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Commercial Litigation

December 2014

The United States Supreme Court Holds That a Defendant's Notice of Removal Need Only Include a "Plausible Allegation" That the Amount in Controversy Exceeds the US$5 Million Jurisdictional Threshold

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On December 15, 2014, the US Supreme Court issued its opinion in *Dart Cherokee Basin Operating Co., LLC, et al. v. Owens*.[1] Writing for the 5 – 4 majority, Justice Ginsberg held that a defendant's notice of removal pursuant to the Class Action Fairness Act of 2005 ("CAFA") "need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold."[2] Accordingly, defendants need not offer evidence in their notices of removal establishing that the amount in controversy exceeds US$5 million.[3] Rather, just as a "plaintiff's amount-in-controversy allegation is accepted if made in good faith," a defendant's amount-in-controversy allegation should also "be accepted when not contested by the plaintiff or questioned by the court."[4] And since "a dispute about a defendant's jurisdictional allegations cannot arise until after the defendant files a notice of removal containing those allegations," evidence submitted by defendants *after* the notice of removal is timely.[5] Thus, it was error for the district court to remand the *Dart Cherokee* case to state court based on the lack of an evidentiary submission in the notice of removal, and an abuse of discretion for the Tenth Circuit to decline review of the remand order.[6]

Writing for the four dissenters, Justice Scalia argued that the Court should not have taken the case since it did not know why the Tenth Circuit refused to review the lower court ruling.[7] Justice Thomas, also in dissent, wrote that the Court lacked jurisdiction where the Tenth Circuit declined review.[8] None of the justices, however, challenged the majority's holdings that a notice of removal need not contain evidence to support its jurisdictional allegations or that a defendant could supplement its allegations with evidence once its jurisdictional allegations were challenged.

1 No. 13-719, 574 U.S. __, slip op. (December 15, 2014) [hereinafter *Dart Cherokee*].

2 *Id.* at 7.

3 *Id.*

4 *Id.* at 5.

5 *Id.* at 7 (emphasis in original).

6 *Id.* at 7-8, 14.

7 *Dart Cherokee*, No. 13-719, 574 U.S. __, Scalia, J., dissenting, at 7-8.

8 *Dart Cherokee*, No. 13-719, 574 U.S. __, Thomas, J., dissenting, at 1-2.

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Significance of the *Dart Cherokee* Decision

Culminating in the *Dart Cherokee* decision, courts continue to lower the threshold for CAFA removal. Where courts once held that CAFA removal was impossible unless *plaintiffs'* filings or documents established the amount in controversy,[9] the *Dart Cherokee* decision makes clear that defendants need only offer a "short and plain" allegation of the amount in controversy without any evidentiary support.[10] The law has been evolving in this direction for years. In *Pretka, et al. v. Kolter City Plaza II, Inc.*,[11] plaintiffs argued that the defendant could not satisfy CAFA's amount-in-controversy jurisdictional requirement where the complaint did not allege any amount of damages. Although the defendant knew the precise amount-in-controversy and submitted affidavits to that effect, the district court refused to consider defendant's affidavits because they were not created by or received from the plaintiffs. White & Case successfully appealed to the Eleventh Circuit, which held that defendants may submit their own affidavits and evidence to establish the amount in controversy.[12] In *Dart Cherokee*, the pertinent question was no longer the appropriateness of submitting affidavits to support removal, but rather the timing of those evidentiary submissions, which the Court expanded. In the future, it is likely that defendants will cite *Dart Cherokee* not only in connection with CAFA's amount-in-controversy requirement but also in connection with all of CAFA's jurisdictional requirements to support "short and plain" allegations in their notices of removal.

Importantly, the Court also held that—in contrast to the general presumption against removal—"no anti-removal presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court."[13] Thus, regardless of the grounds on which plaintiffs challenge a defendant's CAFA removal, defendants should easily defeat plaintiffs' arguments that all doubts should be resolved in favor of remand to state court. Rather, Congress's original intention for interstate class actions will prevail: CAFA's "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."[14]

9 See *Lowery v. Alabama Power Co.*, 483 F. 3d 1184 (11th Cir. 2011).

10 *Dart Cherokee*, No. 13-719, 574 U.S. __, slip op., at 2.

11 608 F.3d 744 (11th Cir. 2010).

12 *Id.* at 754-56.

13 *Dart Cherokee*, No. 13-719, 574 U.S. __, slip op., at 7 (citing *Standard Fire Ins. Co. v. Knowles*, No. 11-1450, 568 U.S. __, slip op., at 3 (March 19, 2013)).

14 S. Rep. No. 109–14, p. 43 (2005).