

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SUMATRA KENDRICK, an
individual,

Plaintiff-Appellee,

v.

CONDUENT STATE AND LOCAL
SOLUTIONS, INC., FKA Xerox State
and Local Solutions, Inc.,

Defendant-Appellant,

and

BAY AREA TOLL AUTHORITY, a
California public corporation;
GOLDEN GATE BRIDGE, HIGHWAY
AND TRANSPORTATION DISTRICT, a
California public corporation,

Defendants.

No. 18-16988

D.C. No.
3:18-cv-00213-RS

OPINION

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, District Judge, Presiding

Argued and Submitted November 14, 2018
San Francisco, California

Filed December 13, 2018

Before: Mary M. Schroeder and Paul J. Watford, Circuit Judges, and David A. Ezra, * District Judge.

Opinion by Judge Schroeder;
Dissent by Judge Watford

SUMMARY**

Class Action Fairness Act

The panel affirmed the district court’s order remanding to state court an action brought under the Class Action Fairness Act on behalf of users of the Golden Gate Bridge who alleged that defendants violated California privacy statutes by collecting their personal data.

Plaintiffs brought the action in state court against the Bay Area Toll Authority and the Golden Gate Bridge Highway and Transportation District, both entities of the State of California, and against Conduent State and Local Solutions, Inc., a private company that has contracted with the state entities to operate the bridge’s toll system. The district court found that Conduent was acting for the state and that it and the other principal defendants were not subject to jurisdiction under the Class Action Fairness Act because the Act does not apply to state entities or “other governmental entities.”

* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

28 U.S.C. § 1332(d)(5)(A). Conduent appealed and sought to remain in federal court while the dispute against the public entities proceeded in state court.

The panel held that it need not decide whether remanding on the “other governmental entit[y]” ground pursuant to § 1332(d)(5)(A) was permitted because there was a further justification for the remand. The panel held that a remand was required by provisions of the Class Action Fairness Act, 28 U.S.C. § 1332(d)(4), which call for local actions to be heard in state court. The panel held that this was essentially a dispute between those who use the bridge to travel between Marin County, California and San Francisco, California, and defendants who operate the bridge on behalf of the State of California. The panel concluded that the district court properly ruled that the case against Conduent, the toll collector, belonged in state court with the California entities that manage the bridge’s maintenance and operation.

Dissenting, Judge Watford agreed that this class action belongs in state court. But in Judge Watford’s view, the plain text of the Class Action Fairness Act required that the case remain in federal court, as nonsensical as that result may seem because the Act dictates that remand is required only if “no other class action” has been filed in the preceding three years, and here another class action had been filed during that period.

COUNSEL

Barbara L. Lyons (argued) and Gary T. Lafayette, Lafayette & Kumagai LLP, Oakland, California, for Defendant-Appellant.

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Samantha D. Wolff and Alexandra V. Atencio, Hanson Bridgett LLP, San Francisco, California, for Amici Curiae Bay Area Toll Authority and Golden Gate Bridge, Highway, and Transportation District.

OPINION

SCHROEDER, Circuit Judge:

This is an appeal under the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d), from an order granting plaintiffs’ motion to remand to the state court. The plaintiffs seek to maintain this action in state court on behalf of a class of users of the Golden Gate Bridge. They brought the action against the Bay Area Toll Authority (“BATA”) and the Golden Gate Bridge Highway and Transportation District (“GGB”), both entities of the state of California, and against Conduent State and Local Solutions, Inc. (“Conduent”), a private company that has contracted with the state entities to

operate the bridge's toll system. Plaintiffs' principle claims allege defendants are in violation of California privacy statutes prohibiting the collection of personal data. Conduent appeals the remand. While remand orders generally are not reviewable, 28 U.S.C. § 1447(d), we have discretion to review actions removed under CAFA, 28 U.S.C. § 1453(c). We granted Conduent's petition to appeal.

Although the district court found that most of the requirements for maintaining the case in federal court under CAFA were met, including the size of the class and the amount in controversy, it ruled that the principal defendants were not subject to CAFA jurisdiction. The defendants included two state entities and Conduent, which the district court held was acting for the state. Conduent appeals and BATA and GGB, while agreeing they belong in state court, have filed an amicus brief in support of Conduent's remaining in federal court.

