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Commentary

SUPREME COURT QUESTIONS ITS JURISDICTION IN CAFA CASE

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McGlinchey Stafford attorneys Anthony Rollo, Michael D. Ferachi and Gabriel A. Crowson discuss the U.S. Supreme Court's pending Class Action Fairness Act case, its third in as many years.

For the third year in a row, U.S. the Supreme Court has a Class Action Fairness Act case on its docket: *Dart Cherokee Basin Operating Co. v. Owens*, No. 13-719, *cert. granted* (U.S. Apr. 7, 2014), which was argued Oct. 7.

The justices' 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 Insurance 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 property owners who were allegedly underpaid royalties from Dart Cherokee Basin Operating Co. and a corporate affiliate. *Owens v. Dart Cherokee Basin Operating Co. et al.*, No. 5:12-cv-04157, 2013 WL 2237740 (D. Kan. May 21, 2013).

Dart Cherokee removed the suit to federal court under CAFA, 28 U.S.C. § 1332(d), claiming in its notice of removal that the amount in controversy exceeded $8.2 million, well above CAFA's $5 million jurisdictional threshold.

After the plaintiff sought remand, Dart Cherokee submitted a declaration from its general counsel that outlined the company's calculation of the amount in controversy.

The District Court, however, granted the remand motion, calling Dart Cherokee's removal notice defective.

“Even assuming that defendants can now establish the amount in controversy exceeds $5 million, they were obligated to allege all necessary jurisdictional facts in the notice of removal,” U.S. District Judge Julie A. Robinson wrote.

Appeals courts offer no explanations

Dart Cherokee filed a petition for permission to appeal the District Court's ruling to the 10th U.S. Circuit Court of Appeals under CAFA's “discretionary appeal” clause, 28 U.S.C. § 1453(c), which provides that federal appeals courts “may” review an order granting or denying remand in a class action.

The appeals court denied Dart Cherokee's petition in a one-sentence order. *Dart Cherokee Basin Operating Co. v. Owens*, No. 13-603, 2013 WL 8609250 (10th Cir. June 20, 2013).

Dart Cherokee then filed a petition for rehearing *en banc*, which was denied by a 4-4 vote, again without explanation. *Dart Cherokee Basin Operating Co. v. Owens*, No. 13-603, 730 F.3d 1234 (10th Cir. Sept. 17, 2013).

Circuit Judge Harris L. Hartz, however, wrote a lengthy dissent joined by the other three circuit judges who had likewise voted to grant the rehearing petition.

***2** According to the dissent, 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."

The lower 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," Judge Hartz added.

According to Judge Hartz, CAFA's removal provisions, 28 U.S.C. § 1446(a), set up a system whereby a party only has to submit a short and plain statement of the grounds for federal jurisdiction. Only if the jurisdictional allegations are challenged does the removing party need to support them with evidence, the judge said.

The Supreme Court granted *certiorari*, agreeing to decide whether the majority or the dissent got the issue right.

Pleading requirement vs. evidentiary burden

In their merits brief to the high court, the parties addressed whether CAFA's removal provisions set forth a pleading requirement or an evidentiary burden.

Dart Cherokee argued that the removal provision sets forth only a pleading requirement, since it expressly requires a removal notice to contain a "short and plain statement of the grounds for removal."

According to Dart Cherokee, the standard resembles the notice-pleading requirement found in Federal Rule of Civil Procedure 8. Only when challenged does the defendant need to submit actual evidence that the stakes exceed $5 million, the company argued.

Requiring removing defendants to submit evidence along with the removal notice would complicate the removal process and significantly burden defendants, Dart Cherokee said.

In their response, the plaintiffs claimed that Dart Cherokee had the damages evidence available at the time it removed the case to federal court. As such, they said, the company was required to submit the evidence with its removal notice or otherwise provide it to the state court plaintiffs before exercising its removal rights.

Amicus *presents an interesting wrinkle*

In an *amicus* brief filed with the high court, the advocacy group Public Citizen Inc. has argued that the Supreme Court does not have subject matter jurisdiction over the merits issue because its jurisdiction is generally limited to cases "in the courts of appeal."

According to Public Citizen, the Dart Cherokee suit was never actually "in" an appellate court because the 10th Circuit declined to exercise its discretionary jurisdiction over the case.

CAFA does not require the circuit courts to accept any appeal, the group argued, and the appeals courts do not even have to explain their reasons for declining a case. In fact, in denying Dart Cherokee's petitions, neither the 10th Circuit panel nor the full court offered any explanation.

The only issue the Supreme Court can review, Public Citizen said, is whether the 10th Circuit abused its discretion by refusing to consider the original appeal. The court should dismiss its earlier *certiorari* order as improvidently granted, the group argued.

***3** The high court heard oral argument Oct. 7, focusing largely on whether the justices have the authority to review the District Court's remand ruling. But several members of the court seemed to signal that they agree with the defendants on the merits.

Justice Elena Kagan, for instance, said she thought most of the court felt that way, but she said she was unsure how the court could reach the merits in light of the case's unusual procedural posture.

For now, CAFA followers will have to wait and see.
Judge: Julie A. RobinsonJudge: Elena Kagan

Footnotes

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