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EXPERT ANALYSIS

# Supreme Court to Decide Important Issue In Class-Action Litigation

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The U.S. Supreme Court recently granted *certiorari* in *Dart Cherokee Basin Operating Co. v. Owens*, No. 13-719, *cert. granted* (U.S. Apr. 7, 2014), concerning a removing defendant asserting federal jurisdiction on the basis of the federal diversity statute, 28 U.S.C. § 1332. The court will review whether the defendant must attach sufficient documentary evidence to prove the jurisdictional amount to the notice of removal itself, or whether such evidence may be introduced during briefing on a motion to remand.

The case presents one further wrinkle: The lawsuit removed was a class action, and the removing defendant (now petitioner) alleged federal jurisdiction under 28 U.S.C. § 1332(d) (a subsection of the diversity statute specific to class actions, enacted in 2005 as a part of the Class Action Fairness Act). While the Supreme Court's ruling may articulate a broad rule for all notices of removal, or removals of diversity actions, the context of the case might also permit the court to render a limited decision relevant only to CAFA cases.

During the course of the proceedings below, Dart Cherokee Basin Operating Co. filed a notice of removal asserting the existence of federal jurisdiction under CAFA, based in part on the allegation that the amount in controversy exceeded CAFA's threshold of $5 million.[1] Although Dart Cherokee alleged facts in support of its conclusion that the jurisdictional amount was met, it did not attach an affidavit or other evidence to its notice.

Under 28 U.S.C. § 1446(a), the federal removal statute, "a defendant desiring to remove any civil action from a state court shall file ... a notice ... containing a short and plain statement of the grounds for removal." Under Section 1446(c)(2)(B), "removal of the action is proper on the basis of an amount in controversy ... if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified."

Section 1453, governing the removal of class actions, allows a class action to be removed as provided in Section 1446, with some alteration. Without denying that the amount in controversy was greater than $5 million, plaintiff Brandon Owens moved to remand based on Dart Cherokee's failure to attach any evidence to its notice of removal. Owens said the requirement that a removing defendant prove the jurisdictional amount by a "preponderance of the evidence" must be met at the time of filing the notice of removal.

The U.S. District Court for the District of Kansas agreed. Following the 10th U.S. Circuit Court of Appeals' denial of leave to appeal, and subsequent denial of a petition for rehearing *en banc*, Dart Cherokee filed its petition for *certiorari*. The company said that, while factual allegations supporting federal jurisdiction must be alleged in a notice of a removal, evidence should not need to be attached, but allowed to be presented in opposition to a motion to remand.

The District Court's holding is not limited to cases removed under CAFA. Indeed, the court interprets 10th Circuit case law as requiring evidence of the jurisdictional amount in any notice of removal under

Section 1332(a). The court also finds additional 10th Circuit case law extends that evidentiary requirement to removal under CAFA.[2]

The Supreme Court's decision may thus have a far-reaching impact. If the 10th Circuit rule is upheld without limitation, any removing defendant will be bound to attach evidence of the jurisdictional amount to its notice of removal.

The 10th Circuit rule, however, diverges from the burgeoning majority of circuits that have held, in one form or another, that a notice of removal need not attach such evidence. Six circuits have reached this conclusion, holding that a notice of removal need only satisfy pleading requirements mirroring the plausibility standard of Rule 8.[3] Three of the same circuits, plus a fourth additional circuit, have gone further to clarify that a court may consider evidence presented by the defendant post-removal, in opposition to a motion to remand.[4]

The ultimate upshot of both rules is the same. A notice of removal need only plausibly allege facts supporting federal jurisdiction, while the federal removal statutes require that a court determine the existence of jurisdiction by preponderance of the evidence.[5] Therefore, such evidence, *a fortiori*, must be allowed past the filing of the notice of removal. As such, the Supreme Court's adoption of either version of this removal rule would support the petitioner's position.

Seven circuits have espoused rules permitting presentation of post-removal jurisdictional evidence,[6] and six have applied this rule to actions removed under CAFA.[7] The 7th U.S. Circuit Court of Appeals, led by hornbook mainstay Judge Frank Easterbrook, has emerged as one of the preeminent authorities on this issue. Reasoning that a removing defendant should not need to confess liability to prove an amount in controversy exceeds CAFA's jurisdictional threshold, the 7th Circuit held in *Spivey v. Vertrue Inc.* that the notice of removal imposes "a pleading requirement, not a demand for proof."[8]

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The 7th Circuit's holdings have been widely cited and are among the most permissive toward removing defendants: "Once the proponent of federal jurisdiction has explained plausibly how the stakes exceed $5 million ... then the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much."[9] The 10th Circuit, by contrast, stands alone in holding that a removing defendant may not rely on post-removal evidence in opposing a motion to remand.

