Class Action Litigation Report®

Source: Class Action Litigation Report: All Issues > 2009 > 11/27/2009 > Analysis & Perspective > A Move in the Right Direction—The Tide Is Turning For Removal by Counterclaim Defendants Under CAFA

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In this Analysis & Perspective, attorneys Anthony Rollo and Candy Burnette of McGlinchey Stafford PLLC comment on recent cutting-edge developments in CAFA removal by counterclaim defendants, including the first federal district court decision allowing removal, set to be reviewed by the Sixth Circuit.

A Move in the Right Direction—The Tide Is Turning For Removal by Counterclaim Defendants Under CAFA

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A district court in Ohio recently made a bold break from the general rule existing prior to enactment of the Class Action Fairness Act that class action counterclaim defendants may not remove. *Deutsche Bank Nat. Trust Co. v. Weickert,* 638 F. Supp. 2d 826 (N.D. Ohio 2009). The *Weickert* court's holding—that CAFA now allows counterclaim defendants to remove—accomplishes the intended goal of CAFA that significant interstate class actions, including counterclaim class actions, should be resolved in federal court.

I. That's One Small Step for the District Court ...

Weickert began as a foreclosure action in Ohio state court brought by trustee Deutsche Bank National Trust Co. ("Deutsche"). The defendant borrowers, the Weickerts, filed a class action counterclaim against original plaintiff Deutsche, and added as counter-defendants Home Loan Services ("HLS"), and Lerner, Sampson & Rothfuss ("LSR"), the servicer and foreclosure attorneys, respectively, alleging claims based on their servicing and collection practices. HLS and LSR removed the case under CAFA, and the Weickerts moved to remand, arguing that as "cross-claim" or "third-party defendants," HLS and LSR did not have the right to remove.

In his initial decision entered on April 15, 2009, District Judge Jack Zouhary rejected the Weickerts' argument that HLS and LSR were properly characterized as "third-party defendants," because they would not be "secondarily liable" or "liable over" regarding Deutsche's claims against the Weickerts, and therefore could not have been "impleaded" under Ohio Civil Rule 14. [1] Moreover, said the district court, Rule 14 authorizes the joinder of *derivative* claims, not brand new claims, even if the new claims are transactionally related to the original claims. Therefore, HLS and LSR were true counterclaim defendants that were permissively and properly joined under Ohio Civil Rule 20(a). [2]

[1] 2009 WL 1011098 at *3.

[2] *Id*.

Noting that defendants who join additional parties under Rule 20 are treated as "plaintiffs," and that "any defendant" can remove under CAFA (28 U.S.C. § 1453(b)), [3] the court concluded that HLS and LSR were "class-action defendants to the Weickerts' class-action complaint," and could therefore remove the action to federal court. [4]

[3] 28 U.S.C. § 1453 states:

(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 (b) shall not apply), 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.

[4] 2009 WL 101198 at *3.

After inviting further briefing by the parties, Judge Zouhary issued a new opinion on July 2, 2009, [5] in which he confirmed his prior ruling that removal was proper, and provided an additional well-reasoned discussion of the basis for his holding. Finding that Section 1453(b) was intended to extend removal power to all parties who may become "defendants," and not just to the original defendants to the suit, he stated: "Concluding that a lawsuit that otherwise qualifies under CAFA is not of national importance merely because the class-action plaintiffs brought the claim via counterclaims rather than an original complaint contravenes clear congressional intent. By enacting CAFA, Congress intended to open the federal courts to qualifying class actions; this clear intent eliminates the federalism concerns which animated the rule of construction that removal statutes be read narrowly. [6]

[5] 638 F. Supp. 2d 826.

[6] 638 F. Supp. 2d at 830.

II. ... One Giant Leap for CAFA Removal

The *Weickert* decision is a significant departure from the pre-CAFA majority rule that counterclaim defendants lack removal authority. A class action counterclaim defendant's ability to remove is critical to effectuate the intended purpose of CAFA, but prior to *Weickert*, the few courts to address this CAFA issue had declined to take Congress at its word by allowing removal by "any defendant." That reluctance had been problematic for companies that were subject to the risk of unremovable class actions if they or their assignee sued a consumer on an account in state court. The *Weickert* decision fulfills the intended objectives Congress expressed in passing CAFA.

