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SCOTUS RESOLVES CIRCUIT SPLIT ON CAFA AMOUNT IN CONTROVERSY BURDEN

For those of you who are regular readers of the Hoosier Litigation Blog, you will recognize that it is a rarity that we discuss a case from the Supreme Court of the United States. Nevertheless, a decision from this past week merits discussion. In a case, considered by most to be more interesting in its procedural posture than in its ultimate holding, the Supreme Court resolved a split amongst the appellate circuit courts regarding the burden on a defendant seeking to remove a class action case from state court to federal court under jurisdiction provided by the Class Action Fairness Act (CAFA). In *Dart Cherokee Basin Operating Co., LLC v. Owens*, the Court, in a (5-4) decision, held that a defendant is not required to support its notice of removal with evidentiary support attached to the pleadings to satisfy CAFA's jurisdictional requirement.

For that summary to make sense, we must take a step back and examine CAFA. We have twice discussed CAFA on this blog. In discussing a Seventh Circuit decision authored by Judge Richard Posner, we summarized the relevant portion of the CAFA:

CAFA, like many federal laws, did not smoothly slide into the U.S. Code. It altered numerous existing sections. One of those sections is 28 U.S.C. § 1332, the section most well known for permitting diversity

jurisdiction. Section 1332(d)(2) sets the amount in controversy to exceed \$5 million. This means simply that the stakes of the case for the defendant is at least \$5 million – well, technically a penny more than \$5 million, for at \$5 million even, the amount in controversy does not “exceed” \$5M. Exactly how, when, and to what degree of certainty this amount needs to be shown has been the topic of much debate and was the catalyst for the *Knowles* decision last year.

The other occasion was in discussion of the Supreme Court’s decision in *Standard Fire Ins. Co. v. Knowles*, which you will noticed is referenced above. In discussing that case, we noted:

When a party seeks to bring a matter before a federal court, it is the party seeking federal jurisdiction that must show that the amount in controversy is sufficiently high so as to exceed the \$5 million figure. Traditionally, exercise of federal jurisdiction over class action cases has been more desirous for defendants than for plaintiffs seeking to certify a class. As such, the party who typically must bear the burden of showing that there is actually \$5 million at stake is the defendant.

The burden of establishing the amount in controversy when removing a case from state to federal court is not as simple as blindly asserting that it is met. As explained by the First Circuit Court of Appeals in *Amoche v. Guarantee Trust Life Ins. Co.*, there are two possible standards utilized by the various federal circuits. At the time of the *Amoche* decision – February 2009 – the First Circuit joined with the Second and Seventh Circuits in applying the “reasonable probability standard” requiring a removing defendant to “show that it appears to a ‘reasonable probability’ that the aggregate claims of the plaintiff class are in excess of \$5 million.” The alternative standard, utilized at the time by the Third and Ninth Circuits, is to require the defendant to prove “to a legal certainty” the amount in controversy. Regardless of which standard is applicable, it is a higher threshold than the requirement to initially file a case in federal court – that the amount alleged have been made in good faith.

As we shall discuss, the Tenth Circuit also followed the lead of the Third and Ninth Circuits in applying the “legal certainty” standard. Notably, *Knowles* did not answer the question of which standard was correct. *Dart Cherokee*, however, set out to do just that.

On its way to answering the question of which of the two standards—“legal

certainty” or “reasonable probability”—the case fell into a procedural pitfall that condemned it to a split (5-4) decision on the issue of whether the Supreme Court had jurisdiction to determine the case. In order to understand this portion of the opinion—which is what consumes the majority of the case—we must look at the procedural history of the case.

Dart Cherokee began as a case filed as a putative class action in a state court in Kansas. The defendant sought to remove the case to federal court and filed its notice of removal. In that notice, the defendant “stated that the purported underpayments to putative class members totaled more than \$8.2 million.” Thus, on the face of the notice, the case met the amount in controversy of \$5 million. But, the notice provided no evidentiary support for the assertion. Consequently, the plaintiff sought remand to the state court by arguing that the notice was legally deficient. Although the defendant attempted to bolster its contention with evidence filed after the notice of removal, the issue before the federal district court was simply whether the notice of removal required an evidentiary showing of satisfaction of the amount in controversy.

Reading Tenth Circuit precedent to require proof of the amount in controversy in the notice of removal itself, the District Court granted [plaintiff’s] remand motion. . . . The Tenth Circuit, as the District Court read Circuit precedent, “has consistently held that reference to factual allegations or evidence outside of the petition and notice of removal is not permitted to determine the amount in controversy.”

The defendant, still wishing to remain in federal court, sought an appeal to the Tenth Circuit.

Ordinarily, remand orders “[are] not reviewable on appeal or otherwise.” There is an exception, however, for cases invoking CAFA. In such cases, “a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand.” Citing this exception, [the defendant] petitioned the Tenth Circuit for permission to appeal. “Upon careful consideration of the parties’ submissions, as well as the applicable law,” the Tenth Circuit panel, dividing two-to-one, denied review.

The defendant then filed a petition for certiorari to the Supreme Court, and the Court exercised its discretionary authority to review the decision.