Thus, if the strengths of the parties' respective positions are measured strictly by a show of hands among the circuits, Dart Cherokee appears to have the advantage. Alternatively, if, despite the majority rule of the circuit courts, the Supreme Court upholds the underlying district court order without limitation, the decision will have a profound impact on the 30,000 defendants that remove state court actions each year.[10]

Even under the majority rule, removing defendants already face a greater burden than plaintiffs in demonstrating federal jurisdiction. A plaintiff asserting federal jurisdiction must provide "a short and plain statement" of the jurisdictional amount.[11] Unless challenged, a plaintiff's factual allegations of the jurisdictional amount are sufficient; if challenged, the plaintiff must come forward with sufficient facts demonstrating that it is legally *plausible* that the claim involves the jurisdictional amount.[12] If any doubts exist, courts favor granting federal jurisdiction.[13]

Similarly, a removing defendant asserting federal jurisdiction under the majority rule need only assert "a short and plain statement" of the jurisdictional amount. If jurisdiction is challenged, however, the defendant must come forward with evidence demonstrating the amount in controversy exceeds the jurisdictional minimum by a "preponderance of the evidence."[14]

Furthermore, there is a general consensus that doubts should be resolved against removal.[15]

Thus, under the majority rule, removing defendants bear a greater burden if jurisdiction is challenged. Plaintiffs need only allege plausible facts demonstrating the amount in controversy, while removing defendants must provide evidence that demonstrates this amount "by a preponderance of the evidence." This elevated burden may be based both on the deference courts give to a plaintiff's choice of forum and on a plaintiff's right to be the master of its own complaint.[16]

Under the 10th Circuit rule, removing defendants would not only face a greater burden than a plaintiff in asserting jurisdiction, but that burden would be placed on them at the time of filing a removal notice — that is, irrespective of whether the plaintiff challenges the jurisdictional amount or even consents to it.

This heightened burden could place a defendant in the position of outlining the theories of liability upon which the plaintiff could recover, and it could harm the defendant's ability to dismiss, or otherwise move against, those claims in the future.[17] As noted in the *Dart Cherokee* dissent, such a rule "imposes an evidentiary burden on the notice of removal that is foreign to federal court practice and, to my knowledge, has never been imposed by a federal appellate court."[18]

The respondent justified the imposition of this burden as serving the principles of judicial economy, arguing that requiring evidence of removal with the petition will prevent "gearing up the federal district court machinery in cases where jurisdiction is lacking."[19] It is true that removal can often be a dilatory tactic and that courts are wary of its abuse. It is not clear, however, that application of the 10th Circuit rule will limit the strain on judicial resources caused by unsupported removal actions.

In many circumstances, plaintiffs may be better situated to estimate their damages than defendants.[20] The respondent suggested that the 10th Circuit rule will require defendants to wait to file a notice of removal until they can meet their evidentiary burden, which will prevent the rush to federal court until such evidence is developed.

Courts strictly enforce removal statutes, though, which require removal upon 30 days' notice of new evidence.[21] Because the removal statutes do not limit the removal attempts a defendant may make upon new evidence, a cautious defendant may file a notice of removal each time new evidence is revealed that supports damages being over the jurisdictional amount. Otherwise, the defendant risks a plaintiff's objection as to the timeliness of its removal.

Furthermore, the 10th Circuit rule rewards plaintiffs, such as Owens, who do not challenge the jurisdictional amount, but only the timing of the defendant's evidentiary submissions. Therefore, courts may reasonably expect an influx of motions for remand on procedural grounds alone, where there is no reasonable dispute that the jurisdictional amount is, in fact, satisfied.

Thus, adoption of the 10th Circuit rule will not only place a great burden on about 30,000 removing defendants each year, but it may increase motion practice in federal courts. Cautious defendants will wish to preserve their right to remove, while plaintiffs will wish to preserve their choice of state forum, even where they do not dispute the underlying facts regarding the jurisdictional amount.