The *Weickert* court had jurisprudential support for its groundbreaking ruling that counterclaim defendants can remove under CAFA, citing to the dissenting opinion by Judge Paul V. Niemeyer of the Fourth Circuit in *Palisades Collections LLC v. Shorts,* [7] in which Judge Niemeyer found that Congress did not intend to leave the large and growing category of counterclaim class actions in state court when it enacted CAFA. [8] Judge Zouhary certified his opinion for interlocutory appeal to the Sixth Circuit, citing a contrary ruling from an Ohio district court in *Wells Fargo Bank v. Gilleland*, 621 F. Supp. 2d 545 (N.D. Ohio 2009), as grounds supporting review, and the Sixth Circuit granted that appeal under 28 U.S.C. § 1292(b). [9]

[7] 552 F.3d 327 (4th Cir. 2008).

[8] The Fourth Circuit later denied a petition for rehearing *en banc* in *Palisades*, and the Supreme Court recently declined to grant certiorari. For an in-depth analysis of the *Palisades* decision and Judge Niemeyer's dissent, see Anthony Rollo and Candy Burnette, "Requested En Banc Rehearing Petition to 4th Circuit in Palisades Could Breathe New Life into CAFA Removal Petition," *Consumer Financial Services Law Report*, Volume 12, Issue 14, 1/2009.

[9] *See* order dated September 28, 2009, in *In re Weickert* (case No. 09-312), in the United States Court of Appeals for the Sixth Circuit.

A. Palisades

Palisades, similar to *Weickert*, began as a simple collection action, brought in West Virginia state court to collect less than $800 from a defaulting cellular telephone account holder. *Palisades* then turned into a UDAP class action when defendant Charlene Shorts filed a counterclaim against original plaintiff Palisades, the collection agency, and later amended her counterclaim to add class claims against AT&T Mobility LLC ("ATTM"), the successor to the original wireless provider, AT&T Wireless Services Inc. Shorts filed a motion to certify a class of roughly 160,000 similarly situated customers in West Virginia, seeking over $16 million in damages. ATTM removed the case under CAFA before the state court could hear the certification motion. Shorts moved to remand, arguing that ATTM was not a traditional "defendant" with authority to remove under 28 U.S.C.A. § 1441. The district court remanded the case, and ATTM appealed.

On appeal, the divided Fourth Circuit panel affirmed, relying on the rule announced by the Supreme Court almost 70 years ago in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), that a counterclaim defendant who is also the original plaintiff cannot remove under the predecessor provision to 28 U.S.C. § 1441. According to the majority opinion, only a "traditional" defendant—one against whom the original plaintiff asserts claims—can remove under § 1441. Similarly, the majority held that the definition of "defendant" in § 1441 (as informed by *Shamrock*) must be imported

into the phrase "any defendant" in § 1453(b), the new CAFA removal provision, thus disallowing removal by both the counterclaim defendant who is the original "plaintiff" and any additional counterclaim defendants.

Judge Niemeyer penned a lengthy dissent (discussed in more detail below), in which he found that the majority's interpretation is "demonstrably at odds" with CAFA and the intent of Congress; that "any defendant" may remove under CAFA; that *Shamrock* does not apply in the CAFA context; and that, even if it does, it only applies to counterclaim defendants who were also the original plaintiffs in the action.

Declining to poll the court on the petition for rehearing, Judge Niemeyer invited the Supreme Court, which ultimately declined a petition for certiorari, to review this question in a brief dissent: "This is an important issue of statutory interpretation, and the majority's interpretation creates an unfortunate loophole in the Class Action Fairness Act that only the Supreme Court can now rectify."

B. The Loophole

As ATTM noted in its petition for certiorari, an interpretation of CAFA that denies removal authority to counterclaim defendants creates a loophole allowing plaintiffs' lawyers to "game" the procedural rules and keep large class actions out of federal court, defeating the express purpose of CAFA, which was to "provid[e] for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b)(2). [10] In enacting CAFA, Congress clearly recognized, and expressly sought to address, abuses of the class action device in state court, as well as manipulation of pleadings by plaintiffs' lawyers to, in essence, hold defendants hostage there. [11]

[10] *See Petition for a Writ of Certiorari* filed by AT&T Mobility LLC and AT&T Mobility Corporation, petitioners, in the Supreme Court of the United States, No. 08-1156 (the "Palisades petition"), at 3-5.

[11] *Id*. at 15-16.

C. Closing the Loophole: "Any Defendant" Includes Counterclaim Defendants

1. CAFA Removal Under Section 1453(b) Is Not Governed by the *Shamrock* Rule

Judge Niemeyer found in *Palisades* that the language "any defendant" in § 1453(b) plainly includes any and all types of defendants, not just the traditional defendant who could remove before CAFA under § 1441. [12]

[12] 552 F.3d at 339 (Niemeyer, J., dissenting).

