No. _____

In The

Supreme Court of the United States

SASKATCHEWAN MUTUAL INSURANCE COMPANY,

Petitioner,

v.

CE DESIGN, LTD.,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT D. KOLAR
TRESSLER LLP
233 South Wacker Drive 22nd Floor
Chicago, Illinois 60606
(312) 627-4194
rkolar@tresslerllp.com

Counsel for Petitioner

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTION PRESENTED

To enforce a judgment entered in Canada refusing to enforce judgment entered in a state court in Illinois on behalf of a class against a Canadian insurer was not enforceable because it did not provide proper notice, the insurer sought to register that Canadian judgment in federal court in Illinois to prevent the class' attempt to enforce its Illinois judgment. Jurisdiction was based on CAFA. Contrary to the intent of the statute and the law, the Seventh Circuit affirmed the dismissal of the registration on grounds that as the case reached federal court the insurer was the plaintiff, the class is the defendant and thus there is no jurisdiction because CAFA only applies to a plaintiff class and not a defendant class.

The question presented is whether the registration of a foreign judgment alters the status of the parties to that judgment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was Defendant-Appellant below, is Saskatchewan Mutual Insurance Company ("SMI").

Respondent, who was Plaintiff-Appellee below, is CE Design, Ltd. ("CE Design").

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PETITION FOR A WRIT OF CERTIORARI

Petitioner SMI respectfully submits this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Pet.App. 1a) is reported at 865 F.3d 537. The order of the District Court for the Northern District of Illinois is not reported.

JURISDICTION

The Seventh Circuit entered judgment on July 26, 2017. Petitioner timely filed a petition for rehearing en banc on August 9, 2017, which was denied by order of the court on September 7, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d).

STATEMENT OF THE CASE

1. Saskatchewan Mutual Insurance Company ("SMI") is an insurance company based in Saskatchewan, Canada. CE Design, Ltd. ("CE Design") is an Illinois corporation based in Illinois whose business is litigating TCPA claims. Homegrown Advertising, Inc. ("Homegrown") was a Canadian marketing company based in Regina,

Saskatchewan. SMI issued a commercial liability insurance policy ("Policy") to Homegrown.

2. In 2005 CE Design sued Homegrown in a class action lawsuit filed in the Circuit Court of Lake County, Illinois asserting claims for violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.*

3. CE Design subsequently filed a motion for approval of a settlement agreement between it and Homegrown enforceable only against the Policy. As part of the agreement, Homegrown assigned all of its rights under the policy to CE Design. The settlement agreement provided for certification of a class and a consent judgment against Homegrown, but enforceable only against SMI. In 2007 the settlement agreement was approved, a plaintiff class was certified and judgment was entered against Homegrown pursuant to the settlement agreement. Subsequently, the Illinois Court entered a default judgment on behalf of the plaintiff class against SMI.

4. In October 2007 CE Design filed a petition in Saskatchewan, Canada (Queen's Bench Action 1195 of 2007) seeking to enforce and collect $5,095,032 plus interest against SMI pursuant to the Foreign Judgments Enforcement Act of Saskatchewan. On January 8, 2008, the Queen's Bench for Saskatchewan entered a final and conclusive judgment in favor of SMI on CE Design's petition, finding that CE Design failed to provide SMI with adequate notice of the request for

judgment against SMI in Illinois and dismissed CE Design's petition. *CE Design v. SMI*, [2008] S.J. No. 164, 315 Sask. R. 91. 31 ("the Saskatchewan Judgment"). The Queen's Bench also awarded costs in favor of SMI and against CE Design in the amount of $1,000. CE Design did not file any appeal from that ruling. The Saskatchewan Judgment is thus now final, conclusive and enforceable under the laws of Saskatchewan, Canada.

5. Despite the entry of the Saskatchewan Judgment, CE Design subsequently attempted to collect on the Illinois Judgment in Illinois. In November 2013 CE Design served a citation to discover assets on TD Ameritrade (at its office in Schaumburg, Illinois, and in that citation CE Design represented that $8,073,852.96 remained unsatisfied on the Illinois Judgment.

