No. 08-113

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AT&T MOBILITY LLC and AT&T MOBILITY CORPORATION,

Petitioners,

v.

CHARLENE SHORTS,

Respondent-Defendant and Counterclaim Plaintiff.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

On Petition for Permission to Appeal an Order of the United States District Court for the Northern District of West Virginia in Case No. 5:07-cv-00098-IMK (Keeley, J.)

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No. 08-113 Caption: AT&T Mobility LLC, et al. v. Shorts

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/s/ John H. Beisner (signature) August 14, 2008 (date)

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IDENTITY OF *AMICUS CURIAE*, ITS INTEREST, AND SOURCE OF AUTHORITY TO FILE

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs involving issues of national concern to American business.

The Chamber's members are frequently defendants in large interstate class actions in which the existence of federal jurisdiction under the Class Action Fairness Act ("CAFA") is at issue. Accordingly, an important question presented by this appeal – *i.e.*, whether counterclaim defendants are statutorily barred from invoking CAFA's removal provisions – is of significant and widespread importance to the Chamber and its members.

A motion for leave to file accompanies this brief.

INTRODUCTION

Three-and-a-half years ago, our nation took a critical step toward ending class action abuse with the enactment of CAFA. The decade preceding CAFA's passage had seen an exponential increase in the number of class actions brought in the United States, as plaintiffs' attorneys exploited a loophole in federal diversity

jurisdiction to bring interstate class actions involving tens or even hundreds of millions of dollars in certain state courts that came to be known as "magnet jurisdictions." S. Rep. No. 109-14, at 13 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 13-14. These magnet jurisdictions engaged in numerous abusive practices, such as certifying class actions on an *ex parte* basis and approving class settlements in which plaintiffs' attorneys received millions of dollars in fees while class members received coupons of little – if any – value. *Id.* at 13-23. CAFA ended many of these abusive practices by creating federal jurisdiction over most large interstate class actions and setting standards for coupon settlements. The results have been dramatic: the so-called class action "magnet jurisdictions" have seen a marked drop in class action activity and reports of class action abuse are waning.

The trial court's decision here threatens to undo these advances – to put magnet jurisdictions back in business by imposing a statutory prohibition on counterclaim defendants invoking CAFA's removal provisions. In this case, Palisades Collection LLC brought a debt collection proceeding against Respondent Charlene Shorts arising out of an unpaid cell phone bill. Respondent Shorts then transformed that suit into a multi-million dollar putative statewide class action by filing a counterclaim class action against Palisades and Petitioners AT&T Mobility LLC and AT&T Mobility Corporation, alleging violations of the West Virginia Consumer Credit & Protection Act. *See Palisades Collections LLC v. Shorts*, No.

5:07CV098, 2008 WL 249083, at *1 (N.D. W. Va. January 29, 2008). The proposed class action at issue here is precisely the type of case for which Congress intended to create federal jurisdiction under CAFA; in fact, the district court noted that the putative class action clearly satisfies each of CAFA's jurisdictional prerequisites. *Id.* at *8 ("It appears, then, that this Court would have jurisdiction over this case, if it has been properly removed."). Had the Respondent filed the proposed class action as a stand-alone proceeding, there is no doubt that Petitioners could successfully remove this case to federal court. Nonetheless, the district court held that the mere fact that the putative class action – involving more than 160,000 potential class members and implicating at least $16 million amount-in-controversy, *id.* at *7-*8 – was brought as a counterclaim in the context of an $800 debt collection proceeding made removal improper.

If the district court's decision is left undisturbed, the plaintiffs' bar will have a tool for circumventing CAFA – simply bring all class actions as counterclaims. As a practical matter, it will be relatively easy for plaintiffs' attorneys to find debt collection proceedings or other small-scale litigation to serve as the vehicle for such counterclaim class actions. Indeed, if need be, plaintiffs' attorneys could even engineer such initial proceedings by, for example, having a potential counterclaim plaintiff fail to pay certain bills.

The Chamber agrees with the arguments raised by Petitioners in their opening brief – *i.e.*, that the district court improperly relied on *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941),[1] in remanding this case to state court, and that the text, legislative history, and purpose of CAFA all indicate that any defendant (original, counterclaim, or otherwise) should be permitted to invoke CAFA's removal provisions under 28 U.S.C. § 1453. The Chamber writes separately, however, to emphasize three additional arguments that support Petitioners' proposed interpretation.

