

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: April 24, 2007

Decided: May 13, 2008)

Docket No. 06-5703-mv

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ESTATE OF BARBARA PEW (DECEASED), JOHN
PEW, JR., INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF BARBARA E. PEW, HAROLD
PEW, DONNA PEW, H. NANCY HANN, JULIA
HUDASKY and KATHLEEN PRICKETT, on behalf
of themselves and all others similarly
situated,

Plaintiffs-Respondents,

- v.-

DONALD P. CARDARELLI, PETER J. O'NEILL
and PRICEWATERHOUSECOOPERS LLP,

Defendants-Petitioners.

- - - - -x

Before: JACOBS, Chief Judge, KEARSE and POOLER,
Circuit Judges.

Judge Pooler dissents in a separate opinion.

On this petition for leave to appeal an order of the
United States District Court for the Northern District of

1 New York (Mordue, C.J.), which granted plaintiffs' motion to
2 remand this action to New York State Supreme Court, we
3 conclude that the action falls within the grant of federal
4 jurisdiction in the Class Action Fairness Act.
5 Consequently, we have authority to accept jurisdiction to
6 review the district court's order. We elect to exercise
7 jurisdiction and, on the merits, we reverse the remand
8 order.

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34
35

36 DENNIS JACOBS, Chief Judge:

1 This case construes certain provisions of the Class
2 Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119
3 Stat. 4 (codified in scattered sections of Title 28, United
4 States Code). One purpose of CAFA is to provide a federal
5 forum for securities cases that have national impact,
6 without impairing the ability of state courts to decide
7 cases of chiefly local import or cases that concern
8 traditional state regulation of the state's corporate
9 creatures. CAFA does that by expanding federal diversity
10 jurisdiction, by allowing removal of securities cases of
11 national impact from the state courts, and by conferring
12 appellate jurisdiction to review orders granting or denying
13 motions to remand such removed cases.

14 This putative class action was commenced in New York
15 State Supreme Court, and was removed to the United States
16 District Court for the Northern District of New York
17 (Mordue, C.J.). The action alleges that officers of an
18 issuer--abetted by the issuer's auditor--failed to disclose,
19 while marketing certain debt certificates, that the issuer
20 was insolvent. Plaintiffs seek relief under New York's
21 consumer fraud statute. The main question for this appeal
22 is whether such a claim falls within an exception to CAFA's

1 grant of original and appellate jurisdiction--for class
2 actions that solely involve claims that "relate[] to the
3 rights, duties (including fiduciary duties), and obligations
4 relating to or created by or pursuant to any security." 28
5 U.S.C. § 1332(d)(9)(C); id. § 1453(d)(3). This is a
6 question of first impression in the circuit courts.

7 Although the matter is not entirely clear given the
8 imperfect wording of the statute, we hold that the present
9 suit does not fall within this exception to CAFA
10 jurisdiction. Consequently, we have authority to accept an
11 appeal from the district court's order granting plaintiffs'
12 motion to remand this action to the state court. We elect
13 to grant defendants' petition for permission to appeal and,
14 on the merits, we reverse the district court's remand order.

15
16 **I**

17 Agway, Inc., an agricultural supply and marketing
18 cooperative, sought to raise capital by issuing money market
19 certificates ("Certificates")--unsecured, fixed-interest
20 debt instruments. Later, Agway suspended sale of the
21 Certificates, and ended its practice of repurchasing them
22 prior to maturity. Agway filed for bankruptcy in September

1 2002. This is the second litigation brought by these
2 plaintiffs over these Certificates.

3 The 2003 Lawsuit. Plaintiffs, seeking to represent a
4 class of individuals who purchased the Agway Certificates
5 between September 2000 and September 2002, filed a lawsuit
6 in New York Supreme Court against Agway officers Donald P.
7 Cardarelli and Peter J. O'Neill, as well as Agway's auditor,
8 PriceWaterhouseCoopers, LLP ("defendants"). That complaint
9 was predicated on the federal securities laws--in
10 particular, § 11(a) of the Securities Act of 1933, 15 U.S.C.
11 § 77k(a)--and it asserted that misrepresentations in Agway's
12 financial statements fraudulently concealed that Agway was
13 insolvent and could only discharge its previous debt through
14 the issuance of new debt instruments.

15 Defendants removed the action to the United States
16 District Court for the Northern District of New York.
17 Plaintiffs then amended the complaint to plead essentially
18 the same acts of concealment under New York's consumer fraud
19 law, which creates a private right of action for victims of
20 "[d]eceptive acts or practices in the conduct of any
21 business, trade or commerce or in the furnishing of any
22 service," N.Y. Gen. Bus. Law § 349(a). See id. § 349(h).

1 As to the federal securities claim, Judge Mordue
2 granted defendants' motion to dismiss with prejudice. See
3 Pew v. Cardarelli, No. 5:03-cv-742, 2005 WL 3817472, at *7
4 (N.D.N.Y. Mar. 17, 2005). Judge Mordue declined to exercise
5 supplemental jurisdiction over plaintiffs' state law claim,
6 dismissing without prejudice. Id. at *16. We affirmed by
7 summary order, ruling that "no reasonable investor could
8 have been misled about the nature and extent of the risks
9 associated with investing in Agway Certificates." Pew v.
10 Cardarelli, 164 Fed. App'x 41, 44 (2d Cir. 2006) (summary
11 order).

