FEBRUARY 8, 2018

Fourth Circuit Reaffirms Pre-Dart Cherokee Ruling that Counter-Defendant Cannot Remove Class Action Counterclaims Under CAFA

By Joe Reynolds

In *Jackson v. Home Depot U.S.A., Inc.*, 880 F.3d 165 (4th Cir. Jan. 22, 2018), the Fourth Circuit held a counter-defendant cannot invoke federal jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"). The Court reasoned that both CAFA and the general removal statute, 28 U.S.C. § 1441 expressly provide for removal by a "defendant"—not a counter-defendant. The Seventh and Ninth Circuit have reached the same result, *Westwood Apex v. Contreras*, 644 F.3d 799 (9th Cir. 2011), and *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350 (7th Cir. 2017). But the Fourth Circuit's careful attention to the procedural posture of the case suggests a different timeline might have produced a different result.

In *Jackson*, Citibank filed a debt collection action against George Jackson in North Carolina state court, based on Jackson's failure to pay for a water treatment system purchased using a Citibank-issued credit card. 880 F.3d at 167. Jackson responded by filing a counterclaim against Citibank and third-party class action claims against Home Depot and Carolina Water Systems ("CWS"), claiming the latter two entities misled customers about their water treatment systems. Following Citibank's voluntary dismissal of its original claims against Jackson, Home Depot removed the action to federal court, invoking federal jurisdiction under CAFA. And after removal, Home Depot moved to realign the parties such that Jackson would be the plaintiff and Home Depot, CWS, and Citibank would be the defendants. Jackson moved to remand and then amended his third-party complaint to remove any reference to Citibank. *Id.*

The general removal statute contemplates that "the defendant" or "the defendants" may remove a case to federal court, providing in pertinent part: "[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed *by* ***the defendant*** *or* ***the defendants***, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441 (emphasis added). CAFA incorporates this statute, providing that a class action filed in state court may be removed "in accordance with section 1446 [the procedure for removal of civil actions under § 1441]… without regard to whether ***any defendant*** is a citizen of the State in which the action is brought, except that such action may be removed by ***any defendant*** without the consent of all defendants." 28 U.S.C. § 1453(b) (emphasis added).

Apart from this statutory language, the Supreme Court held long ago that a plaintiff cannot remove a counterclaim brought against it. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). In doing so, the Supreme Court held that the predecessor to the current removal statue, which used similar language,

should be strictly construed. *Id.* at 108. Congress enacted CAFA, on the other hand, "to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014). As such, "CAFA's provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Id.* (quoting S.Rep. No. 109–14, p. 43 (2005)).

In advocating for the application of CAFA, Home Depot first argued the phrase "any defendant" in CAFA should be read to include a counter-defendant, especially in light of the Supreme Court's recent decision in *Dart Cherokee* that "no antiremoval presumption attends cases invoking CAFA." *Jackson*, 880 F.3d at 170 (quoting *Dart Cherokee*, 135 S. Ct. at 554). The Fourth Circuit rejected this argument, holding that Congress chose to use the term "defendant," and absent evidence otherwise, the Court would presume that Congress intended to adopt its well-established meaning. The Court of Appeals also refused to "upend so settled a definition as 'defendant' without clear direction from the Supreme Court," leaving it to the highest court to rule "directly" CAFA effectuated such an expansion. *Id.* at 171.

Home Depot next argued that it actually constituted the true "defendant" as to the only live action remaining in the case (Jackson's third-party class action claims against Home Depot and CWS). 880 F.3d at 171. The Fourth Circuit rejected this argument as well, paying "particular attention to the complex timeline of events in this case." *Id.* Specifically, the Court of Appeals placed great emphasis on the fact that, at the time Home Depot removed, Citibank remained a counterclaim-defendant, even if Jackson thereafter dropped his claims against Citibank. *Id.*

Finally, Home Depot challenged the district court's denial of its motion to re-align the parties. 880 F.3d at 172. The Fourth Circuit likewise gave short shrift to this argument, on the grounds that the purpose of realignment is to prevent "the creation of sham diversity jurisdiction." *Id.* According to the Court of Appeals, "[b]ecause no party contends that this case involves an attempt to fraudulently manufacture jurisdiction, we need not delve too deeply into the issue of realignment." *id.* at 172-73.

Takeaway: The *Jackson* decision rejected the argument that *Dart Cherokee* warranted a change to the existing law holding that an existing counterclaim-defendant could not remove. But the decision's careful attention to the timeline of the case may leave open a procedural path for removal by a similarly-situated counterclaim-defendant in the future. If, for example, an additional counterclaim-defendant facing class claims can persuade a state court to re-align the parties with the original defendant as plaintiff (which could only happen if, as with Citibank in *Jackson*, the original plaintiff dismissed its claims against the original defendant), would the state court order granting realignment constitute an "order or other paper" rendering the case removable under 28 U.S.C. § 1446(b)(3)? For that matter, could Home Depot "re-remove" the case if it persuaded the North Carolina state court to re-align the parties following the remand of *Jackson*? Until these remaining procedural questions have been answered, the final fate of the current rule barring additional counterclaim-defendants from removing remains unresolved.