

## Justices Question Their Powers In Class Action Removal Row

By **Keith Goldberg**

*Law360, New York (October 07, 2014, 8:05 PM ET)* -- The standard for transferring class actions from state to federal court was at the center of U.S. Supreme Court oral arguments Tuesday, but the case before the justices might just turn on whether the high court has the authority to correct a Tenth Circuit ruling that heightened the standard and split from at least seven other circuits.

In a case with the potential to affect a broad swath of disputes ranging from class actions to mass torts, the high court in April granted a petition for writ of certiorari filed by Dart Energy Corp. Dart argued that the Tenth Circuit erred when it upheld a decision that Dart hadn't provided enough evidence to support its bid to transfer a class action over oil and gas royalties to federal court and couldn't cure the defect by submitting evidence later on. Royalty owner Brandon Owens had brought the suit in Kansas state court.

However, at Tuesday's oral arguments, many justices were more consumed with whether they had the jurisdiction to review the Tenth Circuit's decision. A divided three-judge panel denied Dart's petition to appeal the district court ruling without ruling on its merits in June 2013, and the appeals court denied Dart's petition for a rehearing en banc in a 4-4 decision in September.

Essentially, the Tenth Circuit made no decision on the merits of the underlying case, Justice Antonin Scalia told Alston & Bird LLP partner and Dart attorney Nowell Berreth, questioning his assertion that the Supreme Court can review any aspect of an appeals court decision.

"We can't override their judgment not to take it unless there is something unlawful about that judgment," Justice Scalia said. "You give us too much credit, you know, we don't have total power to make decisions."

Berreth argued the dissent authored by U.S. Circuit Judge Harris L. Hartz in the en banc rehearing denial noted that the district court felt constrained by preexisting Tenth Circuit precedent.

"A classic abuse of discretion is an error of law," Berreth told the court. "And there was an error of law here because the district court felt constrained."

That's assuming that appeals court only make merits determinations when they decide whether to take an appeal, Justice Elena Kagan replied.

"And if that's all that appeals courts were doing when they decide whether to take an appeal, then you would be right," Justice Kagan said. "But, in fact, we know from everything we do every day that when a

court decides to take something or not to take something, they are not just making a merits evaluation. They are doing a thousand other things as well about how they think it's best to arrange their docket. And what we don't know is whether the Tenth Circuit here did one of those things.”

Attorneys have been closely watching the Dart case, with many expecting the Supreme Court to side with Dart’s contention that the Tenth Circuit’s ruling splits with at least seven other circuit courts that have concluded that the notice of removal to federal court must satisfy only a notice-pleading standard — which requires a “short and plain statement of the grounds for removal.”

But the jurisdictional question has thrown a major wrench into what was previously thought to be a pretty straightforward question presented to the court, case watchers told Law360 on Tuesday.

“I would say it’s a tossup as to whether the court gets to the merits,” said Mayer Brown LLP litigation partner Archis Parasharami, who attended the oral arguments. “There are strong arguments that it should, but clearly, the court had strong questions about whether it would get to the merits.”

If the court does get to the merits of the case, Tuesday’s oral arguments suggested that a majority of justices would side with Dart.

“Do you pay any attention at all to the obvious purpose of the Class Action Fairness Act, which was to get cases out of the state courts and into the federal courts?” Justice Ruth Bader Ginsburg quizzed Owens attorney Rex Sharp. “Usually, we don't have that strong federal policy of having the adjudication in the federal court.”

In fact, Justice Kagan all but proclaimed that a majority was in Dart’s corner during her questioning of Berreth.

“The next half hour is going to reveal that, actually, most of us agree with you on the merits,” she said.

Yet if the Supreme Court decides it doesn’t have jurisdiction, not only would it heap new evidentiary burdens on defendants and new administrative burdens on state and federal courts within the Tenth Circuit, but attorneys say it could incentivize appeals courts to not grant reviews of certain class actions, knowing that the cases’ underlying issues would be insulated from Supreme Court review.

“What if there’s a renegade court of appeals that chooses, for convenience or otherwise, to deny a petition?” said Kaye Scholer LLP counsel Alan Rothman. “That’s a troubling position for the Supreme Court to issue a blanket decision saying ‘We cannot review a denial of a petition seeking permission to appeal.’”

In a way, the case before the Supreme Court isn’t even about transferring class actions from state to federal court anymore, attorneys say.

“It’s a fascinating dispute over the Supreme Court’s power to review appeals arising under CAFA when the court of appeals fails to take up the case itself,” Parasharami said. “It’s the rare case where the merits seem so easy, but the gateway question seems comparatively much harder.”

Dart is represented by Nowell D. Berreth and Brian D. Boone of Alston & Bird LLP and Matthew J. Salzman, Molly Walsh, David E. Bengtson and Jordan E. Kieffer of Stinson Leonard Street LLP.

Owens is represented by Rex A. Sharp and David E. Sharp of Gunderson & Sharp LLP; John F. Edgar of Edgar Law Firm LLC; and Grady Young of Southeast Kansas Legal Associates PA.

The U.S. Chamber of Commerce, which filed an amicus brief on behalf of Dart, is represented by John H. Beisner, Jessica D. Miller and Geoffrey M. Wyatt of Skadden Arps Slate Meagher & Flom LLP and Kate Comerford Todd and Tyler R. Green of the U.S. Chamber Litigation Center Inc.

The case is Dart Cherokee Basin Operating Co. LLC et al. v. Brandon W. Owens, case number 13-719, in the U.S. Supreme Court.

--Editing by John Quinn and Philip Shea.

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