12 The 2005 Lawsuit. The present lawsuit, filed in New
13 York Supreme Court, makes essentially the same factual
14 allegations, but seeks relief only under the state consumer
15 fraud statute, N.Y. Gen. Bus. Law § 349. Defendants removed
16 the action to federal court under CAFA, which in some
17 circumstances permits removal of class actions based wholly
18 on state law. Plaintiffs moved to remand the case to state
19 court, arguing that their suit falls within an exception to
20 CAFA's removal provision for actions "that relate[] to the
21 rights, duties (including fiduciary duties), and obligations
22 relating to or created by or pursuant to any security," and

1 that the district court therefore lacks jurisdiction over
2 it, 28 U.S.C. § 1332(d)(9)(C), and cannot accede to removal,
3 id. § 1453(d)(3). Chief Judge Mordue agreed, and remanded.
4 Estate of Pew v. Cardarelli, No. 5:05-cv-1317, 2006 WL
5 3524488 (N.D.N.Y. Dec. 6, 2006).

6 Defendants filed the present petition pursuant to 28
7 U.S.C. § 1453(c), seeking permission to appeal the district
8 court's remand order. We advised the parties that were we
9 to grant defendants' motion for leave to appeal, we might
10 also elect to decide the merits simultaneously.

11 12 II

13 CAFA requires that any petition for review of an order
14 granting or denying a motion to remand be made to the court
15 of appeals "not less than 7 days after entry of the order."
16 28 U.S.C. § 1453(c)(1) (emphasis added). As the Third
17 Circuit concluded, this is surely a typographical error,
18 because the "uncontested legislative intent behind § 1453(c)
19 was to impose a seven-day deadline for appeals," not a
20 waiting period. Morgan v. Gay, 466 F.3d 276, 277 (3d Cir.
21 2006) (emphasis added). We join our sister circuits in
22 interpreting the statute to mean "not more than 7 days."

1 Id.; see also Miedema v. Maytag Corp., 450 F.3d 1322, 1326
2 (11th Cir. 2006) (reaching same interpretation); Amalg.
3 Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.,
4 435 F.3d 1140, 1146 (9th Cir. 2006) (same); Pritchett v.
5 Office Depot, Inc., 420 F.3d 1090, 1093 n.2 (10th Cir. 2005)
6 (same). Defendants' petition is timely because it was filed
7 on the seventh business day after the entry of the district
8 court's order.

10 III

11 Ordinarily, an order of remand is unappealable. See 28
12 U.S.C. § 1447(d). Plaintiffs argue that we lack
13 jurisdiction to decide the present appeal because defendants
14 failed to make a timely application to the district court to
15 stay its order of remand. Section 1453 conditions the right
16 of appeal on a timely filing, without mention of a stay.
17 See 28 U.S.C. § 1453(c)(1). We therefore hold that in
18 granting the federal courts of appeals jurisdiction to
19 review remand orders "notwithstanding section 1447(d),"
20 Congress did not require a defendant to seek a stay. Id. §
21 1453(c)(1).

1 IV

2 Plaintiffs contend that we lack appellate jurisdiction
3 to review the order of remand, by virtue of 28 U.S.C. §
4 1453(d) (3).

5 As always, we have jurisdiction to determine our
6 jurisdiction. See Kuhali v. Reno, 266 F.3d 93, 100 (2d Cir.
7 2001). Section 1453 provides, in pertinent part:

8 (b) In general.--A class action may be removed to
9 a district court of the United States . . .
10 without regard to whether any defendant is a
11 citizen of the State in which the action is
12 brought

13
14 (c) Review of remand orders.--

15
16 (1) In general.--Section 1447 shall apply to
17 any removal of a case under this section,
18 except that notwithstanding section 1447(d), a
19 court of appeals may accept an appeal from an
20 order of a district court granting or denying
21 a motion to remand a class action to the State
22 court from which it was removed if application
23 is made to the court of appeals not less than
24 7 days after entry of the order.

25
26 (2) Time period for judgment.--If the court of
27 appeals accepts an appeal under paragraph (1),
28 the court shall complete all action on such
29 appeal, including rendering judgment, not
30 later than 60 days after the date on which
31 such appeal was filed

32
33 (d) Exception.--This section shall not apply to
34 any class action that solely involves--

35 . . .
36
37

1 (3) a claim that relates to the rights, duties
2 (including fiduciary duties), and obligations
3 relating to or created by or pursuant to any
4 security
5

6 As explained in detail infra, § 1453(d) (3) mirrors §
7 1332(d) (9) (C), which provides an exception to CAFA's grant
8 of original federal jurisdiction.

9 Subsection (b) permits defendants (who are New York
10 residents) to remove the action from New York Supreme Court.
11 Subsection (c) gives defendants the right to petition this
12 Court for an appeal of the district court's remand order.
13 Compare 28 U.S.C. § 1447(d) ("An order remanding a case to
14 the State court from which it was removed is not reviewable
15 on appeal or otherwise").

