Deciding Class Action Removal Rights At High Court

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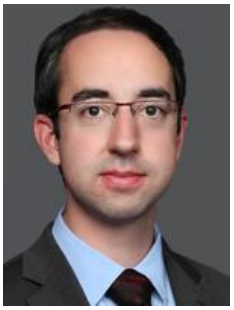

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A company is sued in state court in a putative nationwide or multistate class action seeking more than $5 million. That situation looks like a prime candidate for removal under the Class Action Fairness Act of 2005, or CAFA, which Congress enacted with the "primary objective" of "ensuring 'Federal court consideration of interstate cases of national importance.'"[1] Yet when the company removes the case to federal court under CAFA, the federal court remands the case back to state court and the court of appeals affirms the remand order.

How could that happen? The reason courts have given: Instead of being brought as an independent lawsuit, the class action against the company was pleaded as a "counterclaim" to an individual action — a collections action or other small-scale litigation — brought by a different party. Four of the courts of appeal — the Fourth, Sixth, Seventh and Ninth Circuits — have concluded that a class action defendant that was newly added to an individual action is foreclosed from removing the lawsuit to federal court solely because the class action was pleaded as a counterclaim. Each of the courts of appeal has felt compelled to reach this anomalous result by the U.S. Supreme Court's decision in Shamrock Oil & Gas Corp. v. Sheets.[2] Over three quarters of a century ago, the court in Shamrock Oil held that an original plaintiff who chooses to sue in state court cannot turn around and remove the case to federal court once a counterclaim has been asserted against it. But Shamrock Oil has become unmoored from that original holding; the lower courts have read it to stand for the proposition that only an originally named defendant in a case has a right to remove the case to federal court. And class action plaintiffs' lawyers have seized on the "unfortunate loophole" created by that overbroad interpretation of Shamrock Oil to avoid CAFA and pursue interstate class actions in state court.[3]

Thankfully, the Supreme Court has now agreed to step in, granting review in Home Depot USA Inc. v. Jackson to resolve two questions that have the potential to close this loophole.

First, the court will decide whether a newly added counterclaim defendant counts as "any defendant" under CAFA's broad removal provision[4] and is therefore entitled to remove a class action to federal court if it otherwise satisfies CAFA's requirements (minimal diversity and an amount in controversy of over $5 million). Second, the Supreme Court agreed to hear not just the CAFA-specific question presented by the petition, but also added the question whether Shamrock Oil extends to third-party counterclaim defendants at all.

In our view, CAFA's plain language unambiguously authorizes removal by a new class action counterclaim defendant. As the Supreme Court has observed, a statutory phrase introduced by the word "any" is ordinarily interpreted to have "a broad meaning" of "one or some indiscriminately of whatever kind."[5] And a newly added counterclaim defendant, like

any other kind of defendant, is haled into court involuntarily. There is no logical or textual reason why such a defendant's access to federal court should turn on the happenstance of whether the putative class action against it is brought as a counterclaim. On the contrary, both dictionary definitions and the Federal Rules of Civil Procedure confirm that the plain meaning of "defendant" in this context is simply a "person [or entity] sued in a civil proceeding."[6]

As mentioned above, the federal courts of appeal have felt constrained by Shamrock Oil to give the term "any defendant" in CAFA a narrow reading, even though Shamrock Oil involved interpreting the more restrictive language "the defendant or the defendants" in the general removal statute.[7] But beyond this material difference in language, the judicial expansion of Shamrock Oil to newly added counterclaim defendants of any kind is unwarranted.

The entire rationale for the Shamrock Oil decision was that it would be unfair to allow the original plaintiff, as the party that had chosen to litigate in state court, to remove the case to federal court once named as a counterclaim defendant. Shamrock Oil framed the "question for decision" as "whether the suit in which the counterclaim is filed, is one removable by the plaintiff to the federal district court."[8] The court explained that "the plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal."[9] Quoting the legislative history in which Congress had eliminated a prior provision allowing "either party" to remove, the court emphasized that the reason the modified statute restricted the right to remove to "the defendant" was that Congress believed it to be "just and proper to require the plaintiff to abide his selection of a forum" and that, if the plaintiff "elects to sue in a State court when he might have brought his suit in a Federal court," there was "no good reason to allow him to remove the cause."[10]

Unlike the original plaintiff in Shamrock Oil, however, an added counterclaim defendant has not chosen the state forum, and is treated as a defendant in every legal and practical sense — save (for now) the right of removal to federal court.

