

Second Circuit Court of Appeals Joins Seventh Circuit in Holding that Post-Removal Amendment Does Not Destroy CAFA Jurisdiction

Yesterday, the U.S. Court of Appeals for the Second Circuit held that once a defendant removes a complaint to federal court under the Class Action Fairness Act ("CAFA"), the plaintiff's subsequent amendment of the complaint to remove the class-action allegations does not deprive the federal court of jurisdiction. In deciding *In Touch Concepts, Inc. d/b/a ZCOM v. Cellco Partnership d/b/a Verizon Wireless*, the Second Circuit joined the Seventh Circuit in applying prior analogous Supreme Court holdings to the CAFA context.

Background

The plaintiff in *In Touch Concepts*, a former Verizon retail sales agent known as Zcom, filed a putative class-action lawsuit against Verizon and several Verizon employees in New York state court, alleging various state-law claims arising from Verizon's termination of its relationship with Zcom. The defendants removed the case to federal court under CAFA, 28 U.S.C. § 1332(d), which creates federal diversity jurisdiction over any class action in which at least one plaintiff class member and one defendant are from different states.

Zcom subsequently amended its complaint to drop the class-action allegations. The federal district court nonetheless maintained subject matter jurisdiction over the case, which it ultimately dismissed on the merits. Zcom appealed to the Second Circuit.

Prior Supreme Court Precedent

Where a plaintiff amends its complaint after filing suit, federal courts usually look to the amended complaint to determine whether federal jurisdiction exists. As the Supreme Court explained in *Rockwell International Corp. v. United States* (2007), however, the opposite rule applies in removal cases. In such cases, courts determine jurisdiction on the basis of the original complaint, due to concerns that a plaintiff might otherwise re-plead its complaint simply to deprive the defendant of its entitlement to a federal forum.

The Supreme Court has made clear that the original complaint determines jurisdiction in both cases removed on federal-question grounds, such as *Rockwell International*, and cases removed on the basis of diversity, as the Supreme Court first held in *St. Paul Mercury Indemnity Co. v. Red Cab Co.* (1938).

In Touch Concepts

The Second Circuit concluded in *In Touch Concepts* that CAFA cases are a subset of diversity-removal cases, and therefore the Supreme Court's general rule for such cases should apply to CAFA cases as well. The opinion specifically notes that CAFA is an amendment to the diversity statute and appears in the section of the U.S. Code describing diversity jurisdiction.

The *In Touch Concepts* court also cited to the Seventh Circuit's similar conclusion in 2010, in *In re Burlington Northern Santa Fe Railway Co.*

The Impact of *In Touch Concepts* on Class-Action Litigation

In Touch Concepts makes clear that class-action plaintiffs cannot amend their pleadings to destroy federal jurisdiction. The opinion may also signal the Second Circuit's willingness to follow the Seventh Circuit's lead in holding (in 2010's *Cunningham Charter Corp. v. Learjet, Inc.*) that CAFA jurisdiction survives a district court's denial of class certification. Such an expansion of the Second Circuit's CAFA jurisprudence would provide defendants with additional security against post-removal loss of a federal forum.

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