dance with the procedures incorporated in HUD's QM definition, HUD says it intends to adopt the CFPB's changes to the exemption for non-profit transactions from the QM standards. However, HUD says it is not adopting the new points-and-fees cure provision adopted by CFPB, but is providing guidance to mortgagees on curing points-and-fees errors prior to insurance endorsement. CFPB's final rule provides a limited, post-consummation cure mechanism for loans that are originated with the expectation of QM status but actually exceed the points-and-fees limit. The CFPB's final rule amends 12 C.F.R. § 1026.43(e)(3) to permit a creditor or assignee to cure an inadvertent excess over the QM points-and-fees limits by refunding to the consumer the amount of excess, under certain conditions.

"[W]hile recognizing the usefulness of a cure provision for these loans, HUD cannot adopt the CFPB's cure provision," HUD said in its final rule, explaining that the CFPB's cure provision "requires that the cured loan meet CFPB's qualified mortgage definition in order to qualify for the cure, but HUD has codified its own definition, which differs. Second, if HUD permitted a FHA lender to return funds to a borrower or pay down the principal balance for a single-family mortgage insured under Title II, the amount returned could result in a violation of the statutorily required borrower minimum cash investment of 3.5 percent or other FHA requirements relating to interested party contributions and the calculation of the maximum insured mortgage value." Plus, HUD explained that the points-and-fees limit for Title II mortgages is a requirement for insurability of the mortgage by FHA, making the impact on FHA as the insurer "substantially different" from the general market. While eschewing the CFPB's cure provision, HUD affirms that "FHA approved lenders are not without the ability to cure errors that occur in origination before submission for insurance endorsement." HUD says that the FHA believes that the existing ability to cure errors is sufficient and is consistent with the attachment of QM status at endorsement. "As such, HUD is not adopting the CFPB's cure provisions and does not believe any further ability to cure is warranted. In summary, HUD's qualified mortgage definition for Title II mortgages, except for manufactured housing and exempted transactions, will continue to use the CFPB's points-and-fees limit at 12 CFR 1026.43(e)(3) as of January 10, 2014 and not include the change published on November 3, 2014. The new HUD rule became effective on Nov. 3, 2014. *Find the rule at* gpo.gov/fdsys/pkg/FR-2014-11-03/pdf/2014-25492.pdf.

GUEST COMMENTARY

SUPREME COURT QUESTIONS ITS JURISDICTION IN CASE ABOUT CAFA JURISDICTION

By Anthony Rollo, Michael Ferachi, and Gabriel A. Crowson

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For the third year in a row, the Court has another Class Action Fairness Act case on its docket, *Dart Cherokee Basin Operating Co., LLC v. Owens*, No. 13-719 (U.S., *certiorari granted* 04/07/14), which was recently argued on October 7, 2014. This interest in CAFA has extended over the past two terms, as the court issued decisions in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014) and *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013).

In *Dart Cherokee*, the plaintiff filed a putative class action in Kansas state court, seeking to represent a class of royalty owners who were allegedly underpaid royalties from Dart Cherokee Basin Operating Company and Cherokee Basin Pipeline. (*See Owens v. Dart Cherokee Basin Operating Co. LLC*, No. 12-4157, 2013 WL 2237740 (D. Kan. 05/21/13). Dart Cherokee removed the suit to federal court under CAFA, alleging in its notice of removal that the amount in controversy was in excess of $8.2 million, well above CAFA's $5 million jurisdictional threshold.

In response to the plaintiff's motion to remand, Dart Cherokee submitted a declaration from its general counsel that outlined Dart Cherokee's calculation of the amount in controversy. The district court, however, granted the plaintiff's motion for remand, holding that Dart Cherokee did not allege all necessary jurisdictional facts in its notice of removal. The district court judge said: "Even assuming that Defendants can now establish the amount in

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controversy exceeds $5 million, they were obligated to allege all necessary jurisdictional facts in the notice of removal."