16 The plain language of subsection (d) ("This section
17 shall not apply" (emphasis added)) limits all of §
18 1453, including subsection (c), which delineates the scope
19 of our authority to "accept an appeal" from a remand order.
20 Therefore, § 1453(d) limits our jurisdiction to review the
21 district court's remand order.¹

¹It may seem odd that Congress would confine appellate jurisdiction to review a remand order to precisely the same boundaries used to limit the district court's original jurisdiction; but the § 1453(d) exceptions are not the only exceptions to CAFA's expansion of federal jurisdiction--and the other exceptions do not purport to double as limitations

1 Within our bounded appellate jurisdiction we
2 nevertheless retain discretion to decline to hear such
3 appeals. Section 1453(c) provides that “a court of appeals
4 may accept an appeal from an order of a district court
5 granting or denying a motion to remand” 28 U.S.C. §
6 1453(c) (1) (emphasis added). A sound exercise of discretion
7 will be guided by consideration of the importance and
8 novelty of the issues raised by the case. See, e.g., Hart
9 v. FedEx Ground Package Sys. Inc., 457 F.3d 675, 678 (7th
10 Cir. 2006) (exercising discretion to accept an appeal to
11 “address [an] important question” under CAFA). Here, we
12 elect to entertain defendants’ appeal because the question
13 of whether a state-law deceptive practices claim predicated
14 on the sale of a security is removable under CAFA is
15 important and consequential, and a decision of the question
16 will alleviate uncertainty in the district courts.

17 Lastly, because we grant defendants’ petition for leave
18 to appeal, see infra, we also elect to decide the merits of

on appellate jurisdiction. See, e.g., 28 U.S.C. §
1332(d) (5) (A) (excepting from CAFA’s grant of original
jurisdiction any class action in which “the primary
defendants are States, State officials, or other
governmental entities against whom the district court may be
foreclosed from ordering relief”).

1 the appeal simultaneously. This approach finds support in
2 the caselaw, see, e.g., Wallace v. La. Citizens Prop. Ins.
3 Corp., 444 F.3d 697, 701 n.5 (5th Cir. 2006) (“Although this
4 case comes to us as a petition to accept the appeal, the
5 parties sufficiently address the basis for the underlying
6 appeal, thus allowing us to rule on the merits.”), and it is
7 permitted by the Federal Rules of Appellate Procedure, see
8 Fed. R. App. P. 2. Plaintiffs urge us to decide now only
9 the motion for leave to appeal, and decide the merits later.
10 That course would be inefficient because in order to decide
11 whether we have appellate jurisdiction we must construe the
12 same statutory language upon which the district court rested
13 its remand order (and because the parties have already
14 briefed their positions on that virtually identical
15 statute). Moreover, once leave to appeal is granted, the
16 Court has only 60 days to render a decision. See DiTolla v.
17 Doral Dental IPA of N.Y., LLC, 469 F.3d 271, 275 (2d Cir.
18 2006) (“CAFA’s 60-day clock for rendering judgment starts
19 running on the day that the Court’s order granting
20 permission to appeal is filed.”). Rather than spin wheels,
21 we elect to decide the merits of the appeal now.

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V

To determine whether the district court properly remanded to state court (and whether we lack appellate jurisdiction under § 1453(c)), we must consider an exception to CAFA's grant of original federal jurisdiction, for "any class action that solely involves a claim . . . that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security." 28 U.S.C. § 1332(d)(9)(C). If plaintiffs' state-law consumer fraud claim falls within this exception, the district court lacks jurisdiction and properly remanded the case to state court (and we lack appellate jurisdiction to review that determination).

We first look to the statute's plain meaning; if the language is unambiguous, we will not look farther. See Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). Here, because the imperfect drafting of the statute makes it ambiguous, we read the wording, consider the statutory context, and consult the legislative history. And we conclude that all modes of analysis agree.

CAFA amends the diversity jurisdiction statute by adding § 1332(d), which confers original federal

1 jurisdiction over any class action with minimal diversity
2 (e.g., where at least one plaintiff and one defendant are
3 citizens of different states) and an aggregate amount in
4 controversy of at least \$5 million (exclusive of interest
5 and costs). See 28 U.S.C. § 1332(d)(2). However, "to keep
6 purely local matters and issues of particular state concern
7 in the state courts," Lowery v. Alabama Power Co., 483 F.3d
8 1184, 1194 (11th Cir. 2007), Congress excluded from CAFA's
9 expanded jurisdiction (inter alia) certain securities-
10 related class actions, described in three subsections (set
11 out in the margin).² Subsection (A) of § 1332(d)(9) carves

²Section 1332(d)(9) provides:

Paragraph (2) [granting district courts original jurisdiction over such class actions] shall not apply to any class action that solely involves a claim--

(A) concerning a covered security as defined under 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));

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

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or

1 out class actions for which jurisdiction exists elsewhere
2 under federal law, such as under the Securities Litigation
3 Uniform Standards Act ("SLUSA"), i.e., state-law fraud
4 claims in connection with the purchase or sale of securities
5 traded on a national stock exchange, see 15 U.S.C. §
6 78bb(f); § 77r(b)(1)). Subsection (B) of § 1332(d)(9)
7 carves out class actions that are within the states' purview
8 of corporate law and governance. It is undisputed that the
9 exception to federal jurisdiction in subsection (A) of §
10 1332(d)(9) is inapplicable here because the Certificates are
11 not traded nationally, nor are they listed on any national
12 securities exchange. Likewise, subsection (B) of §
13 1332(d)(9) is inapplicable because plaintiffs' claims do not
14 concern corporate governance.

