Justices Make Procedural Requirements for Removal Under CAFA Entertaining

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The big news on the opening day of the Supreme Court's 2014 term was the court's decision not to review several circuit-court decisions on same-sex marriage. A much lower-profile case was argued a few days later—*Dart Cherokee Basin Operating Company v. Owens*.

While that case lacked the media attention of the same-sex marriage cases and some of the other high-profile cases of the term, it resolved a crucial issue for class-action plaintiffs and defendants. Specifically, the Supreme Court held that, under the Class Action Fairness Act of 2005 (CAFA), a defendant seeking to remove a case to federal court is not required to include evidence supporting its amount-in-controversy allegation in its notice of removal. Although an unquestionably important decision for practitioners, what makes *Owens* interesting is the battle between Justice Ginsburg, the author of the majority opinion, and her friend, Justice Scalia, the author of the dissent.

Owens involves a putative class action brought by "royalty owners" of gas wells who were allegedly underpaid by defendants Cherokee Basin Operating Co. or Cherokee Basin Pipeline. The plaintiffs sued in state court and the defendants removed under CAFA. In the notice of removal, the defendants asserted that the amount in controversy was more than $8 million, well above the $5 million jurisdictional requirement in CAFA, and explained how they arrived at this conclusion. The plaintiffs moved to remand, arguing that the notice of removal was deficient as a matter of law because the defendants failed to submit any evidence in support of their claim that the amount in controversy exceeded the statutory requirement. In response, the defendants submitted an affidavit from their general counsel that further explained the calculations referenced in the notice of removal. Nonetheless, the district court granted the motion to remand.

In its opinion, the district court noted that "a defendant seeking to remove under CAFA must show that the amount in controversy exceeds $5 million by a preponderance of the evidence." The district court held that the defendants failed to satisfy this burden because they did not "submit any supporting documentation, affidavit or declaration" in support of their calculation of the amount in controversy. While the defendants did submit "additional support" for their calculation in response to the plaintiff's remand motion, the district court rejected this evidence, holding that: "The Tenth Circuit 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 defendants moved for leave to appeal to the Tenth Circuit, but the request was denied. The defendants then sought en banc review of the panel's decision, but this was also denied, by an evenly divided vote. The four judges who voted in favor of en banc review filed a "formal dissent," explaining their reasons and arguing that the Tenth Circuit should have reviewed and reversed the district court's decision. The dissenting judges argued that a notice of removal need only contain a "short and plain statement of the grounds for removal," and did not require the removing party to submit evidence in support of

those claims unless those allegations are challenged. Accordingly, the dissenting judges argued that the district court was wrong: (1) to require the defendants to submit evidence proving the amount in controversy along with their notice of removal; and then (2) to reject the defendants' efforts to provide evidence after the allegations in the notice of removal were challenged by the plaintiff.

The dissenting judges also criticized their colleagues for not exercising their discretion to hear defendants' appeal, noting:

CAFA is a newcomer to the scene and its intricacies are unfamiliar to many of us. It will always be tempting for very busy judges to deny review of a knotty matter that requires a decision in short order. But we have an obligation to provide clarity in this important area of the law.

In this regard, the dissenting judges compared *Owens* to *Standard Fire Insurance Company v. Knowles*, a recent Supreme Court decision holding that a class action plaintiff cannot prevent removal under CAFA by stipulating, before certification of the class, that he and the class will not seek more than $5 million in damages. That case followed the same procedural course as *Owens*—a contrary decision from the U.S. District Court for the District of Arkansas followed by a petition to the Eighth Circuit for leave to appeal, which was denied, and a petition for rehearing of that decision, which was also denied. Nonetheless, according to the dissenting justices in *Owens*, the issue in *Knowles* was "deemed sufficiently worthy of attention by the Supreme Court that it granted certiorari" and reversed the district court. The dissenting Tenth Circuit judges in *Owens* seemed to be inviting the Supreme Court to do the same thing again.

