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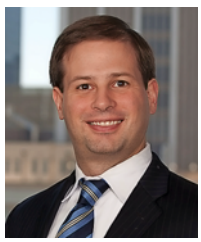
REMOVAL

CLASS ACTION FAIRNESS ACT

The Supreme Court decision in *Dart Cherokee* unequivocally dispels any notion that a presumption against removal applies in Class Action Fairness Act cases, a development that portends to ''drastically change the landscape for CAFA removal litigation for years to come,'' attorneys Anthony Rollo, Michael D. Ferachi and Gabriel A. Crowson say.

Supreme Court Rejection of Presumption Against Removal of CAFA Cases In *Dart Cherokee* Opens Door to Presumption in Favor of CAFA Removal



BY ANTHONY ROLLO, MICHAEL D. FERACHI AND GABRIEL A. CROWSON

While most articles about the U.S. Supreme Court's decision in *Dart Cherokee* have focused on evidentiary standards for the notice of removal, and whether the U.S. Supreme Court even had jurisdiction to decide the case, we posit that the most important portion of the decision is the Court's pronouncement that there is no antiremoval presumption for CAFA cases.

We assert that the Court's decision provides a clear path to argue that there is a **presumption in favor of CAFA removal**.

For the third year in a row, the U.S. Supreme Court has issued a decision regarding the Class Action Fairness Act (''CAFA''). *See Dart Cherokee Basin Operating Co., LLC v. Owens*, 2014 BL 350806, 135 S. Ct. 547, (Dec. 15, 2014). The *Dart Cherokee* opinion followed the Court's decisions in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 2014 BL 10404, 134 S. Ct. 736 (2014), and *Standard Fire Ins. Co. v. Knowles*, 2013 BL 72103, 133 S. Ct. 1345 (2013), from the past two terms.

In *Dart Cherokee*, the Court concluded that a defendant's notice of removal need not contain evidence of CAFA's $5 million amount in controversy, but instead ''need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.'' According to the Court, only if the plaintiff or the court challenges the defendant's allegations must the defendant then submit evidence to establish the jurisdictional amount. The Court's holding on this issue does not come as much of a surprise to most class action practitioners, as it was widely viewed that the Tenth Circuit requiring evidence at the removal stage was inconsistent with the removal procedural provisions.

In addition, although *Dart Cherokee* was a narrow 5-4 decision, the Court does not appear to have been divided on the pleading versus evidence issue. Instead,

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the majority opinion and the lead dissenting opinion traded jabs on whether the Court should even reach the merits of the case. This is because the Tenth Circuit judgment at issue denied Dart Cherokee's petition for appeal without giving any actual reasons for the denial. The majority opinion concluded that the Tenth Circuit abused its discretion by declining to review a clearly erroneous district court remand ruling, and thus the Supreme Court had jurisdiction to reach the merits.

Most of the commentary following the *Dart Cherokee* opinion has focused on the Court's discussion on why it could decide the merits of the case, particularly in light of the spirited dissent filed by Justice Scalia. What has largely been overlooked, however, is a short passage in the majority opinion that unequivocally rejected the use of any presumption against removal in CAFA cases. *See* Slip Op. at 7 (''It suffices to point out that no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court.'').

Not only did the Court definitively rule out any antiremoval presumption in CAFA cases, by citing certain portions of CAFA's legislative history, the Court has effectively opened the door to defense arguments that a presumption in favor of removal should apply for CAFA removals. At a minimum, the Court has wiped the slate clean on this issue, paving the way for defendants to litigate whether a presumption in favor of removal should apply.

Background of *Dart Cherokee* Litigation

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 (collectively ''Dart Cherokee''). *See Owens v. Dart Cherokee Basin Operating Co. LLC*, 2013 BL 133655, No. 12-4157 (D. Kan. May 21, 2013).

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. *Id.* In response to the plaintiff's motion to remand, Dart Cherokee submitted a declaration from its General Counsel, which outlined Dart Cherokee's calculation of the amount in controversy. *Id.* 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. *Id.* (''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.'').

