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The Aftermath Of High Court's Class Action Removal Opinion

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Class action defendants usually prefer to have their cases heard in federal court, where the protections of Federal Rule of Civil Procedure 23 apply and where courts and juries are less likely to disfavor an out-of-state business. And as every class action lawyer knows, the Class Action Fairness Act of 2005 puts a significant thumb on the scale in favor of having large class actions heard in federal court, allowing for removal of most class actions in which the amount in controversy exceeds $5 million and there is minimal diversity of citizenship between the defendants and the members of the putative class.

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But does this removal provision apply when one business sues a consumer and the consumer files a class action third-party counterclaim against a different business? Last week, the U.S. Supreme Court held in Home Depot USA Inc. v. Jackson that a third party named as a defendant in a class action counterclaim cannot remove the case to federal court under CAFA. Unless and until Congress changes the law to close this loophole in CAFA, we can expect that plaintiffs' lawyers will try to bring many more class actions filed as counterclaims in state court to take advantage of the Home Depot ruling.

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Removal 101

Some background is necessary to understand the thorny issues presented in Home Depot. The general federal removal statute, 28 U.S.C. § 1441(a), provides that when a "civil action" is brought in state court but would be within the "original jurisdiction" of federal district courts, that action may be removed to federal court by "the defendant or the defendants." Thus, under Section 1441(a), when there is more than one defendant, all defendants must consent to removal. CAFA relaxed some of Section 1441(a)'s requirements for class actions; in particular, using the broader article "any," it provides that a class action may be removed by "any defendant without the consent of all defendants."[1]

Applying the predecessor to Section 1441(a), the general removal statute, the Supreme Court held in Shamrock Oil & Gas Corp. v. Sheets that when a suit is brought in state court and the defendant brings a counterclaim that invokes federal jurisdiction, the original plaintiff may not remove the case. The Shamrock Oil court reasoned that in those

circumstances, the original plaintiff chose the state forum in the first instance and should be required to "abide his selection."[2]

Over time, however, the lower courts expanded Shamrock Oil's holding to cover other situations that Shamrock Oil did not address. Most pertinently, they held that, under Shamrock Oil, a "third-party counterclaim defendant" — i.e., a party that was not a plaintiff in the original complaint but instead was brought into the lawsuit for the first time as a counterclaim defendant — cannot remove the case to federal court.

That is the circumstance involved in Home Depot. The case began when Citibank brought a debt-collection action in North Carolina state court against George Jackson, who had borrowed money on a Citibank credit card to buy a home water-filtration system. In response, Jackson asserted a putative class action counterclaim against Citibank (the original plaintiff) and two third parties (one of which was Home Depot). Home Depot filed a notice of removal under CAFA, but the district court remanded the case to state court, holding that under Shamrock Oil Home Depot was not entitled to remove the action, even though it was not an original plaintiff, and that the broader language in CAFA did not compel a different result. The U.S. Court of Appeals for the Fourth Circuit affirmed, and the Supreme Court granted certiorari in an order that expressly added the question whether the holding in Shamrock Oil that an original plaintiff may not remove a counterclaim against it extends to third-party counterclaim defendants.

The Court's Decision

The court held 5-4 that a third-party counterclaim defendant may not remove a case to federal court — even if the counterclaim against the defendant is brought as a putative class action that otherwise satisfies the requirements for federal subject matter jurisdiction under CAFA.

The majority opinion, authored by Justice Clarence Thomas, characterized Home Depot's argument — i.e., that a third-party counterclaim defendant is a "defendant" and thus entitled to remove under either 28 U.S.C. § 1441(a) or CAFA's removal provision, 28 U.S.C. § 1453 — as a "plausible" reading of the statutory language, but not the "best one," because "the words of a statute must be read in their context."[3] In context, the majority stated, the term "defendant," as used in 28 U.S.C. § 1441(a), means the defendant sued in the original complaint.