First, despite the district court's suggestion to the contrary, courts construing CAFA should interpret the statute expansively and construe any statutory ambiguities in favor of finding jurisdiction, not remand. The rule relied upon by the district court derives from *Shamrock Oil*; however, *Shamrock Oil* involved an in-

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[1] The district court grounded its decision almost entirely in *Shamrock Oil*, in which the Supreme Court held that a party who brought suit in state court could not remove the proceeding to federal court under 28 U.S.C. § 1441 if the original defendant subsequently asserted a counterclaim. *Shamrock Oil* is plainly inapposite to this case for two reasons. First, the counterclaim defendant in *Shamrock Oil* was the original plaintiff, and the Court based its decision in large part on the fact that, as the original plaintiff, the counterclaim defendant had "submitted [itself] to the jurisdiction of the state court." 313 U.S. at 106. By contrast, Petitioners are ***additional*** counterclaim defendants, added to the case only when the counterclaim plaintiff filed her putative class action, and therefore were never plaintiffs in this proceeding. Second, *Shamrock Oil* is a statutory interpretation case involving the Court's construction of the predecessor statute to 28 U.S.C. § 1441, the general removal statute. Removal on the basis of CAFA jurisdiction, however, is not performed pursuant to § 1441, but rather is governed by a separate, novel removal statute – 28 U.S.C. § 1453.

terpretation of a different removal statute, with a different (and in many respects, opposite) legislative history and purpose from that of § 1453. Accordingly, any ambiguity regarding whether counterclaim defendants possess removal rights should be resolved in favor of finding that they do.

Second, courts interpreting CAFA have generally held that for purposes of the statute, claims against new defendants are treated as new actions, distinct from any previously initiated proceedings. Applying that precedent to this case indicates that the claims against the Petitioners should not be viewed through the lens of the original proceeding, but rather should be viewed as a separate action which, as the district court concedes, clearly satisfies each of CAFA's jurisdictional prerequisites.

Third, the district court's interpretation of § 1453 would create a significant loophole in the diversity jurisdiction statute, enabling plaintiffs' attorneys to circumvent CAFA's provisions. Given that the very purpose of CAFA was to close jurisdictional loopholes and end the gamesmanship that led to class action abuse in the pre-CAFA period, it would make little sense to construe CAFA to an opposite effect.

For these reasons, as well as those raised by Petitioners, the Court should reverse the district court's remand order.

ARGUMENT

CAFA was enacted to close loopholes in federal diversity jurisdiction. In creating diversity jurisdiction, the Framers sought to ensure that cases involving parties from different states and sufficiently large sums of money could be heard in federal court on the ground that adjudicating such cases in state court could lead to bias or the appearance of bias against out-of-state parties. *See* S. Rep. No. 109-14, at 8. Prior to CAFA, however, no federal diversity jurisdiction existed over many large, interstate class actions, even though such actions frequently involved both parties from all fifty states and amounts-in-controversy in the tens or hundreds of millions of dollars. CAFA represented an effort to correct this anomaly and ensure that diversity jurisdiction operated in a manner more consistent with the Framers' understanding. Under CAFA, subject to a few minor exceptions, federal jurisdiction extends over all class actions in which: (1) there is minimal diversity of citizenship; (2) there are at least 100 putative class members; and (3) the aggregate relief sought by the class places in controversy at least $5 million. *See* 28 U.S.C. §§ 1332(d)(2), (d)(5)(B).

As noted above, the class action proposed by the Respondent clearly satisfies the CAFA prerequisites. Thus, the only question at issue in this appeal is whether the CAFA removal provision, 28 U.S.C. § 1453 – which permits a class action to be removed by "any defendant" – should be construed to allow removal

by additional counterclaim defendants such as Petitioners. For the reasons set out in more detail below (and in Petitioners' brief), the answer to that question is plainly yes. Accordingly, the trial court's ruling should be reversed.

I. THE TRIAL COURT'S RULING WAS IN ERROR BECAUSE COURTS SHOULD CONSTRUE ANY STATUTORY AMBIGUITY IN CAFA TO FAVOR REMOVAL.