Dart Cherokee filed a petition for permission to appeal with the Tenth Circuit pursuant to CAFA's discretionary appeal provision, 28 U.S.C. § 1453(c). The Tenth Circuit denied Dart Cherokee's petition with an order that simply stated 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 (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 any explanation for the denial. *See Dart Cherokee Basin Operating Co., LLC v. Owens*, 730 F.3d 1234, 2013 BL 249291 (10th Cir. 2013).

The Supreme Court granted Dart Cherokee's petition for writ of certiorari as to 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? In light of the question presented, 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.

An amicus brief filed by Public Citizen, Inc., however, added a very interesting wrinkle. Public Citizen argued 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 Tenth 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—28 U.S.C. § 1453(c)—states that the circuit courts of appeal ''may accept'' an appeal of an order granting or denying a remand motion in a class action.

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Thus, Public Citizen contended that the only thing that the Supreme Court could review was whether the Tenth Circuit abused its discretion in denying the petition to appeal. Because the Tenth Circuit did not give any reasons for its denial, Public Citizen claimed that the Court should dismiss the case as improvidently granted.

The *Dart Cherokee* Opinion

Although the Court's decision was split 5-4, the removal pleading issue was not the divisive question. Instead, in light of Public Citizens' amicus brief, the Court was split on whether it even had jurisdiction over the case. Writing for the majority, Justice Ginsburg stated that by letting stand a district court remand ruling that was legally erroneous, the Tenth Circuit did abuse its discretion.

The majority opinion emphasized that by denying review, the Tenth Circuit kept in place circuit court precedent that required removing defendants to submit evidence with the removal notice, which the majority had already concluded was not the correct legal principle. On the other hand, Justice Scalia and the dissenters would have dismissed the case as improvidently granted, reasoning that the Tenth Circuit could have denied appellate review for any number of reasons and, thus, the Court cannot determine whether the Tenth Circuit abused its discretion in denying the appeal.

With respect to the merits issue, the Court concluded that a defendant's notice of removal need not contain evidence of CAFA's $5 million amount in controversy, but instead ''need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.'' According to the Court, only if the plaintiff or the court challenges the defendant's allegations must the defendant then submit evidence to establish the jurisdictional amount. The Court reasoned that the removal procedure statute—28 U.S.C. § 1446—''tracks the general pleading requirements stated in Rule 8(a) of the Federal Rules of Civil Procedure.'' *See* Slip Op. at 5. In that regard, the Court stated that by borrowing the pleading requirements from Rule 8(a), Congress intended to simplify the pleading requirements for removal. *Id.*

In reaching its conclusion on the merits, the Court emphasized that the district court had ''relied, in part, on a purported 'presumption' against removal.'' *See* Slip. Op. at 7. On that point, the Court stated that the Court ''need not here decide whether such a presumption is proper in mine-run diversity cases.'' *Id.*

The Court confirmed that ''it suffices to point out that no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court.'' *Id.* (citing *Standard Fire Ins. Co. v. Knowles*, 2013 BL 72103, 568 U.S. __ (slip op. at 6) (2013) (''CAFA's primary objective'' is to ''ensure 'Federal court consideration of interstate cases of national importance.' '' (quoting § 2(b)(2), 119 Stat. 5)); S. Rep. No. 109-14, p. 43 (2005) (''CAFA's provision should be read broadly, ***with a strong preference*** that interstate class actions should be heard in a federal court if properly removed by any defendant.'') (emphasis added).

Does *Dart Cherokee* Permit a Presumption in Favor of CAFA Removal?

The lone paragraph in *Dart Cherokee* rejecting the antiremoval presumption is particularly significant in a number of respects that are not necessarily expressed in the actual opinion. More particularly, in rejecting the antiremoval presumption, the Court cited with approval both the Findings & Purposes section of the CAFA statute and the Senate Judiciary Committee Report that accompanied CAFA's enactment.

