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The U.S. Supreme Court's Dec. 15, 2014, decision in *Dart Cherokee*, which expands the scope of appellate jurisdiction of remand orders under the Class Action Fairness Act, ''implicitly encourages future litigants to develop creative approaches in seeking review,'' attorneys Britt Cramer and Douglas G. Smith say. The ruling ascribed to the Tenth Circuit motives that were never articulated by the panel, and claimed for the Supreme Court jurisdiction to reach the merits by imputing error to a silent panel's discretionary behavior, the authors say.

Another Expansion in Federal Jurisdiction: The Supreme Court's Decision In *Dart Cherokee Basin Operation Co. v. Owens*

BY BRITT CRAMER AND DOUGLAS G. SMITH

The Supreme Court's decision in *Dart Cherokee Basin Operating Co. v. Owens*[1] is the most recent illustration of the ways in which the federal courts, and in particular the United States Supreme Court, are willing to reach out and adopt creative methods to exercise federal jurisdiction to avoid remand to state court in appropriate cases. The Supreme Court granted review to ascertain the scope of review of remand orders under the Class Action Fairness Act of 2005 (''CAFA'').[2]

The Court interpreted the scope of the federal appellate courts' jurisdiction to review such remand orders broadly, holding that it would be an abuse of discretion for an appellate court to deny an appeal of a remand order that, ''[f]rom all signals one can discern,'' was based on a legally erroneous premise.[3]

Notably, the majority decided the merits of the remand issue on review despite the fact that the precise reasoning for the appellate court's denial of the petition for appeal was not clear from its order. Thus, to correct an order it found clearly problematic, the Supreme Court effectively ''presume[ed] that the lower court adopted a legally erroneous argument advanced by one

[1] No. 13-719, 2014 BL 350806 (U.S. Dec. 15, 2014).

[2] CAFA establishes that district courts shall have original jurisdiction over any civil action that (i) involves a class of greater than 100 members, (ii) where ''any member of a class of plaintiffs is a citizen of a State different from any defendant,'' (iii) ''in which the matter in controversy exceeds the sum or value of $5 [million].'' 28 U.S.C. § 1332(d)(2)(A), (5)(B).

[3] *Dart Cherokee*, 2014 BL 350806, at *8.

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party'' in order to justify exercising jurisdiction to resolve the merits of the remand question.[4]

The Supreme Court's decision is consistent with a line of decisions in which the federal courts, and the Supreme Court itself, have reached out to exercise federal jurisdiction over remand orders that they believe are erroneous. In a series of cases, federal courts have adopted exceptions to the ''general rule'' that ''[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.''[5] *Dart Cherokee* is another strong precedent in that line of authority adopting such exceptions, encouraging practitioners to develop new and creative approaches for obtaining appellate review of remand orders.

The *Dart Cherokee* Decision

Dart Cherokee involved a dispute over royalties owed under oil and gas leases. Plaintiffs filed a putative class action in Kansas state court seeking compensation for the alleged underpayments under the leases on behalf of the purported class. Defendants removed the case to the U.S. District Court for the District of Kansas, asserting jurisdiction under the Class Action Fairness Act. In its notice of removal, defendants pleaded that CAFA's jurisdictional requirements were met, given that the matter involved ''approximately 400 royalty owners,'' there was ''minimal diversity of citizenship'' among defendants and the putative class, and that ''based on [defendants'] calculation of Plaintiff's putative class claims, the amount of additional royalty sought is in excess of $8.2 million.''[6]

Plaintiffs moved to remand the case to state court. Plaintiffs argued that, while defendants had alleged ''without any supporting proof whatsoever,'' that the amount in controversy requirement of CAFA had been satisfied, such ''bare allegation[s]'' were insufficient to grant the court subject matter jurisdiction absent support proving by a preponderance of the evidence that the amount in controversy exceeded $5 million.[7]

Consequently, plaintiffs maintained that defendants' notice of removal was ''deficient as a matter of law, and cannot be cured.''[8] The district court agreed. Reading Tenth Circuit precedent to ''consistently h[old] that reference to factual allegations or evidence outside of the petition and notice of removal is not permitted to determine the amount in controversy,''[9] the court concluded that defendants were required to provide evidence supporting their amount in controversy allegations in the notice of removal itself.