15 The bone of contention is subsection (C) of §
16 1332(d)(9), which carves out any class action

17 that relates to the rights, duties
18 (including fiduciary duties), and
19 obligations relating to or created by or
20 pursuant to any security (as defined
21 under section 2(a)(1) of the Securities

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).

1 Act of 1933) and the regulations issued
2 thereunder).

3
4 As explained supra, the same wording is used in §
5 1453(d)(3), which provides an exception to defendants' power
6 to remove an action, see 28 U.S.C. § 1453(b), and an
7 exception to our jurisdiction to review a district court's
8 remand order, see id. § 1453(c). Thus CAFA's jurisdictional
9 and removal provisions operate in tandem. If there is
10 original jurisdiction for plaintiffs' underlying claim, we
11 have appellate jurisdiction, we reverse the remand order,
12 and this action remains in federal district court. If the
13 district court lacked jurisdiction over the underlying
14 claim, we would dismiss the appeal for lack of appellate
15 jurisdiction, the remand order would stand, and the action
16 would be consigned to state court. Accordingly, both
17 original and appellate jurisdiction depend on whether
18 plaintiffs' allegations fall within CAFA's exception for
19 claims that relate to rights, duties and obligations related
20 to or created by or pursuant to a security.

21 To aid analysis, it is useful to break down the wording
22 of § 1332(d)(9)(C) and § 1453(d)(3) into numbered phrases as
23 follows:

24 [i] [Section 1332(d)(2) and section 1453(b) and
25

1 (c)] shall not apply to any class action that
2 solely involves a claim . . . that relates to

3
4 [ii] the rights, duties (including fiduciary
5 duties), and obligations

6
7 [iii] relating to or created by or pursuant to

8
9 [iv] any security

10
11 The sentence as a whole cannot be read to cover any and
12 all claims that relate to any security, because that would
13 afford no meaning to [ii] and [iii], which are evidently
14 terms of limitation. If the limitation is to rights, duties
15 and obligations (those that relate to, are created by or
16 arise pursuant to a security), what are those rights, duties
17 and obligations?

18 The statute gives clues as to the import of each term.
19 The word "duties" expressly includes "fiduciary duties,"
20 which reinforces the common understanding that duties are
21 owed by persons (whether human or artificial).

22 "Obligations" can be owed by persons or by instruments, but
23 the natural reading of this statutory language is to
24 differentiate obligations from duties by reading obligations
25 to be those created in instruments, such as a certificate of
26 incorporation, an indenture, a note, or some other corporate
27 document. And certain duties and obligations of course

1 "relate to" securities even though they are not rooted in a
2 corporate document but are instead superimposed by a state's
3 corporation law or common law on the relationships
4 underlying that document. Finally, the "rights" are those
5 of the security-holders (or their trustees or agents) to
6 whom these duties and obligations run. Thus, an instrument
7 that creates an obligation generates a corresponding right
8 in the holder.

9 Plaintiffs argue (and the dissent essentially agrees)
10 that the term "rights . . . relating to . . . any security"
11 includes the right to bring any cause of action that relates
12 to a security. But this would defeat any limitation that
13 was intended by the use of the term. Moreover, this
14 interpretation would render superfluous § 1332(d)(9)(A)
15 (excepting class actions "concerning a covered security")
16 and § 1453(d)(1) (same), because all "covered securities"
17 are (of course) "securities." See 28 U.S.C. § 1332(d)(9)(C)
18 (excepting suits relating to rights, duties and obligations
19 relating to or created by or pursuant to "any security").

20 The Agway Certificates--which the parties agree are
21 "securities" under CAFA--certainly create "obligations," and
22 therefore corresponding "rights" in the holders. For

1 example, the Certificates create rights in the holders to a
2 rate of interest and to principal repayment at certain
3 dates. But the present suit does not "relate[] to" those
4 rights; rather, it is a state-law consumer fraud action
5 alleging that Agway fraudulently concealed its insolvency
6 when it peddled the Certificates. Claims that "relate[] to
7 the rights . . . and obligations" "created by or pursuant
8 to" a security must be claims grounded in the terms of the
9 security itself, the kind of claims that might arise where
10 the interest rate was pegged to a rate set by a bank that
11 later merges into another bank, or where a bond series is
12 discontinued, or where a failure to negotiate replacement
13 credit results in a default on principal. The present
14 claim--that a debt security was fraudulently marketed by an
15 insolvent enterprise--does not enforce the rights of the
16 Certificate holders as holders, and therefore it does not
17 fall within § 1332(d)(9)(C) and § 1453(d)(3).

18 Our interpretation arguably renders the words "relating
19 to" superfluous. But forced as we are to construe "CAFA's
20 cryptic text," Lowery, 483 F.3d at 1187, we prefer an
21 interpretation that preserves the meaning of an entire
22 subsection. In any event, the words "relating to" are

1 repetitive and lack any predictable or precise effect. See
2 28 U.S.C. § 1332(d)(9)(C) (excepting from federal
3 jurisdiction any class action solely involving a claim “that
4 relates to the rights, duties (including fiduciary duties),
5 and obligations relating to or created by or pursuant to any
6 security”) (emphases added).