In CAFA's Findings & Purposes, Congress made it clear that the ''concept of diversity jurisdiction as intended by the Framers of the United States Constitution'' had been undermined because state courts had kept ''cases of national importance out of Federal court.'' *See* 28 U.S.C. § 1711, Historical and Statutory Notes. As such, Congress stated that one of the purposes of CAFA was to ''restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.'' *Id.*

Likewise, the Senate Judiciary Committee Report (the ''Committee Report''), which was published on February 28, 2005, states that if a purported class action is removed under CAFA, ''the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied).'' *See* S. Rep. 109-14, at 42-43 (2005). The Committee Report further stated that if there is any uncertainty about whether the jurisdictional amount has been satisfied, ''the court should err in favor of exercising jurisdiction over the case.'' *Id.*

The Committee Report further made clear that CAFA's diversity jurisdictional provisions ''should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.'' *Id.*[1]

Shortly after CAFA's enactment, some federal district courts initially followed CAFA's legislative history and placed the burden of proof on plaintiffs to demonstrate that CAFA removal was not proper. *See, e.g., Berry v. Am. Express Publ'g Corp.*, 381 F. Supp. 2d 1118, 1122 (C.D. Cal. 2005) (finding that the ''Committee Report expresses a clear intention to place the burden of removal on the party opposing removal to demonstrate that an interstate class action should be remanded to state court''); *Natale v. Pfizer*, 379 F. Supp. 2d 161, 168 (D. Mass. 2005) (same); *Dinkel v. General Motors Corp.*, 400 F. Supp. 2d 289, 294-95 (D. Me. 2005) (same).

Over time, however, this issue percolated through the circuit courts, and those courts eschewed CAFA's legislative history and applied a presumption against removal. *See, e.g., Romo v. Teva Pharmaceuticals USA,*

[1] While not cited in the *Dart Cherokee* opinion, CAFA's legislative history also included a House Sponsors' Statement, which was inserted into the House record by Representative F. James Sensenbrenner. *See* 151 Cong. Rec. H723-02, at H727-29 (daily ed. Feb. 17, 2005). Like the Senate Judiciary Committee Report, the House Sponsors' Statement also provided that CAFA ''should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court,'' and that if the court is uncertain about whether the jurisdictional amount has been satisfied, ''the court should err in favor of exercising jurisdiction.'' *Id.*

Inc., 731 F.3d 918, 921 (9th Cir. 2013) (''A corollary precept is that we apply a presumption against removal and construe any uncertainty as to removability in favor of remand.'') (citing *Scimone v. Carnival Corp.*, 720 F.3d 876, 882 (11th Cir. 2013)); *see also Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 686 (9th Cir. 2006) (''We join our sister circuit and hold that CAFA's silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction.''); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (''But when the legislative history stands by itself, as a naked expression of ''intent'' unconnected to any enacted text, it has no more force than an opinion poll of legislators—less, really, as it speaks for fewer. Thirteen Senators signed this report and five voted not to send the proposal to the floor. Another 82 Senators did not express themselves on the question; likewise 435 Members of the House and one President kept their silence.''); *Westerfeld v. Independent Processing, LLC*, 621 F.3d 819, 821 (8th Cir. 2010) (''Although CAFA expanded federal jurisdiction over class actions, it did not alter the general rule that the party seeking to remove a case to federal court bears the burden of establishing federal jurisdiction.'').[2]

Thus, by the time that *Dart Cherokee* reached the Supreme Court, CAFA removal procedure was fairly settled such that courts would place the initial burden on defendants to prove that CAFA's jurisdictional provisions applied, primarily the $5 million amount-in-controversy requirement. Once defendants discharged that burden, then courts generally required plaintiffs to show that one of CAFA's exceptions applied. *See, e.g., Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007) (''Consistent with the plain language of the statute and this well-established rule, we conclude that although the removing party bears the initial burden of establishing federal jurisdiction under § 1332(d)(2), once federal jurisdiction has been established under that provision, the objecting party bears the burden of proof as to the applicability of any express statutory exception under § § 1332(d)(4)(A) and (B).''); *see also Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 153 (3d Cir. 2009). In conducting this analysis, as noted above, courts would frequently invoke a presumption against removal, and if there was any uncertainty would err in favor of remanding the case to state court.

