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Court clarifies pleading standard for notices of removal to federal court

In a previous installment of Tully's Law, I wrote about a case that would be heard by the U.S. Supreme Court, *Dart Cherokee Basin Operating Company LLC v. Owens*, No. 13-719, that presented the question of whether a defendant seeking to remove a case to federal court must present evidence supporting federal jurisdiction in its notice of removal.

The court's decision is in, so it's time for an update.

In *Dart*, the defendant removed a case that was pending in Kansas state court to federal court pursuant to the Class Action Fairness Act of 2005. The defendant's notice of removal contained factual allegations setting forth the basis of diversity jurisdiction, however, no supporting evidence was filed or submitted with the notice of removal.

The plaintiff subsequently moved to remand the case to state court, arguing that the notice of removal was deficient as a matter of law because it contained no evidence supporting the allegation that the amount in controversy exceeded \$5 million. In response, the defendant filed a declaration that contained a damages calculation showing that the amount in controversy well exceeded the statutory amount.

However, relying on precedent from the 10th U.S. Circuit Court of Appeals, the district court held that proof of the amount in controversy must be included in the notice of removal itself and granted the plaintiff's motion.

Dart petitioned the 10th Circuit for permission to appeal. The 10th Circuit declined to hear the appeal based on "careful consideration of the parties' submissions, as well as the applicable law." Fol-

lowing the 10th Circuit's denial, Dart filed a petition for certiorari with the U.S. Supreme Court, which the court granted.

In its decision, the court noted that, under Section 1446, the federal removal statute, the defendant's notice of removal must contain "a short and plain statement of the grounds for removal." The language used in Section 1446 is intentionally meant to track the pleading requirements provided in Federal Rule of Civil Procedure 8(a) and to simplify the pleading requirements for removal.

Like diversity allegations made in a plaintiff's complaint, the amount in controversy allegations contained in a defendant's notice of removal should be accepted if made in good faith and not questioned by the plaintiff of the court.

If the defendant's allegations are contested, Section 1446(c)(2)(B) provides that removal is proper "if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds" the jurisdictional amount. The court explained that this provision, added

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as part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011, was meant to clarify the procedure to be followed when a defendant's removal allegations have been challenged.

The court quoted a passage from the House Judiciary Committee's report on the JVCA, which bears repeating here:



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"[D]efendants may simply allege or assert that the jurisdictional threshold has been met. Discovery may be taken with regard to that question. In case of a dispute, the district court must make findings of jurisdictional fact to which the preponderance standard applies."

The court held that a notice of removal need only include a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence supporting the amount is required only after the plaintiff contests (or the court questions) the defendant's allegations.

The jurisdictional question presented for review by Dart was not the only jurisdictional question the court considered in its decision. The court looked at whether it had jurisdiction to hear Dart's appeal in the first instance, since the 10th Circuit had declined to review the district court's decision.

Under CAFA, the appeals court's review of a remand order is discretionary, and the 10th Circuit previously denied Dart's petition for leave to appeal. The

court held that it had jurisdiction to review the 10th Circuit's denial of leave to appeal and, thus, had jurisdiction to consider the question presented.

Although the 10th Circuit did not provide a detailed reason for its denial of the application, the majority opinion of the court concluded that the 10th Circuit based its decision on an erroneous understanding of the law.

The majority observed that the 10th Circuit's denial essentially "froze" the requirement of evidentiary support in the removal notice as the law of the circuit. It was unlikely that the 10th Circuit would have the opportunity to review this issue again because any diligent attorney would meet this evidentiary requirement going forward.

In light of these perceived repercussions, the majority concluded that the 10th Circuit must have denied Dart's petition to appeal because it believed the district court had correctly interpreted the law. Thus, the court found the 10th Circuit's denial of Dart's petition to be an abuse of discretion. The court vacated the judgment of the 10th Circuit and remanded the case for further proceedings.

The court included a footnote stating that its "disposition does not preclude the 10th Circuit from asserting and explaining on remand that a permissible ground underlies its decision to decline Dart's appeal." This footnote leaves unanswered the questions that would arise if the 10th Circuit accepts the invitation and explains that it had a permissible ground to decline Dart's appeal.

The majority's decision to vacate the 10th Circuit's denial was based on the assumption that the 10th Circuit misapplied the law. If that assumption proves to be incorrect, what happens next?