Of course, the Supreme Court could affirm the 10th Circuit rule in the much narrower context of removal under CAFA. From a pure policy perspective, there may be good reason to distinguish between removal under Sections 1332(a) and 1332(d). As Chief Judge Sandra Lynch of the 1st Circuit noted in *Amoche v. Guarantee Trust Life Insurance Co.*, class-action defendants may, at least in breach-of-contract cases, be uniquely positioned to know the amount in controversy with relative precision.[22]

In *Dart Cherokee*, for example, the amount in controversy depends, for starters, on the number of royalty owners (the putative class members) that have an interest in the Kansas oil wells in which the respondent also has an ownership interest. Then, it also depends on various factors concerning the royalties paid by the respondent and the expenses the respondent deducts (allegedly improperly) before payment to the royalty owners.

Since, at the early stages of litigation, a putative class may have little idea how many members it has, and even less understanding of how much money is at stake, shifting the burden to a defendant may be sound practice. Furthermore, Supreme Court precedent indicates a preference for limiting federal court access for class actions.[23]

That said, nothing in CAFA or the removal statutes themselves provides a basis for such a distinction. In fact, the "preponderance of the evidence" standard under which courts evaluate

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evidence of the amount in controversy on a motion to remand, Section 1446(c)(2)(B), is only facially applicable to actions removed under Section 1332(a).[24]

If the "preponderance of the evidence" standard is applicable to a Section 1332(d) CAFA notice of removal at all, it is through Section 1453, which applies the removal rules of Section 1446 to actions removed under CAFA. In fact, at least two circuits have held that "that there is 'no logical reason why we should demand more from a CAFA defendant' than other parties invoking federal jurisdiction."[25] Thus, removal statutes themselves cannot be the basis for a heightened standard for removal under CAFA.

Because the CAFA and removal statutes give no basis for applying heightened notice-of-removal standards to actions removed under CAFA, any effort to limit the holding in *Dart Cherokee* will need to find its basis in CAFA's legislative history. Courts considering this legislative history, however, have recognized that CAFA is designed to expand, not limit, access by class action defendants to federal court.[26]

An affirmance without limitation in *Dart Cherokee* would dramatically change the practices of removing defendants who, in the majority of circuits, may safely remove based on allegations alone and confront their evidentiary hurdle only if the jurisdictional amount is contested. While policy considerations may support a limited application of the 10th Circuit rule in removals pursuant to CAFA, that distinction is not supported by the text and legislative history of CAFA. Regardless of the outcome, removing defendants should be in a better position to safeguard their removal rights following the Supreme Court's decision in *Dart Cherokee*.

*If the Supreme Court upholds the underlying district court order without limitation, the decision will have a profound impact on the 30,000 defendants that remove state court actions each year.*

## NOTES

[1] The notice of removal, as well as the decisions of the district court and 10th Circuit discussed herein, can be found in petitioner's appendix to its petition for *certiorari*.

[2] *Dart Cherokee,* Pet. Appx. at 17a-18a.

[3] Circuits stating this form of the rule include the 3rd Circuit in *Frederico v. Home Depot,* 507 F.3d 188, 197 (3d Cir. 2007); the 4th Circuit in *Ellenburg v. Spartan Motors Chassis Inc.,* 519 F.3d 192, 199 (4th Cir. 2008); the 5th Circuit in *Berniard v. Dow Chemical Co.,* 481 Fed. Appx. 859, 862 (5th Cir. 2010); the 7th Circuit in *Spivey v. Vertrue Inc.,* 528 F.3d 982, 986 (7th Cir. 2008); the 8th Circuit in *Hartis v. Chicago Title Insurance Co.,* 694 F.3d 935, 944-45 (8th Cir. 2012); and the 9th Circuit in *Janis v. Health Net Inc.,* 472 Fed. Appx. 533, 534-35 (9th Cir. 2012).

[4] Circuits applying this form of the rule include the 4th Circuit in *Bartnikowski v. NVR Inc.,* 307 Fed. Appx. 730, 732 (4th Cir. 2009) (considering defendant's post-removal declaration on motion to remand); the 5th Circuit in *Gebbia v. Wal-Mart Stores,* 223 F.3d 880, 883 (5th Cir. 2000) (post-removal affidavits may be considered if amount in controversy is ambiguous); the 9th Circuit in *Janis,* 472 Fed. Appx. at 534-35; and the 11th Circuit in *Pretka v. Kolter City Plaza II Inc.,* 608 F.3d 744, 773 (11th Cir. 2010).

[5] *See* 28 U.S.C. § 1446(c)(2)(B).