6. On June 4, 2015 SMI registered a notarized copy of the Saskatchewan Judgment with the United States District Court for the Northern District of Illinois pursuant to the Uniform Foreign-Country Money Judgments Recognition Act, 735 ILCS 5/12-661 *et seq.* SMI moved to enforce the Saskatchewan Judgment and enjoin CE Design from further collection proceedings.

a. The District Court dismissed the case for lack of subject matter jurisdiction on October 6, 2015.

The District Court held that although CAFA allows class members' claims to be aggregated if the total exceeds $5 million, it does so only if the class is

a plaintiff class, and that by registering the Canadian judgment in Illinois and seeking to prevent CE Design from collecting on the Illinois judgment, SMI converted the class into a defendant class. SMI filed a notice of appeal of that order on October 20, 2016.

b. The Seventh Circuit affirmed.

In an opinion authored by Judge Wood, the court held that federal jurisdiction did not exist because as the case reached the federal court SMI is the plaintiff and the class is the defendant, and CAFA only applies to plaintiff classes.

c. The Seventh Circuit's judgment is now final, because Petitioner's motion for rehearing en banc was denied.

Accordingly, Petitioner now seeks review of the Seventh Circuit's holding that registration of a foreign judgment converts a plaintiff class into a defendant class.

REASONS FOR GRANTING THE PETITION

This case presents an important issue of first impression to which guidance from this Court is necessary. CAFA was enacted in 2005 to expand federal jurisdiction as a result of abuses in class action lawsuits. Rather than apply CAFA broadly, the Seventh Circuit narrowed its scope by construing the registration of a foreign judgment from a plaintiff class to a defendant class. This not only is

derogation of the obligation to construe CAFA broadly, it is also contrary to the law and the reality that registration of a foreign judgment does not change the status of the parties to the original judgment.

I. CAFA MUST BE, BUT WAS NOT, BROADLY CONSTRUED

CAFA "is intended to expand substantially federal court jurisdiction over class actions." *Chavis v. Fidelity Warranty Services,* 415 F.Supp.2d 620, 625 (D.S.C. 2006), *citing* S.Rep. No. 109-14 at 42 (2005). CAFA was enacted to expand jurisdiction in federal courts as a result of abuses in class action lawsuits, such as the abuses by CE Design in this case, to "assure fair and prompt recoveries for class members with legitimate claims; [to] restore the intent of the framers ... by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and [to] benefit society by encouraging innovation and lowering consumer prices." *Tanoh v. Dow Chemical Co.,* 561 F.3d 945 (9th Cir. 2009), *citing* CAFA § 2, 119 Stat. at 5. CAFA was designed primarily to curb perceived abuses of the class action device which had often been used to litigate multi-state or even national class actions in state courts and were negatively impacting commerce. *Id.* Another concern for why Congress enacted CAFA was to address state and local courts keeping cases of national importance out of federal court. *Freeman v. Blue Ridge Paper Prods.,* 551 F.3d 405, 407-08 (6th Cir. 2008), *citing* CAFA § 2(a)(4)(A).

II. REGISTRATION OF A JUDGMENT DOES NOT CHANGE THE STATUS OF THE PARTIES TO THE JUDGMENT

Registering a judgment is a ministerial act that does not change the substance of the original lawsuit and confers no power on the court where the judgment is registered to alter the judgment. *In re Prof'l Air Traffic Controllers Org.*, 699 F.2d 539, 544 (D.C. Cir. 1983) ("registration is a rapid procedure that does not require the intervention of a judge. It is merely a matter of having the clerk of the court in which the judgment is registered enter the pertinent provisions of the sister court's judgment on the judgment docket."); *Sallie Mae Servicing v. Lee*, 2016 WL 613963, *4 (D.Ariz. Feb. 16. 2016); *Dietz v. Dietz*, 2012 WL 1931549, *2 (D.Colo. May 29, 2012) ("this is not a new action but merely the registration of a foreign judgment"); *Juneau Spruce v. Int'l Longshoremen's Warehousemen's Union*, 128 F.Supp. 697, 699 (D. Haw. 1955) ("[r]egistration is purely a ministerial act in the enforcement of a foreign judgment by reason that it confers upon this Court no power to alter the judgment itself."); *Consesco Marketing v. IFA Ins. Services*, 221 Cal.App.4th 831, 838, 164 Cal.Rptr.3d 788 (2013) ("the entry of a sister state judgment by the clerk is a ministerial, not a judicial act…so that it may be enforced against property located in this state"); *Bonfiglio v. Bonfiglio*, 2001 Pa.Super. 213, 781 A.2d 1197, 1200 (2001) ("[t]hese statutes provide that the 'ministerial act' of registration will serve as an alternative to filing a new action…registration of the