APPEALS COURTS OFFER NO EXPLANATIONS

Dart Cherokee filed a petition for permission to appeal with the 10th Circuit pursuant to CAFA's discretionary appeal provision at 28 U.S.C. § 1453(c). The 10th Circuit denied Dart Cherokee's petition with a simply stated order that, "upon careful consideration of the parties' submissions, as well as the applicable law, the petition is denied." (*See Dart Cherokee Basin Operating Co., LLC v. Owens*, No. 13-603, 2013 WL 8609250 (10th Cir. 06/20/13). Dart Cherokee then filed a petition for rehearing *en banc*, which was denied by a 4-4 vote, again without any explanation for the denial. (*See Dart Cherokee Basin Operating Co., LLC v. Owens*, 730 F.3d 1234 (10th Cir., *reh'g denied* 2013).

Circuit Judge Harris L. Hartz, however, wrote a several-page dissenting opinion that was joined by the other three circuit judges who likewise voted to grant the petition. The dissent stated that the 10th Circuit had "let stand a district-court decision that will in effect impose in this circuit requirements for notices of removal that are even more onerous than the code pleading requirements that I had thought the federal courts abandoned long ago."

Judge Hartz further commented that the district court's decision "imposes an evidentiary burden on the notice of removal that is foreign to federal-court practice and, to my knowledge, has never been imposed by a federal appellate court." According to Judge Hartz, the removal procedure provisions set up a system whereby a party submits a short and plain statement of the grounds for the court's jurisdiction. Only if the jurisdictional allegations are challenged by the opposing party or the court does the removing party then need to produce proof of the allegations.

The Supreme Court granted Dart Cherokee's petition for writ of *certiorari* on the following question presented: Must a defendant seeking removal to federal court include evidence supporting federal jurisdiction in the notice of removal, or is including the required "short and plain statement of the grounds for removal" enough?

PLEADING REQUIREMENT VS. EVIDENTIARY BURDEN

Given that question, the parties' merits briefs addressed whether the removal provisions set forth a pleading requirement or an evidentiary burden. Dart Cherokee argued that the CAFA removal rules set forth a *pleading* requirement, as 28 U.S.C. § 1446(a) simply provides that the removal notice must contain a "short and plain statement of the grounds for removal."

According to Dart Cherokee, this is a pleading standard akin to Rule 8's notice pleading requirement for original complaints. Dart Cherokee claimed that only when the amount in controversy is challenged by the plaintiff or by the district court does the defendant need to submit evidence to *prove* that the amount at issue exceeds $5 million. Requiring removing defendants to submit evidence with the removal notice would, according to Dart Cherokee, complicate the removal process and significantly burden removing defendants.

Plaintiffs responded by arguing that Dart Cherokee had the damages evidence available at the time it removed the case to federal court. As such, Plaintiffs contended that Dart Cherokee was required to submit the evidence with its removal notice or otherwise provide that evidence to Plaintiffs in the state court proceeding and then wait for an "other paper" in the state court case to exercise its removal rights.

AMICUS PRESENTS AN INTERESTING WRINKLE

Public Citizen argued in an *amicus* brief that the Supreme Court did not have jurisdiction to review the merits issue, because the Court's jurisdiction is generally limited to cases "in the courts of appeal." According to Public Citizen, this case was never "in" the court of appeal, because the 10th Circuit had declined to exercise its discretion to accept the defendants' petition to appeal the district court's remand ruling. Public Citizen emphasized that CAFA's appellate provision states at 28 U.S.C. § 1453(c) that the circuit courts of appeal "may accept" an appeal of an order granting or denying a remand motion in a class action.

CAFA does not require the circuit courts to take the appeal, nor does CAFA require the circuit courts to explain their reasons for declining to accept an appeal. In fact, in denying Dart Cherokee's petition to appeal, the 10th Circuit panel did not give any reasons for its denial. Likewise, in denying Dart Cherokee's *en banc* petition, the 10th Circuit declined to give any reasons.

Public Citizen thus contended that the only thing that the Supreme Court could review was whether the 10th Circuit abused its discretion in denying the petition to appeal. Because the 10th Circuit did not

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give any reasons for its denial, Public Citizen claimed that the Court should dismiss the case as improvidently granted.

In light of Public Citizen's amicus brief, the October 7th oral argument before the Court largely concerned whether the Court has the power to review the remand ruling at issue, even though several members of the Court appeared to agree with the defendants' position on the merits.

