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GUEST COMMENTARY

DART CHEROKEE PORTENDS LITIGATION OVER PRESUMPTION IN FAVOR OF CAFA REMOVAL

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The U.S. Supreme Court, in its December 2014 decision in *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014), concluded that a defendant's notice of removal need not contain evidence of the Class Action fairness Act's $5 million amount in controversy but "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.

This holding has not been considered particularly controversial, as most class action practitioners believed that the 10th U.S. Circuit Court of Appeals rule requiring evidence at the removal stage was inconsistent with the procedural provisions governing removal. Most importantly, in supporting the 5-4 holding, the majority rejected the use of any presumption against removal in CAFA cases.

"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," wrote Justice Ruth A. Ginsburg for the majority.

We believe that this is the most significant aspect of the *Dart Cherokee* opinion. The Court not only definitively ruled out any antiremoval presumption in CAFA cases but also -- by citing certain portions of CAFA's legislative history -- the Top Court has given defendants a chance to argue 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.

The litigation's history

The case was initiated by Brandon W. Owens, who 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 Co. and Cherokee Basin Pipeline. (*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, which outlined Dart Cherokee's calculation of the amount in controversy.

The district court granted the plaintiff's motion for remand, holding that Dart Cherokee did not allege all necessary jurisdictional facts in its notice of removal. "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," the district court wrote.

Dart Cherokee filed a petition for permission to appeal with the 10th Circuit pursuant to CAFA's discretionary appeal provision, 28 U.S.C. st1453(c). A split 10th Circuit appellate panel 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." (*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 e*n banc*, which was denied by a 4-4 vote, again without any explanation for the denial. (*Dart Cherokee Basin Operating Co., LLC v. Owens*, 730 F.3d 1234 (10th Cir. 2013).)

Pleading requirement or evidentiary burden?

The Supreme Court granted Dart Cherokee's petition for writ of *certiorari* to consider whether a defendant seeking removal to federal court must include evidence supporting federal jurisdiction in the notice of removal, or whether including the required "short and plain statement of the grounds for removal" is enough. Given 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. st1446(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.

The case took an unusual turn after Public Citizen Inc. filed an *amicus* brief, which 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 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, st1453(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. Thus, Public Citizen 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 give any reasons for its denial, Public Citizen claimed that The Court should dismiss the case as improvidently granted.

10th Circuit abused its discretion

Public Citizen's arguments about The Court's jurisdiction ultimately caused a split decision. The Court did not appear divided on the removal pleading issue, but instead whether it even had jurisdiction to hear the merits of the case. The majority held that by letting stand a district court's remand ruling that was legally erroneous, the 10th Circuit did abuse its discretion. The majority emphasized that by denying review, the appellate panel 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 10th Circuit could have denied appellate review for any number of reasons and, thus, The Court could not determine whether the 10th Circuit abused its discretion in denying the appeal.

The Supreme Court concluded that, on the merits, 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." Only if the plaintiff or the court challenges the defendant's allegations must the defendant then submit evidence to establish the jurisdictional amount.

The majority reasoned that the removal procedure statute, st1446, "tracks the general pleading requirements stated in Rule 8(a) of the Federal Rules of Civil Procedure." 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.

The Court emphasized in its conclusion on the merits that the district court had "relied, in part, on a purported 'presumption' against removal." On that point, the majority stated that The Court "need not here decide whether such a presumption is proper in mine-run diversity cases." 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," citing *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013) ("CAFA's primary objective" is to "ensure 'Federal court consideration of interstate cases of national importance,"' quoting st2(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.*)

Legislative history cited

The Court, in rejecting the antiremoval presumption, approvingly cited both the Findings & Purposes section of the CAFA statute and the Senate Judiciary Committee Report that accompanied CAFA's enactment. CAFA's Findings & Purposes section states 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. st1711, Historical and Statutory Notes.) According to Congress, 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."

Moreover, the Senate Judiciary Committee Report (the "Committee Report"), which was published on Feb. 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."

The report also 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." 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 did not follow CAFA's legislative history and applied a presumption against removal.

- *Romo v. Teva Pharmaceuticals USA, Inc.*, 731 F.3d 918 (9th Cir. 2013), holding that "[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 (11th Cir. 2013)).
- *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006), which held that "[w]e 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 (7th Cir. 2005), holding that "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 (8th Cir. 2010), which held that "[a]lthough 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." [1]

Thus, by the time that *Dart Cherokee* reached the Supreme Court, it was fairly settled as a matter of CAFA removal procedure 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.

If defendants satisfied their initial burden, courts generally then required plaintiffs to show that one of CAFA's exceptions applied. (*See, e.g.*, *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018 (9th Cir. 2007), which said: "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 st1332(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 sst1332(d)(4)(A) and (B);" *see also Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144 (3d Cir. 2009).) As part of this analysis, courts routinely invoked a presumption against removal, which meant that the courts would remand the case to state court if there was any doubt about whether the CAFA requirements had been satisfied.

The change wrought by *Dart Cherokee*

We believe that this analysis is no longer applicable in light of the *Dart Cherokee* Court's pronouncement, stated in no uncertain terms, that there is no antiremoval presumption in CAFA cases -- even if such a presumption applies in run-of-the-mill non-CAFA cases. As such, district courts cannot err in favor of remand if there is a doubt whether CAFA's jurisdictional requirements have been satisfied. And 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.

In sum, *Dart Cherokee* has drastically changed the battlefield 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. Indeed, lower courts have already started to cite *Dart Cherokee*'s recognition of a strong preference in favor of CAFA jurisdiction. (*See Jordan v. Nationstar Mortg., LLC*, 781 F.3d 1178 (9th Cir. 2015), holding that "[i]n light of the Supreme Court's recent opinion in *Dart Cherokee* ... and mindful of Congress' intent to '*strongly favor the exercise of federal diversity jurisdiction of class actions with interstate ramifications,' S. Rep. No. 109-14, at 35 (2005), we agree that the approach to 'federal officer' removal taken in Durham must now be extended to CAFA claims." (*Emphasis added.*).)* [2]

In connection with litigation that will occur on this issue over the next few years, 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 amended st1446 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 st1332(a)." (*See* st1446(c)(2)(B).) The statue is silent as to whether the court should err in favor

or, or against removal. Additionally, although this provision refers to a preponderance of the evidence analysis, the statute is silent as to which party bears the initial burden.

The Court in *Dart Cherokee* addressed this provision. It 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." 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.

Furthermore, to the extent st1446(c) applies to CAFA cases, it only concerns the amount in controversy requirement. It does not include the host 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 be decided with the premise of a "strong preference" that "interstate class actions" be heard in federal court.

The Supreme Court's *Dart Cherokee* opinion has the potential to drastically change the battlefield for CAFA removal litigation in the years to come. The Court flatly rejected any notion that a presumption against removal applies for CAFA cases. And by citing CAFA's legislative history, The Court has made a fresh start 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.

Importantly, the courts that have faced this issue since the *Dart Cherokee* decision are following the Supreme Court's lead and not applying the presumption against removal.

Footnotes

1 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).

2 *See also Dudley v. Eli Lilly & Co.*, 778 F.3d 909 (11th Cir. 2014), which held: "Applying this binding precedent from the Supreme Court, we may no longer rely on any presumption in favor of remand in deciding CAFA jurisdictional questions;" *Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193 (9th Cir. 2014).

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