As an initial matter, the trial court's finding that the term "any defendant" in CAFA does not apply to counterclaim defendants was based on application of improper canons of construction.

The district court based its conclusion that Petitioners lacked a right to remove on two canons of constructions that apply generally to pre-CAFA removals: (1) "courts are 'obliged to construe removal jurisdiction strictly'"; and (2) "any doubts [regarding the existence of federal jurisdiction] should be resolved in favor of remand." *Palisades Collections LLC*, 2008 WL 249083, at *2 (citations omitted). But these canons derive from construction of the traditional removal statute, 28 U.S.C. § 1441 and its predecessors. CAFA is indisputably different.

The interpretive canon mandating "strict construction" of removal jurisdiction under § 1441 reflects the Supreme Court's analysis in *Shamrock Oil* and *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), of Congressional intent in enacting and amending that statute. In those cases, the Court examined the statute and its predecessors and, based on the statute's evolution over time and its legislative history, concluded that Congress meant for it to be construed

narrowly. *See Shamrock Oil*, 313 U.S. at 108 ("Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation."); *St. Paul Mercury*, 303 U.S. at 288 ("The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts."). Notably, on other occasions, the Court has clearly indicated that, had Congress been motivated by a different, more expansive purpose, the interpretive canon it adopted might have been different. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697 (2003) (noting that construction of removal statute is influenced by later Congressional enactments evidencing different Congressional policy regarding removal). *Cf. Shamrock Oil*, 313 U.S. at 106 (observing that an earlier removal statute had greatly liberalized removal practice).[2]

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[2] This approach – *i.e.*, interpreting a statute consistent with legislative intent – is fundamental to statutory interpretation. *United States v. N.E. Rosenblum Truck Lines, Inc.*, 315 U.S. 50, 53 (1942) ("The question here, as in any problem of statutory construction, is the intention of the enacting body."); *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (noting that canons of statutory construction are merely guides "designed to help judges determine the Legislature's intent as embodied in particular statutory language").

The very same principles of statutory construction that led the Supreme Court to employ a presumption in favor of remand when applying § 1441 compel the opposite result here. After all, the text of CAFA explicitly states that the purpose of enacting the statute was to address the problem of state and local courts "keeping cases of national importance out of Federal court" and to develop a jurisdictional regime that would "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Class Action Fairness Act of 2005, Pub. L. No. 109-2, §§ 2(a)(4)(A), 2(b)(2), 119 Stat. 4 (2005). In short, Congress explicitly stated in CAFA that the statute's purpose was to broaden (not limit) federal jurisdiction.

Furthermore, it is well established that courts construing ambiguous statutes should inquire into Congressional intent as evidenced in legislative history. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1982) (statements of bill's sponsors "are an authoritative guide to the statute's construction"); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir. 1980) ("In trying to learn Congressional intent by examining the legislative history of a statute, we look to the purpose the original enactment served, the discussion of statutory meaning in committee reports, the effect of amendments whether accepted or rejected and the remarks in debate preceding passage."). Here, CAFA's legislative history could not have been clearer in

evidencing Congress's intent to have the entire statute, including § 1453, construed broadly.[3] *See, e.g.*, 151 Cong. Rec. H730 (Feb. 17, 2005) (comments of Mr. Sensenbrenner) (CAFA "should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if properly removed by a defendant").[4]

In sum, although both § 1441 and § 1453 grant parties the right to remove state cases to federal court, they are different statutes, enacted at different times for different purposes. Notably, Congress did not need to create § 1453 – it could

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[3] This conclusion is in no way undermined by this Court's recent decision in *Strawn v. AT&T Mobility LLC*, 530 F.3d 293 (4th Cir. 2008), that the removing defendant bears the burden of establishing jurisdiction under CAFA. In concluding that the party seeking to invoke federal jurisdiction bears the burden of demonstrating the existence of federal jurisdiction, the Court noted that the issue of burden is not addressed in CAFA's text and stated that where "the legislative history stands by itself, as a naked expression of 'intent' unconnected to any enacted text, it has no more force than an opinion poll of legislators." *Id.* at 297 (quoting *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005)). The question facing the Court here, however, is the effect of legislative history on the proper construction of a provision of the statute itself. As other courts have recognized, CAFA's legislative history is probative on the question of how ambiguity in CAFA's provisions should be interpreted. *See Amalgamated Transit Union Local 1309 v. Laidlaw Transit Sews., Inc.*, 448 F.3d 1092, 1093 (9th Cir. 2006) (noting in the context of construing 28 U.S.C. § 1453(c) that "when we interpret a statute, our purpose is always to discern the intent of Congress") (quotations omitted).

