

No. 08-0513

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 27, 2008
LEONARD GREEN, Clerk

In re: UPS SUPPLY CHAIN SOLUTIONS, INC.;)
UNITED PARCEL SERVICE, INC.,)
)
Petitioners.)
)
)
)

ORDER

Before: BOGGS, Chief Judge; MERRITT and GRIFFIN, Circuit Judges.

Petitioners, the defendants in this employment action brought under state law, removed the action from a Kentucky court. They now petition pursuant to 28 U.S.C. § 1453(c)(1) for leave to appeal the district court’s order remanding the case to the state court. We conclude that the petition must be denied.

The plaintiff sued on behalf of herself and all others similarly situated, relying on Rule 23, Kentucky Rules of Civil Procedure. The complaint included two counts; the first claimed disability discrimination, and the second claimed a violation of wage-and-hour requirements. All claims were based on Kentucky statutes. The complaint did not specify the amount of damages sought.

Within 30 days of the complaint, the petitioners filed a notice of removal. They invoked federal diversity jurisdiction under 28 U.S.C. § 1332 because the case “is a civil action wherein the matter in controversy exceeds the sum of \$75,000.00, exclusive of interest and costs, and is between citizens of different states.” The plaintiff moved to remand and asserted that the relief sought did not exceed the jurisdictional amount. The petitioners argued that the plaintiff’s former rate of pay, the claim for backpay, the length of time it would likely require to reach a final judgment, and the other damages requested, all made it likely that the amount in controversy exceeded \$75,000.

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The district court disagreed. It concluded that the petitioners had been able to “place \$36,864 in controversy” but that any further damages were speculative. After considering the assertions as to both the discrimination and the wage-and-hour claims, the district court granted the motion to remand. Within the time provided for in the statute, the petitioners filed this petition to appeal pursuant to 28 U.S.C. § 1453(c)(1).

Section 1453 was enacted by the Class Action Fairness Act of 2005 (“CAFA”). Among other things, CAFA amended the federal diversity statute to provide federal jurisdiction in class actions where the amount in controversy exceeds \$5,000,000 and there is some diversity of the parties. 28 U.S.C. § 1332(d). The presence of such “class-action diversity” may also be the basis for removing an action from state court to federal court. 28 U.S.C. § 1453.

Section 1453(c)(1) further provides that the 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” based upon a timely application. Thus, this court has exercised jurisdiction to consider whether a district court erred in remanding an action to state court where the defendant claimed federal subject-matter jurisdiction under CAFA. *Smith v. Nationwide Property and Casualty Ins. Co.*, 505 F.3d 401 (6th Cir. 2007).

In this case, however, the claim of federal jurisdiction was based not on CAFA but rather on general diversity. The notice of removal, the parties’ pleadings, and the district court’s memorandum and opinion all address the traditional requirements for diversity jurisdiction. A determination that there is no federal subject-matter jurisdiction, such as the absence of diversity jurisdiction, is not reviewable. 28 U.S.C. § 1447(d); *see also Powerex Corp. v. Reliant Energy Services, Inc.*, 127 S.Ct. 2411 (2007); *Things Remembered, Inc. v. Petracca*, 516 U.S. 124, 128 (1995).

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Section 1453(c)(1) does not confer a right to seek review in a case such as this. *Saab v. Home Depot U.S.A., Inc.*, 469 F.3d 758 (8th Cir. 2006). The “precatory” language of § 1453(c)(1) providing for review “cannot serve as a mandate for [the court of appeals] to reach otherwise non-reviewable remand decisions once [it is] determine[d] that CAFA is inapplicable.” *Patterson v. Morris*, 448 F.3d 736, 742 (5th Cir. 2006); *see also Wallace v. Louisiana Citizens Property Ins. Corp.*, 444 F.3d 697, 700 (5th Cir. 2006) (“The application of § 1453(c)(1) is therefore limited to the context of CAFA.”)

Therefore, the petition for permission to appeal the district court’s memorandum opinion and order of August 8, 2008, is **DENIED**.

ENTERED BY ORDER OF THE COURT

A handwritten signature in cursive script, appearing to read "Leonard Green".

Leonard Green
Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Leonard Green
Clerk

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Re: Case No. 08-513, *In Re: UPS Supply Chain Soluti, et al*
Originating Case No. : 07-00605

Dear Sir or Madam,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Cheryl Borkowski
Case Manager
Direct Dial No. 513-564-7035
Fax No. 513-564-7094

cc: Mr. Jeffrey A. Apperson

Enclosure

No mandate to issue