7 “Interpretation of a word or phrase depends upon
8 reading the whole statutory text[and] considering the
9 purpose and context of the statute” Dolan v. U.S.
10 Postal Serv., 546 U.S. 481, 486 (2006). Review of SLUSA and
11 CAFA confirms an overall design to assure that the federal
12 courts are available for all securities cases that have
13 national impact (including those that involve securities
14 traded on national exchanges), without impairing the ability
15 of state courts to decide cases of chiefly local import or
16 that concern traditional state regulation of the state’s
17 corporate creatures:

- 18 • Thus, although SLUSA bars state-law class actions
19 from all courts if the class alleges a fraudulent
20 statement or omission or manipulative device in
21 connection with the purchase or sale of a security
22 traded on a national exchange, see 15 U.S.C. §

1 77p(b), it carves out an exception for actions
2 that are based on the law of the state in which
3 the issuer is incorporated or organized and that
4 concern transactions with or communications to
5 persons who already hold the securities of the
6 issuer, see id. § 77p(d)(1)(A)-(B), thereby
7 creating concurrent jurisdiction in cases that are
8 likely to have both national and local impact.

- 9
- 10 • CAFA's amendments to the diversity statute--
11 including its exceptions--proceed along similar
12 lines, granting federal courts jurisdiction over
13 all class actions (with regard to securities and
14 otherwise) over \$5 million in the aggregate if the
15 class members are largely out of state, see 28
16 U.S.C. § 1332(d)(3), (4). Reading the provisions
17 in context, we infer that diversity jurisdiction
18 is created under CAFA for all large, non-local
19 securities class actions, subject to the three
20 exceptions discussed above.

21

22 The legislative history confirms our reading of CAFA.

1 See S. Rep. No. 109-14, at 45 (2005), reprinted in 2005
2 U.S.C.C.A.N. 3, 42-43. This Circuit has expressed some
3 skepticism as to the "probative value" of the Senate Report
4 because it was issued after CAFA's enactment (by ten days).
5 Blockbuster, Inc. v. Galeno, 472 F.3d 53, 58 (2d Cir. 2006).
6 However, as the Eleventh Circuit has pointed out, the Report
7 "was submitted to the Senate on February 3, 200[5]--while
8 that body was [still] considering the bill." Lowery, 483
9 F.3d at 1206 n.50 (emphasis added) (citing 151 Cong. Rec.
10 S909, 978 (daily ed. Feb. 3, 2005)). We therefore think it
11 appropriate in this case to examine the legislative history
12 of these particularly knotty provisions.

13 Certain passages from the Senate Judiciary Committee
14 Report speak directly to the issue here:

15 [T]he Act excepts from . . . [its grant to the district
16 courts of original] jurisdiction those class actions
17 that solely involve claims that relate to matters of
18 corporate governance arising out of state law. . . . By
19 corporate governance litigation, the Committee means
20 only litigation based solely on . . . the rights
21 arising out of the terms of the securities issued by
22 business enterprises.

23 . . .

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25
26 The subsection 1332(d)(9) exemption to new section
27 1332(d) jurisdiction is also intended to cover disputes
28 over the meaning of the terms of a security, which is
29 generally spelled out in some formative document of the
30 business enterprise, such as a certificate of

1 incorporation or a certificate of designations.
2
3 S. Rep. 109-14, at 45 (emphases added). These passages
4 demonstrate that Congress intended that § 1332(d)(9)(C) and
5 § 1453(d)(3) should be reserved for "disputes over the
6 meaning of the terms of a security," such as how interest
7 rates are to be calculated, and so on. This is entirely
8 consistent with our interpretation of § 1332(d)(9)(C) and §
9 1453(d)(3) as applying only to suits that seek to enforce
10 the terms of instruments that create and define securities,
11 and to duties imposed on persons who administer securities.
12

13 CONCLUSION

14 For the foregoing reasons, we have appellate
15 jurisdiction to review the district court's remand order.
16 Furthermore, we grant defendants leave to appeal, reverse
17 the district court's remand order, and remand the case to
18 the district court for further proceedings.
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1 POOLER, Circuit Judge, dissenting:

2 The majority opinion misconstrues the plain language of
3 a statute and reaches an incorrect result. Because I
4 believe we are bound by the text of the enactment, I am
5 constrained, respectfully, to dissent.