The Supreme Court accepted the invitation but then, at oral argument, seemed uncertain about exactly what it could do. Most of the oral argument was devoted to an issue raised by an amicus—whether the court had jurisdiction over the district court's decision on the merits, or just over the Tenth Circuit's discretionary decision to deny the defendants' motions for leave to appeal and en banc review. If only the latter, then several justices questioned how the Supreme Court could say that the Tenth Circuit abused its discretion when the Tenth Circuit gave no reason for its decision. For example, at oral argument, Justice Kagan acknowledged to defendants' counsel that "most of us agree with you on the merits"—a conclusion that Justice Alito claimed "might be a little premature"—but questioned how the Supreme Court could know what legal rule, if any, the Tenth Circuit relied upon that might have constituted an abuse of discretion. Similarly, several justices questioned whether the Supreme Court could rely on the dissent from the Tenth Circuit, as opposed to some statement from the judges who voted to deny the motions, to determine the reasons behind the decision to deny the motions.

This difference of opinion revealed during oral argument manifested itself in the court's 5-4 decision, with the justices split, not necessarily on the merits, but rather on the procedural issue of whether the court should even hear the case. On the merits, Justice Ginsburg, joined by Chief Justice Roberts and Justices Breyer, Alito and Sotomayor, held that the removal statute, which was patterned after the Federal Rules of Civil Procedure, required only a "short plain statement of the grounds for removal." Under this liberal standard, the removing party's plausible statement of the amount-in-controversy should be accepted as true, and need only be substantiated with extrinsic evidence if it is contested by the plaintiff or questioned by the court. If the allegation is challenged, then both sides must submit proof and the court decides, by a preponderance-of-the-evidence standard, whether the amount-in-controversy threshold has been met.

On the procedural issue, the majority held that "[t]he case was 'in' the Court of Appeals because of Dart's leave-to-appeal application, and [it had] jurisdiction to review what the Court of Appeals did with that application." If the Tenth Circuit's decision was based on "an erroneous view of the law," then, according to the majority, the Supreme Court was obligated to correct that mistake. In response to the argument that it could not know what the Tenth Circuit based its decision on because there was no written opinion explaining its decision, the majority found that there were "many signals that the

Tenth Circuit relied on the legally erroneous premise that the District Court's decision was correct." Chiefly, the majority noted that, by refusing to review the district court's decision, the Tenth Circuit allowed the underlying issue to "leave the ambit of the federal courts for good." Stated differently, the issue would never come before the Tenth Circuit again because, in light of the district court's decision, no "responsible attorney" would file a notice of removal without proof of the amount due. Therefore, the majority reasoned, the Tenth Circuit would not have "frozen" the district court's decision in place unless it agreed with the district court's conclusion.

In a dissenting opinion joined by Justices Kennedy, Thomas and Kagan, Justice Scalia criticized this conclusion, and criticized the majority for stretching to reach the merits of the case: "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." The dissent argued that there were "countless other, permissible reasons" why the Tenth Circuit might have chosen not to review the district court's decision, and the court should not strain to find one that allows it to review the merits of that decision. Justice Scalia rejected the majority's reasoning that the Tenth Circuit "froze" the district court's opinion in place, and scoffed at the idea that "responsible attorneys" would never provide the Tenth Circuit with another chance to review the issue in the future: "Even discounting the existence of irresponsible attorneys, responsible attorneys, and even responsible judges, sometimes make mistakes." In support of the conclusion that responsible judges make mistakes, Justice Scalia cited to the order granting certiorari in *Owens* itself.

Justice Scalia also somewhat playfully addressed the majority's "stinging observation" that he had joined the majority in *Knowles*. Justice Scalia noted that *Knowles* did not involve precisely the same issue as *Owens*, but nonetheless accepted responsibility for joining in the *Knowles* opinion, while needling Justice Ginsburg in the process:

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." (Emphasis added.)

Notably, Justice Ginsburg invoked this same phrase in her dissent in the *Hobby Lobby* decision from last term.

Ultimately, the holding in *Owens* is straightforward. The defendants seeking to remove a putative class action need not include evidence supporting the amount-in-controversy as part of their removal notice. Such evidence will only be required if the amount in controversy is challenged by the court or by the plaintiff. While this holding is relatively dry, the manner in which the court arrived at it makes for an entertaining and interesting read.

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