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Removing a Barrier: The Supreme Court Holds That, Under CAFA, Notices of Removal Need Not Include Evidence Supporting the Amount in Controversy

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On December 15, 2014, the United States Supreme Court held in *Dart Cherokee Basin Operating Co., LLC v. Owens* that a class action defendant need only allege the requisite amount of controversy “plausibly” in the notice of removal and need not provide evidence supporting the amount in controversy unless challenged by the plaintiff or questioned by the court.¹ The Court’s holding is consistent with the requirement that a notice of removal contain only a “short and plain” statement setting forth the bases for removal. The decision resolves a significant circuit split regarding the pleading requirements imposed on removing defendants under the Class Action Fairness Act (“CAFA”).

Prior to *Dart Cherokee*,² the majority of the circuits had either expressly held that a defendant need not present evidence of the amount in controversy with its notice of removal³ or that evidence of the amount in controversy submitted in opposition to a motion to remand would be considered even if it had been not presented in the notice of removal.⁴ The Tenth Circuit, however, declined *Dart Cherokee*’s petition for review of the district court’s decision, which had refused to consider evidence *Dart Cherokee* offered in response to a motion to remand based upon its holding that a defendant is required to submit evidence in support of removal at the time a notice of removal is filed.

In *Dart Cherokee*, the defendants removed the state court class action pursuant to CAFA, alleging that each of CAFA’s elements was satisfied.⁵ The plaintiff moved to remand the matter to state court arguing that *Dart Cherokee*’s notice of removal was deficient because it did not contain evidence to support the amount in controversy requirement. In response, *Dart Cherokee* submitted a declaration with detailed damages calculations substantiating an amount in controversy in excess of \$5 million.⁶ The district court held that Tenth Circuit precedent “require[d] proof of the amount in controversy in the notice of removal itself,” and

¹ *Dart Cherokee Basin Operating Co., LLC v. Owens*, Slip Op., No. 13-719, --- S. Ct. ---, 2014 WL 7010692, at *5, 6 (U.S. Dec. 15, 2014).

² See *All or Nothing? The U.S. Supreme Court to Address Whether Evidence In Support of Removal Must Be Submitted with the Notice of Removal*, Apr. 24, 2014, available at <http://www.klgates.com/resources/xpgPublicationDetailKNLG.aspx?xpST=PubDetail&pub=11416> (prior alert discussing the Supreme Court’s grant of certiorari to hear the *Dart Cherokee* case).

³ See, e.g., *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 200 (4th Cir. 2008) (explaining that a notice of removal’s “short and plain statement” standard is “deliberately parallel to the requirements for notice pleading found in Rule 8(a)”; *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008); *Hartis v. Chicago Title Ins. Co.*, 694 F.3d 935, 944-45 (8th Cir. 2012); *Janis v. Health Net, Inc.*, 472 F. Appx. 533, 534-35 (9th Cir. 2012); *Lowery v. Al. Power Co.*, 483 F.3d 1184, 1217 n.73 (11th Cir. 2007).

⁴ See, e.g., *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 46, 51-53 (1st Cir. 2009); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 773-74 (11th Cir. 2010).

⁵ CAFA provides jurisdiction over putative class actions (1) consisting of more than 100 class members, (2) whose claims, *in the aggregate*, exceed \$5 million, and (3) in which any of the class members is a citizen of a state different from any defendant, unless at least two-thirds or more of the members of the class in the aggregate and the primary defendants are citizens of the state in which the action was originally filed. See 28 U.S.C. §§ 1332(d)(2), (d)(5)(B).

⁶ *Dart Cherokee*, 2014 WL 7010692, at *3.

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therefore, granted plaintiff's motion to remand the matter to state court.⁷ By divided panels, the Tenth Circuit denied Dart Cherokee's petition for appeal and for *en banc* review.⁸