[6] Although one of the decisions cited in the *certiorari* petition arguably does not stand for the proposition for which it is cited, *Amoche v. Guarantee Trust Life Insurance Co.,* 556 F.3d 41 (1st Cir. 2009), the petitioner's brief omits authority from other two circuits tending to support its argument. *See Amoche,* 556 F.3d at 51 (although cited by petitioner for its holding that "the entire record ... must be evaluated," the 1st Circuit appears to refer here to the scope of its review on appeal, not to the scope of review permitted to a district court on a motion to remand); *Frederico*, 507 F.3d at 197 (3d Cir.), and *Berniard*, 481 Fed. Appx. at 862 (5th Cir.) (both allowing evidence post-notice of removal).

[7] *See Frederico,* 507 F.3d at 197 (3d Cir.); *Bartnikowski,* 307 Fed .Appx. at 732 (4th Cir.); *Berniard,* 481 Fed. Appx. at 862 (5th Cir.).

[8] *Spivey*, 528 F.3d at 986, citing *Brill v. Countrywide Home Loans,* 427 F.3d 446, 449 (7th Cir. 2005)).

[9] *Id.*

[10] *Dart Cherokee,* Pet. Br. at 9.

[11] Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly,* 127 S. Ct. 1955, 1965 (2007).

[12] *Gibbs v. Buck,* 59 S. Ct. 725, 729 (1939); *St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283, 284-85 (1936).

[13] *See Tongkook Am. v. Shipton Sportswear Co.,* 14 F.3d 781, 785 (2d Cir. 1994) ("Where the damages sought are uncertain, the doubt should be resolved in favor of the plaintiff's pleadings.").

[14] 28 U.S.C. § 1446(c)(2)(B); *see also* cases cited in notes 3 and 4, *supra*, allowing evidence post-filing of petition for removal.

[15] *See, e.g., Vantage Drilling Co. v. Su,* 741 F.3d 535, 537 (5th Cir. 2014); *Purdue Pharma v. Kentucky,* 704 F.3d 208, 220 (2d Cir. 2013); *Fajen v. Found. Reserve Ins. Co.,* 683 F. 2d 331 (10th Cir. 1982); *Miedema v. Maytag Corp.,* 450 F.3d 1322, 1328 (11th Cir. 2006). At least the 7th Circuit, however, has held that this principle "has no role to play in determining the amount in controversy." *Meridian Sec. Ins. Co. v. Sadowski,* 441 F. 3d 536, 540 (7th Cir. 2006).

[16] *See, e.g., Gulf Oil Corp. v. Gilbert,* 508, 67 S. Ct. 839 (1947)("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."); *Healy v. Sea Gull Specialty Co.,* 237 U.S. 479, 480 (1915)("[T]he plaintiff is absolute master of what jurisdiction he will appeal to.").

[17] These concerns were at the heart of the 7th Circuit's decision in *Brill*, 528 F.3d at 986, and *Spivey*, 427 F.3d at 449, both of which have been cited favorably by other circuits.

[18] *Dart Cherokee,* Pet. App. at 3a.

[19] *Dart Cherokee,* Resp. Br. at 13.

[20] For example, many "deep pocket" defendants including insurers or indemnitors will lack significant knowledge of the underlying details of a claim; so, too, will defendants in breach-of-contract claims for expectation damages, and in tort claims based on personal injury.

[21] 28 U.S.C. § 1446(b)(1); *Crop Prot. Inc. v. Henson,* 123 S. Ct. 366, 369 (2002) (removal statutes are strictly construed).

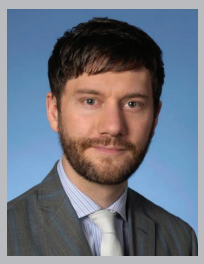
[22] *See Amoche,* 556 F.3d at 52 (defendants were in a better position than plaintiff to determine which customers had contracts with defendants, where they lived, and what amounts of contracts were).

[23] *See, e.g., Am. Express Co. v. Italian Colors Rest.,* 133 S. Ct. 2304 (2013) (arbitration agreements should be rigorously enforced, even where they limit the right to class action).

[24] Prior to codification of the standard in Section 1446, courts nevertheless applied the standard to both Section 1332(a) diversity and CAFA cases. *See, e.g., McPhail v. Deere & Co.,* 529 F.3d 947 (10th Cir. 2008), *Abrego Abrego v. Dow Chemical Co.,* 443 F.3d 676, 682-3 (9th Cir. 2006).

[25] *Frederick v. Hartford Underwriters Ins. Co.,* 683 F.3d 1242, 1246 (10th Cir. 2012), quoting *Bell v. Hershey Co.,* 557 F. 3d 953, 957 (8th Cir. 2009).

[26] *See Amoche,* 556 F.3d at 47-48; *Blockbuster Inc. v. Galeno,* 472 F.3d 53, 56 (2d Cir. 2006).



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