

# One Minute Memo®



## Supreme Court: Third-Party Defendants Cannot Remove to Federal Court

By Seth Fortin

It has long been established that a state-court plaintiff who is the subject of a counterclaim cannot remove the case to federal court. The federal removal statute provides that a state civil action may be removed to federal court only by “the defendant or the defendants,” 28 U.S.C. § 1441(a), and, in 1941, the Supreme Court determined that the term “defendant” in the statute did not extend to a plaintiff against whom a counterclaim was asserted. Congress, the Court noted, had deliberately removed “plaintiffs” from the removal statute in an 1887 amendment, and there was no evidence that Congress intended to carve out an exception for plaintiffs who became counterclaim defendants as well. See *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

But the Court’s decision left unanswered the question of whether third-party defendants, who are not plaintiffs at all, may remove. More than seven decades later, the Court has now definitively said they may not. In *Home Depot, U.S.A. v. Jackson*, No. 17-1471 (U.S. May. 28, 2019), the Court concluded that neither the ordinary removal statute (§ 1441) nor the removal provision of the Class Action Fairness Act (28 U.S.C. § 1453) (“CAFA”) allows a third-party defendant to remove.

*Jackson* started with a debt collection action by Citibank against George Jackson for charges incurred on a Home Depot credit card. Jackson counterclaimed against Citibank and also filed third-party class action claims against Home Depot and another entity. After Citibank dropped its underlying claim and Jackson amended his third-party complaint to remove all references to Citibank, Home Depot removed the class claims to federal court. The district court granted Jackson’s motion to remand, and the Fourth Circuit affirmed.

The Supreme Court agreed that remand was proper. Justice Thomas, writing for a five-justice majority, recognized that Home Depot’s reading of the term “defendant” to include third-party defendants was “plausible” but nonetheless found that in context it should be read to exclude such defendants. While Home Depot was a defendant to a “claim,” § 1441 speaks of the removal of a “civil action,” and a district court’s determination of its jurisdiction on removal has traditionally turned on whether the *action*, as defined by the original complaint, could have been originally brought in federal court. The Court therefore found “defendant,” as used in the removal statute, to mean a defendant to the claims in the original complaint. The Court also noted that reading “defendant” broadly could have unintended and problematic effects on the rest of the statute, such as determining which parties must consent to removal.

The majority also concluded that CAFA does not allow removal by third-party defendants. As the Court noted, this is a “closer question,” because the CAFA statute permits removal by “any defendant” to a “class action.” Nonetheless, the Court concluded that “any” as used here was not intended to expand the removal jurisdiction granted to district courts under § 1441. It merely indicates that, in a class action, the consent of all defendants is not needed—“any” defendant may remove without the consent of the others.

The dissent, written by Justice Alito and joined by the Chief Justice and Justices Gorsuch and Kavanaugh, noted that the Court's decision ran against CAFA's intent to make the federal courts more readily available to class-action defendants in response to the perceived tendency of state court judges to favor class plaintiffs and freely certify classes. As the dissent noted, the Court's new rule means that, as happened in this case, a "routine attempt to collect a debt from a single consumer could be leveraged into an unremovable" class action. The majority acknowledged the dissent's concern but redirected the issue to Congress: "[T]hat result is a consequence of the statute Congress wrote."

Whether Congress sees fit to adjust the statute in light of this ruling remains to be seen. In the meantime, third-party class action defendants must be prepared to litigate in state court.

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