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Games People Play: Supreme Court Can Put a Stop to an Obvious CAFA Workaround

by Joe G. Hollingsworth and Katharine R. Latimer

Earlier this fall, the Supreme Court took up the Class Action Fairness Act of 2005 (CAFA) when it granted *certiorari* in *Home Depot U.S.A., Inc. v. Jackson*, 880 F.3d 165 (4th Cir. 2018). We're hoping for a slap-down because the *Home Depot* decision and its ilk improperly deny an entire sub-category of defendants protection from abusive state court class actions.

CAFA is an important statutory safeguard that Congress enacted to rectify serious class action abuses in state courts. See CAFA, S. Rep. No. 109-14, at 13 (2005). Congress expressly found that ungainly and abusive interstate class actions "(A) harmed class members with legitimate claims and defendants that have acted responsibly; (B) adversely affected interstate commerce; and (C) undermined public respect for our judicial system." CAFA § 2(a)(2) (codified at 28 U.S.C. § 1711 notes).

To protect defendants against abuses tolerated by some state courts, CAFA expanded a defendant's authority to remove a class action to federal court by abolishing three traditional limitations on removal: 1) a defendant cannot remove a case filed in its home forum; 2) a defendant cannot remove a case that has been pending more than a year in state court; and 3) defendants must unanimously consent to removal. *Home Depot*, 880 F.3d at 168.

With CAFA limiting their ability to continue filing nationwide class actions in friendly state court forums, plaintiffs' lawyers began looking for a way to game the system. They seized on earlier Supreme Court precedent holding that because "Section 28 of the Judicial Code authorizes removal of the suits to which it applies 'by the defendant or defendants therein,'" a plaintiff who becomes a counterclaim defendant is not entitled to remove because that party is not "the defendant" within the meaning of the removal statute. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

Enterprising plaintiffs' lawyers realized that when corporate entities bring routine, small-money state court actions (*e.g.*, debt collection actions) against individuals, the individuals can turn around and assert interstate class action counterclaims against the original corporate plaintiffs—and also against additional third-party defendants who may be the real targets of the class actions. Because the counterclaim defendants are not defendants to the initiating lawsuits, plaintiffs' lawyers argue that *Shamrock Oil* dictates that none of the counterclaim defendants has any right of removal.

Home Depot follows this fact pattern. Citibank filed a collection action against Mr. Jackson in state court after he failed to pay for a water treatment system he purchased from Home Depot using a Citibank card. Mr. Jackson filed a counterclaim against Citibank and third-party class action claims

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against Home Depot and Carolina Water Systems. Citibank dismissed its claim against Mr. Jackson and, shortly thereafter, Home Depot removed, but the district court granted Mr. Jackson's motion to remand. *Home Depot*, 880 F.3d at 167.

The Fourth Circuit held that Home Depot lacked authority to remove the class action filed against it because third-party defendant Home Depot was not a defendant to Citibank's original suit against Mr. Jackson and so, following *Shamrock Oil*'s teaching, was not authorized by statute to seek removal. *Home Depot*, 880 F.3d at 168, citing *Palisades Collections LLC v. Shorts*, 552 F.3d 327 (4th Cir. 2008). The Fourth Circuit pointed to its earlier *Palisades* case: (1) a counter-defendant is not "the defendant" under § 1441; (2) § 1453 merely serves to remove obstacles to removal (*e.g.*, the home state defendant removal bar in § 1441) rather than independently providing a basis for removal; and (3), notwithstanding intervening Supreme Court jurisprudence suggesting otherwise, removal jurisdiction in CAFA should be construed strictly. *Home Depot*, 880 F.3d at 169. These rationales do not withstand scrutiny.

While *Shamrock Oil* refused to allow a counterclaim defendant to be considered a "defendant" for removal under § 1441, it did so in the context of a counterclaim defendant who was the original plaintiff—and the *Shamrock Oil* court did not approve of a plaintiff who had submitted himself to the jurisdiction of the court by initiating suit in the first instance, "avail[ing] himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction." *Shamrock Oil*, 313 U.S. at 106. The court's concerns about inconsistent positions by one party are fair but are not met when a third-party counterclaim defendant makes a removal request because that counterclaim defendant is new to the case, a pure and true defendant.

The *Home Depot* analysis is further weakened by the plain language of the CAFA statute. Section 1453 provides removal authority over a "class action" by "any defendant." To declare that Congress intended the word "any" defendant to be limited to only those defendants named by the initial plaintiff and that Congress should have specifically mentioned third-party counterclaim defendants seems farfetched.

Nor should removals be strictly construed. In 2013, the Supreme Court stated that CAFA's "primary objective" was to "ensur[e] Federal court consideration of interstate cases of national importance." *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 589 (2013) (quotations and citation omitted). And a year later, the Supreme Court held that "no antiremoval presumption attends cases invoking CAFA" because Congress enacted CAFA "to facilitate adjudication of [qualifying] class actions in Federal Court." *Dart Cherokee Basin Operating Co., LLC v. Owens*, __ U.S. __, 135 S. Ct. 547, 554 (2014). Removals under CAFA must be interpreted according to the plain language of the statute and, where the application of the language is plain, courts should not perform a congressional-intent evaluation.

Home Depot and its compatriots hide behind *Shamrock Oil* even as they override its narrow confines, and do so even in the face of recent Supreme Court precedent indicating the power of CAFA. They piously claim "'there is not a whisper in [recent Supreme Court jurisprudence] of any move to overrule *Shamrock Oil*. If that is where the Supreme Court is going, it will have to get there on its own; it is not for us to anticipate such a move.'" *Home Depot*, 880 at 171, quoting *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 356 (7th Cir. 2017).

With the Supreme Court granting *certiorari* in *Home Depot* (in which it will hear oral argument on January 15, 2019), the Fourth Circuit's challenge should soon be answered.