foreign judgment advance(s) the obligee to the enforcement stage").

By registering the Saskatchewan Judgment, SMI did not change the nature of the lawsuit. At no time was a defendant class ever certified. As a result, CE Design remains the plaintiff of a plaintiff class just as it was when it filed its petition in Saskatchewan. This is further evidenced by CE Design's citation to discover assets to TD Ameritrade after entry of the Saskatchewan Judgment, where CE Design identified itself as the plaintiff seeking to recover in excess of $8 million on behalf of a class. *Cf. Addison Automatics v. Hartford Cas. Ins.*, 731 F.3d 740, 743 (7th Cir. 2013). Thus, the Seventh Circuit's finding that "[a]s the case reached the federal court, SMI is the plaintiff and the class is the defendant" (Pet.App. 4a) is wrong. The District Court also erred when it ordered the clerk to change the case caption to change CE Design's status from plaintiff to defendant (and vice-versa), and further erred when it found that by registering the judgment SMI "converted the class into a defendant class." *See Sallie Mae*, 2016 WL 613963, *3 (finding no basis for amending a case caption as "no rule of civil procedure applies for amending the case caption in this case, because, quite plainly, no pleading has been filed."). Similarly, here SMI merely registered the Saskatchewan Judgment and filed no pleading. Since CE Design, as class representative, is the plaintiff in the registered Saskatchewan Judgment, this matter relates to a plaintiff class and thus CAFA applies and allows for jurisdiction over this matter.

Both the district court and Seventh Circuit erroneously relied on the fact that SMI is the one who invoked the federal court's jurisdiction. While true, this does not make SMI a plaintiff, no more than when a defendant removes a case to federal court. In that situation, the defendant is the one who invokes the federal court's jurisdiction but such does not make the removing defendant a plaintiff in the lawsuit.

The Seventh Circuit's error is further demonstrated by the recent decision involving CE Design cited by the Seventh Circuit, *CE Design Ltd. v. Healthcraft Prods.,* 2017 IL App (1st) 143000, which involved the registration of an Ontario judgment in Cook County. Similar to this case, the Ontario court found against CE Design and entered judgment against it, along with an award of costs. When the Ontario judgment was registered by the insurer in Cook County, CE Design was still referred to as the plaintiff, despite the fact that, as here, the insurer sought to collect the costs awarded in addition to stopping CE Design's collection efforts. Moreover, the class in this case was only certified as a plaintiff class seeking recovery of money. At no time did SMI seek to certify a defendant class or was any defendant class ever certified.

The Seventh Circuit's rationale was based on *Travelers Prop. Cas. v. Good*, 689 F.3d 714 (7th Cir. 2012). However, *Good* has no application to the facts in this case. *Good* involved a declaratory judgment lawsuit brought by an insurer against a class representative. Unlike *Good*, this is not a declaratory

judgment action, as here the plaintiff class has already obtained a judgment against SMI. Instead, SMI is simply registering a judgment holding that the judgment entered against it, and in favor of the plaintiff class, is not enforceable. Also, unlike the insurer in *Good*, SMI is not seeking to assert claims as a plaintiff in this case. Rather, it is simply registering the Saskatchewan Judgment to prevent CE Design from its ongoing collection efforts that are directly contrary to, and violative of, the Saskatchewan Judgment. Given the procedural history of this case, it is certainly understandable why SMI registered the judgment in the district court rather than the state court that improperly entered the judgment against it in the first place. Federal court is an entirely proper haven in such circumstances, and indeed is a primary basis for federal jurisdiction. *Betar v. DeHaviland Aircraft of Canada*, 603 F.2d 30 (7th Cir. 1979) (the underlying purpose of federal diversity jurisdiction is to provide access to an unbiased court for an out of state resident forced into litigation in a state in which it was a stranger and of which its opponent was a citizen, and thus exists to prevent local prejudice from state court bias); *Ziady v. Curley*, 396 F.2d 873 (4th Cir. 1968).