The Fourth Circuit majority interpreted the phrase "any defendant" in § 1453(b) to simply signal that under CAFA, any defendant may remove without the consent of the other defendants—a departure from the previous "unanimous-consent" rule. [13] However, the majority need not have questioned the scope of the term "any" had it not presumed that the rule in *Shamrock* applied to limit removal to original defendants in the new CAFA context. As Judge Niemeyer pointed out, a "natural" reading of "any defendant" would include counterclaim defendants. [14]

[13] *Id*. at 335.

[14] *Id*. at 339 (Niemeyer, J., dissenting).

Judge Niemeyer further found that in using the language "any defendant," Congress affirmatively chose to depart from the rule announced in *Shamrock* that counterclaim defendants may not remove. [15] He questioned whether CAFA could have abrogated the unanimous consent rule established in the seminal *Martin* decision, [16] but not the *Shamrock* rule, when both rules were based on the phrase "the defendant or the defendants" in the predecessor to § 1441(a). [17]

[15] *Id*. at 339-41 (Niemeyer, J., dissenting).

[16] *Chicago, Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245 (1900).

[17] 552 F. 3d at 340 (Niemeyer, J., dissenting).

Moreover, argued Judge Niemeyer, the canons of strict construction of the removal statute, established in *Shamrock* in the stricter context of complete diversity, need not be applied in the context of CAFA, because the stated purpose of CAFA and its relaxed minimal diversity threshold was not to protect the jurisdiction of state courts and limit removal, but to facilitate federal jurisdiction over more class actions by expanding removal authority. [18] Therefore, there is no reason to import the *Shamrock* rule and artificially limit "any defendant" under CAFA to the original defendant.

[18] *Id*. at 342 (Niemeyer, J., dissenting).

2. *Shamrock* Cannot Apply to "Additional" Counterclaim Defendants That Remove Under CAFA

Judge Niemeyer argued in *Palisades* that *Shamrock* is wholly inapplicable in the CAFA context, and therefore does not affect the removal authority conferred by CAFA on "any defendant." Judge Zouhary's adoption of Judge Niemeyer's reasoning suggests that if faced with the issue, he would also hold that "any defendant" would be entitled to remove under CAFA, including a counterclaim defendant who is also the plaintiff in the original suit.

Notwithstanding, both *Palisades* and *Weickert* dealt with removal by an "additional" counterclaim defendant, who was not the original plaintiff. Judge Niemeyer recognized in the *Palisades* dissent that *Shamrock* dealt with, and could apply only (if at all) to a counterclaim defendant who *also* was the original plaintiff in the state court action. [19] Indeed, the Supreme Court stated in its introduction to *Shamrock* that "[t]he question for decision is whether the suit in which the counterclaim is filed, is one removable *by the plaintiff* to the federal district court on grounds of diversity of citizenship...." [20] In holding that a counterclaim defendant could not remove, the Court followed *West v. Aurora City*, in which it had found that "the plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction." [21] An "additional" counterclaim defendant is arguably more like the "defendant" than the original plaintiff in that scenario, and should not be prohibited from removing.

[19] 552 F.3d at 340 n. 3 (Niemeyer, J., dissenting).

[20] 313 U.S. at 103 (emphasis added).

[21] 6 Wall. 139, 18 L. Ed. 819 (1867).

Similarly, Judge Zouhary noted in *Weickert* that because the removing parties were "additional" counterclaim defendants that did not file the original suit, that provided an additional basis to distinguish the only other appellate decision to address the CAFA counterclaim removal issue, *Progressive West Ins. Co. v. Preciado*, 479 F.3d 1014, 1017-18 (9th Cir. 2007) (in case where there were no "additional" counterclaim defendants involved, court held CAFA did not abrogate the *Shamrock* rule that original "plaintiff/cross-defendants" may not remove).

Again, however, the logic of Weickert and the dissent in Palisades in interpreting CAFA and its stated legislative purpose should similarly apply to enable an original plaintiff who is a defendant in a class a class action counterclaim to remove to the same extent as an additional counterclaim defendant may remove.

III. Conclusion

The *Weickert* decision is a significant move in the right direction for removal by counterclaim defendants under CAFA. A favorable decision by the Sixth Circuit affirming *Weickert* will provide the momentum needed in the courts to better effectuate the important intended purposes of CAFA, and close the loophole on counterclaim class actions.

ISSN 1529-8000