Conduent argues that the case against it belongs in federal court because the district court's conclusion that Conduent is a state actor was flawed. Conduent points to the language of a CAFA exception that provides CAFA does not apply to proposed classes where "the primary defendants are states, state officials or other governmental entities against whom the district court may be foreclosed from ordering relief." 28 U.S.C. § 1332(d)(5)(A). Although the other two defendants are clearly governmental entities within the meaning of the statutory exception, Conduent contends it is not such an entity. Conduent therefore argues that the district court erred and the case against Conduent must stay in federal court, even though this results in the case being litigated simultaneously in both state and federal court. There is no dispute that the plaintiffs' case against the public entities,

BATA and GGB, is now properly in state court on claims similar to those against Conduent, nor is there any dispute that Conduent is a “primary defendant.”

The elements of CAFA jurisdiction are established in 28 U.S.C. § 1332(d)(2). A district court shall have jurisdiction over a class action when: (1) the amount in controversy exceeds five million, and (2) any class member is a citizen of a state different from any defendant. *Id.* CAFA creates an exception from federal court jurisdiction for cases targeting state, local, and other government entities that may claim immunity. *Id.* § 1332(d)(5)(A); *see Bridewell-Sledge v. Blue Cross of California*, 798 F.3d 923, 927–28 (9th Cir. 2015). The exception is aimed at entities that may try to take advantage of Eleventh Amendment immunity by removing to federal court. S. Rep. No. 109-14, at 41–42 (2005). The Senate Report describes what Congress intended to do:

[P]revent states, state officials, or other governmental entities from dodging legitimate claims by removing class actions to federal court and then arguing that the federal courts are constitutionally prohibited from granting the requested relief. This provision will ensure that cases in which such entities are the primary targets will be heard in state courts that do not face the same constitutional impediments to granting relief.

Id. at 42.

This case began in state court. Plaintiffs/Appellees Sumatra Kendrick and Michelle Kelly filed this putative class

action in San Francisco Superior Court on November 21, 2017. They alleged Defendants invaded their privacy and collected their personally identifiable information when they drove over bay area toll bridges and then shared this information with various unauthorized third parties including car rental companies, banks, credit bureaus, and law enforcement agencies, in violation of California Streets and Highway Code § 31490, and they asserted other related California claims. Section 31490 states in relevant part that “a transportation agency may not sell or otherwise provide to any other person or entity personally identifiable information of any person who subscribes to an electronic toll or electronic transit fare collection system or who uses a toll bridge, toll lane, or toll highway that employs an electronic toll collection system.” *Id.* § 31490(a).

Conduent removed the entire case from San Francisco Superior Court to the Northern District of California under CAFA, 28 U.S.C. § 1332(d). Plaintiffs/Appellees moved to remand, arguing, among other things, that removal is precluded under 28 U.S.C. § 1332(d)(5)(A) because Conduent is acting on behalf of the state even though it is a private company. The California agencies, BATA and GGB, were undisputedly state entities, and the district court concluded that Conduent was as well, because it was exercising the authority of the state with respect to the alleged violation of plaintiffs’ privacy rights:

[P]laintiffs allege that Conduent, BATA, and GGB are inextricably intertwined such that the actions of one entity can be imputed to the others. As the assessment of tolls on state-owned bridges arguably exercises the coercive power of the state, to the extent plaintiffs

accuse Conduent of acting in concert with government agencies to violate class members' rights, they have alleged state action on the face of the complaint.

The district court stated that Conduent had the burden of satisfying § 1332(d)(5)(A) and because that burden was not met, removal was improper. Accordingly, the district court remanded the case to state court, where it has been assigned to the same judge presiding over related actions. The state court proceedings have been stayed pending this appeal.

In this appeal Conduent argues the district court erred because it relied on 42 U.S.C. § 1983 case law to determine that Conduent was a state actor, and that the district court failed to address the language of CAFA's statutory exception relating to "other governmental entities against whom the District Court may be foreclosed from ordering relief."