Particularly in the class action context, the differences between state and federal court are very real. Indeed, the very concerns that Congress sought to address by enacting CAFA underscore the practical importance of this case. Congress enacted CAFA in response to a decade's worth of "abuses of the class action device" by plaintiffs lawyers — including the filing of important interstate class actions in state court.[11] The text of CAFA sets forth the "findings" of Congress that these abuses have "undermine[d] the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction," in that class action counsel have been "keeping cases of national importance out of Federal court."[12] Consistent with that finding, one of the legislative "purposes" set forth in the statute is to "provid[e] for Federal court consideration of interstate cases of national importance under diversity jurisdiction."[13] The Senate Judiciary Committee's report further observes that CAFA addresses problems in prior law that enabled lawyers to "'game' the procedural rules" by "manipulat[ing] their pleadings" to keep class actions in state court — for example, by adding parties to defeat complete diversity or alleging that no individual class member was seeking damages above the jurisdictional threshold.[14] And the report voiced concern about the "common abuse" by plaintiffs lawyers of filing meritless class actions in state court "as 'judicial blackmail'" to extract sizable settlements from corporate defendants.[15]

As the practices that led to CAFA's enactment amply demonstrate, plaintiffs lawyers have proven themselves adept at exploiting loopholes — including the loophole that is the subject of this case. Class counsel can be expected to take advantage of every opportunity to keep cases in "magnet" state court jurisdictions that apply lax class certification standards, thus increasing — perhaps dramatically — the likelihood of what Judge Henry Friendly famously described as "blackmail settlements" that defendants must pay (whether the case is meritorious or not) to guard against the risk of an outsized classwide judgment.

It is therefore unsurprising that the same tactic employed in this case has been replicated in dozens of other cases in recent years. As a practical matter, plaintiffs attorneys have little trouble finding consumers who are defendants in debt collection proceedings or other small-scale lawsuits that can serve as a vehicle for bringing counterclaim class actions.

We hope the Supreme Court will close this "unfortunate loophole" in CAFA's coverage.

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Disclosure: The authors filed an amicus brief for the Product Liability Advisory Council in support of the petitioner at the certiorari stage.

[1] Standard Fire Ins. Co. v. Knowles, 568 U.S. 588, 595 (2013) (quoting CAFA § 2(b)(2) (codified at 28 U.S.C. § 1711 note).

[2] 313 U.S. 100 (1941).

[3] Palisades Collections LLC v. Shorts, 552 F.3d 327, 345 (4th Cir. 2008) (Niemeyer, J., dissenting from the denial of rehearing en banc).

[4] 28 U.S.C. § 1453(b).

[5] Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 218-19 (2008).

[6] Black's Law Dictionary (10th ed. 2014); see also Fed. R. Civ. P. 20(a)(2) (treating persons as "Defendants" "if ... any right to relief is asserted against them").

[7] 28 U.S.C. § 1441.

[8] 313 U.S. at 103.

[9] Id. at 106 (emphasis added).

[10] Id. at 106 n.2 (emphasis added) (quoting H.R. Rep. No. 49-1078, at 1 (1887)).

[11] CAFA § 2(a)(2) (28 U.S.C. § 1711 note); see also id. § 2(a)(4) (finding that state courts sometimes "act[] in ways that demonstrate bias against out-of-State defendants").

[12] CAFA §§ 2(a)(2), 2(a)(4)(A) (28 U.S.C. § 1711 note).

[13] CAFA § 2(b)(2) (28 U.S.C. § 1711 note); accord Standard Fire, 568 U.S. at 595.

[14] S. Rep. No. 109-14, at 4, 26 (2005).

[15] S. Rep. No. 109-14, at 20.