No. 15-1135

In the Supreme Court of the United States

EAGLE US 2 L.L.C.,
Petitioner,
v.
EVA D. ABRAHAM, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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April 22, 2016

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CAFA's "primary objective [is to] ensur[e] 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013). It would "exalt form over substance, and run counter to" that objective to "allow[] the subdivision of a $100 million action into 21 just-below-$5-million state-court actions" to defeat a CAFA-based removal. *Id.*

Here, plaintiffs' counsel devised a different, but equally perfidious scheme. They subdivided 1,700+ plaintiffs — each asserting liability on the self-same basis against Eagle and using exactly the same verbiage — into 77 cases such that each case contains fewer than 100 plaintiffs.

To end both this scheme to defeat "mass-action" removal and craft a "class-action substitute" using Louisiana cumulation, review should be granted.

1. Other Circuits Do Not Tolerate Use of the Defunct Anti-Removal Presumption. Plaintiffs assert that the district court's "analysis of the Motion to Remand had nothing to do with any presumption." Opp17. This is directly contradicted by what that court professed: "[A] suit is presumed to lie outside a federal court's jurisdiction until the party invoking federal-court jurisdiction establishes otherwise." App9a. That ruling flew in the face of *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 550 (2014) ("no antiremoval presumption attends cases invoking CAFA").

Plaintiffs next try to excuse this error by arguing that the *Fifth Circuit* made "no mention of any presumption." Opp18. But this ignores that the Fifth Circuit went out of its way to "agree with *the district court's analysis*." App2a (emphasis added).

And the starting point for that analysis was the anti-removal presumption, effectively incorporated by reference.

Eagle's petition also noted that the same panel in this case decided *Arbuckle Mountain Ranch of Tex., Inc. v. Chesapeake Energy Corp.*, 810 F.3d 335, 347 (5th Cir. 2016), less than a month later. Yet, just as here, the *Arbuckle* majority could not bring itself to acknowledge that *Dart Cherokee* had overturned the anti-removal presumption. The dissent, while at least acknowledging the presumption had been eliminated, refused to follow *Dart Cherokee*'s instruction that CAFA's "provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed." 135 S. Ct. at 554.

Plaintiffs refuse to grapple with what *Arbuckle* reveals about the Fifth Circuit's reluctance to read CAFA to mean what it says — instead of asserting "considerations of federalism," 810 F.3d at 347 (Elrod, J., dissenting), can block such removals. Plaintiffs assert that *Dart Cherokee* and *Arbuckle* are irrelevant because they involved "class actions." Opp15-16. But this conveniently assumes away exactly what is disputed. Plaintiffs know that Eagle contends this case is a *de facto* class action. Thus, the whole fight about whether the lower courts applied an anti-removal presumption goes to the heart of whether those courts' view of the law was distorted because they put a thumb on the scale against finding CAFA jurisdiction, and thus also erroneously refused to presume *in favor of* CAFA removals, as CAFA's legislative history requires.

Dart Cherokee, 135 S. Ct. at 554 (quoting S. Rep. No. 109-14, at 43 (2005), 2005 U.S.C.C.A.N. 3, 31)).

Plaintiffs similarly have nothing to offer against the Ninth and Eleventh Circuits' acknowledgements that the CAFA anti-removal presumption is dead. *Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178, 1183-84 (9th Cir. 2015) ("Supreme Court left no doubt" on this point"); *Dudley v. Eli Lilly and Co.*, 778 F.3d 909, 912 (11th Cir. 2014) (*Dart* is "binding precedent").

To blunt the defiance of *Dart*, plaintiffs resort to arguing that *Dart* is merely a case about CAFA "amount[s] in controversy." Opp19. No, *Dart* eliminated the presumption against removal in *all* CAFA cases. The Ninth Circuit rejected the very distinction plaintiffs deploy. *Jordan*, 781 F.3d at 1183-84.

Getting the governing presumption wrong in CAFA cases is not harmless but foundational error. It infected not only the analysis of whether the 77 suits embodied a *de facto* class, it also infected the separate issue of whether a "mass action" was present. This is because all of the "mass action" cases the Fifth Circuit relied on, App22a, trace to the Ninth Circuit's decision in *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952–53 (9th Cir. 2009). And *Tanoh* undeniably rested on the anti-removal presumption. Yet, although *Dart Cherokee* pulled the key plank out from *Tanoh*, not a single one of the appellate cases following *Tanoh*'s lead and coming after *Dart Cherokee* (this one included) ever reexamined the daring holding that CAFA mass-action jurisdiction could be circumvented by the simple expedient of filing complaints with under 100 plaintiffs.

