

## CAFA Removal Procedure At Center Stage In Dart Cherokee

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The oral arguments earlier this week in *Dart Cherokee Basin Operating Co. v. Owens*, a U.S. Supreme Court case involving removal procedures under the Class Action Fairness Act, took an interesting and potentially surprising turn. The issue presented in *Dart Cherokee* is whether a defendant who wishes to remove a case to federal court under CAFA is required to submit evidence supporting federal jurisdiction along with the notice of removal. Based on the oral arguments, the answer will be no — defendants need not attach evidence to a notice of removal, but only if the court concludes that it has the power to reach the merits.

In most circuits, when a defendant seeks to remove a class action to federal court under CAFA, all the defendant has to do is file a notice of removal alleging that CAFA's jurisdictional requirements have been satisfied — most significantly, that the amount in controversy exceeds \$5 million. More often than not, plaintiffs who, as Justice Ruth Bader Ginsburg put it memorably during oral argument, are “looking for big bucks” do not contest that showing. Of course, sometimes plaintiffs resist removal by moving for a remand to state court. In such situations, the defendant — who bears the burden of proving that federal jurisdiction exists — can come forward with evidence in opposing removal, and plaintiffs can contest that showing, including by responding with their own evidence.

But the prevailing rule in the Tenth Circuit is different. There, district courts, applying Tenth Circuit precedent, routinely hold that a defendant must attach evidence supporting removal to the notice of removal itself. That can be challenging for defendants, who typically are required to file a removal notice within 30 days of being served with a complaint — and the 30-day deadline is usually, although not always, mandatory and jurisdictional.

In *Dart Cherokee*, the defendant did not do so. Instead, it removed the case and alleged in its notice of removal that the amount in controversy exceeded \$8.2 million (i.e., that is, greater than CAFA's \$5 million threshold). After the plaintiff moved to remand, the defendant submitted uncontested evidence in opposition to the remand motion to shore up the allegation that the amount in controversy had been met. The district court remanded the case to state court, concluding that the evidence defendant submitted was too late to be considered. The defendant sought leave to appeal under 28 U.S.C. Section



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1453(c), which provides that, for removals under CAFA, “a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the state court from which it was removed.” A divided panel of the Tenth Circuit denied leave to appeal, and rehearing en banc was denied by a divided 4-4 vote, over a vigorous dissent by Judge Harris Hartz.

The Supreme Court granted certiorari, presumably to resolve the lopsided split among the circuits. Oral arguments revealed two things. First, if the Supreme Court reaches the merits of the issue presented, Dart Cherokee will almost certainly win. Not one justice asked questions reflecting any sympathy for the Tenth Circuit’s rule. To the contrary, the justices who spoke about the issue seemed to find it an easy one. The statute governing notices of removal, 28 U.S.C. Section 1446, provides that “[a] defendant ... desiring to remove any civil action from a state court shall file in the district court of the United States ... a notice of removal ... containing a short and plain statement of the grounds for removal ...” As Justice Ginsburg pointed out at oral argument, that language tracks Federal Rule of Civil Procedure 8(a), which governs pleadings. Under Rule 8, it is clear that a complaint must have sufficient factual allegations but need not be — and rarely is — accompanied by evidence.

That said, it is possible the Supreme Court may not answer the question at all. Why not? The potential wrinkle — one that received the most air time during oral argument — has to do with whether the underlying merits have properly been presented to the Supreme Court at all. And the credit (or blame) for this wrinkle belongs to Public Citizen, whose amicus brief in support of the respondent first raised this question.

In its amicus brief, Public Citizen first argues that the Supreme Court lacks any jurisdiction to consider the case at all. Under 28 U.S.C. Section 1254, the Supreme Court has jurisdiction to review only “[c]ases in the court of appeals”; Public Citizen contends that because the Tenth Circuit denied leave to appeal, the case was never “in” the court of appeals. At the argument, the justices showed little sympathy for this position, but many justices seemed intrigued by Public Citizen’s backup position, which was that all that was “in” the Tenth Circuit was whether leave to appeal should be granted, and that issue is one that is reviewed for an abuse of discretion.

In assessing that more limited question — whether the Tenth Circuit abused its discretion in denying review — the justices seemed conflicted. On the one hand, if the Tenth Circuit agreed with the district court on the merits, then (assuming that Dart Cherokee is right about the merits) the Tenth Circuit’s refusal to review the district court’s order rested on an error of law, which always amounts to abuse of discretion. On the other hand, if the denial rested on other factors (e.g., docket congestion, factual issues, lack of interest, etc.) then it seems less likely that an abuse of discretion could be found.

So will the court reach the underlying merits in Dart Cherokee? My own take is that it’s a toss-up. For most practitioners, it would be a bizarre result indeed if the oral argument revealed that there is an easy answer to the question presented but, for far more complicated reasons, the Supreme Court cannot deliver that answer. As Justice Kagan put it to Dart Cherokee’s counsel after grilling him on jurisdictional issues: “I sympathize with you. Because the next half hour” — in which counsel for respondents would argue — “is going to reveal that, actually, most of us agree with you on the merits,” or, at minimum, that “I agree with you on the merits.”

Furthermore, the Supreme Court’s past practice suggests that whether or not the court of appeals grants leave to appeal should not be an obstacle to the Supreme Court’s plenary review of the merits. After all, just last term, a unanimous Supreme Court held in *Standard Fire Insurance Co. v. Knowles* that an order remanding the case to state court violated CAFA in a case where the Eighth Circuit, just like the

Tenth Circuit here, denied the defendant leave to appeal the district court's remand order.

Moreover, if Public Citizen is right that a court of appeals can insulate questions arising under CAFA from Supreme Court review by denying leave to appeal, that will create perverse incentives for the lower courts and may hamper the development of uniform rules governing CAFA removals — a result that seems at odds with CAFA's purpose of ensuring that cases of national importance are easily removed to federal court. Indeed, it is telling that Public Citizen's brief focuses entirely on the jurisdictional issue, avoiding any effort to defend the judgment on the merits.

Will the Supreme Court answer the issue presented? We'll have to wait and see.

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