[4] *See also* S. Rep. No. 109-14, at 35 (the intent of CAFA "is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications"); *id.* at 27 ("The Committee believes that the federal courts are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy.").

have simply amended 28 U.S.C. § 1332 and then allowed the traditional removal statute to govern CAFA removals. Instead, Congress enacted an entirely new removal statute, evidencing a clear desire to expand access to federal court for qualifying class actions and to have CAFA removals treated differently from other removals. Accordingly, any ambiguity under CAFA should be construed in favor of removal, and the term "any defendant" in 28 U.S.C. § 1453 should be interpreted to encompass additional counterclaim defendants such as petitioners.

II. THE TRIAL COURT'S RULING IS CONTRARY TO CAFA PRECEDENT ON THE "COMMENCEMENT" ISSUE.

The trial court also erred in granting Respondents' remand motion because CAFA precedent regarding the removal rights of newly added defendants indicates that such defendants should enjoy full removal rights under CAFA. In analyzing whether a new defendant has the right to remove under CAFA, courts almost universally have addressed the issue by examining whether that defendant can satisfy CAFA's jurisdictional prerequisites – independent of the circumstances of any other defendant. Under that construct, Petitioners clearly enjoy a right to remove under § 1453 – as noted above, it is undisputed that the putative class action here satisfies the CAFA jurisdictional prerequisites.

Because CAFA applies only to class actions "commenced" on or after its effective date, there was a substantial amount of litigation regarding when class actions are deemed to "commence" for purposes of CAFA in the months following

CAFA's enactment. Although some differences between courts on the "commencement" issues quickly emerged, courts were virtually unanimous in concluding that defendants added after the date of CAFA's enactment may remove pursuant to CAFA's expanded jurisdictional principles on the ground that the addition of a new defendant commences a new action as to that defendant for purposes of CAFA. *See, e.g.*, *Braud v. Transp. Serv. Co.*, 445 F.3d 801 (5th Cir. 2006) ("The caselaw holds that generally 'a party brought into court by an amendment, and who has, for the first time, an opportunity to make defense to the action, has a right to treat the proceeding, as to him, as commenced by the process which brings him into court.' . . .Therefore, if a defendant was added post-CAFA, the suit commences post-CAFA as to him.") (quoting *United States v. Martinez*, 195 U.S. 469, 473 (1904)); *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 807 (7th Cir. 2005) ("[T]he addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes[.]").[5]

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[5] *See also Farina v. Nokia*, No. 06-0724, 2008 WL 436921, at *4 (E.D. Pa. Feb. 13, 2008) (addition of new defendant after enactment of CAFA constituted commencement of a new action under CAFA); *Schillinger v. 360Networks USA, Inc.*, No. 06-138-GPM, 2006 U.S. Dist. LEXIS 31108, at *13 (S.D. Ill. May 18, 2006) (addition of a new party defendant after the effective date of CAFA "commenced a new litigation for purposes of removal under the CAFA"); *Adams v. Fed.*

Thus, in assessing the "commencement" question, courts developed a framework for determining the removal rights of a defendant who is newly added to a previously filed class action. And the conclusion they reached was that those removal rights should be determined independently of whether other parties may remove. Accordingly, a class action that commenced long before CAFA's enactment with respect to three defendants might be removed to federal court by a fourth defendant added after CAFA's effective date – the fact that the first three defendants were barred from removing under CAFA had no bearing on the fourth defendant's removal rights.