2. Plaintiffs Have Twisted Cumulation Procedure Into *De Facto* Class Actions. After pretending that the anti-removal presumption is unimportant here, plaintiffs jam their opposition full of overheated rhetoric attacking Eagle's credibility. Space does not permit Eagle to launch all of its rebuttals — just the key ones.[1]

a. The 77 complaints involved are nearly identical, word-for-word cookie cutters of *Abraham*, except as to the plaintiffs listed. App24a-36a. The 1,700+ plaintiffs captioned in the 77 complaints do not set out different liability theories.

b. Nor do the groupings of the plaintiffs in the 77 suits follow any pattern. As one example, minors are split off from their parents/guardians. For instance, Felicia Bigelow was placed in *Abraham, et al. v. Eagle US 2 LLC, et al.*, No. 2014 5045 (La. Div. B, 14th JDC), while the minor in her care is in *Bigelow, et al. v. Eagle US 2 LLC, et al.*, No. 2014-5117 (La. Div. D, 14th JDC).

c. Article 463 of the Louisiana Code of Civil Procedure permits cumulation only where there is a "community of interest" between the parties. La. C.C.P. art. 463(1).[2] But paragraph 23 of the complaints denominated "petitions" in Louisiana just parrots this requirement. App33a. At no point, do

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[1] The district court and the Fifth Circuit disagreed with Eagle's legal positions, but they never accused Eagle of sharp practice.

[2] One Louisiana trial court has held the cumulation statute applies to an arbitrary grouping of plaintiffs by opposing counsel. Eagle's rights to contest that decision are not yet exhausted.

plaintiffs ever explain how the arbitrary groupings they opted to use in their complaint share a community of interest. For instance, plaintiffs do not claim similarities in (i) locations during the fire; (ii) alleged exposures or "doses"; (iii) types of "injury;" or (iv) types of damages.[3]

d. The 77 complaints comprise a fungible mass of 1,700+ plaintiffs. As a logical pleading matter, for all that a reader of the complaints can make out, each plaintiff represents any other such plaintiff.

Individualization is absent from the complaints: (a) plaintiff addresses are not listed; nor are (b) any injuries unique to particular plaintiffs; or (c) plaintiff locations during the incident. Yet each of the complaints proposed joint trials. App33a ("Under LCCP art. 463, the trial court can try the cases individually or jointly."). Plaintiffs respond that this is an "egregious falsehood" because it refers only to joint trials as to plaintiffs named *within* any given complaint, not to joint trials *across* complaints. Opp7; *see also id.* at 8.

Several problems plague this response:

First, the *default rule* in cumulated actions is *joint trial*; it is not an individual trial of each plaintiff. *E.g., Cooper v. Festiva Resorts, LLC*, 171 So. 3d 1058, 1062 n.8 (La. Ct. App. 2015) ("The dictates of La. C.C.P. 464 and 465 provide that the trial court is to order the separate trials, not have

[3] Plaintiffs also ignore that a "[c]lass action is more appropriate than cumulation when there is a large number of plaintiffs … involved." *Thomas v. Charles Schwab & Co.*, 683 So. 2d 734, 737 (La. Ct. App. 1996).

the parties do so themselves."); *see also* Pet14-15. Plaintiffs have no response.[4] Article 463 provides by its text only that *entire* suits can be cumulated, not just parts thereof. Once cumulated, such suits stay that way unless ordered separated. La. C.C.P. art. 465.

Second, nothing prevents the plaintiffs, once cases are assigned to particular judges, from obtaining joint trials for plaintiff combinations drawn from different complaints. *E.g., Abraham*, Dkt. #14, at 5-6 (describing common orders adopted within each division); *id.* #14-3, Ex. 17 (allowing plaintiffs to choose multiple claims to try). This further underscores the artificial nature of the plaintiff groupings, as they effectively operate like a class whatever name they travel under.

Third, there is no discernible line separating any of these 77 individual actions from any other. The only reason they are separate is that plaintiffs' counsel opted to plead them that way.

Plaintiffs next turn to assailing Eagle's point that the prior state court litigation was conducted on a *de facto* class-basis. Plaintiffs proclaim "there were only individual claims in which individual awards were made to the Plaintiffs, and each Plaintiff's credibility was assessed in each case as reflected in the state court rulings." Opp4-5. But this ignores that various rulings and causation determinations were

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[4] Plaintiffs argue that Louisiana cumulation is not unique, as other States allow claims joinder. Opp4 n.2. This ignores: (1) the default cumulation rule of beginning with a presumption of joint trials; and (2) the fact that plaintiffs have made no effort to satisfy Louisiana's "community of interest" standards.

cited by the plaintiffs and applied by the state judges to later-tried actions. App48a-49a; *Abraham*, Dkt. #14-3, Ex. 12 at 1.

