July 2, 2019

Class & Collective Action Group Newsletter

Supreme Court

Decision in *Home Depot U.S.A. Inc. v. Jackson*

Key Issue

Whether the general removal statute or the removal provision in the Class Action Fairness Act (CAFA) permit third-party defendants to remove class-action claims from state to Federal court.

Background

Citibank sued George Jackson, the original defendant, in June 2016 in a debt-collection action in North Carolina state court. Jackson asserted an individual counterclaim against Citibank and named Home Depot and Carolina Water Systems, Inc. as additional third-party counterclaim defendants in a putative class action. Citibank dropped its claims, and Home Depot filed a notice of removal pursuant to CAFA. The plaintiff filed an amended complaint dropping Citibank from the action and moved to remand the case to state court. The District Court granted Jackson's motion to remand on the grounds that Home Depot was not entitled to remove the remaining class action.

The Fourth Circuit affirmed, holding that 28 U.S.C. § 1441(a) (the general removal statute) limits the right of removal to "the defendant or the defendants," which does not include a counterclaim defendant even if added as a third party, and also rejected Home Depot's argument that CAFA, which allows removal by "any defendant," provides removal rights that include third-party counterclaim defendants.

In December 2018, the Supreme Court granted certiorari to decide the issue of whether third-party defendants are entitled to removal under CAFA and also directed the parties to address whether *Shamrock Oil & Gas Corp. v. Sheets*,[1] which bars original plaintiffs from removing counterclaims under the general removal statute, should be extended also to bar removal by third-party counterclaim defendants.

Decision

The Supreme Court held that a third-party counterclaim defendant cannot remove claims to Federal court either under the general removal statute or under CAFA's removal provision.[2]

Justice Thomas, who, in an unusual alignment, was joined by the four more usually liberal justices of the Court, held that in these removal provisions, "the term 'defendant' refers only to the party sued by the original plaintiff." The Court came to this conclusion based on an analysis of the text of the removal statute and the relevant Federal procedural

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

[2] *Home Depot U.S.A. Inc. v. Jackson*, 587 U.S. — (May 28, 2019).

rules. Specifically, the Court found that § 1441(a) refers to "civil actions" (not "claims") as to which the district court must have original jurisdiction to justify removal, and the relevant pleading therefore "is the action as defined by the plaintiff's complaint." The "defendant" to that action is the defendant to the complaint, not a party named in a counterclaim. Although the Majority acknowledged that the Dissent's reading of § 1453(b)'s use of the term "any defendant" as expanding the class of parties entitled to remove to include third-party defendants was "plausible," it held that the better reading of the statute was that the inclusion of the word "any" was simply to reinforce that all defendants were not required to consent to a removal under CAFA and that, as such, it was not intended to expand the class of parties who are permitted to remove. Having found that the term "defendant" did not include third-party counterclaim defendants under § 1441(a), the Court declared that the term "defendant" should have the same limited meaning in § 1453(b).

As a policy matter, Justice Thomas acknowledged the Dissent's argument that this opinion permits "defendants to use the statute as a 'tactic' to prevent removal," but noted that if Congress disapproves of this behavior, it can amend the text of the statute accordingly.

Justice Alito wrote a lengthy, detailed Dissent, which was joined by Justices Roberts, Gorsuch and Kavanaugh. While noting the policy argument, Justice Alito also focused his arguments principally on a textual analysis of the removal statutes. In particular, he argued that "a 'defendant' is a 'person sued in a civil proceeding,'" and therefore plainly included third-party defendants as parties entitled to invoke CAFA's expanded removal rights.

Thoughts & Takeaways

This decision significantly extends the Court's holding in *Shamrock*, where the party who sought removal was both the original plaintiff and a counterclaim defendant. In *Home Depot*, the party seeking removal was a third-party counterclaim defendant and thus had no role in selecting the forum. The decision dramatically expands a previously-recognized loophole in CAFA if the statute were read not to permit removal of class-action counterclaims. In this case, such removal was not permitted even by new third-party defendants, even though they had no input into the selection of the forum, and even though the original plaintiff was no longer in the case.

