Congress Should Authorize Removal of Counterclaims and Third-Party Claims Pleaded as Class Actions

By Mike Pennington, Scott B. Smith, and Jeff Holmstrand

For over 240 years, Congress has allowed citizens of different states to litigate in federal court and, for equally as long, has permitted defendants to remove such cases from state court to federal court in cases exceeding the jurisdictional minimum. Judiciary Act of 1789, 1 Stat. 79 Section 12. While the specifics of that right have varied over time, the underlying premise has always been the same: when the stakes are high enough, an out-of-state defendant facing a claim in the plaintiff's home court should have the ability to have the dispute heard in federal court.

When the law seems to favor one side over the other, Congress has acted to rebalance the scales. As a result, almost all class actions in the United States are now litigated in federal court, thanks to the Class Action Fairness Act of 2005 (CAFA). With very limited exceptions, that statute allows "any defendant" to remove any class action from state court to federal court as long as (1) any plaintiff was diverse from any class member, (2) the putative class contains at least 100 members, and (3) the aggregate amount in controversy for the entire putative class exceeds $5 million. This single statute has caused a mass migration of class litigation from state court to federal court in the last fifteen years.

But an artifact of history has created another imbalance. For more than sixty years before Congress enacted CAFA, the Supreme Court and lower federal courts had held that persons who were made defendants to a counterclaim—raising the stakes to meet the requirements for removal to federal court—were stuck in state court, even though the original case could not have been filed in federal court. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941) (a unanimous decision). So, even a minimal debt-collection case filed in state court could morph into a multi-million-dollar class action as a result of a counterclaim seeking such relief.

These holdings were based largely upon specific language in these old statutes that allowed removal by "*the* defendant or defendants," which federal courts took to mean the original defendants—*i.e.*, the party originally sued. That law was fairly well-established for the traditional removal statutes, but CAFA was a new statute. Its removal provisions do not limit removal to "the defendants," but instead allow "any defendant" to remove a case containing a claim meeting its requirements. 28 U.S.C. §1453(b). Specifically, it provides, "A class action may be removed to a district court of the United States… by any defendant…"; it says far more than "a defendant may remove a class action…." The breadth and passive tense of CAFA's language suggests any party may remove as long as it faces a claim that CAFA defines as a "class action." Did that mean that counterclaim and third-party claims could now remove class actions otherwise meeting CAFA's requirements?

For the last fifteen years, every lower federal appellate court facing this question uniformly answered, "no." But when Home Depot was added as a third-party defendant to a counterclaim filed on behalf of a debtor sued by Citibank in a paltry debt collection action, Home Depot took the issue all the way to the Supreme Court. It argued that it had never been anything other than a defendant in the case, had never voluntarily chosen to be in state court, and that "any defendant" surely included it.

In *Home Depot U.S.A., Inc. v. Jackson*, 139 S.Ct. 1743 (2019) (a 5-4 decision), a majority of the Supreme Court disagreed. It again precluded a party—in that instance a third-party defendant who had nothing to do with the choice of the original forum—from removing a class action against it that met the requirements of CAFA. In an opinion by Justice Thomas, the majority found that while CAFA's removal provision presented a "closer question," 139 S.Ct. at 1750, it found no clear congressional intent to expand removal rights to parties other than original defendants to a complaint or amended complaint filed by the plaintiff. Justice Alito, writing for the dissent, disagreed, stating:

> 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 arising just one filing later (in the countercomplaint).

Home Depot, 139 S.Ct. 1755 (Alito, J. dissenting). But is CAFA's lack of any clear expression of such intent a deliberate policy decision or a mere oversight by Congress? As the *Home Depot* minority stated, "I can think of no rational purpose for this limit on which defendants may remove." *Id.*



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All signs point to oversight. Given the overarching purposes of CAFA, there is no apparent policy reason for opening up the federal courts to almost all class actions initiated by the original plaintiff, yet at the same time keeping otherwise removable class actions in state court simply because they are pleaded in a counterclaim or third-party claim, rather than in an original complaint or amended complaint. Congress expressly declared that the purpose of CAFA was to prevent "home-cooking" and to promote uniformity by ending the sordid history of state court "class action hellholes" attracting the bulk of class litigation in this country. Congress hoped to promote more uniformity and predictability in class adjudication by funneling class litigation to federal courts operating under the same set of procedural rules, rather than the procedural rules of fifty different states. Those were and remain sound policies and worthy goals.

These policies apply equally to counterclaim class actions and third-party class actions. In fact, none of these policies are served by creating a loophole out of federal court that a class action can exploit simply by asserting it in a counterclaim or third-party claim, rather than in an original complaint. That was not the purpose of CAFA. At least with respect to class actions, *Shamrock Oil* and *Home Depot* should be legislatively undone.

How might Congress go about correcting its oversight? DRI'S Executive Committee and the DRI Class Action Task Force have a suggestion similar to one already in place in other removal statutes. *See, e.g.,* 28 U.S.C. §1452(a) (permitting "[a] party" to remove a claim or cause of action over which a federal court had bankruptcy jurisdiction; 28 U.S.C. §1454(a) and (b) (permitting "any party" to remove a civil action where a claim for relief arisings under Acts of Congress related to patents, copyrights, or plant protection)). This simple amendment to CAFA's removal provision would solve the problem:

28 USC 1453

…

(b) In General.—

A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any *party* is a citizen of the State in which the action is brought. Such class action may be removed by any party against whom *any claim, cross-claim, counterclaim, or third-party claim is asserted that purports to assert claims on a class action basis,* without the consent of any other party.…

Obviously, getting the attention of Congress may be a little challenging in the pre-election environment. Post-election, this fix might have a chance to gain more traction. And this issue is a particularly important one, especially for our clients such as lenders, credit card issuers, and mortgage servicers, who now risk counterclaim class actions every time they seek to hold a borrower to his or her bargain through a low-stakes civil action. The sooner the defense bar and their clients start pressing for a legislative fix, the sooner reasonable prospects for a legislative fix will materialize.