Conduent's position is that as a private entity it is outside the scope of § 1332(d)(5)(A). It accurately points out that Section 1983 cases are not controlling because the § 1983 state actor analysis looks to an actor's role and conduct while the CAFA inquiry goes to the nature of the entity itself. The district court's exclusive reliance on § 1983 case law was not appropriate. The issue is whether Conduent may be considered an instrumentality of the state.

The district court's analysis, however, also focused to some extent on the relationship between Conduent and the state entities ultimately responsible under California law for collecting bridge tolls. Conduent is an entity acting on behalf of the state to perform toll related functions required by state statute. California law expressly establishes civil penalties

for the evasion of bridge tolls, California Vehicle Code § 40250, recognizes the existence of contractual arrangements for processing toll delinquencies with entities which it describes as “issuing agenc[ies],” § 40252, and defines an “issuing agency” as “an entity, public or private, authorized to collect tolls.” *Id.* § 40250(e)(1).

The Eleventh Amendment of the United States Constitution provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. This means that private individuals may not sue non-consenting state entities in federal court. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). The state need not be named as a defendant. The Supreme Court has held that “the reference to actions ‘against one of the United States’ encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities.” *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997).

To determine whether an entity is able to invoke such immunity our Court has said we generally look to a number of factors:

- (1) whether a money judgment would be satisfied out of state funds,
- (2) whether the entity performs central governmental functions,
- (3) whether the entity may sue or be sued,
- (4) whether the entity has the power to take property in its own name or only the

name of the state, and (5) the corporate status of the entity.

Beentjes v. Placer County Air Pollution Control Dist., 397 F.3d 775, 778 (9th Cir. 2005) (quoting *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988)). We examine these factors by looking at the way state law treats the entity. *Mitchell*, 861 F.2d at 201.

On this record, Conduent satisfies the second factor of performing a central government function and it has not asserted that it lacks any of the other characteristics. Conduent performs the government function of processing bridge tolls, collecting fines and imposing penalties in the name of the state. This record does not reflect whether it may satisfy the other factors. We have observed, however, that the *Mitchell* factors are not particularly useful when applied to a private entity because a private entity cannot be an arm of the state when the relationship to the sovereign is only by contract. *See Del Campo v. Kennedy*, 517 F.3d 1070, 1077 (9th Cir. 2008). Here Plaintiffs contend the relationship is more than contractual because the state has enacted a special statutory scheme for the collection of bridge tolls and has recognized the entities with whom the state contracts for such purposes as “an issuing agency.” Our case law provides no clear answer as to whether Conduent qualifies as a governmental entity within the meaning of CAFA.

Conduent contends that even if it is a government entity, it waived any immunity it might have had by removing the case to federal court. *See Lapidus v. Bd. of Regents of Univ. System*, 535 U.S. 613, 624 (2002). In deciding whether the governmental entity exception applies, however, the existence or waiver of immunity is not the issue; the only issue is

whether the entity is such that a claim of immunity may be made. Moreover the Supreme Court’s holding in *Lapides* was limited. A state waives Eleventh Amendment immunity by removal only for state-law claims “in respect to which the State has explicitly waived immunity from state-court proceedings.” *Id.* at 617. Here, the record does not reflect that Conduent waived immunity in state court. Accordingly, *Lapides* is not dispositive. *See id.* at 617–18 (“[n]or do we address the scope of waiver by removal in a situation where the State’s underlying sovereign immunity from suit has not been waived or abrogated in state court.”)

We need not decide whether the district court erred in remanding on the “other governmental entit[y]” ground pursuant to § 1332(d)(5)(A) because there is a further justification for the remand. The plaintiffs correctly contend that the result is required by provisions of CAFA calling for local actions to be heard in state court. The local controversy exception is one of several exceptions to CAFA removal jurisdiction. *See Bridewell-Sledge*, 798 F.3d at 928. It is defined at 28 U.S.C. § 1332(d)(4). The provision instructs that a district court is required to decline jurisdiction over a class action when: (1) more than two-thirds of the proposed plaintiff class(es) are citizens of the state in which the action was originally filed, (2) there is at least one in-state defendant against whom “significant relief” is sought and “whose alleged conduct forms a significant basis for the claims asserted” by the proposed class, (3) the “principal injuries” resulting from the alleged conduct of each defendant were incurred in the state of filing, and (4) no other class action “asserting the same or similar factual allegations against any of the defendants” has been filed within three years prior to the present action. *Id.* § 1332(d)(4)(A). The exception’s purpose is to ensure that class actions with a local focus

remain in state court rather than being removed to federal court because state courts have a strong interest in resolving local disputes. *Bridewell-Sledge*, 798 F.3d at 928.