The case represents an interesting clash between two schools of conservative thought. Justice Thomas's Majority opinion clearly reflects traditional deference to state courts and a reluctance to expand the jurisdiction of the Federal courts. Justice Alito's Dissent arguably reflects the pro-business sentiments of the members of the Court who joined in his Dissent. The case is likely to have its greatest impact in the area of consumer-debt class-action claims. Firms interested in pursuing such claims will likely look for opportunities to take advantage of a state-law collection action as a platform from which they can launch class-action counterclaims that now may include multiple additional parties, all without the ability to remove the case to Federal court.

Read the decision here.

Denial of Certiorari in *Hagan v. Khoja*

Key Issue

Whether the Ninth Circuit erred by imposing a duty to update on "a statement of historical fact that was accurate when made, where the 'value' or 'weight' of that prior statement was later 'diminished' by subsequent events."

Background & Decision

In 2015, Orexigen issued an "interim analysis" that its obesity drug reduced the risk of cardiovascular events by 41%. Weeks later, new results from the study showed the drug offered no such benefits, which information Orexigen did not include in its subsequent SEC filing, which repeated the early claim of a successful interim test. Plaintiffs filed

a putative securities class action, and the District Court dismissed, holding that Orexigen had not issued misleading statements because its earlier results were accurate when released and it had explicitly cautioned, including in its later statement, that more testing would be needed to precisely determine the drug's effects.

The Ninth Circuit reversed, holding, among other things, that although the results of the interim analysis were technically accurate, Orexigen had a duty to disclose that these results were "likely unreliable" because the Food and Drug Administration (FDA) had earlier told Orexigen that the results had a "high degree of uncertainty and were likely to change with the accumulation of additional data," and that it was also misleading to repeat the discussion of the earlier results without disclosing the results of the subsequent test. While the Ninth Circuit's opinion primarily engaged with the separate issues of the contours of the incorporation by reference and judicial notice doctrines, the petition for certiorari focused on what it claimed was the Ninth Circuit's newly-articulated standard of a "duty to update" when the "value" or "weight" of an historical fact has been "diminished" by subsequent events. Petitioners claimed this standard was at odds with those of other Circuits, which reject a duty to update or recognize a duty to update in narrow circumstances, but do not require an issuer to update a statement of historical fact that was accurate when made. On May 20, 2019, the Supreme Court denied the petition for certiorari.[3]

Thoughts & Takeaways

The decision to deny certiorari leaves intact this potential circuit split. Also still intact is the Ninth Circuit's primary holding not presented to the Supreme Court—that courts should exercise extreme caution when applying the incorporation by reference doctrine. Specifically, the Ninth Circuit noted that "it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint," and that it may be improper to consider a document that merely forms the basis of a defense to a plaintiff's claims.

Read the petition for certiorari here, and read the decision below here.

Denial of Certiorari in *Fleshman v. Volkswagen, AG*

Key Issue

The Supreme Court denied a petition for certiorari seeking to challenge Volkswagen's $10 billion settlement in multidistrict litigation stemming from the diesel emissions scandal.[4]

Background

In July 2018, the Ninth Circuit upheld a decision by the U.S. District Court for the Northern District of California approving a $10 billion settlement with a class of owners and former owners of certain Volkswagen automobiles implicated in the emissions scandal that came to light in 2015.

Ronald Clark Fleshman, Jr. was one of a small number of objectors, all of whose appeals were denied by the Ninth Circuit. Fleshman contended that the settlement created a risk of liability under the Clean Air Act (CAA) because it allowed class members to continue driving their vehicles while waiting for an emissions modification solution from Volkswagen or, alternatively, allowed them to opt out of the settlement and drive or resell unmodified vehicles. Fleshman argued that this risk—and the settlement notice's failure to advise class members of it—rendered the settlement unfair and unreasonable. In his petition for certiorari, Fleshman argued, *inter alia*, that the U.S. Environmental Protection Agency (EPA) wrongly stated that the vehicles were "legal to drive and resell," and that the District Court abused its

[3] *Hagan v. Khoja*, No. 18-1010 (May 20, 2019).