Plaintiffs cannot gainsay that state judges in the prior fire litigation made findings on causation carried over from one case to another. *E.g.*, *Abraham*, Dkt. #14-3, Ex. 25 at 64:11-12, 64:26-27 (W.D. La.) (state judge: "I'm going to allow *the unrelated medical records*…. [I]t's probative of what was happening in the community…") (emphasis added). "Communal causation findings" are quintessential class-style conclusions. *See also id.* Ex. 11 at 440 ("this week long trial focused on damages only for the 45 plaintiffs").

How the older fire cases were treated readily met the numerosity, commonality, and typicality requirements of class actions. Pet23-24. The *seriatim* litigation of the cases, carrying over causation findings from those who were lead plaintiffs rendered them representative plaintiffs. Finally, just as class actions are lawyer-, not litigant-driven, the same is true of these "cumulation" actions. Pet23-24 (noting Professor Redish's conclusion these cases are "virtually impossible to distinguish" from class actions).

Plaintiffs offer no real rebuttal, pointing only to the formalism that actions cumulated under Louisiana law are not called "class actions" and thus differ from such actions. That is not the test, since CAFA includes in the set of removable actions not just "class actions" but actions "similar" to class actions. 28 U.S.C. § 1332(d)(1)(B). As Congress explained, "the definition of 'class action' is to be interpreted liberally. Its application should not be

confined … solely to lawsuits that are labeled 'class actions' by the named plaintiff or the state rulemaking authority." S. Rep. No. 109-14, at 35, 2005 U.S.C.C.A.N. at 34. Indeed, in this litigation, identical rulings affecting several hundred plaintiffs have been entered across dozens of the ostensibly separate 77 cases.

It is no surprise why the plaintiff counsel pioneering this peculiar brand of Louisiana cumulation favor this jury-rigged device over class actions: it provides plaintiffs all the *benefits* of a class but offers defendants none of the class-action *protections*.[5]

Plaintiffs try to argue there is no *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405 (6th Cir. 2008)-style gamesmanship here. Opp12. In *Freeman*, the plaintiffs divided their claims into separate suits cutting across different time periods to frustrate CAFA's $5 million amount-in-controversy requirement. Any first-year law student could assert that *Freeman* is "different" than this case because this one is about dodging the 100-plaintiff "mass action" requirement, not about dodging the $5 million amount-in-controversy requirement. What that facile observation ignores is that plaintiffs can design a variety of devices to circumvent CAFA's grounds for removal. *Bullard v. Burlington N. Santa*

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[5] For instance, plaintiffs take swipes at Eagle for noting that parts of the prior fire litigation were settled via a class action, arguing that Axiall's subsidiary there agreed to class treatment. Opp6-7. But class treatment reduced the damages and secured a resolution that fully bound class members. Pet9. By contrast, the cumulation procedure cannot necessarily bind others.

Fe Ry. Co., 535 F.3d 759, 761 (7th Cir. 2008) (Easterbrook, J.) (litigants will work hard to "devise close substitutes [to class actions] that escape the statute's application").[6]

At that point, plaintiffs are hoisted by their own conceptual petard. They argue that "the time divisions [in *Freeman*] were 'completely arbitrary, as there was no colorable reason for breaking up the lawsuits [there], other than to avoid federal jurisdiction." Opp13. But the same is true here. The groupings of plaintiffs in the 77 complaints are *utterly arbitrary*. Children are split from their parents and the only unifying principle is that no single complaint includes 100+ plaintiffs.

Plaintiffs assert that they did not divide a single possible suit into 77 parts to recover more relief. Opp15. But that is wildly implausible. Plaintiffs' counsel obviously sees monetary advantage to staying out of federal court as to the size, scope, and ease of relief they expect to obtain.[7] Else they would have saved paying multiple filing fees and avoided generating 77 duplicative complaints where one would have done.

Lastly, plaintiffs argue that even if this is a *de facto* class action, it is not of national significance

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[6] Because plaintiffs refuse to acknowledge CAFA must be protected from circumvention, they go off on the tangent of distinguishing that Eagle never argued were "on all fours." *Compare* Pet23 *with* Opp21 (arguing *Pickman* and *McGraw* cases are inapposite).

