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From the Experts

'Dart' and Class Certification Order Jurisdiction

Scott E. Gant and Christopher L. Hayes, Corporate Counsel

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The U.S. Supreme Court's [decision in *Dart Cherokee Basin Operating Company v. Owens*](#), issued December 15, has received notice among class action practitioners for establishing that parties seeking to remove class actions to federal court under the Class Action Fairness Act (CAFA) do not need to include with their removal filing evidence showing that the amount in controversy exceeds \$5 million to establish jurisdiction. Little noted, however, is *Dart's* implication for another important aspect of class action practice.

The case also resolves uncertainty about whether the Supreme Court has jurisdiction to review a district court's interlocutory order granting or denying class certification when the court of appeals has declined to review the order.

The plaintiff in *Dart* filed a putative class action in state court seeking an unspecified amount in royalties under oil and gas leases with defendants. The defendants filed a notice of removal in federal court under CAFA, which gives federal district courts jurisdiction over certain class actions in which damages exceed \$5 million. Defendants' notice of removal alleged that the amount in controversy was \$8.2 million, but they did not submit evidence to substantiate the allegation with their notice

Plaintiffs sought remand to state court on the ground that defendants' bare allegation was insufficient to invoke the federal court's jurisdiction. The district court agreed with the plaintiff and entered an order remanding the case to state court.

In most circumstances, remand orders are "not reviewable on appeal or otherwise" 28 U.S.C. §1447(d), but in cases invoking CAFA, "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand." 28 U.S.C. §1453(c)(1). The defendants accordingly filed a petition asking the U.S. Court of Appeals for the Tenth Circuit for permission to appeal the order, but the appeals court denied the request. The *Dart* defendants then filed a petition for certiorari, which the Supreme Court granted. On the merits, the court concluded that the remand order was inappropriate because the defendants' "short and plain statement" of the amount in controversy met the statutory jurisdictional threshold in CAFA.

The court reached this conclusion despite a challenge to its jurisdiction raised in an amicus

brief suggesting that the court lacked subject matter jurisdiction because certiorari jurisdiction is limited to “[c]ases in the courts of appeals” 28 U.S.C. § 1254(1). The Supreme Court rejected these concerns, holding 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.” And although four justices dissented on the merits, only Justice Clarence Thomas expressly rejected the court’s determination on jurisdiction, writing a separate dissenting opinion to address the issue.

The *Dart* decision concerning jurisdiction has important implications for the appeal of interlocutory class certification orders. Ordinarily, interlocutory orders are not appealable. But as with remand orders, the courts of appeals have been given discretion to “permit an appeal from an order granting or denying class-action certification.” Fed. R. Civ. P. 23(f). Prior to *Dart*, it was unclear whether petitioning a court of appeals to permit an appeal of a district court’s order on a motion for certification placed the “case[] in the court of appeals,” and therefore within the ambit of the Supreme Court’s certiorari jurisdiction. See Scott E. Gant, “The Law of Unintended Consequences: Supreme Court Jurisdiction Over Interlocutory Class Certification Rulings,” 6 J. App. Prac. & Process 249 (2004).

Now, under *Dart*, a request for permission to appeal renders the case “in” the court of appeals, giving rise to certiorari jurisdiction. Consequently, if a court of appeals refuses to review a class certification order issued by a district court, *Dart* has effectively established that the Supreme Court nevertheless may undertake review of the trial court’s class certification determination.

This development is significant because a decision on class certification can be the most important moment in a case. Refusal to certify is likely to deprive the plaintiff of incentives necessary to continue prosecuting the case. On the other side, certification of a class may increase the defendant’s exposure to such an extent that settlement is the only reasonable choice.

For parties on either side who have lost at certification, the *Dart* holding makes it clear that they have a comparatively inexpensive shot at avoiding an unfavorable certification order by seeking Supreme Court review. Where, as in *Dart*, there is a strong case that a district court committed legal error, which the court of appeals refused to review, a petition for certiorari should now be strongly considered. And even in cases where it is harder to establish an abuse of discretion, after *Dart*, seeking certiorari may be a worthwhile Hail Mary pass.

Scott E. Gant is a partner and Christopher L. Hayes is counsel at Boies, Schiller & Flexner, where their practices include class action and appellate litigation.

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