Justice Elena Kagan went so far as to comment that she thought most of the court agreed with the defendants' merits arguments, but was unsure how the Court could reach that issue. For now, CAFA followers will have to wait and see whether the Court does reach the merits of the issue or instead dismisses the appeal as improvidently granted.

ALSO IN THE COURTS

QUICK TAKES ON NOTABLE DECISIONS RELATED TO CONSUMER FINANCIAL SERVICES ISSUES

CAFA/Local controversy. *Cedar Lodge Plantation LLC v. CSHV Fairway View LLC, et al.*, No. 14-30735, 2014 WL 4799702 (5th Cir. 09/26/14). The 5th U.S. Circuit Court of Appeals has ruled that plaintiffs cannot defeat federal jurisdiction under the Class Action Fairness Act's "local controversy" exception by adding in-state defendants to properly removed suits and then seeking remand. In a unanimous ruling of first impression, a three-judge panel of the 5th U.S. Circuit Court of Appeals reversed a district court's decision to remand a class action against an apartment complex's out-of-state owners after the plaintiffs added a Louisiana sewage company as a defendant. Even though the sewage company would have defeated federal jurisdiction at the filing stage, the appeals court said, the CAFA exception does not apply retroactively when subsequent events alter a suit's jurisdictional posture.

"It is well-established that the time-of-removal rule prevents post-removal actions from destroying jurisdiction that attached in a federal court under CAFA," Judge Edith H. Jones wrote for the appellate panel, citing *Louisiana v. American National Property & Casualty Co.*, 746 F.3d 633 (5th Cir. 03/26/14). "Thus, what matters for the purpose of determining CAFA jurisdiction is 'the status of an action when filed — not how it subsequently evolves.'" Reversing the trial judge's original ruling, the appeals court panel said the plaintiffs, who live or work in or near the Fairway View Apartments in Baton Rouge, must proceed in federal court with their suit over hazardous sewage leaks they blame on lax oversight by the complex's owners, managers and contractors.

Under CAFA's provision at 28 U.S.C. § 1332(d), class actions that involve at least 100 plaintiffs and $5 million generally belong in federal court as long as there is "minimum diversity" among the parties, meaning at least one plaintiff and one defendant are from different states. But under the local-controversy exception at § 1332(d)(4)(A), federal courts must decline jurisdiction over cases that center on the conduct of a "significant local defendant." That is the angle the plaintiffs pressed as they urged the appeals judges to send the case back to state court. Federal courts must remand any case that implicates the local-controversy exception, no matter the stage of the litigation, they claimed. The panel rejected that "superficially appealing" argument, finding that Congress had anticipated exactly the scenario the case presented and written the CAFA exception to account for it. Under § 1332(d), the local-controversy rule expressly applies only at a lawsuit's initial filing, the appeals court held for the first time. "Allowing [the plaintiffs] to avoid federal jurisdiction through a post-removal amendment would turn the policy underlying CAFA on its head," Judge Jones wrote.

TCPA/Primary jurisdiction doctrine. *Sheehan v. Wells Fargo Bank, N.A.*, No. 1:14-cv-00900, 2014 WL 5529365 (N.D. Ala. 11/03/14); *Beiler v. GC Services, L.P.*, No. 1:13cv869, 2014 WL 5531169 (M.D.N.C. 11/03/14). Two judges in different federal district courts several states apart on the same day denied defendants' motions to stay consumers' putative class actions alleging certain violations of the Telephone Consumer Protection Act by the use of automatic telephone dialing systems to collect debts. Magistrate Judge John J. England III of the Northern District of Alabama, and Judge Thomas D. Schroeder of the Middle District of North Carolina rejected the similar-sounding arguments of Wells Fargo Bank NA and debt collector GC Services that the class actions should be stayed because the Federal Communications Commission has primary jurisdiction in the disputes. Both defendants argued that the FCC's answers to numerous petitions placed by other parties before the regulatory agency would decide their cases — the *Sheehan* case, involving the definition of the "called party" under the TCPA, a matter of first impression with the FCC, and the *Beiler* case, which primarily concerns two issues: (1) whether debt collectors like GCS are exempted under the TCPA, and (2) the nature of "predictive dialers" and ATDS machines.

Magistrate England, in denying the bank's motion to stay in the *Sheehan* case that: "Wells Fargo has not demonstrated the applicability of the primary

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