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Missing The Class Action Removal Boat To Federal Court

Law360, New York (November 08, 2012, 12:10 PM ET) -- Defendants have not made full use of the Class Action Fairness Act of 2005's provision authorizing removal of class actions from state to federal court. Inexplicably, class action defendants litigating in inhospitable state courts have ignored the flexibility Congress gave them. In a recent brief, we argue for a broad reading of CAFA's removal power.[1]

CAFA's Statutory Architecture

Understanding that power requires a statutory overview. In adopting CAFA, Congress reacted to "abuses of the class action device," including "State and local courts" "keeping cases of national importance out of Federal court" and "making judgments that impose their view of the law on other States and bind the rights of the residents of those States." 28 U.S.C. §1711 note. CAFA redressed these abuses by expanding federal jurisdiction over class actions.

Section 4 of CAFA (28 U.S.C. §1332(d)) expands federal courts' original jurisdiction over class actions. CAFA broadly defines a "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." Id. §1332(d)(1)(B). The operative provision of Section 4 authorizes "original jurisdiction" over "any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which" the parties are minimally diverse. Id. §1332(d)(2).

Section 4 also contains several reticulated exceptions to CAFA's expanded original jurisdiction. Some limit original jurisdiction over class actions involving certain subject matter (§1332(d)(9)); others limit original jurisdiction based on the characteristics of the parties (§1332(d)(4)-(5)); and still others grant the district court discretion to decline original jurisdiction under CAFA based on the parties' characteristics and the court's consideration of several factors (§1332(d)(3)).

Section 5 of CAFA (28 U.S.C. §1453) creates a standalone removal provision for class actions. Its operative provision: (1) authorizes removal of any class action within CAFA's broad definition; (2) instructs that removal should be accomplished under the procedural requirements of §1446, except that the case need not be removed within one year of filing; (3) states that removal authority under CAFA is available even when a defendant in the suit is a citizen of the state where the case was filed; and (4) allows that removal under CAFA does not require "the consent of all defendants." 28 U.S.C. §1453(b).

Section 5 also authorizes discretionary interlocutory appeal from a district court's order remanding a class action to state court. See id. §1453(c). Finally, Section 5 excepts from CAFA's removal jurisdiction some class actions "solely involv[ing]" securities or corporate governance issues. Id. §1453(d). The exceptions in §1453(d) are identical to those in §1332(d)(9). None of §1332(d)'s other reticulated exceptions appears in or is referenced by §1453.

The Plain-Text Reading of CAFA's Removal Provision

CAFA thus codifies two distinct expansions of federal jurisdiction over class actions: Section 4 (§1332(d)) enlarges original jurisdiction to include most class actions with minimal diversity, 100 claimants, and $5,000,000 in controversy; Section 5 (§1453) creates an independent basis of removal for most class actions filed in state courts.

These provisions work in parallel, but they are not identical in scope. CAFA's removal-jurisdiction provision is broader than its original-jurisdiction provision. Congress created this asymmetry by establishing prerequisites to a federal court's exercise of original jurisdiction — including the requirements that a class action must involve an aggregate of 100 claimants and more than $5,000,000 — but omitting those requirements from the removal provision. Compare id. §1332(d)(2), (d)(5)(B) with §1453(a)-(b).

It follows that a class action need not have 100 claimants or $5,000,000 in controversy to fall within a federal court's removal jurisdiction. As long as a class action satisfies the constitutional requirements for federal jurisdiction, see U.S. Const., art. III, §2, cl. 1, and does not meet any enumerated exception to CAFA's removal provision, see 28 U.S.C. §1453(d), a federal court has subject-matter jurisdiction over the case (assuming it was removed in accordance with congressionally prescribed procedures).

Nonetheless, lower courts have consistently assumed that the criteria for original jurisdiction under §1332(d) should be transposed onto discussions of removal jurisdiction under §1453.[2] They have done so without explaining the basis for that transposition or acknowledging that their assumptions contravene CAFA's text. We have not been able to locate even one instance in which a federal appellate court has offered a reasoned explanation for abandoning the statutory text to read §1332(d)'s amount-in-controversy or numerosity requirements into §1453.

As suggested by the courts' apparent silence, there is no basis for transposing the requirements set out in §§1332(d)(2) and (d)(5) onto §1453. The best reading of §1453 is as a broad authorization of federal removal jurisdiction over class actions in which the parties are minimally diverse.