[7] Removed cases in the prior fire litigation were settled for pennies on the dollar compared to state-court claims.

because "only 56" plaintiffs hail from outside Louisiana. Opp3. But CAFA permits removals based on "minimal diversity." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 740 (2014).

3. The Fifth Circuit Adopted an Approach to Evading CAFA "Mass Action" Removals Contrasting With Other Circuits' Approaches.

Plaintiffs argue that Eagle tries to "incorrectly meld" CAFA's "class action" and "mass action" provisions. Opp11. This is wrong because Eagle treated each question distinctly. *Compare* Question Presented 2 *with* Question Presented 3. Pet. *i*.

Plaintiffs bury their response to Eagle's main argument on the mass-action front — that the approach of several circuits (the Seventh, Tenth, and Eleventh) is less-categorical than the Fifth's. Pet31-34. Those cases recognize: (1) proposals for joint trial do not have to be explicit — they can be tacit (*Parson v. Johnson & Johnson*, 749 F.3d 879, 888 (10th Cir. 2014); (2) litigation *conduct* can constitute a joint proposal for trial (*Scimone v. Carnival Corp.*, 720 F.3d 876 (11th Cir. 2013); and (3) use of one or more representative actions where the rulings are carried over to later actions via preclusion can give rise to mass-action treatment (*Anderson v. Bayer Corp.*, 610 F.3d 390 (7th Cir. 2010)). Thus, had this same case arisen in the Seventh Circuit, *Anderson* would have permitted mass-action removal.

Plaintiffs have no response to the tension between these approaches and the bright-line Fifth Circuit rule, which *positively invites* the subdivision of suits into less-than-100-plaintiff groupings as a way to avoid removal.

Hamilton v. Burlington Northern Santa Fe Ry. Co., No. Civ. A-08-CA-132-SS, 2008 WL 8148619, *5 (W.D. Tex. Aug. 8, 2008), provides a good example of CAFA's mass-action provisions being appropriately defended against evasion. There, the court held that CAFA's 100-person mass-action requirement could not be circumvented by dividing an action originally filed by about 600 plaintiffs into six "related cases … differ[ing] only in that plaintiffs have been divided alphabetically into groups of fewer than 100 per action filed." Opp9. Plaintiffs try to distinguish the case but it is similar to this one. While the plaintiffs here were not so brazen as to group plaintiffs simply by alphabetizing surnames, the 77 actions are even more arbitrarily sliced because there is no rhyme or reason to the groupings used.[8]

Plaintiffs seek refuge in *Standard Fire*, saying it allows them to game pleadings to stay out of federal court. Opp14. That is a curious reading of the case, which condemned "subdivision of $100 million action into 21-just-below-$5-million state-court actions …."

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[8] Plaintiffs assert that what led *Hamilton* to endorse the "mass action" removal was that the claims involved "different injuries," "different limitations and other defenses," etc. Opp10. That counterintuitive assertion badly distorts the holding. The court sustained CAFA removal because 600 plaintiffs were artificially split into six fewer-than-100-plaintiff actions. Additionally, it also granted a *distinct motion* to *sever* the individual claims from one another in light of differences between plaintiffs. *Hamilton*, 2008 WL 8148619, *13. The Plaintiffs' inability to see that the positions of the removing defendant in *Hamilton* were entirely consistent explains why they fail to see that there is similarly no inconsistency in Eagle's removal arguments and its opposition to cumulation at the state-court level. Opp22-23 & n.15.

133 S. Ct. at 1350. Plaintiffs argue that their situation is different because they secured judgments from a state court that bound them to seek less than $50,000 per plaintiff. Opp25. But this ignores that the Plaintiffs did so via state court proceedings that are void as a matter of law because they were *ex parte*. La. C.C.P. art. 2002(A)(2). Plaintiffs venture no answer.

As Eagle noted, the timing of these unilateral "stipulations" is more-than-suspicious because they purport to limit recovery based on the "foregoing Petition" and yet such "foregoing Petition[s]" were timed such that plaintiffs' counsel couldn't possibly have shared drafts of the complaints with their clients before seeking client signatures on their damages "stipulations." Plaintiffs say it is "sheer speculation as to when counsel drafted the petitions." Opp26. But they've said *exactly the same thing* at every stage below. If they had drafted pleadings and shared them with their clients *before* rushing in to obtain *ex parte* "judgments" limiting future recoveries, plaintiffs' counsel would surely have said so by now. *Standard Fire*'s holding piercing defective damages stipulations supports Eagle, not the plaintiffs.

CONCLUSION

The Court should grant review.

April 22, 2016

Respectfully submitted,

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