In light of *Dart Cherokee*, this analytical framework is no longer applicable. For one thing, *Dart Cherokee* makes it crystal clear that courts can no longer invoke a presumption against removal in CAFA litigation. This also likely means that courts cannot err in favor of remand if there is a doubt whether CAFA's jurisdictional requirements have been satisfied.

Perhaps, most important, by citing with approval the Committee Report, the Court has effectively overruled all the decisions that had declined to consider the Committee Report. Instead, the directive from the Supreme Court is that there is a ''strong preference'' that interstate class actions should be heard in federal court.

Put simply, *Dart Cherokee* has hit the ''reset'' button on the burden-of-proof issue, which will undoubtedly reignite the litigation concerning the use of CAFA's legislative history and, in particular, whether a party opposing jurisdiction has the burden of demonstrating that CAFA jurisdiction does not exist.[3] In connection with that inevitable litigation, courts will have to wrestle with the interplay between CAFA, CAFA's legislative history, and the amendments to the removal statute put into place as part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (the ''JVCA'').

Among other things, the JVCA amended 28 U.S.C. § 1446 to provide that removal ''is proper on the basis of an amount in controversy'' asserted by the defendant in its removal notice ''if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).'' *See* 28 U.S.C. § 1446(c)(2)(B). Although this provision refers to a preponderance of the evidence analysis, the statute is silent as to which party bears the initial burden. The statue is also silent as to whether the court should err in favor of, or against removal.

Addressing this provision, *Dart Cherokee* held that when there is a challenge to a defendant's assertion of the amount in controversy, ''***both sides*** submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied.'' *See* Slip Op. at 6 (emphasis added). Tellingly, the Court did not hold that the defendant has the initial burden of proof on this issue, instead making it clear that ''both sides'' should submit proof of the amount-in-controversy.[4]

In addition, to the extent Section 1446(c) applies to CAFA cases, it only concerns the amount in controversy requirement, not the bevy of other CAFA-related issues that are frequently litigated in a CAFA removal battle, such as whether any of CAFA's exceptions apply. As instructed by the Supreme Court, those issues should get decided under the prism of a ''strong preference'' that ''interstate class actions'' be heard in federal court.

Conclusion

In sum, a short passage in the Supreme Court's *Dart Cherokee* opinion has the potential to drastically change the landscape for CAFA removal litigation in the years to come.

[2] A thorough discussion of the case law that developed shortly after CAFA's enactment on the burden of proof issue can be found in a law review article published by one of the authors of this article. *See* H. Twiford, A. Rollo, and J. Rouse, *CAFA's New ''Minimal Diversity'' Standard for Interstate Class Actions Creates a Presumption That Jurisdiction Exists, With The Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 Miss. C. L. Rev. 7 (2005).

[3] Indeed, a few circuit courts have already cited Dart Cherokee's holding that there is no longer anti-removal presumption in CAFA cases. *See Dudley v. Eli Lilly & Co.*, 2014 BL 364504 (11th Cir. Dec. 29, 2014); *Ibarra v. Manheim Investments, Inc.*, 2015 BL 3272 (9th Cir. Jan. 8, 2015).

[4] Moreover, it is debatable whether Section 1446(c) applies to CAFA removals, given that it specifically refers to the jurisdictional amount under Section 1332(a), the general diversity statute, and not Section 1332(d), the CAFA diversity statute. The Court in *Dart Cherokee* noted this very point. *See* Slip Op. at 6 n.1 (''We assumed, without deciding, a point the parties do not dispute: Sections 1446(c)(2) and 1446(c)(2)(B) apply to cases removed under § 1332(d)(2), and removal is proper if the amount in controversy exceeds $5 million, the amount specified in § 1332(d)(2).'').

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The Court has unequivocally dispelled any notion that a presumption against removal applies for CAFA cases. The Court has wiped the slate clean with respect to whether defendants could invoke a presumption of federal court jurisdiction, given that the Court has blessed the congressional ''preference that interstate class actions'' be heard in federal court.