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The Supreme Court's Dart Cherokee opinion has the potential to drastically change the battlefield for CAFA removal litigation in the years to come, attorneys Anthony Rollo, Michael Ferachi and Gabriel Crowson say. The authors say most courts that have faced this issue since Dart Cherokee are following the Supreme Court's lead and not applying the presumption against removal.

BNA Insights

Is Presumption in Favor of CAFA Removal Gaining Traction Post-*Dart Cherokee?*



By Anthony Rollo, Michael Ferachi and Gabriel Crowson

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The Supreme Court's *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014) opinion has pressed the reset button on CAFA removal, and it has already begun to change the removal of CAFA cases to 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 given defendants a chance to argue that a **presumption in favor of removal should apply for CAFA removals**.

Indeed, post-*Dart Cherokee*, some lower courts have arguably begun to lay the foundation for a presumption in favor of CAFA removal.

The *Dart Cherokee* Opinion

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*, No. 12-4157, 2013 BL 133655 (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.").

The Tenth Circuit subsequently denied Dart Cherokee's petition for appeal 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, 2013 BL 378350 (10th Cir. June 20, 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? Addressing this 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.

Although the Court's decision was split 5-4, the removal pleading issue was not the divisive question. Instead, in light of an amicus brief filed by Public Citizens, 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.

In any event, 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* 135 S. Ct. at 554. 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*, 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).

CAFA's Legislative History Approvingly Cited in *Dart Cherokee*

In rejecting the antiremoval presumption, the Court 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. §1711, 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." *Id*.

Moreover, 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.*

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 but instead applied a presumption against removal. *See, e.g., Romo v. Teva Pharmaceuticals USA, 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."); *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."); *see also* 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) (discussing case law that developed shortly after CAFA's enactment on the burden of proof issue).

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, 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). 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.

Case Law Since *Dart Cherokee*

The *Dart Cherokee* Court 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.

Indeed, lower courts have already started to follow *Dart Cherokee*'s recognition of a ***strong preference*** in favor of CAFA jurisdiction, including *Dart Cherokee's* approval of CAFA's Committee Report. *See Jordan v. Nationstar Mortg., LLC*, 781 F.3d 1178, 1179-80 (9th Cir. 2015) ("In light of the Supreme Court's recent opinion in *Dart Cherokee Basin Operating Co., LLC v. Owens*, __ U.S. __, 135 S. Ct. 547 (2014), and mindful of Congress's 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); *see also Dudley v. Elil Lilly & Co.*, 778 F.3d 909, 912 (11th Cir. 2014) ("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."); *Gallagher v. Johnson & Johnson Consumer Companies, Inc.*, No. 15-6163, 2016 BL 78499 (D.N.J. March 15, 2016) (recognizing that "the presumption against removal does not apply to class actions invoking jurisdiction under the Class Action Fairness Act" because "Congress enacted CAFA to facilitate class actions in federal court, and its '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'") (quoting *Dart Cherokee*, 135 S.Ct. at 554).

As stated by one district court, "CAFA's policy in favor of litigating interstate class actions in federal court trumps the general presumption against removal jurisdiction." *See Mezzadri v. Medical Depot, Inc.*, 113 F. Supp. 3d 1061, 1064 (S.D. Cal. 2015); *see also McElroy v. Cordish Companies, Inc.*, No. 15-390, 2016 BL 80324 (W.D. Ky. March 16, 2016) ("The rule that any doubts as to the propriety of removal must be resolved in favor of remand is inapplicable in the class action context.").

Most recently, the Fifth Circuit appeared to suggest a pro-CAFA removal presumption in its recent opinion in *Arbuckle Mountain Ranch of Texas, Inc. v. Chesapeake Energy Corporation*, 810 F.3d 335 (5th Cir. 2016). In *Arbuckle*, the Fifth Circuit examined an ambiguous complaint suggesting two class definitions, (one a narrow definition and another containing a broad definition) and held that if the pleadings entirely lean towards a broader definition, it should be assumed that the plaintiff intended to define a broader class. *Id.* at 339-343. In its 2-1 decision, the Fifth Circuit found that the broader definition applied, which meant that the plaintiffs could not rely on CAFA's local controversy exception to escape CAFA removal. As part of its opinion, the majority remarked that the plaintiffs bore the burden of establishing the local controversy exception and that,

as such, courts must "rule in favor of exercising jurisdiction when faced with uncertainty." *Id.* at 338 n.3. The majority also reasoned that its conclusions was supported by the "need to resolve lingering doubts in favor of exercising federal jurisdiction when an exception to jurisdiction is asserted." *Id.* at 342.

The dissenting opinion took issue with this analysis, by stating that "the law of this circuit does not require such a presumption in favor of federal jurisdiction, nor should it." *Id.* at 343; *see also id.* at 346 ("The majority opinion is most troubling when it enshrines a presumption against the local controversy exception in this circuit's precedent."). The dissent acknowledged that the Supreme Court in *Dart Cherokee* had held that "no antiremoval presumption attends cases invoking CAFA," but the dissent nonetheless stated that "we should not go further and announce a pro-removal presumption, whether for CAFA as a whole or as to the local controversy exception." *Id.* at 347. Further, the dissent concluded by remarking that "even if CAFA does require that courts 'resolve lingering doubts' against application of the local controversy exception, considerations of federalism and comity are not jettisoned entirely in the CAFA context." *Id.* (quoting *Hood ex rel. Mississippi v. JPMorgan Chase & Co.*, 737 F.3d 78, 84-85 (5th Cir. 2013); 14A Charles Alan Wright, et al., *Federal Practice & Procedure* §3705.1).

The Fifth Circuit subsequently denied the plaintiff's petition for *en banc* hearing in *Arbuckle* but did stay issuance of the mandate pending the plaintiff's petition for certiorari to the U.S. Supreme Court. The Plaintiffs recently filed a petition for certiorari, which has been docketed by the U.S. Supreme Court as Case No. 15-1376. Separately, the U.S. Supreme Court recently denied certiorari in a separate matter in which the petitioning party argued that the Fifth Circuit neglected to apply a pro-removal presumption in accordance with *Dart Cherokee*. *See Eagle US 2 L.L.C. v. Abraham*, No. 15-1135 (U.S. cert petition filed March 10, 2016), *cert denied* May 16, 2016.

In any event, as demonstrated by the dissenting opinion in *Arbuckle*, there will likely be litigation as to whether *Dart Cherokee* permits courts to invoke a presumption in favor of CAFA-removal, consistent with CAFA's Findings & Purposes Section and CAFA's legislative history. As of now, it appears that courts are adhering to *Dart Cherokee's* holding that no anti-removal presumption applies in CAFA removal cases. Courts have also been mindful of the fact that *DartCherokee* cited with approval CAFA's Committee Report, which made it clear that there should be a strong preference in favor of CAFA removal. While the issue is far from settled and may be re-visited by the Supreme Court, *Dart Cherokee* has laid the groundwork for courts to employ a pro-CAFA removal presumption.

Conclusion

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.

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