6 We are called upon in this case to apply certain
7 provisions of the Class Action Fairness Act of 2005
8 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (codified in
9 scattered sections of 28 U.S.C.). There is no dispute that
10 CAFA's general purpose is to significantly expand federal
11 court jurisdiction over multistate class action litigation.
12 As United States District Judge Sarah S. Vance, of the
13 Eastern District of Louisiana, has commented, "CAFA
14 represents the largest expansion of federal jurisdiction in
15 recent memory." Sarah S. Vance, *A Primer on the Class*
16 *Action Fairness Act of 2005*, 80 Tul. L. Rev. 1617, 1643
17 (2006). CAFA, however, contains certain exceptions to the
18 expansion of federal jurisdiction over multistate class
19 actions. I believe that one of these exceptions, by its
20 plain terms, is applicable to the instant case. By

1 contrast, the majority appears to believe that CAFA contains
2 little in the way of plain terms. That is, we are told of
3 "the imperfect wording of the statute," Opinion at 4; it is
4 asserted that "the imperfect drafting of the statute makes
5 it ambiguous," id. at 13; and that we are "forced . . . to
6 construe 'CAFA's cryptic text,'" id. at 19 (quoting Lowery
7 v. Alabama Power Co., 483 F.3d 1184, 1187 (11th Cir. 2007)).
8 But I fear that a reader of the majority's opinion must be
9 forgiven if he or she comes to the conclusion that the
10 generally opaque quality of CAFA has been merely asserted
11 rather than demonstrated. More importantly, with respect to
12 the specific provision of CAFA that I believe governs this
13 case, I expect that this reader may conclude that the
14 majority has simply departed from the statutory text in
15 favor of a dubious consideration of the supposed legislative
16 intent of the statute's drafters. Accordingly, and
17 respectfully, I am compelled to dissent.

18
19 **I. The Applicability of 28 U.S.C. Section 1332(d)(9)(C).**

20 I agree with the majority that the central issue

1 on this appeal is the exception, now codified at 28 U.S.C.
2 Section 1332(d)(9), which states that CAFA's broad grant of
3 federal court jurisdiction over multistate class action
4 litigation "shall not apply to any class action that solely
5 involves a claim

6 (A) concerning a covered security as
7 defined under 16(f)(3) of the Securities
8 Act of 1933 (15 U.S.C. 78p(f)(3)) and
9 section 28(f)(5)(E) of the Securities
10 Exchange Act of 1934 (15 U.S.C.
11 78bb(f)(5)(E));

12
13 (B) that relates to the internal
14 affairs or governance of a corporation or
15 other form of business enterprise and
16 that arises under or by virtue of the
17 laws of the State in which such
18 corporation or business enterprise is
19 incorporated or organized, or

20
21 (C) that relates to the rights,
22 duties (including fiduciary duties), and
23 obligations relating to or created by or
24 pursuant to any security (as defined
25 under section 2(a)(1) of the Securities
26 Act of 1933 (15 U.S.C. 77b(a)(1)) and the
27 regulations issued thereunder). "

28
29 I agree with the majority that the exemption to federal
30 jurisdiction set forth in 28 U.S.C. Section 1332(d)(9)(A) is
31 not applicable here. That provision's reach is expressly

1 limited to claims involving "covered securit[ies] as defined
2 under 16(f) (3) of the Securities Act of 1933." As
3 recognized by the district court, "covered securities" as
4 defined by the Securities Act are "securities that are
5 traded nationally or listed on a regulated national
6 exchange. See 15 U.S.C. § 77r(b), cited in 15 U.S.C. §§
7 77p(f) (3); 78bb(f) (5) (E)." Pew v. Cardarelli, 2006 WL
8 3524488 at *5 (N.D.N.Y. 2006). There is no assertion by
9 either of the parties that the Agway Certificates are traded
10 nationally, nor that they are they listed on any national
11 securities exchange.

12 I also agree with the majority regarding the
13 inapplicability of Section 1332(d) (9) (B). That section
14 speaks of suits relating to "the internal affairs or
15 governance" of the firm against which the suit is brought.
16 The claims asserted by the plaintiffs here only go to the
17 integrity of their investment in the Agway Money Market
18 Certificates ("the Certificates"); they do not seek to alter
19 the course of Agway's management. Our disagreement is
20 therefore over the proper construction of the terms of 28

1 U.S.C. Section 1332(d)(9)(C).

2 The majority correctly asserts that Section
3 1332(d)(9)(C) "cannot be read to cover any and all claims
4 that relate to any security" Opinion at 17. For
5 example, as the defendants argue, if Congress had intended
6 for "a standard misrepresentation claim to come within §
7 1332(d)(9)(C), it could have simply provided that the
8 exception applied to any claim relating to 'a security' (or
9 relating to 'the purchase or sale of a security'). There
10 would have been no need for Congress to add the words that
11 the exception applies only to a claim relating to 'the
12 rights, duties . . . and obligations relating to or created
13 by or pursuant to any security.'" Defts.' Br. at 12-13
14 (emphasis in original). If we examine the securities at
15 issue in this case, however, it is readily apparent that the
16 instant suit in fact relates to rights and obligations
17 created by, or at least relating to, those securities.

18 The majority correctly identifies the Certificates as
19 "unsecured, fixed-interest debt instruments." Opinion at 4.
20 More specifically, the plaintiffs assert that, by issuing

1 the Certificates, Agway undertook the obligation to repay
2 purchasers' principal at maturity dates between October 31,
3 1998 and October 31, 2013, and to pay interest until
4 maturity at stated rates between 4.5% and 9.5%. Complaint ¶
5 63.¹ The plaintiffs' central allegation is that Agway had
6 degenerated into "a classic 'Ponzi' scheme" which could only
7 meet its ongoing payment obligations to holders of the
8 Certificates through the irresponsible issuance of new
9 Certificates. Complaint ¶¶ 2, 3. The complaint alleges
10 that

11 Agway was insolvent from the beginning of
12 the Class Period, because the value of
13 its assets during that time . . . was
14 insufficient by several hundred million
15 dollars to discharge its Money Market-
16 Certificate-related liabilities, and the
17 only substantial liquid source of funds
18 available to discharge the hundreds of
19 millions of dollars of Money Market
20 Certificates sold and maturing during and
21 after the Class Period was other peoples'
22 money - from the sale of hundreds of
23 millions of dollars of new Money Market
24 Certificates to plaintiffs and other
25 unsuspecting investors.