The problem in the procedural posture was not recognized by either party or the Court until an amicus brief raised the issue. As Justice Antonin Scalia, author

of the four-justice dissenting opinion, stated:

Eager to correct what we suspected was the District Court's (and the Tenth Circuit's) erroneous interpretation of § 1446(a), we granted certiorari to decide whether notices of removal must contain evidence supporting federal jurisdiction. After briefing we discovered a little snag: This case does not present that question. Because we are reviewing the Tenth Circuit's judgment, the only question before us is whether the Tenth Circuit abused its discretion in denying Dart permission to appeal the District Court's remand order. Once we found out that the issue presented differed from the issue we granted certiorari to review, the responsible course would have been to confess error and to dismiss the case as improvidently granted.

Ironically, the procedural posture of *Dart Cherokee* is identical to that of *Knowles*. This overlap would provide substantial fodder for the resulting opinion.

The court split 5-4 in an unusual grouping. Traditionally, we see the court split 5-4 along more ideological lines with Justice Kennedy casting the deciding vote. Here, the majority opinion was authored by Justice Ginsburg and joined by Chief Justice Roberts, and Justices Breyer, Alito, and Sotomayor. The first, of two, dissenting opinions was authored by Justice Scalia and joined by Justices Kennedy, Kagan, and Thomas, with Justice Thomas disagreeing with a portion of Justice Scalia's dissent and writing separately as to that portion.

The argument was simply whether the Court had the authority to review the district court's decision or was confined to simply determining whether the Tenth Circuit abused its discretion in denying to exercise appellate review. The majority found that the matter could be reviewed in full. An interesting sidebar, if certiorari had been sought and granted prior to the Tenth Circuit's decision, this procedural problem would not have been presented. We will not delve too deeply into the procedural debate, as there are others more well qualified to write on the topic than your author. However, because we can certainly take a peak without depriving the scholars their opportunity to more thoroughly discuss the case, we shall do just that. Also, it is a classic example of justices bickering in an opinion that is salacious enough to provide some amusement, if nothing else.

One of the primary driving factors in the majority deciding that the Court had jurisdiction to review the full case was the argument that this issue would be unlikely to present itself again in a subsequent appeal Justice Scalia undertook the burden or rebutting that argument with several persuasive points. A footnote in the majority decision chided dissenters for having joined the unanimous opinion in

Knowles without raising the issue. Justice Scalia very aptly responded to that charge, stating:

As for my own culpability in overlooking the issue, I must accept that and will take it with me to the grave. But its irrelevance to my vote in the present case has been well expressed by Justice Jackson, in a passage quoted by the author of today's opinion: "I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday."

In support of the argument that the issue would not likely present itself again for appellate review, the majority contended that "no responsible attorney" would likely fall into the same trap of not providing evidentiary support and therefore the issue would never arise again. Justice Scalia argued that the issue could still arise in the context of sufficiency of the evidence provided, but more strongly pointed out that the majority's bald assertion of competent counsel not making such an error overlooks the fact that the counsel in this case did just that in light of Tenth Circuit precedent. He then added a cheeky statement that is worth a chuckle:

Even discounting the existence of irresponsible attorneys, responsible attorneys, and even responsible judges, sometimes make mistakes, *see, e.g.,* 572 U.S. —, 134 S. Ct. 1788, 188 L.Ed.2d 757 (2014) (order granting certiorari in this case).

Bickering aside, the opinion is unanimous in one aspect: the applicable burden in pleading the amount in controversy under CAFA in a notice of removal. Though the dissenting opinions do not so clearly state agreement with the majority's conclusion on that point—unsurprising, given that the dissenters thought the Court without authority to decide that issue—the dissent clearly adopts the same position as the majority. The dissent's argument that there were other possible bases for the Tenth Circuit's denial other than agreement with the district court's opinion stands on the supposition that the district court's opinion was erroneous. Regardless, the holding of the case, as clearly expressed by the majority, is that the "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence establishing the amount is required . . . only when the plaintiff contests, or the court questions, the defendant's allegation."

This burden is consummate with the First, Second, Fourth, and Seventh Circuit "reasonable probability standard" and overrules the Third, Ninth, and Tenth Circuit cases requiring something akin to "a legal certainty." The result

leaves the issue of establishing the amount in controversy to be tested on an evidentiary motion and not one premised upon the face of an initial pleading.

Join us again next time for further discussion of developments in the law.

Sources

- *Dart Cherokee Basin Operating Co., LLC v. Owens*, No. 13-719, 2014 WL 7010692 (U.S. Dec. 15, 2014).
- *Standard Fire Ins. Co. v. Knowles*, 568 U. S. ____, 133 S. Ct. 1345, 185 L. Ed. 2d 439 (2013).
- *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 48-49 (1st Cir. 2009).
- Brief of Amicus Curiae Public Citizen, Inc., In Support of Respondent, *Dart Cherokee Basin Operating Co., LLC v. Owens*, 568 U.S. ____ (2014) (No. 13-719).
- Class Action Fairness Act – codified in part at 28 U.S.C. 1332(d).
- Colin E. Flora, *Class Action Fairness Act: Amount in Controversy after Knowles*, HOOSIER LITIG. BLOG (Mar. 22, 2013).
- Colin E. Flora, *7th Circuit (Posner) Examines CAFA Amount in Controversy in Light of Knowles & Rooker-Feldman Doctrine*, HOOSIER LITIG. BLOG (Apr. 11, 2014).

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