Defendants petitioned for permission to appeal the remand pursuant to 28 U.S.C. § 1453(c). This section, which provides an express statutory basis for appellate review of remand orders,[10] permits federal appellate courts to accept appeals from ''an order of a district court granting or denying a motion to remand a class action.'' The Tenth Circuit denied review and the court declined to consider the matter en banc. No reasons for the denial were given. However, the judges dissenting from the order denying en banc review published a response, noting that ''it is important that this court inform the district courts and the bar of this circuit that a defendant seeking removal under CAFA need only allege the jurisdictional amount in its notice of removal and must prove that amount only if the plaintiff challenges the allegation,'' and expressing disappointment that the panel allowed the district court's decision to stand.[11]

The Supreme Court granted certiorari to decide whether notices of removal must contain evidence supporting federal jurisdiction, or rather may contain only a '' 'short and plain statement of the grounds for removal,' '' akin to the federal pleading standard.[12] Although neither the parties nor the Court had raised the subject, during briefing, consumer advocacy organization Public Citizen, Inc. submitted an *amicus* brief raising an additional jurisdictional issue.

Public Citizen argued that the only decision under review was the Tenth Circuit's refusal to *accept an appeal* from the district court's decision to remand the case. Accordingly, the organization argued, the *merits* of the remand decision were not properly before the Court—only the Tenth Circuit's discretionary decision not to revisit that remand determination.[13] Consequently, it urged the Court to dismiss the case as improvidently granted, or to affirm the Tenth Circuit's exercise of discretion in declining to review the district court's remand order.

In a divided 5-4 decision, the Court resolved the merits of the remand issue. Writing for the majority, Justice Ginsburg clarified that ''a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold,'' and that evidence establishing the amount is required

[4] *Id.* at *10 (Scalia, J., joined by Kennedy, Kagan, and Thomas, JJ., dissenting).

[5] 28 U.S.C. § 1447(d).

[6] Notice of Removal, *Owens v. Dart Cherokee Basin Operating Co.*, No. 5:12-cv-04157-JAR-JPO (D. Kan. Dec. 12, 2012), ECF No. 1.

[7] *Id.*, Motion to Remand (Dec. 19, 2012), ECF No. 13.

[8] *Id.*

[9] *Id.*, Order Granting Remand (May 21, 2013), ECF No. 28, p. 11.

[10] *See* 28 U.S.C. § 1447(d) (''An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . .'').

[11] *Dart Cherokee Basin Operating Co. v. Owens*, 730 F.3d 1234, 1238 (10th Cir. 2013).

[12] The question presented by defendants' petition was: ''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?'' *See* http://www.supremecourt.gov/qp/13-00719qp.pdf.

[13] *See* Public Citizen amicus brief, *Dart Cherokee Basin Operating Co. v. Owens*, No. 13-719 (U.S. July 29, 2014).

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''only when the plaintiff contests, or the court questions, the defendant's allegation.''[14]

The majority rejected Public Citizen's jurisdictional argument, explaining that the ''[d]iscretion to review a remand order is not rudderless,'' and noting that there were ''many signals that the Tenth Circuit relied on the legally erroneous premise that the District Court's decision was correct.''[15]

The majority asserted that, therefore, the issue of whether the appellate court abused its discretion in denying review was inextricably linked to the issue of whether the district court's remand order was erroneous, as both questions required an analysis of what a removal notice must contain. In short, the Court concluded, it was ''an abuse of discretion for the Tenth Circuit to deny [the defendants'] request for review'' because the district court's remand order was ''fatally infected by legal error.''[16]

Justice Scalia—joined by Justices Kennedy, Kagan, and Thomas—dissented. The dissent focused on the lack of reasoning in the Tenth Circuit's decision, suggesting that the majority sought to fill the void in order to improperly assert jurisdiction. While the dissent maintained that ''[a]ttributing 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,'' it asserted that this approach was ''insuperable'' in view of the fact that the Tenth Circuit gave no indication that it denied permission to appeal on this basis.[17] Consequently, the dissenters agreed that the petition should have been dismissed as improvidently granted or the Tenth Circuit's ruling should have been affirmed.[18] Either way, the dissent concluded, the Court should not reach the merits of the remand order.