The majority held that Section 1441(a) refers to removal of a "civil action" and that the "civil action" subject to removal is the action "defined by the plaintiff's complaint," not a counterclaim later filed in that action.[4] The only "defendant" entitled to remove, the court thus concluded, is the defendant named in the original complaint.

Although Home Depot emphasized that CAFA uses different and broader language than Section 1441(a) — referring to "any defendant" rather than "the defendant" — the majority held that a third-party counterclaim defendant may not remove under CAFA either. The majority explained that CAFA had simply eliminated, for purposes of qualifying class actions, "certain limitations on removal that might otherwise apply," such as the requirement that all defendants concur in removal; it did not alter Section 1441's limitation on "who can remove."[5] The majority also determined that construing the term "defendant" to have different meanings for purposes of Section 1441 and CAFA would render the provisions "incoherent."[6]

Justice Samuel Alito issued a dissenting opinion that was joined by Chief Justice John Roberts and Justices Neil Gorsuch and Brett Kavanaugh. He argued that the word "defendant," as used in CAFA's removal provision, must be interpreted according to its plain meaning — and that under the plain meaning of that term, a third party sued in a class action counterclaim is clearly a "defendant" entitled to remove.[7] That was particularly true, he pointed out, given that the word "defendant" in CAFA's removal provision is modified by "any," which indicates that Congress meant to "cover[] defendants of whatever kind."[8]

Justice Alito criticized the majority opinion for construing the statute to create a "potential loophole" in CAFA without any evidence that Congress intended to do so. This loophole, he argued, "subverts CAFA's evident aims" and serves "no rational purpose."[9]

Implications

It is too early to tell what the full impact of the Home Depot decision will be. The decision does not provide plaintiffs with a way to bring original class action complaints in state court and avoid removal; rather, plaintiffs can evade removal only if they are first sued in state court and then assert class action claims as counterclaims in the lawsuits pending against them. That obstacle will limit the universe of plaintiffs who can take advantage of Home Depot's holding.

Nevertheless, it seems very likely that going forward, we will see an uptick in the number of consumer class actions that plaintiffs counsel file as third-party counterclaims in state court. It is common for consumers to be sued in state court on various obligations, such as credit card debts, mortgage debt and the like — and once a consumer is sued in state court, he or she can attempt to assert any class action counterclaim that is somehow connected with the matter in suit.

The number of class actions that could be brought in this manner is no doubt substantial: One of our colleagues found 10 years ago that class actions that are easily pleaded as counterclaims — class actions under consumer protection laws — "compris[ed] more than one fifth of all class actions filed in or removed to federal court" at the time,[10] and the number of such class actions is likely comparable today.

Whether the "loophole" that Home Depot embraced will be closed is now up to Congress, which could address the issue by amending the law to clarify that defendants sued on third-party class action counterclaims may remove to federal court if a class action counterclaim satisfies CAFA's jurisdictional requirements. As Justice Alito pointed out in his dissent, there is little doubt that the Congress that passed CAFA would have made this fix: The prospect that a substantial number of class actions that meet CAFA's requirements will now be heard in state court directly conflicts with Congress's intent in enacting CAFA. But whether the current Congress will act to solve this problem is less clear.

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[1] 28 U.S.C. § 1453(b).

[2] 313 U.S. 100, 106 n.2 (1941).

[3] Home Depot U.S.A., Inc. v. Jackson, No. 17-1471, slip op. at 5 (U.S. May 28, 2019).

[4] Id. at 6.

[5] Id. at 9, 10.

[6] Id. at 11.

[7] Jackson, slip op. at 9 (Alito, J., dissenting).

[8] Id. at 10 (internal quotation marks omitted).

[9] Id. at 7, 8.

[10] Dan Himmelfarb, Fourth Circuit Ruling Permits Broad Circumvention of Class Action Fairness Act, Legal Opinion Letter (Wash. Legal Found.), Apr. 10, 2009, http://www.wlf.org/upload/4-10-09Himmelfarb_LegalOpinionLetter.pdf.