[4] *Fleshman v. Volkswagen, AG*, No. 18-1264 (May 28, 2019).

discretion in approving a settlement that condoned conduct in violation of the CAA and related state implementation plans.

Thoughts & Takeaways

The Court's denial of certiorari leaves in place the Ninth Circuit's finding that the risk of liability Fleshman raised was so improbable at the time of settlement that there was no need to explain it to class members or to protect them from it. This finding was not based on assessment of Fleshman's interpretation of the CAA, however, but rather on the more practical consideration that the EPA and most states had clearly indicated that they would allow consumers to continue driving unmodified vehicles.

Read the petition for certiorari here, and read the decision below here.

Federal Appellate Courts

Decision in *In re Hyundai & Kia Fuel Economy Litigation*

Key Issue

Whether individualized issues, including potential variations in state consumer protection laws, defeat predominance in the context of a multi-state nationwide class-action settlement.

Background

In 2015, the U.S. District Court for the Central District of California approved a $210 million nationwide class-action settlement between Hyundai Motor America and Kia Motors America and Elantra and Sonata owners who purchased cars as to which there were overstated fuel efficiency estimates in advertisements and on-car "Monroney stickers" (containing the false class of fuel efficiencies) for certain 2011, 2012 and 2013 models of the vehicles. In approving the settlement, the District Court applied California law, despite the fact that it was a nationwide class-action settlement involving car purchasers in multiple states. Various objectors, including a putative representative of a sub-class including 16,000 Virginia plaintiffs, appealed the District Court's certification order, settlement approval order and award of attorneys' fees.

In January 2018, a divided Ninth Circuit panel (the "Panel") vacated the certification decision finding that the District Court failed to conduct the rigorous choice-of-law analysis and examination of the variations in state consumer protection statutes that was required to satisfy Rule 23(b)(3)'s predominance requirement. Hyundai, Kia and the settling plaintiffs sought rehearing *en banc*, which a majority of the Ninth Circuit granted in July 2018. Oral argument was heard in September 2018.

Decision

On June 6, 2019, a majority of the Ninth Circuit overruled the decision of the Panel and affirmed the District Court's 2015 certification order, finding that neither individual issues regarding the level of reliance on the false representations, especially in the case of used car owners whose cars lacked "Monroney stickers," nor those arising from the potentially varying remedies available under various state consumer protection laws, defeated predominance.[5] The Ninth Circuit agreed with the District Court that while certain vehicle purchasers may not have seen the on-car stickers displaying their fuel efficiency, Hyundai and Kia had made the across-the-board misrepresentations in the context of a cohesive, nationwide marketing strategy. The Court found that the predominance standard was

[5] *In re Hyundai & Kia Fuel Econ. Litig.*, No. 15-56014, --F.3d--, 2019 WL 2376831 (9th Cir. June 6, 2019).

satisfied by the common misrepresentation that caused injury and by the fact that all members of the class suffered the same measurable injury. Relatedly, the Court found that one of the settlement options offered to plaintiffs would fully compensate their actual losses.

Grounding its decision in the distinction between certifying a class for the purpose of settlement as opposed to litigation, the Ninth Circuit held that the District Court's failure to conduct a definitive choice-of-law analysis did not defeat predominance or preclude certification. The Court found it was sufficient that the District Court "tentatively" found that California law applied to all of the underlying claims for purposes of approving the settlement. The Court held it is appropriate for a Federal court to apply the state law where it is sitting when, as the Court found was the case here, the parties involved have not adequately demonstrated under that state's choice-of-law rules that some other law should apply.