¹ Citations to the complaint refer to the state court complaint, filed on September 22, 2005, in the Supreme Court of the State of New York for the County of Onondaga.

1
2 Complaint ¶ 3 (emphases in original). Thus, it is alleged
3 that Agway fraudulently concealed the fact that it could not
4 meet its unqualified obligations with respect to the
5 Certificates, i.e., that the plaintiffs were fraudulently
6 deprived of their right to repayment of the principle
7 component of their investment:

8 [T]he new Money Market Certificates
9 purchased by plaintiffs . . . had no
10 possibility of ever being fully repaid.
11 To the contrary, aside from the money of
12 plaintiffs and other hapless investors, .
13 . . the only possible source for Agway's
14 satisfaction of any portion of the
15 principal amount of the new Money Market
16 Certificates . . . was the dismantling
17 and sale of Agway's most valuable
18 remaining business segments But
19 these valuable assets would never be
20 available in connection with the more
21 distant maturities of the new Money
22 Market Certificates . . . because the
23 assets would have to be disposed of to
24 meet Agway's presently existing
25 obligations with respect to the hundreds
26 of millions of dollars of previously sold
27 Money Market Certificates maturing during
28 and shortly after the Class Period.

29
30 Complaint ¶ 5 (emphases in original).

31 In light of these allegations, the applicability of the

1 Section 1332(d)(9)(C) exemption appears to me to be obvious.
2 By issuing the Certificates, Agway took on an obligation to
3 pay interest and principle to the purchasers of the
4 Certificates. These purchasers therefore possessed a
5 corresponding right to receive these payments. The instant
6 suit plainly concerns Agway's failure to fulfill its
7 obligations with respect to the Certificates and the
8 plaintiffs' consequent deprivation of their rights with
9 respect to the same. If this suit therefore does not solely
10 involve a claim "that relates to the rights . . . and
11 obligations relating to or created by or pursuant to" the
12 Certificates, I am at a loss to understand why.²

13 **II. The Majority's Failed Effort to Deny the Applicability**
14 **of Section 1332(d)(9)©.**
15

16 An odd feature of the majority's opinion is that it
17 explicitly acknowledges the initial premise of the argument

² Although there are still few cases considering Section 1332(d)(9)(C), I note that one district court has held that the exemption applies in cases involving rights of payment to the holders of debt securities. See Genton v. Vestin Realty Mortg. II, Inc., 2007 WL 951838 at *3 (S.D. Cal. Mar. 9, 2007) ("Plaintiffs' . . . claims arise directly from Vestin Realty's alleged failure to pay Plaintiffs their pro rata share as security owners in Vestin as required by the Operating Agreement.").

1 just made. That is, the majority writes that the
2 Certificates "certainly create 'obligations,' and therefore
3 corresponding 'rights' in the holders. . . . [T]he
4 Certificates create rights in the holders to a rate of
5 interest and to principle repayment at certain dates."
6 Opinion at 18-19. But then the majority takes an
7 idiosyncratic turn:

8 But the present suit does not "relate[]
9 to" those rights; rather, it is a state-
10 law consumer fraud action alleging that
11 Agway fraudulently concealed its
12 insolvency when it peddled the
13 Certificates. Claims that "relate[] to
14 the rights . . . and obligations"
15 "created by or pursuant to" a security
16 must be claims ground in the terms of the
17 security itself, the kind of claims that
18 might arise where the interest rate was
19 pegged to a rate set by a bank that later
20 merges into another bank, or where a bond
21 series is discontinued, or where a
22 failure to negotiate replacement credit
23 results in a default on principal. The
24 present claim - that a debt security was
25 fraudulently marketed by an insolvent
26 enterprise - does not enforce the right
27 of the Certificate holders as holders,
28 and therefore it does not fall within §
29 1332(d)(9)(C)

30
31 Id. at 19.

1 Now there are a host of comments that could be made
2 about this passage. For example, the phrase "Certificate
3 holders as holders" seems to be without sense. Further, one
4 wonders why a suit involving "a failure to negotiate
5 replacement credit [which] results in a default on
6 principal" would fall within the purview of Section
7 1332(d)(9)(C), but a suit, such as the present one,
8 involving the fraudulent marketing of debt securities which
9 results in a default on principal, does not. But the most
10 important thing to be said about the passage is that it
11 constitutes a wholly inexplicable departure from the plain
12 text of Section 1332(d)(9)(C).

13 Thus, the majority's recitation of what claims "must
14 be" in order to fall within the Section 1332(d)(9)(C) is
15 purely its own invention. The terms of the Section itself
16 merely say, without qualification, that claims which
17 "relate[] to" the "rights" - another term which is
18 unqualified - of securities holders are exempted from CAFA's
19 scope. I can only conclude that the majority's
20 specifications as to what claims "must be" in order to

1 qualify for exemption is an act of judicial re-drafting of
2 CAFA. We frequently hear, however, that "legislating from
3 the bench" is a cardinal sin of the judicial profession.