In Support of the Plain-Text Reading

The broad reading of 1453 finds support beyond the statute's plain text. The structure of CAFA's provisions and how they interact buttresses this reading, as do Supreme Court guidance on statutory interpretation and analogous removal statutes elsewhere in Title 28.

First, §1453(b) does not mention the original-jurisdiction requirements that a class action involve an aggregate $5,000,000 in controversy (§1332(d)(2)) and 100 class members (§1332(d)(5)(B)). Nor does it limit removal to class actions within original jurisdiction, which would necessarily invoke the restrictions of §§1332(d)(2)-(10).

Moreover, Congress's repetition in §1453(d) of the exceptions contained in §1332(d)(9) and the omission of even a reference to the other substantive provisions of §1332(d) constitute "strong evidence that Congress did not intend" to impose upon the exercise of CAFA's removal jurisdiction additional requirements "that it simply forgot to incorporate expressly." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002) (internal quotation marks omitted).

Importing wholesale the substantive requirements of §1332(d) into §1453 — as many federal courts appear to have done sub silentio — would render §1453(d) a pointless redundancy. Implicitly incorporating the full text of §1332(d) into §1453(b) means that the limited exclusions from removal jurisdiction contained in §1453(d) would appear in §1453 twice — once in §1453(b) as a result of importing §1332(d)(9) and again, identically, in §1453(d).

Reading §1453(b) in a way that renders §1453(d) redundant violates the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (internal quotation marks omitted).

Second, precedent also counsels that CAFA's plain language controls. In Exxon Mobil Corp. v. Allapattah Services Inc., 545 U.S. 546 (2005), the Supreme Court considered the scope of the federal supplemental jurisdiction statute, 28 U.S.C. §1367. The court instructed that federal courts "must not give jurisdictional statutes a more expansive interpretation than their text warrants." Allapattah, 545 U.S. at 558.

But, the court cautioned, "it is just as important not to adopt an artificial construction that is narrower than what the text provides." Id. Jurisdictional statutes, like all others, should be construed in accordance with the court's consistent guidance that "all [statutory] inquiries must begin[] with the language of the statute itself." United States v. Ron Pair Enters. Inc., 489 U.S. 235, 241 (1989). The text of §1453 authorizes broad removal jurisdiction, and there is no reason for federal courts to adopt an artificial construction that is narrower than what the text provides." Allapattah, 545 U.S. at 558.

Finally, §1453 is consistent with other federal removal statutes. Although the general removal statute, applies only to a "civil action brought in a State court of which the district courts of the United States have original jurisdiction," 28 U.S.C. §1441(a), several other removal statutes authorize removal of cases that could not have been filed initially in federal court. For example, Congress has provided federal officers a broad removal right in suits involving actions taken under color of their office. See id. §1442.

The right of removal under that provision is "absolute," "regardless of whether the suit could originally have been brought in a federal court." Willingham v. Morgan, 395 U.S. 402, 406 (1969). The same is true under §1442a, which provides a parallel right of removal for members of the United States armed forces; §1443, which authorizes removal to federal court of state civil or criminal proceedings that would necessarily deny the defendant civil rights guaranteed by law; and §1444, which allows the United States to remove quiet title actions. Interpreting §1453 by its plain text is harmonious with these other specific removal provisions.

Unavailing Objections to the Plain-Text Reading

Three predictable objections to reading §1453 according to its plain text are unavailing. Neither the text of §1332(d) nor the canon of constitutional avoidance supports imposing the provisions of 1332(d) upon §1453, nor reading §1453 by its plain text yield absurd results.

First, no references to removal in §1332(d) limit §1453's breadth. While §1453 contains no reference to the substantive provisions of §1332(d), two of those provisions mention §1453. The first reference appears in §1332(d)(10), which relates to the citizenship of unincorporated associations and does not limit removal. The second appears in §1332(d)(11), which extends federal jurisdiction under CAFA to "mass actions," cases that are not class actions but "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the grounds that the plaintiffs' claims involve common questions of law or fact." Id. §1332(d)(11)(B)(i).

The mass-action provision complements §1453 by specifying that a mass action satisfying §1332(d)(2)-(d)(10) "shall be deemed to be a class action" and therefore "removable" under §1453. In the absence of §1332(d)(11), such cases would not be removable under §1453, which does not mention mass actions. The express requirement that mass actions meet the strictures of §§1332(d)(2)-(10) does not imply a parallel obligation for class actions; if anything, it highlights the absence of any analogous limitation on removing class actions under §1453.