Expanding the Scope of Appellate Jurisdiction to Review Remand Orders

Dart Cherokee fits in with a general trend in the federal courts, and the Supreme Court in particular, to recognize new exceptions, or interpret existing rules liberally, to allow review of remand orders. The power of the courts of appeals to review district court remand orders is circumscribed by 28 U.S.C. § 1447(d), which states that ''[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.'' However, the Supreme Court stated long ago that the § 1447(d) proscription is not absolute. In fact, in a series of cases, the Court has repeatedly carved out exceptions to this rule in order to permit review of remand orders it finds problematic. Applying these decisions, the federal appellate courts have followed suit, in many instances interpreting them broadly to authorize appellate review. *Dart Cherokee* is simply the most recent decision in a line of authority providing a variety of potential avenues for appellate review of remand orders.

One of the first and most significant decisions in which the Supreme Court interpreted Section 1447(d) narrowly in order to assert appellate jurisdiction over a remand order was *Thermtron Products, Inc. v. Hermansdorfer*.[19] In *Thermtron*, the district court remanded a properly-removed diversity suit, citing the court's crowded federal docket. The district court otherwise did not question the jurisdictional propriety of the removal. The removing defendant filed a mandamus petition requesting review of the district court's order on the ground that the court had acted beyond its authority. Citing § 1447(d), the Sixth Circuit found that it had no jurisdiction to entertain the defendant's petition. The Supreme Court reversed. The Court held that ''only remand orders issued under § 1447(c) and invoking the grounds specified therein that removal was improvident and without jurisdiction are immune from review under § 1447(d),'' and instructed that the two sections had to be ''construed together.''[20] Accordingly, the Court in *Thermtron* created a potentially broad exception to the prohibition in Section 1447(d) for cases in which the district court acted outside its jurisdiction in issuing a remand order.

After *Thermtron*, litigators began to advance, and federal appellate courts began to develop, novel approaches to bypass Section 1447(d)'s bar preventing review of remand orders. For example, the appellate courts (including the Second, Sixth, and Ninth Circuits) issued a series of decisions establishing a body of case law holding that ''a remand order is reviewable on appeal when it is based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction.''[21]

The Third Circuit, examining the history of § 1447(d) and following the logic underlying *Thermtron*, developed a related exception, holding that federal appellate courts had authority to review a remand order where the district court's jurisdictional determination rested upon its conclusion that the statutory scheme that would have granted the district court subject matter jurisdiction in the case was unconstitutional and thus inoperative.[22] The Third Circuit reasoned that, because the district court's grounds for remand in such situations were ''not the type of federal subject matter jurisdictional decision intended to be governed by the terms of or the policy underlying section 1447(c)'' such rulings fell outside Section 1447(d) and could properly be subject to review by the appellate court.[23]

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[14] *Dart Cherokee Basin Operating Co. v. Owens*, No. 13-719, 2014 BL 350806, at *6 (U.S. Dec. 15, 2014).

[15] *Id.* at *7.

[16] *Id.*

[17] *Id.* at *10 (Scalia, J., dissenting).

[18] Justice Thomas wrote separately to argue that applications for certificates of appealability do not constitute cases, and to state that he would dismiss the matter for lack of jurisdiction on that ground. *Id.* at *14 (Thomas, J., dissenting).

[19] 423 U.S. 336 (1976), *abrogated in part by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

[20] *Id.* at 346.

[21] *Regis Associates v. Rank Hotels (Mgmt.) Ltd.*, 894 F.2d 193, 194 (6th Cir. 1990) (remand order based on district court's interpretation of a forum selection clause is reviewable on appeal); *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656 (2d Cir. 1988) (same); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984) (same).

[22] *In re TMI Litig. Cases Consol. II*, 940 F.2d 832 (3d Cir. 1991) (where district court based remand order on determination that the Price-Anderson Amendments Act of 1988 was unconstitutional, and thus could not grant it subject matter jurisdiction over claims presented, appellate review appropriate).