Most of these requirements are met. Plaintiffs submitted evidence indicating that more than two thirds of the traffic on the Golden Gate Bridge during rush hour is comprised of California citizen motorists. 28 U.S.C. § 1332(d)(4)(A)(i). They seek relief from two in-state defendants, BATA and GGB, for injuries incurred in California. *Id.* The district court refused to remand under this exception, however, because it held the fourth requirement was not met. One of the plaintiffs in this case, Michelle Kelly, had previously filed a class action in state court on September 7, 2016, and removed to federal court on November 28, 2016, alleging similar theories. The district court viewed that filing as disqualifying. We conclude it is not because that case never proceeded independently and essentially became part of this case. This is reflected in a close examination of the proceedings in both state and federal court.

Shortly after Kelly filed her case in state court as a putative class action, it was removed to federal court, where Kelly voluntarily dismissed the case as to her claims only. When this, the Kendrick case, was filed in state court, Kelly became a plaintiff in it. When the Kendrick case in turn was removed to federal court, the district court ordered it joined with the remainder of the Kelly case as a related case. *See* N.D. Cal. Civ. L.R. 3.12; *see also* Fed. R. Civ. P. 42. So when the district court remanded this case to state court, it remanded one case that included all the parties and potential parties to both the Kelly and Kendrick actions.

As we pointed out in *Bridewell-Sledge*, the reason for the no prior class action prerequisite to remand is to ensure that controversies giving rise to multiple class actions be heard in federal court in one proceeding. *Id.* at 932. In *Bridewell-Sledge* there was no “other class action” because the prior action and the pending action had been consolidated. There can be no “other class actions” in this case either, since the earlier Kelly action has been effectively succeeded by this one, in which Kelly is a named party. There is here, as in *Bridewell-Sledge*, every practical reason why the local action rule should apply, and it supports the district court’s remand order. As in *Bridewell-Sledge*, we are dealing with a single case, not two different class actions proceeding on different tracks before different judges. Therefore, no “other class action” has been filed within the meaning of the statute. *See* 28 U.S.C. § 1332(d)(4)(A)(ii); *Bridewell-Sledge*, 798 F.3d at 928–31.

The history, language, and purpose of CAFA reflects it is to provide a federal forum for national issues, but keep smaller and more local issues in state court. The Golden Gate Bridge may be a national treasure, but whether collection of its tolls is a controversy that belongs in federal court is a different question. Congress has provided that when the controversy is localized, the case belongs in state court. *See Bridewell-Sledge*, 798 F.3d at 933. This is essentially a dispute between those who use the bridge to travel between Marin County, California and San Francisco, California, and defendants who are charged with operating the bridge on behalf of the State of California. The district court properly ruled that the case against Conduent, the toll collector,

belongs in state court with the California entities that manage the bridge's maintenance and operation.

AFFIRMED.

WATFORD, Circuit Judge, dissenting:

I agree with my colleagues that this class action belongs in state court. But in my view the plain text of the Class Action Fairness Act (CAFA) requires that the case remain in federal court, as nonsensical as that result may seem.

In remanding this case to state court, the district court relied on a provision that says CAFA jurisdiction shall not extend to any class action in which “the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.” 28 U.S.C. § 1332(d)(5)(A). Although the majority does not squarely resolve the issue, I think it’s clear that this provision does not divest the court of jurisdiction. Everyone agrees that there are three primary defendants in this action: Bay Area Toll Authority; Golden Gate Bridge, Highway and Transportation District; and Conduent State and Local Solutions, Inc. The first two defendants are indisputably entities of the State of California against whom the district court may be foreclosed from ordering relief, as they might be entitled to assert Eleventh Amendment immunity in federal court. Conduent, however, is not a state entity. It is a private corporation that contracts with the State to collect tolls on public bridges in the Bay Area. We have held that Eleventh Amendment immunity does not extend to private corporations, even when they contract with the State

to perform central governmental functions. *Del Campo v. Kennedy*, 517 F.3d 1070, 1076–79 (9th Cir. 2008). As a result, Conduent does not qualify as a governmental entity “against whom the district court may be foreclosed from ordering relief.” 28 U.S.C. § 1332(d)(5)(A).