Second, constitutional-avoidance considerations provide no reason for extending all of the §1332(d) limits into §1453. Under the canon of constitutional avoidance, courts "are obligated to construe the statute to avoid constitutional problems if it is fairly possible to do so." Boumediene v. Bush, 553 U.S. 723, 787 (2008) (internal quotation marks omitted).

A requirement of minimal diversity should arguably be read into §1453 under the canon of constitutional avoidance. While §1453 authorizes federal courts to exercise removal jurisdiction over class action suits beyond the reach of their original jurisdiction, "Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution," Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 491 (1983). Article III's fundamental limits on federal jurisdiction still apply, but those fundamental limits require only minimal diversity.

This court has long held that the "complete diversity requirement is based on the diversity statute, not Article III," Newman-Green Inc. v. Alfonzo-Larrain, 490 U.S. 826, 829 n.1 (1989), and that "Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens," State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967). Moreover, amount-in-controversy requirements for diversity jurisdiction are also purely statutory creations. See, e.g., Arbaugh v. Y&H Corp., 546 U.S. 500, 514-15 (2006).

Avoidance considerations, however, do not license rewriting other aspects of CAFA where no potential constitutional concern exists. Other than a requirement of minimal diversity, therefore, there is no avoidance-based justification for imposing upon §1453 the substantive requirements of §1332(d), including either the amount-in-controversy requirement or the numerosity requirement.[3]

Finally, reading CAFA's removal provision according to its terms does not produce absurd results. "It is well established that when the statute's language is plain, the sole function of the court — at least where the disposition required by the text is not absurd — is to enforce it according to its terms." Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004) (internal quotation marks omitted). Extending removal jurisdiction to cases not subject to original jurisdiction merely makes some class actions triable in federal court at the sole option of the defendant. Several removal provisions reflect a policy of allowing only defendants to choose a federal forum for certain litigation.

Congress had particularly good reasons for making such a choice as to class actions. In crafting CAFA, Congress reacted to "abuses of the class action device," 28 U.S.C. §1711 note, and "sought to check what it considered to be the overreadiness of some state courts to certify class actions," Shady Grove Orthopedic Assocs. PA v. Allstate Ins. Co., 130 S. Ct. 1431, 1473 (2010) (Ginsburg, J., dissenting).

Congress responded to abuses that distorted the class action device in plaintiffs' favor by giving defendants recourse to a neutral federal forum, even in cases plaintiffs could not have filed in federal court themselves. Congress reasonably addressed complaints that some state courts treat class action defendants unfairly by authorizing removal to federal court of any class action within the scope of Article III. Congress's solution is not the only conceivable solution, but it is not so unreasonable to justify ignoring the statutory text.

Conclusion

The best reading of CAFA's removal provision allows defendants great leeway to remove almost any class action in which the parties are minimally diverse to federal court. Defendants who prefer to litigate in federal court should exercise their rights under §1453's plain text.

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[1] Brief for Nat'l Ass'n of Mfrs. as Amicus Curiae Suggesting Reversal, Standard Fire Ins. Co. v. Knowles (No. 11-1450) (U.S. cert granted Aug. 31, 2012).

[2] See, e.g., Frederick v. Hartford Underwriters Ins. Co., 683 F.3d 1242, 1245 (10th Cir. 2012); Hargis v. Access Capital Funding, LLC, 674 F.3d 783, 789 (8th Cir. 2012); Keeling v. Esurance Ins. Co., 660 F.3d 273, 274 (7th Cir. 2011); Lewis v. Verizon Commc'ns, Inc., 627 F.3d 395, 396 (9th Cir. 2010); Coll. of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co., 585 F.3d 33, 39 (1st Cir. 2009); Strawn v. AT&T Mobility LLC, 530 F.3d 293, 296-97 (4th Cir. 2008); Smith v. Nationwide Prop. & Cas. Ins. Co., 505 F.3d 401, 404 (6th Cir. 2007); Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc., 485 F.3d 804, 810 (5th Cir. 2007); Blockbuster, Inc. v. Galeno, 472 F.3d 53, 56-57 (2d Cir. 2006); Morgan v. Gay, 471 F.3d 469, 473 (3d Cir. 2006); Miedema v. Maytag Corp., 450 F.3d 1322, 1327 (11th Cir. 2006).

[3] If courts conclude that engrafting a minimal-diversity requirement on §1453 is inappropriate, despite avoidance considerations, that would simply reflect a judgment that even avoidance considerations would not justify deviating from §1453's plain language. In that case, §1453 would be unconstitutional as applied to the narrow category of cases where even minimal diversity was lacking, but otherwise enforceable according to its terms.
