federal court.[30] In both suits, the district court agreed with SCANA's stockholders and granted their motions to remand, holding that "one or all of the exceptions to removal under [the Fairness Act were]

21. *Dominion*, 928 F.3d at 331.

22. *See generally* Will Kenton, *Reverse Triangular Merger*, INVESTOPEDIA (updated Apr. 9, 2019), https://www.investopedia.com/terms/r/rtm.asp [https://perma.cc/8FQF-EZDX] (describing reverse triangular mergers).

23. *Dominion*, 928 F.3d at 331.

24. *Id.*

25. *See Scana Corp (SCG)*, BARCHART, (updated Dec. 31, 2018), https://www.barchart.com/stocks/quotes/SCG [https://perma.cc/PF7Z-X2Z9] (showing SCANA's stock price plummeting from $71.09 on June 19, 2017 to $39.09 on December 25, 2017). Many attribute this loss to SCANA's decision to abandon a $9 billion dollar project and attempt to recover its sunk costs from its customers. *See* Alex Crees, *The Failed V.C. Summer Nuclear Project: A Timeline*, CHOOSE ENERGY (updated Jan. 20, 2020), https://www.chooseenergy.com/news/article/failed-v-c-summer-nuclear-project-timeline/ [https://perma.cc/X82M-8GAL].

26. *Dominion*, 928 F.3d at 331–32.

27. *See id.*

28. *Supra* notes 6–10 and accompanying text.

29. *Dominion*, 928 F.3d at 332.

30. *Id.* at 333.

satisfied."[31] Dominion and Sedona then filed a petition for appeal, requesting appellate review of the remand order in both suits, and the courts consolidated the petitions for review.[32]

HOLDING

Without much discussion, the Fourth Circuit adopted the First Circuit's non-exhaustive list of factors,[33] and held that in this case "the relevant factors weigh[ed] heavily in favor of a prompt appellate review" of the district courts' remand orders.[34] Of utmost importance in the decision to grant the petition for appeal was the opportunity to present and answer "the important and unsettled question of whether a claim for aiding and abetting [a] breach of a fiduciary duty falls within one or more of the [Fairness Act's] removal exceptions."[35] Recognizing that several district courts have addressed the question, the court considered it one likely to recur.[36]

Reviewing de novo the district court's determination of whether it had subject matter jurisdiction under the Fairness Act, the Fourth Circuit held that "both of these class actions were properly removed to the District of South Carolina" and that the remand orders must be reversed.[37] The court had three primary bases for the ruling. First, the SCANA stockholders failed to prove that their aiding and abetting claims satisfied any of the three exceptions to removal in the Fairness Act. Specifically, the internal affairs exception did not apply because Dominion and Sedona were outsiders to SCANA and their actions did not relate to the internal affairs of SCANA.[38] Furthermore, using a line of cases from the Second Circuit as a guide,[39] the Fourth Circuit held that because SCANA stock did not create a relationship or any duties between Dominion and Sedona and SCANA's stockholders, any claims against

31. *Id.* (quotation omitted).
32. *Id.*
33. *Supra* notes 18–19 and accompanying text.
34. *Dominion*, 928 F.3d at 335.
35. *Id.*
36. *Id.*
37. *Id.* at 336.
38. *Id.* at 338.
39. *See generally* Estate of Pew v. Cardarelli, 527 F.3d 25, 31 (2d Cir. 2008) (explaining that the securities related exception "cannot be read to cover any and all claims that relate to any security"); Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp., 603 F.3d 23, 29 (2d Cir. 2010) (ruling that the inquiry under the securities-related exception "focus[es] . . . on the source of the right that the plaintiff's claim seeks to enforce[]"); BlackRock Fin. Mgmt. v. Ambac Assur. Corp., 673 F.3d 169 (2d Cir. 2012) ("duties superimposed by state law as a result of the relationship created by or underlying [a] security fall within the plain meaning of the [exception], which expressly references duties (including fiduciary duties)[]") (quotation omitted).

Dominion and Sedona are *not* predicated on any duties "created by or pursuant to SCANA stock."[40]

Second, the court reasoned that the Fairness Act's extension of jurisdiction should be interpreted broadly and the exceptions should be construed narrowly.[41] Third, in reading and applying the Fairness Act in light of its purpose and objective, the court determined that these class actions were undeniably interstate claims of national importance.[42] In fact, the court held that the aiding and abetting claims were "part and parcel of two interstate and nationally-important class actions, and Congress — in enacting [the Fairness Act] — plainly intended for such actions to be litigated in the federal courts."[43]

IMPACT

Perhaps the most obvious impact of the Fourth Circuit's decision is the adoption of the non-exhaustive list of factors for an assessment of petitions for permission to appeal under the Fairness Act.[44] Theoretically, these factors will make decisions more predictable, allowing for both plaintiff shareholders and defendant corporations to better prepare for litigation.

The ability to remove cases involving aiding and abetting claims to federal court under the Fairness Act certainly extends the reach of the Fairness Act and increases the likelihood that class actions of this type will be litigated in a forum of the corporation's choosing. Corporate defendants typically prefer to litigate cases in federal courts, due to the perception that state courts are "friendlier" to individual plaintiffs.[45] For the above reasons, the Fourth Circuit's decision to expand the jurisdiction of the Fairness Act provides substantial benefits to corporations.

To amplify the above practical advantages to corporations that the Fourth Circuit granted via their extension of the Fairness Act, the decision has two effects that are better understood from a plaintiff's perspective. First, as Judge Motz asserts in her dissent, this decision may seem to "profoundly impair[]" Congress's purpose in enacting CAFA to promote fairness and efficiency by encouraging plaintiffs in these class actions "to bring inextricably intertwined claims in separate courts" to avoid having claims removed into the federal circuits.[46] Similarly, the corporation's ability to remove the state law claims into

40. *Dominion*, 928 F.3d at 342 (quotation omitted).

41. *Id.* at 336.

42. *Id.* at 336–37.

43. *Id.* at 337.

44. *Id.* at 334.

45. Marianne Bonner, *What is a Class Action Lawsuit?*, THE BALANCE SMALL BUSINESS (updated Sept. 25, 2019), https://www.thebalancesmb.com/what-is-a-class-action-lawsuit-3623787 [https://perma.cc/T4MS-4YPF].

46. *Dominion*, 928 F.3d at 348 (Motz, J., dissenting).

federal court undermines state courts' ability to "decide cases of chiefly local import or that concern traditional state regulation,"[47] inhibiting the development of state law in state courts.[48] Second, the Fairness Act's jurisdictional extensions decrease the number of class certifications and, ultimately, decrease the class action's "ability to deter corporate wrongdoing."[49] The Fourth Circuit's holding that aiding and abetting a breach of fiduciary duty does not fall under the Fairness Act's removal exceptions broadens the reach of the Fairness Act and, with it, a corporation's ability to operate and negotiate more free from the threat of an unpredictable suit from unhappy shareholders.

WILL BOWERS**

47. Estate of Pew v. Cardarelli, 527 F.3d 25, 32 (2d Cir. 2008).

48. *Dominion*, 928 F.3d at 348–49 (Motz, J., dissenting).

49. Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2550 (2008).

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