The Court also relied on the holding in *Amchem Products Inc. v. Windsor*,[6] that, in determining whether the requirements of Rule 23 have been met, the Court need not consider differences among plaintiffs that relate solely to concerns about conducting a manageable trial. The Court held that the potential different levels of reliance among car purchasers, including especially those of used car owners, at most raised trial manageability concerns.[7] The Court similarly held that the potentially different remedies available to consumers under Virginia's consumer protection laws, including an arguably enhanced ability to collect exemplary damages beyond that provided by California law, also simply raised trial manageability concerns.

Finally, the Court noted that *Amchem*'s principal concern was with overbroad inclusion within a settlement class of parties with radically disparate rights or injuries. The Court found that was not the case here and that the significance of the relatively minor differences in rights among residents of different states could be considered and dealt with at the final fairness hearing.

The Court also held that there was no due process concern because a Virginia objector could protect herself by opting out of the class.

The Ninth Circuit also held that objectors' additional challenges to the notice and claim forms did not preclude certification and rejected the allegations of collusion between class counsel and defendants as well as the claim that there were excessive attorneys' fees awarded by the District Court.

Judge Sandra Segal Ikuta, the author of the January 2018 Panel opinion decertifying the class, authored a Dissent joined by two other members of the Ninth Circuit, which took issue with the Majority's failure to require the District Court to make a definitive ruling on the choice-of-law issues at the certification stage and to appropriately weigh substantive differences in various state laws. The Dissent also took issue with the Majority's claim that it was sufficient to address the variances in state laws only at a final fairness hearing.

Thoughts & Takeaways

In some ways this case provided the easiest opportunity for satisfying Rule 23(b)'s predominance standard: There was a single provable cause of all of the claimed injuries—the acknowledged misrepresentations of the fuel efficiency, and the actual damages suffered by class members—the costs of paying for more fuel—were exactly alike for all class members. Moreover, the Court found that one of the options provided under the class settlement afforded class plaintiffs full recovery of their actual losses. Even under these circumstances, there were three appellate judges who dissented from the Court's holding. They reasoned that certification of a settlement class required the Court to certify compliance with Rule 23(b)'s

[6] 521 U.S. 591 (1997).

[7] The Court also minimized such concerns by referring to the significant marketing campaign that promoted the false claims of fuel efficiencies and the limited level of reliance that might be needed to establish a claim.

predominance requirement, which, in turn, required that the District Court decide the choice-of-law question at the certification stage. In another case, where the differences between the substantive rights provided by various state laws is more acute than it was here, or the choice of law issues are pursued by objectors more vigorously, there remains the possibility of a different outcome. In such cases, it may be necessary to consider the creation of sub-classes, each with separate class representatives and counsel, in order to effectuate a nationwide settlement of state-law-based claims.

Read the decision here.

Other Noteworthy Developments

State Legislation Regarding Private Rights of Action for Data Privacy Claims

In May 2019, the California Senate declined to move forward on a bill that would have expanded the private right of action under the California Consumer Privacy Act (CCPA). Currently, the CCPA allows consumers to seek damages for certain data breaches that occur as a result of businesses violating their duty to implement and maintain reasonable security procedures. The proposed bill would have permitted damages for any violation of consumer rights under the CCPA, and would also have removed a right for businesses to cure alleged violations within 30 days of receiving notice of them. The proposed bill would likely have led to an expansion of class-action litigation in the data privacy sector.

Read the text of the proposed bill here.

The Massachusetts Senate is considering a consumer data privacy bill which, among other provisions, allows consumers to demand that businesses not disclose their personal data to third parties and that businesses delete any personal data they have collected from the consumer. The bill currently contains a private right of action and provides that consumers "need not suffer a loss of money or property" in order to bring an action; a violation of the bill "shall constitute an injury in fact to the consumer." The bill permits either statutory damages of up to $750 per consumer per incident or actual damages, whichever is greater, as well as injunctive or declaratory relief and reasonable attorneys' fees and costs. The bill does not require consumers to prove that a company was negligent or reckless in violating the statute.

Read the text of the proposed bill here.

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