DOES “ANY DEFENDANT” REALLY MEAN “ANY DEFENDANT”?

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U.S. Financial Institutions and Services Litigation Alert

On September 27, 2018, the United States Supreme Court granted the petition for writ for certiorari in *Home Depot U.S.A., Inc. v. Jackson*, No. 17-1471 ("*Home Depot*"), to address two issues: (1) whether, under the federal Class Action Fairness Act ("CAFA"), a third-party defendant can remove to federal court class action claims that are brought as counterclaims by the defendant/third-party plaintiff; and (2) whether the Supreme Court's holding in *Shamrock Oil & Gas Co. v. Sheets* [1] — that an original plaintiff may not remove a counterclaim against it — extends to third-party counterclaim defendants. [2] Resolution of these issues by the Supreme Court may have significant implications for any counterclaim or third-party defendant (and possibly any counterclaim defendant) seeking to remove a class action or a mass action from state to federal court.

Under CAFA, "any defendant" in a state court class action is permitted to remove the action to federal court if certain jurisdictional requirements are satisfied [3]. Under long-standing jurisprudence, however, the Supreme Court in *Shamrock Oil* held that a plaintiff who becomes a counterclaim defendant is not considered a "defendant" that is permitted to remove an action under the traditional removal statutes [4]. Although *Shamrock Oil* involved a predecessor to the current removal statutes (including CAFA), federal courts reviewing removed cases by counterclaim defendants pursuant to CAFA have reached the same conclusion expressed in *Shamrock Oil* [5]. Similarly, courts have held that a third-party defendant brought into the case after it is filed is not considered a "defendant" entitled to remove a matter to federal court under CAFA [6]. Removal as a "defendant" in these circumstances has been found to be impermissible because plaintiffs who become counterclaim defendants, or newly added third-party defendants to a counterclaim, are not considered original defendants because "original defendants" are only those parties joined by the original plaintiff [7].

The *Home Depot* case began as a debt collection action in North Carolina state court against the respondent, George Jackson. In response to the collection action, Jackson filed a class-action consumer protection counterclaim against (1) the plaintiff (a credit card company) and (2) Home Depot and Carolina Water Systems, Inc., who were not parties to the original collection action. Thereafter, the original plaintiff voluntarily dismissed its affirmative debt collection claims against Jackson, and Home Depot removed the counterclaims to federal court pursuant to CAFA [8].

In removing the action, Home Depot argued that it should be considered a "defendant" in the class action because it was never a plaintiff in any claim associated with the original case in state court and all of the other prerequisites to a CAFA removal were met [9]. In response, Jackson sought to remand the case back to state court, and amended the complaint to remove the original plaintiff from the counterclaim [10]. The district court granted the motion to remand, finding that Home Depot, as a third-party defendant, was not an "original defendant" entitled to seek removal. [11] Home Depot appealed to the Fourth Circuit, which affirmed the district court's decision, relying on the precedent set forth by the Supreme Court in *Shamrock Oil* [12].

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The Supreme Court's grant of certiorari in *Home Depot* is unique because there is no apparent circuit split on this issue. To date, all the circuit courts that have weighed in on the issue recognize *Shamrock Oil* as *stare decisis* and decline to treat counterclaim defendants (including third-party defendants) as original "defendants" within the meaning of the removal statutes. It is expected that the Supreme Court will clarify the reach of *Shamrock Oil* as applied to CAFA removals by counterclaim defendants and third-party defendants, and will confirm how courts should interpret the phrase "any defendant" under CAFA. If the Supreme Court were to broadly interpret the phrase "any defendant," it could effectively overturn *Shamrock Oil* and open up the federal courts to hear claims that have, at least since *Shamrock Oil*, not been removable. As such, the Supreme Court's decision in *Home Depot* could have a far-reaching impact on the ability of businesses and financial institutions to remove class action counterclaims and third-party counterclaims under CAFA. K&L Gates will continue to monitor the *Home Depot* matter and will report on future developments on this important class action issue.

For additional information regarding the types of class actions defended by K&L Gates and the K&L Gates lawyers who concentrate in class action defense and consumer financial services litigation, please visit our practice group websites at http://www.klgates.com/class-action-litigation-defense-practices/ and http://www.klgates.com/financial-services-litigation-practices/.

NOTES

[1] 313 U.S. 100 (1941).

[2] Home Depot U.S.A., Inc. v. Jackson, 880 F.3d 165, (4th Cir. 2018), *cert. granted*, --- S. Ct. ----, 2018 WL 1950484 (mem.) (U.S. Sep. 27, 2018) (No. 17-1471); Petition for Writ of Certiorari, Home Depot U.S.A., Inc. v. Jackson, No. 17-1471, 2018 WL 1961140 at *1 (U.S. April 23, 2018).

[3] 28 U.S.C. § 1441(a), 28 U.S.C. § 1453(b).

[4] *Shamrock Oil*, 313 U.S. at 106-07 (use of phrase "defendant or defendants" in predecessor to § 1441 applies only to original defendants and not to plaintiffs who become counterclaim defendants).

[5] Palisades Collections LLC v. Shorts, 552 F.3d 327, 335 (4th Cir. 2008) (use of the phrase "any defendant . . . does not grant removal power to additional counter-defendants… and we must likewise conclude that 'defendant' in § 1441(b) means only an original defendant."); *In re* Mortg. Elec. Registration Sys., Inc., 680 F.3d 849, 853 (6th Cir. 2012) (counterclaim defendants are not permitted effectuate removal under CAFA); Tri-State Water Treatment, Inc. v. Bauer, 845 F.3d 350, 357 (7th Cir. 2017) (additional counterclaim-defendant is like all other counterclaim-defendants and thus not entitled to removal); Progressive W. Ins. Co. v. Preciado, 479 F.3d 1014, 1018 (9th Cir. 2007) (state-court plaintiff/cross-defendant did not qualify as "defendant" able to effectuate CAFA removal).

[6] *See Palisades Collections LLC*, 552 F.3d at 333 (finding that additional counter-defendant is not a "defendant" within the meaning of removal statute); *In re* Mortg. Elec. Registration Sys., Inc., 680 F.3d at 853 (prohibiting third-party defendants from filing notice of removal under CAFA); Westwood Apex v. Contreras, 644 F.3d 799, 807 (9th Cir. 2011) (finding that 28 U.S.C. §1453(b) did not change the longstanding rule that a party joined to action as a counterclaim defendant or as third-party defendant may not remove the case to federal court).

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[7] *See* 28 U.S.C. § 1441(a), (c); *see also Palisades Collections LLC*, 552 F.3d at 333; *Tri-State Water Treatment, Inc.*, 845 F.3d at 357; *In re* Mortg. Elec. Registration Sys., Inc., 680 F.3d at 853; *First Bank*, 598 F.3d at 918.

[8] Home Depot U.S.A., Inc. v. Jackson, 880 F.3d 165, 167 (4th Cir. 2018).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 168, 173.

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