[23] *Id.* at 845.

The Supreme Court again weighed in on the subject in 1996, embracing the expansion of appellate jurisdiction being developed by the various federal circuit courts. In *Quackenbush v. Allstate Insurance Company*, the Court concluded that an abstention-based remand order was reviewable—although not via a writ of mandamus, but rather as a final order pursuant to 28 U.S.C. § 1291—under the collateral order doctrine.[24]

In *Quackenbush*, the district court relied on *Burford* abstention in remanding a case to federal court, concluding that abstention was appropriate under *Burford* because the state court had greater expertise on a particularly difficult and important question of state law implicated by the dispute.

The Ninth Circuit vacated the district court's decision, concluding both that abstention-based remand orders are reviewable *and* that such orders constitute reviewable final decisions under the collateral order doctrine. The Supreme Court affirmed. The Court reiterated that Section 1447(d) imposed no bar to appellate review, as reliance on the abstention doctrine as the basis for remand fell outside the ambit of Section 1447(c). It then went beyond its prior decision in *Thermtron*, holding that remand orders were not reviewable simply by mandamus, but could be reviewed as final judgments.[25] The court therefore affirmed the Ninth Circuit's decision holding that abstention-based remand orders constituted appealable final decisions, opening up a new class of remand orders potentially subject to appellate review. Once again, the scope of federal appellate review of remand orders was expanded.

Finally, in *Osborn v. Haley*, the Supreme Court evidenced a willingness to carve out creative and ''implicit'' exceptions to the rules of non-reviewability where it wanted to weigh in on the merits of a remand order that appeared contrary to a more-specific statutory mandate.[26] Plaintiff in *Osborn* brought an action in state court against an employee of the U.S. Forest Service, alleging that the employee tortiously interfered with her continued employment. The government invoked Westfall Act immunity on the employee's behalf, certifying that the employee was acting in the scope of employment and attempting to substitute the United States government as the defendant. By law, once such certification occurs, the relevant action ''shall be removed'' to federal court and the United States government must be substituted as defendant for the originally-named employee.[27]

Nonetheless, upon removal, the district court denied substitution and remanded the case back to state court, deeming the certification unpersuasive and finding a lack of subject matter jurisdiction. On appeal, the Sixth Circuit vacated the district court's decision. The Supreme Court affirmed the appellate court, holding that Section 1447(d) should be read in conjunction with the certification consequences outlined in the Westfall Act. The Court held that Act's requirement that a case ''shall be removed'' from state court ''renders the federal court exclusively competent and categorically precludes a remand to the state court.''[28] In such ''extraordinary case[s] in which Congress has ordered the intercourt shuttle to travel just one way,'' the Court noted, the restriction on appellate review of remand orders must give way to the prohibition against remand itself.

Lessons for Practitioners

Dart Cherokee continues in the vein of *Thermtron*, *Quackenbush* and *Osborn*. Once again, the Court has articulated a creative and flexible reading of Section 1447(d) in order to expand the availability of appeal of remand orders that it views as contrary to law.

In *Dart Cherokee*, the majority ascribed to the Tenth Circuit motives and rationales that were never articulated by the panel itself, and claimed for itself jurisdiction to reach the merits by imputing error to a silent panel's discretionary behavior. In so doing, the Court has again implicitly encouraged future litigants to develop creative approaches in seeking appellate review of remand orders.

The Court's articulation of exceptions to the restrictions on appellate review where district courts act outside their jurisdiction, or issue what amount to collateral orders invites practitioners to think creatively to articulate ways in which remand orders can be characterized such that they fit within these categories.

The Court's decision in *Dart Cherokee* is likely to only further encourage this trend among the federal circuits to expand the scope of appellate jurisdiction over remand orders and to encourage litigants to develop novel and creative arguments in order to obtain review of remand orders that they believe are erroneous.

[24] 517 U.S. 706 (1996).
[25] *Id.* at 715.
[26] 549 U.S. 225, 224 (2007).
[27] 28 U.S.C. § 2679(d)(2).
[28] *Osborn*, 549 U.S. at 226-27.

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