4 Further, the majority's assertion that this suit is "a
5 state-law consumer fraud action" is of no moment. If the
6 plaintiffs were challenging a bank merger, or the
7 discontinuance of a bond series, or a failure to negotiate
8 replacement credit, such actions would presumably be brought
9 under state corporate law. But the terms of CAFA simply do
10 not contain any indication that this distinction has any
11 import whatsoever. Under those terms, all that matters is
12 that the suit is one in which securities holders are seeking
13 the enforcement of rights created by, or relating to, the
14 securities they hold. If this condition is met, our inquiry
15 is finished.

16 The majority's attempt to justify its eccentric reading
17 of Section 1332(d)(9)(C) is left to rest upon dubious
18 legislative intent. Specifically, it is noted that the
19 Senate Report relating to the passage of CAFA
20 "demonstrate[s] that Congress intended that § 1332(d)(9)(C)

1 . . . should be reserved for 'disputes over the meaning of
2 the terms of a security,' such as how interest rates are to
3 be calculated, and so on." Opinion at 23 (quoting S. Rep.
4 109-14, at 45 (2005)). But the majority acknowledges that
5 "[t]his Circuit has expressed some skepticism as to the
6 'probative value' of [this] Senate Report because it was
7 issued after CAFA's enactment" Id. at 22 (quoting
8 Blockbuster, Inc. v. Galeno, 472 F.3d 53, 58 (2d Cir.
9 2006)). The majority appears to believe this skepticism is
10 cured by the views of the Eleventh Circuit. Id. For my
11 part, I believe that the Seventh Circuit fully justifies our
12 skepticism with its observation that the report in question
13 "has no more force [as a source of legislative intent] than
14 an opinion poll of legislators - less really, as it speaks
15 for fewer. Thirteen Senators signed this report and five
16 voted not to send the proposal to the floor. Another 82
17 Senators did not express themselves on the question;
18 likewise 435 Members of the House and one President kept
19 their silence." Brill v. Countrywide Home Loans, Inc., 427
20 F.3d 446, 448 (7th Cir. 2005).

1 Far more importantly, the Senate Report's assertion
2 that the scope of Section 1332(d)(9)(C) is limited to suits
3 involving disputes over the terms of securities simply has
4 no relation to the enacted text. As already noted, that
5 text unambiguously exempts from CAFA's reach suits involving
6 claims of "rights . . . and obligations" "created by or
7 pursuant to" a security and contains not a word suggesting
8 that these terms are limited in the manner asserted by the
9 majority. In such circumstances, the Supreme Court has
10 instructed us that it would be improper for us to consult
11 legislative history as to the meaning of the statutory
12 provision at issue:

13 We have stated time and again that courts
14 must presume that a legislature says in a
15 statute what it means and means in a
16 statute what it says there. When the
17 words of a statute are unambiguous, then,
18 this first canon is also the last: the
19 judicial inquiry is complete.

20
21 Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-254
22 (1992) (internal quotation marks omitted).³

³ I believe that it is important to note that the majority does not assert that the inapplicability of Section 1332(d)(9)(C) to this case has anything to do with the

1 **III. A Concluding Observation.**

2 Writing almost ninety ago, a wise and revered judge
3 noted that statutes are "designed to meet the fugitive
4 exigencies of the hour." Benjamin N. Cardozo, *The Nature of*
5 *the Judicial Process*, 83 (1921). Because they are enacted
6 under such circumstances, he concluded that it sometimes
7 happens that "gaps" appear between the statutory language
8 and the facts presented by a given case. In such
9 situations, he asserted that judges, in order to reach
10 decisions, have the discretion to apply the statutory
11 language in a manner which effectively adds to or subtracts
12 from the existing text as if the judge were acting as a
13 legislator. He cautioned, however, that judges should not
14 get carried away in this regard:

merits of the plaintiffs' claims. The majority is wise to avoid any such assertion. Although it is true that CAFA was enacted upon an express finding by Congress that "there have been abuses of the class action device," 28 U.S.C. Section 1711(a)(2), the substantive terms of the statute are wholly jurisdictional; they afford the federal courts no authority to use CAFA as a vehicle for dismissing suits considered to be meritless. In sum, we have only decided here that federal jurisdiction exists and we "remand [this] case to the district court for further proceedings," Opinion at 23, without any instruction as to how it should decide the merits of the plaintiffs' claims.

1 In countless litigations, the law is so
2 clear that judges have no discretion.
3 They have the right to legislate within
4 gaps, but often there are no gaps. We
5 shall have a false view of the landscape
6 if we look at the waste spaces only, and
7 refuse to see the acres already sown and
8 fruitful.

9
10 Id. at 129.

11 I believe the application of CAFA to the facts of the
12 instant case leads to the straightforward conclusion that
13 the district court correctly held that the case should be
14 remanded to state court. In other words, no gap exists. By
15 contrast, I believe that the majority has ignored the plain
16 terms of CAFA, created its own waste space, and filled in
17 the resulting gap with an unwarranted exercise of
18 legislative power. I must therefore respectfully dissent.