Justice Ginsburg, writing for the majority, ruled that the district court improperly relied on a "presumption against removal," and noted that the language of the statutory requirements for a notice of removal "tracks the general pleading requirement" applicable to pleadings such as complaints.⁹ The Court held that in enacting the current version of the removal statute, Congress acted to "simplify the 'pleading' requirements for removal" and intended for courts to "apply the same liberal rules [to removal allegations] that are applied to other matters of pleading."¹⁰ The Court concluded that a removing defendant's "amount-in-controversy allegation should be accepted when not contested by the plaintiff or questioned by the court."¹¹ The Court further held that if a plaintiff filed a motion to remand challenging a defendant's allegations in the notice of removal, the proper procedure is for both parties to then submit proof, and for the district court to decide whether the amount in controversy requirement is met under a preponderance of the evidence standard.¹² Accordingly, "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold [and] [e]vidence establishing the amount is required by § 1446(c)(2)(B) only when the plaintiff contests, or the court questions, the defendant's allegation."¹³

Notably, although four Justices dissented from the majority opinion, the disagreement did not concern the evidence that needs to be submitted at the time of removal. Indeed, the dissenters signaled their *support* for the majority opinion that evidence need not be presented when a notice of removal is filed.¹⁴ Justice Scalia, writing for the dissenters, noted that the Court was "[e]ager to correct what we suspected was the District Court's (and the Tenth Circuit's) erroneous interpretation of § 1446."¹⁵ However, he asserted that "[i]nstead of correcting an *erroneous district court opinion* at the expense of an erroneous Supreme Court opinion," he would have dismissed the case as improvidently granted for lack of jurisdiction and, failing that, he would have affirmed on the ground that the Tenth Circuit did not abuse its discretion in declining to review the district court's decision.¹⁶

Although the *Dart Cherokee* decision was decided in the context of removal pursuant to CAFA and did not specifically address the broader issue concerning whether a "presumption against removal" exists in traditional diversity cases, it may lay the foundation for removing defendants to seek broader application in future cases. Much of the reasoning in *Dart Cherokee* regarding the purpose and language of the applicable removal statute (28 U.S.C. § 1446) could apply to a removal under the either the traditional diversity statute or pursuant to CAFA.¹⁷ Even if the *Dart Cherokee* decision is limited to CAFA, however, it firmly bolsters

⁷ *Id.* at *4; see *Owens v. Dart Cherokee Basin Operating Co. LLC*, No. 12-4157, 2013 WL 2237740, at *4 (D. Kan. May 21, 2013); see also *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1246 (10th Cir. 2012) (requiring jurisdictional proof at the time of removal through discovery, calculations, settlement demands, affidavits, or expert testimony).

⁸ See *Dart Cherokee*, 2014 WL 7010692, at *4; *Dart Cherokee Basin Operating Co., LLC v. Owens*, 730 F.3d 1234, 1234 (10th Cir. 2013).

⁹ See *Dart Cherokee*, 2014 WL 7010692, at *5, 6.

¹⁰ *Id.* at *5 (quoting H.R.Rep. No. 100-889, p. 71 (1988)).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at *6.

¹⁴ *Id.* at *9, 14 (Scalia, J., dissenting).

¹⁵ *Id.* at *9; see also *id.* at *14 (referring to the "erroneous district court opinion").

¹⁶ *Id.* at *14 (emphasis added).

¹⁷ See, e.g. *id.* at *5 (noting that Section "1446(a) tracks the general pleading requirement stated in Rule 8(a)"); *id.* (stating generally that "when a defendant seeks federal-court adjudication, the defendant's amount-in-controversy allegation should be accepted when not

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the efforts of removing defendants across the country. The Court's confirmation that no evidence need be provided at the time a case is removed to federal court sends the message to all district courts – consistent with the intent and purpose of CAFA – that class actions with allegations meeting CAFA's requirements belong in federal, not state, court. The *Dart Cherokee* decision also marks the second decision from the Supreme Court in the past two years that eases restrictions on defendants removing class actions pursuant to CAFA,¹⁸ signaling a positive trend for class action defendants.

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contested by the plaintiff or questioned by the court"); *id.* at *6 (holding "as specified in § 1446(a), a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold").

¹⁸ See *Standard Fire Ins. Co. v Knowles*, 133 S. Ct. 1345 (2013) (holding class representatives cannot avoid CAFA jurisdiction by stipulating to damages below the \$5 million jurisdictional amount; defendant entitled to remove under CAFA); see also *Classy Move: The Supreme Court Rebuffs Class Action Forum Manipulation*, Mar. 25, 2014 available at <http://www.klgates.com/resources/xpqPublicationDetailKNLG.aspx?xpST=PubDetail&pub=10263> (alert discussing *Knowles* decision).