Untangling "A Little Snag" At the Supreme Court

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Most civil defense lawyers who read the Supreme Court's December 15, 2014 opinion in *Dart Cherokee Basin Operating Co., L.L.C. v. Owens*, 135 S. Ct. 547 (2014), will focus on the holding that a notice of removal under 28 U.S.C. § 1446(a) does not have to attach evidence establishing that the case satisfies the applicable jurisdictional amount. The Court's discussion as to why a notice of removal "need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold," slip op. at 7, aligns with the position that DRI—The Voice of the Defense Bar advocated in its *amicus* brief.

For many appellate litigators, however, the more interesting and significant part of *Dart Cherokee* may be the Justices' heated debate about

whether the notice-of-removal question was properly before the Court. The Justices' sharp disagreement on that subject resulted in a 5-4 split decision, with Justice Ginsburg authoring the majority opinion and Justices Scalia and Thomas each filing dissenting opinions. (For the reader's convenience, citations in this article to the Court's majority opinion are to "slip op.," and citations to the dissenting opinions are to "Scalia dissent" and "Thomas dissent.")

Case Background

Dart Cherokee involved a putative class action arising out of allegedly underpaid oil and gas lease royalties. Originally filed in Kansas state court, the defendants removed the case to federal district court, as authorized by the Class Action Fairness Act ("CAFA"). *See* 28 U.S.C. § 1332(d)(2). Their notice of removal asserted that the purported underpayments to putative class members exceeded CAFA's $ 5 million threshold amount for removal of class actions on diversity grounds. See ibid. The district court, however, granted the plaintiffs' motion to remand on the ground that proof of the amount in controversy was required to accompany the notice of removal. Most remand orders are not appealable. *See id.* § 1447(d). But there is an exception for CAFA cases, *id.* § 1453(c)(1), which vests the courts of appeals with discretion to accept an appeal challenging a district court order granting or denying a motion to remand.

The *Dart Cherokee* defendants filed a timely petition for permission to appeal in the U.S. Court of Appeals for the Tenth Circuit. *See* Fed. R. App. P. 5(a); 28 U.S.C. § 1453(c)(1). Without stating its reasons, but

"[u]pon careful consideration of the parties' submissions, as well as the applicable law," a Tenth Circuit panel voted 2-1 to deny the petition for review. See slip op. at 3. The defendants sought rehearing en banc, but that request was denied following a vote by an evenly divided court. Ibid. Circuit Judge Hartz, joined by three other judges, filed a formal dissent predicting that because appellate review had been denied, diligent attorneys within the Tenth Circuit no longer would risk remand by failing to provide amount-in-controversy evidence with CAFA notices of removal. *See id*. at 10.

The defendants filed a petition for a writ of certiorari, requesting the Supreme Court to decide the following question: "Whether a defendant seeking removal to federal court is required to include evidence supporting federal jurisdiction in the notice of removal, or is alleging the required 'short and plain statement of the grounds for removal' enough?" *Id*. at 4. The Court granted certiorari. Although the plaintiffs did not dispute the Supreme Court's jurisdiction to grant certiorari, anamicus brief filed by Public Citizen did. *See* slip op. at 8. Public Citizen contended that because the Tenth Circuit had denied the petition for permission to appeal the district court's remand order, the question of whether jurisdictional amount evidence must accompany a notice of removal was not properly before the Supreme Court. *Ibid*. At the October 7, 2014 oral argument, several Justices expressed concern about whether the notice-of-removal issue was actually before the Court, since the Tenth Circuit, as is typical, denied review without explaining why.

The "Question Presented" Controversy

Part III of Justice Ginsburg's *Dart Cherokee* majority opinion (joined by Chief Justice Roberts and Justices Breyer, Alito, and Sotomayor) defends the Court's grant of certiorari and attempts to rebut Justice Scalia's stinging dissent. See slip op. at 7-14. In his dissent, Justice Scalia (joined by Justices Kennedy, Kagan, and Thomas) explained that "we granted certiorari to decide whether notices of removal must contain evidence supporting federal jurisdiction," but "[a]fter briefing, we discovered a little snag. This case does not present that question." Scalia dissent at 1-2.

The Supreme Court's certiorari jurisdiction is established by 28 U.S.C. § 1254(1), which refers to review of "[c]ases in the courts of appeals." Finding "no jurisdictional barrier to our settlement of the question presented," the majority opinion explains that "[t]he case was 'in' the Court of Appeals because of Dart's leave-to-appeal application, and we have jurisdiction to review what the Court of Appeals did with that application." *Id.* at 8. The majority opinion further indicates that "[t]here are many signals that the Tenth Circuit relied on the legally erroneous premise that the District Court's decision was correct," and thus, was "infected by legal error." *Id.* at 9, 11. Citing Circuit Judge Hartz's dissent from the Tenth Circuit's denial of rehearing en banc, the majority opinion explains that "[i]n practical effect, the Court of Appeals' denial of review established the law not simply for this case, but for future CAFA removals sought by defendants in the Tenth Circuit." *Id.* at 10. Thus, the *Dart Cherokee* majority concluded that the Tenth Circuit's decision to deny the

defendants' request for appellate review was "an abuse of discretion" that "froze the governing rule in the Circuit for this case and future CAFA removal notices, with no opportunity for defendants . . . responsibly to resist making the evidentiary submission." *Id*. at 12, 13. For that reason, the majority indicated that the issues of whether the Tenth Circuit abused its discretion and whether the district court's remand order was erroneous "do not pose genuinely discrete questions." *Id*. at 13.

