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Justices Back Limits On Class Action Removal Authority

By **Jon Hill**

Law360 (May 28, 2019, 10:36 AM EDT) -- The U.S. Supreme Court declined on Tuesday to close what Home Depot and other business interests have argued is a legal loophole allowing plaintiffs lawyers to trap big-dollar class actions in state court, ruling that third-party counterclaim defendants in such cases can't remove claims filed against them to federal court.

In an unusual 5-4 split, Justice Clarence Thomas sided with the high court's liberal wing to form a majority holding that when a defendant files class action counterclaims that bring a previously uninvolved party into a state court case, that additional party cannot remove the claims to federal court under either the statute governing general removal authority or the Class Action Fairness Act, a 2005 law intended to increase the number of class actions heard in federal courts.

The high court's ruling means that Home Depot USA Inc. won't get a federal venue for its fight against a consumer fraud class-action counterclaim brought against it in a North Carolina state court by George Jackson, the original defendant in a debt collection case initiated by Citibank NA, which is no longer involved in the litigation.

"Because in the context of these removal provisions the term 'defendant' refers only to the party sued by the original plaintiff, we conclude that neither provision allows such a third party to remove," Justice Thomas wrote in a majority opinion joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan.

The general removal statute, found in 28 U.S. Code Section 1441, lays out a pathway for "the defendant or the defendants" to remove civil actions brought in state court, provided certain requirements are met.

CAFA, meanwhile, relaxes some of these requirements, allowing "any defendant" to move a qualifying class action from state to federal court. But circuit courts have held that this authority only extends to the original defendants in a case, not third-party defendants added later.

Home Depot and business advocacy groups have contended that this interpretation of CAFA has created an opening for otherwise minor state-level suits to be used as vehicles to assert class actions against third parties via counterclaim, which are then kept out of the harsher litigating environs of federal court.

That's what the home improvement retailer argued had happened to it in the debt collection action that Citibank brought in a Charlotte-area state court against Jackson, who had purchased a water treatment system using a Home Depot-branded credit card issued through the bank.

After Citibank commenced its suit in 2016, Jackson hit Home Depot, the bank and another company with counterclaims alleging an illegal scheme to sell the treatment systems by making customers think that their water wasn't safe and that they could get their systems for free if they referred enough other buyers.

Citibank then dropped its debt collection claims against Jackson, and Home Depot subsequently removed the counterclaims to North Carolina federal court under CAFA. Jackson moved to send the case back to state court, later amending these claims to take out Citibank — the original plaintiff in the underlying collection action.

Home Depot put up a fight, but neither the district court nor a Fourth Circuit panel was persuaded that the home improvement retailer had a right to remove the case to federal court.

To the Fourth Circuit, third-party counterclaim defendants like Home Depot couldn't remove cases under the general removal statute because they weren't the original defendants to the state court plaintiff's claims, an interpretation of removal authority that stems from a 1941 Supreme Court decision known as Shamrock Oil & Gas Corp. v. Sheets.

Although CAFA had provided for expanded removal authority, the Fourth Circuit reiterated its long-standing view that the law's reference to "any defendant" didn't change which kinds of "defendant" could avail themselves of this authority — it meant only that any original defendant would have it, not that counterclaim defendants like Home Depot would have it, too.

In its opinion Tuesday, the high court majority agreed that the 15-year-old federal class action reform law didn't overturn a decades-old understanding of how removal authority works.

"Although the term 'any' ordinarily carries an expansive meaning … the context here demonstrates that Congress did not expand the types of parties eligible to remove a class action," Justice Thomas wrote.

But in a dissenting opinion, Justice Samuel Alito argued that this result is at odds with the legislative aims of CAFA, which he said Congress had crafted to address concerns about bias that class action defendants might face when litigating in state courts.

Given such a backdrop, it would make little sense for lawmakers to have written the law to loosen removal requirements just for plain-vanilla original defendants and not also for third-party counterclaim defendants like Home Depot, according to Justice Alito, who was joined by Chief Justice John Roberts as well as Justices Neil Gorsuch and Brett Kavanaugh.