The plaintiffs contend that § 1332(d)(5)(A) should be interpreted to preclude CAFA jurisdiction even if just one of the primary defendants is a governmental entity that may be immune from suit in federal court. That reading certainly seems better suited to carrying out the purpose of this provision, which is to ensure that class actions targeting defendants who would be entitled to Eleventh Amendment immunity will remain in state court, where the claims against all of the defendants can be resolved in a single forum. When a class action will have to proceed against one or more of the primary defendants in state court anyway (because those defendants can’t be sued in federal court), it makes little sense for the same claims to be litigated simultaneously against the remaining defendants in a parallel federal court proceeding. But, for reasons that remain a mystery, Congress used the phrase “the primary defendants” in § 1332(d)(5)(A), rather than “a primary defendant.” Courts have rightly held that in this context “the primary defendants” must be read to mean *all* primary defendants. *Woods v. Standard Insurance Co.*, 771 F.3d 1257, 1263–64 (10th Cir. 2014); *Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 546–47 (5th Cir. 2006). Since Conduent is a primary defendant but not one “against whom the district court may be foreclosed from ordering relief,” § 1332(d)(5)(A) does not preclude CAFA jurisdiction.

To uphold the district court’s remand order, the majority relies instead on a different provision of CAFA, known as the

local controversy exception. 28 U.S.C. § 1332(d)(4)(A). That provision is designed to ensure that class actions involving residents predominantly of a single State will be litigated in the courts of that State. Everyone agrees that the first three requirements of the local controversy exception are met. The only issue is whether the last condition is satisfied. Remand is required under that condition only if, during the three-year period preceding the filing of this action, “no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.” § 1332(d)(4)(A)(ii).

The phrase “other class action” is not defined. But the phrase does not seem to contemplate some esoteric concept, so I assume it means simply a class action other than the one that is now in federal court. My colleagues appear to accept that reading. We disagree only on how to characterize the relationship between this action and the earlier class action filed by named plaintiff Michelle Kelly.

In my view, if this action were merely a continuation of Kelly’s earlier-filed action, we could fairly say that Kelly’s earlier action shouldn’t count as an “other class action.” See *Vodenichar v. Halcón Energy Properties, Inc.*, 733 F.3d 497, 506–10 (3d Cir. 2013). But Kelly’s earlier action and this action strike me as entirely distinct. Kelly voluntarily dismissed the earlier action shortly after the defendants removed it to federal court. At that point the action was effectively terminated.

Roughly a year later, Kelly and a new named plaintiff, Sumatra Kendrick, filed this action in state court. The claims they assert undoubtedly arise out of the same factual allegations that formed the basis for Kelly’s earlier action.

But neither Kendrick nor Kelly have claimed that Kelly's earlier action "essentially became part of this case." Maj. op. at 12. In fact, they have stated basically the opposite. When the defendants removed this action to federal court and asked that it be assigned to the same judge who presided over Kelly's earlier action, Kendrick and Kelly asserted that the two actions were not even "related" for purposes of the local court rule allowing such reassignment. They stressed that the two actions "do not involve the same claims" and that "the earlier filed action has been administratively closed." The district court ultimately disagreed with that view and found the cases to be related, but it did not order this action "joined with the remainder of the Kelly case as a related case." Maj. op. at 12. This action could not be joined with any aspect of Kelly's earlier action because that action had been voluntarily dismissed.

I am not saying that the result reached by my colleagues is an imprudent one. It seems silly to hold that Kelly's filing of the earlier action precludes remand under the local controversy exception, given the decidedly local nature of the claims at issue. For whatever reason, though, Congress dictated that remand is required only if "no other class action" has been filed in the preceding three years, and here another class action was filed during that period. I would therefore hold that the district court erred by remanding this case to state court.