The district court's determination that Petitioners are barred from removal under § 1453 is at odds with this CAFA precedent. There can be no debate that Petitioners were strangers to this litigation until the Respondent filed her counterclaim and class allegations. They have participated in this litigation only as out-of-state defendants facing multi-million dollar class actions; thus, their circumstances are functionally identical to those of numerous class defendants who remove on the basis of CAFA every day. Yet, according to the district court, Petitioners are precluded from invoking CAFA because their fellow defendant, Palisades, previously

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Materials Co., No. Civ. A. 5:05CV-90-R, 2005 WL 1862378, at *4 (W.D. Ky. July 28, 2005).

had instituted a state court action against Respondent. Thus, under the district court's reasoning, Petitioners' removal rights are tied to other defendants' conduct.

In short, courts assessing whether newly-added class action defendants may remove under CAFA have made such an assessment without regard to the circumstances of other defendants. That approach should apply here as well, allowing Petitioners to enjoy full removal rights under § 1453.

III. IF ALLOWED TO STAND, THE TRIAL COURT'S RULING WOULD LEAD TO THE VERY TYPES OF ABUSES THAT CAFA SOUGHT TO PREVENT.

The trial court's ruling should also be reversed because it carves a jurisdictional loophole in CAFA that would severely compromise the statute's effectiveness. If allowed to stand, the district court's ruling that counterclaim defendants have no removal rights would provide plaintiffs' attorneys with a tool for evading CAFA – simply bring class actions as counterclaims. Indeed, confirmation of the viability of this stratagem is likely one of the primary goals of Respondent's counsel in this litigation; as Petitioners note, one of the litigation consultants to Respondent previously authored a law review article specifically suggesting the use of counterclaims to evade CAFA's restrictions. *See* Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193 (2007) (the "Tidmarsh Article").

The Tidmarsh Article provides a playbook for plaintiffs' counsel seeking to evade CAFA in this manner. According to the article, "[i]n the typical scenario,

one party to a contract – usually a consumer – fails to make a required payment under the contract to the other party – usually a financial institution that sells credit, mortgage, or insurance products." *Id.* at 196-97. That in turn requires the service provider to sue in state court to recover on the contract, since the amount owed by the consumer is typically "far less than the $75,000.01 jurisdictional amount necessary to invoke federal jurisdiction." *Id.* Once the service provider brings suit, the consumer promptly asserts a counterclaim class action, alleging that the contractual term on which the debt collection action is based violates state law, *id.* at 197, thereby causing "the state case suddenly [to] transform[] from an individual action with $75,000 or less at stake into a class suit with more than $5,000,000 at stake" and "[t]he entire litigation dynamic and its center of gravity [to switch] in an instant," *id.* at 199. The Tidmarsh Article goes on to point out a number of recent counterclaim class actions brought in state court, including this proceeding, and asserts that such cases "reveal just the tip of an approaching iceberg." *Id.* The Tidmarsh Article leaves no doubt: this is a test case for circumventing CAFA, and if the technique proves successful, it will no doubt be replicated in short order.

As noted above, the primary goal of CAFA was to close loopholes in the federal diversity jurisdiction statute and thereby end the jurisdictional gamesmanship employed by plaintiffs' attorneys who sought to litigate class actions in "mag-

net courts." S. Rep. No. 109-14, at 10-11. Approving the district court's statutory bar on CAFA removals by counterclaim defendants would thus undermine the statute's central purpose. Plaintiffs' attorneys would once again have an easy way to avoid federal jurisdiction for class actions and there is no reason to think that they would not employ that mechanism to put "magnet" courts back in business.

For this reason too, the trial court's remand order should be reversed.

CONCLUSION

For the foregoing reasons and those set forth in Petitioners' brief, the Court should reverse the district court's order.

August 14, 2008

Respectfully submitted,

/s/ JOHN H. BEISNER

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-113 **Caption:** AT&T Mobility LLC, et al. v. Charlene Shorts

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(s) John H. Beisner

Attorney for Amicus Chamber of Commerce

Dated: August 14, 2008

CERTIFICATE OF SERVICE

I hereby certify that, on the 14th day of August, 2008, a true and accurate copy of the foregoing Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* In Support of Petitioners was filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users. In addition, per Local Rule 31(d), eight bound copies of the foregoing brief were sent to the Clerk of the Court and two courtesy copies were sent to the following via Federal Express delivery:

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Dated: August 14, 2008 /s/ John H. Beisner