According to Justice Scalia, however, "the only question before us is whether the Tenth Circuit abused its discretion in denying . . . permission to appeal the District Court's remand order." Scalia dissent at 2. "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 dismiss the case as improvidently granted." *Ibid*. Instead, Justice Scalia explained, "[t]he Court hits upon a solution: It concludes that the Tenth Circuit decided not to hear the appeal because it agreed with the District Court's analysis." *Ibid*. "Attributing the District Court's reasoning to the Tenth Circuit allows the Court to pretend to review the appellate court's exercise of discretion while actually reviewing the trial court's legal analysis." *Ibid*.

In Justice Scalia's view, the majority's approach presents "insuperable" problems, beginning with the fact that "the Tenth Circuit's short order does not tell us why it decided not to hear Dart's appeal." Ibid. Justice Scalia criticized the majority for relying upon "the utterly uninformative language of the [Tenth Circuit's] order" to conclude that "the Tenth Circuit must have denied Dart's petition because it agreed with the

District Court's legal conclusion." *Id*. at 3, 4. He indicated that there are "countless reasons to deny permission to appeal that are unrelated to the merits of the underlying district court judgment," and offered, as an example, a circuit court of appeals' inability to resolve the merits of a CAFA removal issue within the accelerated period allowed by 28 U.S.C. §§ 1453(c)(2) & (c)(3). *Id.* at 4. Further, taking issue with the majority's observation that as a practical matter, the notice-of-removal evidentiary question never would have returned to the Tenth Circuit court of appeals, Justice Scalia stated that "[e]ven in the legal utopia imagined by the Court—a world in which all lawyers are responsible and no lawyers make mistakes—it is easy to imagine ways in which the issue could come back to the circuit court." *Id.* at 6.

To show that it was on solid footing, the Dart Cherokee majority cited *Standard Fire Insurance Co. v. Knowles*, 133 S.Ct. 1345 (2013), in which the Court granted certiorari to review a district court's remand order in a CAFA case where the Eighth Circuit had issued a one-line denial of the defendant's petition for permission to appeal. In his *Dart Cherokee* dissent, Justice Scalia, who in *Knowles* had voiced no objection to the Court's exercise of certiorari jurisdiction, quoted a 1948 dissenting opinion by Justice Jackson, who explained that "I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday." Scalia dissent at 7 (citation omitted). Thus, "[i]nstead of correcting an erroneous district court opinion at the expense of an erroneous Supreme Court opinion," Justice Scalia and his fellow dissenters "would have dismissed this case as improvidently granted." *Ibid.*

Justice Thomas' Dissent

Filing his own dissenting opinion, Justice Thomas took the debate a step further by "point[ing] out another, more fundamental, defect in the Court's disposition: We lack jurisdiction to review even the Court of Appeals' denial of permission to appeal." Thomas dissent at 1. According to Justice Thomas, and contrary to the majority opinion, see slip op. at 8, "an application to appeal a remand order" is not a "case" within the meaning of 28 U.S.C. §1254(1). *Ibid*. His dissenting opinion criticizes the majority's reliance on *Hohn v. United States*, 524 U.S. 236 (1998), a decision which Justice Thomas believes erroneously held that applications to courts of appeals for certificates of appealability in the federal habeas corpus context are "cases" for purposes of Supreme Court review. In Justice Thomas' view, since the Tenth Circuit denied Dart's petition for permission to appeal the remand order, "no 'case' ever arrived 'in the court of appeals,'" and for that reason, the Supreme Court should have dismissed *Dart Cherokee* "for lack of jurisdiction." Thomas dissent at 2. Since no other Justice joined Justice Thomas' dissenting opinion, apparently he alone sees a jurisdictional problem with the granting of certiorari following a court of appeals' denial of discretionary review. Instead, Justices Scalia, Kennedy, and Kagan, who would have dismissed Dart Cherokee as improvidently granted, appear to view the issue as prudential rather than jurisdictional.

Practical Implications

The good news in *Dart Cherokee* for defense-oriented appellate lawyers is that the Supreme Court—consistent with *Knowles* and other cases, but

now by only a 5-4 majority—has not precluded Supreme Court review merely because a federal court of appeals has denied a petition for review without explanation. This may be important not only in the CAFA removal/remand context, but also for other types of discretionary interlocutory appeals. For example, Federal Rule of Civil Procedure 23(f) authorizes interlocutory review of class-certification rulings. In most cases, when a petition for permission to appeal a class-certification ruling is denied, no explanation is provided. DRI recently filed an amicus brief supporting a certiorari petition seeking review of a class-certification ruling even though the court of appeals denied a Rule 23(f) petition. The brief discusses why, at least for class-action certifications, the availability of pretrial Supreme Court review is crucial.

More generally, 28 U.S.C. § 1292(b) vests the courts of appeals with discretion to review an interlocutory order where a district court has certified "that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." But although the Supreme Court has not precluded review, the chances are slim, at least in the vast majority of non-CAFA cases, that the Supreme Court will grant certiorari to review even a controlling question of law where a court of appeals has declined review and the case is still in an interlocutory posture.

The "teaching" of *Dart Cherokee* appears to be that the prospect of Supreme Court review may be viable only when a court of appeals has denied interlocutory review because it agrees with the district court's

analysis. Ideally, the court of appeals would say so, and even explain why, in its denial order. In most circuits, however, petitions for permission to appeal (like certiorari petitions in the Supreme Court) are routinely denied with no explanation at all. Counsel could consider including in a Rule 5 petition a request that the court of appeals provide an explanation if it decides to deny interlocutory review. But even if a court of appeals were amenable to providing its reasons for denying review, such an explanation ultimately could prove to be counterproductive.

If the majority and dissenting opinions in *Dart Cherokee* are any indication, the Supreme Court in future cases is likely to have more to say about the exercise of certiorari jurisdiction where a court of appeals has denied discretionary review prior to final judgment. Appellate attorneys should be on the lookout for further developments on this subject.