The Seventh Circuit further cites *Good* for its finding that registration of a foreign judgment is "not always a rote administrative task". (Pet.App. 6a). *Good* provides no such support. *Good* did not even involve a registration of a judgment but rather an independent insurance coverage action. Likewise, the Seventh Circuit's suggestion that "SMI still had

real work to do" (Pet.App. 8a) to seek recognition of the Saskatchewan Judgment is incorrect and not supported by its cited authority, *Evans Cabinet Corp. v. Kitchen Int'l,* 593 F.3d 135, 140-41 & n. 6 (1st Cir. 2010). The Seventh Circuit also fails to describe what this so-called "work" entails. There is no such "work", as the judgment is already registered and simply needs to be recognized and enforced.

The Seventh Circuit's finding on this issue also exalts form over substance, which is contrary to the law. *Ford Motor Credit v. Cenance*, 452 U.S. 155, 158 (1981); *Addison Automatics*, 731 F.3d at 740 ("[t]o hold otherwise would, for CAFA jurisdictional purposes…exalt form over substance"). CE Design is no doubt still acting as a plaintiff, as it still seeks to collect on the Illinois Judgment entered against SMI. This is evidenced by CE Design's citation to discover assets that it served on TD Ameritrade.

III. THE SEVENTH CIRCUIT'S RELIANCE ON COMITY WAS ALSO IMPROPER

Finally, sensing the weakness of its jurisdictional analysis under CAFA, the Seventh Circuit resorts to comity considerations, finding that comity supports its approach. It does not and the Seventh Circuit's reference to comity is improper. Comity should not have been considered. The Seventh Circuit's reliance on comity considerations is also directly contrary to the directive that CAFA be applied liberally in favor of securing federal jurisdiction.

In support of its comity finding, the Seventh Circuit cites *Levin v. Commerce Energy*, 560 U.S. 413 (2010), a case that involved taxpayers who challenged the constitutionality of a tax and therefore sought federal interference with the state's exaction of the tax. Comity refers to the principle that "[f]ederal courts generally abstain from cases that challenge state taxation schemes on the basis that those claims are more appropriately resolved in state court." According to *Levin*, federal courts should refrain from hearing state tax challenges where the challenge involves 1) "commercial matters over which [the state] enjoys wide regulatory latitude"; 2) parties that seek "federal-court aid in an endeavor to improve their competitive position"; and 3) state courts that "are better positioned than their federal counterparts to correct any violation....". *Id.* at 415-416.

Levin has no relevance to the facts in this case, which has nothing to do with tax issues. Moreover, courts have rejected any consideration of comity in the context of cases where jurisdiction exists under CAFA. *Dutcher v. Matheson*, 840 F.3d 1183, 1195 (10th Cir. 2016) (rejecting comity consideration in CAFA case and distinguishing Levin); *Boelter v. Advance Magazine Publishers*, 210 F.Supp.3d 579, 592 (S.D.N.Y. 2016); *Cabral v. Supple*, 2016 WL 1180143 (C.D.Cal. Mar. 24, 2016). The reason for this is that "Congress already considered "the principles of fairness and comity' when it passed CAFA, and it is not for this Court to second-guess Congress's judgment." *Cabral*, 2016 WL 1180143, *4.

CONCLUSION

Accordingly, SMI's petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert D. Kolar
Tressler LLP
233 South Wacker Drive 22nd Floor
Chicago, Illinois 60606
(312) 627-4194
rkolar@tresslerllp.com

Counsel for Petitioner