"I cannot imagine why a Congress eager to remedy alleged state-court abuses in class actions would have chosen to discriminate between two kinds of defendants, neither of whom had ever chosen the allegedly abusive state forum, all based on whether the claim against them had initiated the lawsuit or arisen just one filing later (in the countercomplaint)," Justice Alito wrote.

The dissenting justices also found it hard to square such a distinction with the plain meaning of CAFA's "any defendant" language, which Justice Alito argued is much more straightforwardly understood as encompassing a broad spectrum of defendants rather than being highly selective.

It's not often that Justice Thomas splits from Justice Alito and the rest of his fellow conservatives on the bench to cast a deciding vote with the high court's liberal wing, but Korein Tillery partner Aaron Zigler told

Law360 that Justice Thomas' defection in this case doesn't signal some larger change in his judicial philosophy.

On the contrary, given how much his opinion relied on close readings of the general removal statute and CAFA, Justice Thomas' vote was actually consistent with his strict constructionist approach, according to Zigler.

"[Justice] Alito tried to say class action lawyers are always scheming to try to stay in state court and CAFA was passed to beat that scheming, so we need to look at this broadly, irrespective of what our prior cases and rules say, and reach this result," Zigler said. "What's important to [Justice Thomas] is what the language of the statute says, and this argument from the dissenters about how important it is, how CAFA requires this result, isn't enough to get Thomas over to their side."

But the impact of Tuesday's decision remains to be seen. Although the high court essentially left the status quo intact on class action removal authority, Locke Lord LLP partner Rusty Perdew said the majority's ruling "does give final approval to a tactic that the plaintiffs bar can use to manipulate jurisdiction so as to keep otherwise removable class actions in state court."

Congress could always pass legislation to close this purported loophole in CAFA, though the politics around such an effort could be fraught. It's also unclear how much interest lawmakers would have in tackling a procedural issue that is relatively rare: As the National Consumer Law Center pointed out last year in an amicus brief supporting Jackson, counterclaim class actions are "uncommon in state court."

But they may not stay that way in the wake of Tuesday's decision, according to Matthew Waring, an attorney in Mayer Brown LLP's Supreme Court and appellate practice.

"We can expect to see more class actions filed as counterclaims in preexisting state-court lawsuits, now that it is clear that such class actions will not be removable," Waring said.

When counterclaim class actions do get filed, it's often in circumstances like Jackson's — a debt collection lawsuit where the borrower is asserting the counterclaims to challenge the debt itself as somehow fraudulent. That's why Stuart Rossman, director of litigation for NCLC, said he and his colleagues see the Supreme Court's decision as a win for consumers.

"We do think this is a very favorable decision on behalf of consumers and will enable them to be able to exercise their right to defend themselves in state court actions in which they've been named as defendants," Rossman said.

Jackson's counsel likewise praised Tuesday's decision. F. Paul Bland Jr., an attorney who represented Jackson at oral argument and is executive director of Public Justice, said in an email to Law360 that his side was "very glad to see the majority of the court stick to the language of [CAFA]."

"While Congress intended to (and did) move a great many class actions from state court to federal court, it wasn't attempting to federalize all class actions, and it did not touch this part of the statute," Bland said. "And of greater broad significance, no member of the court supported Home Depot's argument to reinterpret the general removal statute, an argument which (if accepted) would have federalized many thousands of cases that were not class actions."

"It's a great day for consumers, federalism, and for the close reading of statutory language," Bland added.

Representatives for Home Depot did not immediately return a request for comment Tuesday.

Home Depot was represented on the briefs by Sarah E. Harrington, Thomas C. Goldstein and Erica Oleszczuk Evans of Goldstein & Russell PC. Appearing for the company at oral argument was its in-house counsel William P. Barnette.

Jackson was represented on the briefs by Brian Warwick, Janet Varnell and David Lietz of Varnell & Warwick PA as well as Scott L. Nelson and Allison M. Zieve of the Public Citizen Litigation Group. Appearing for Jackson at oral argument was F. Paul Bland Jr. of Public Justice.

The case is Home Depot USA Inc. v. George Jackson, case number 17-1471, in the U.S. Supreme Court.

--Editing by Pamela Wilkinson and Aaron Pelc.

Update: This story has been updated with additional details and comments.

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