

Chicago Daily Law Bulletin®

Volume 160, No. 101

Top court to assess ground rules for removing cases to federal courts

On April 7, the U.S. Supreme Court granted certiorari in *Dart Cherokee Basin Operating Company LLC v. Owens*, No. 13-719, a case that presents the question of whether a defendant seeking to remove a case to federal court is required to present evidence supporting federal jurisdiction or whether a short statement of the grounds suffices.

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 for 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 a notice of removal that is unsupported by evidence is improper and cannot support federal jurisdiction. In the face of the plaintiff's motion to remand, the defendant filed a supporting affidavit, but the court refused to consider it, concluding that it was necessary to include supporting evidence with the removal notice.

The 10th U.S. Circuit Court of Appeals declined to hear an appeal, although several judges dissented from this decision on a

petition for rehearing en banc.

In its petition with the Supreme Court, the defendant in *Dart* noted that the lower court's ruling left the 10th Circuit in conflict with seven circuits, including the 7th Circuit, which have held that a defendant removing a case from state to federal court need not submit supporting evidence with its notice of removal.

The *Dart* defendants argued that the 10th Circuit's ruling imposed a double standard on litigants seeking removal in that it required them to satisfy both the notice pleading standard and an evidentiary burden in their initial filing. This double standard, the defendants argued, was without statutory support, as the removal statute, set forth at 28 U.S.C. §1446, establishes only a notice-pleading standard for notices of removal.

A defendant without evidence to support its notice of removal could be in the unenviable position of requesting expedited discovery from the same state court that it no longer wants to have hear the case.

In the 7th Circuit, litigants are not required to submit evidence with their notice of removal, and if evidence supporting removal is developed and submitted at a later time, courts are free to consider such evidence.

In *Harmon v. OKI Systems*, the

TULLY'S LAW



TERI L. TULLY

Teri L. Tully is a partner at Scandaglia & Ryan who has represented clients in a broad range of complex commercial litigation. Prior to joining Scandaglia & Ryan, Tully was an attorney at the Federal Trade Commission; an associate at Jenner & Block LLP; and a law clerk to the late U.S. District Judge Martin C. Ashman.

7th Circuit expressly authorized a district court to consider evidence in support of a notice of removal that was not in the record on the date of removal, if such evidence is submitted. The 7th

Circuit considered but rejected the approach that is now followed in the 10th Circuit. The 7th Circuit spurned that view because suits are removed on the pleading, long before evidence or proof has been adduced. *Brill*

v. Countrywide Home Loans Inc., 427 F.3d 446, 448 (7th Cir. 2005).

To this end, the 7th Circuit has emphasized that a removal notice "is a pleading requirement, not a demand for proof." *Spivey v. Venture Inc.*, 528 F.3d 982, 986 (7th Cir. 2008). Based on this line of

authority, defendants seeking removal in the 7th Circuit are not required to submit evidence demonstrating diversity jurisdiction; rather, such evidence may be adduced later if the plaintiff challenges the basis for jurisdiction and moves to remand the case.

If the Supreme Court affirms the 10th Circuit's decision in *Dart*, this will represent a significant change from how removal is often handled within the 7th Circuit.

The *Dart* case is important for practitioners in both state and federal courts. Notably, even though *Dart* involves a case removed under the Class Action Fairness Act, nothing in the terms of the question presented limits its reach to class actions.

Accordingly, the *Dart* decision may seriously alter the requirements for removal in the 7th Circuit if the Supreme Court adopts the 10th Circuit's view.

In that situation, given the short 30-day window in which a defendant may ordinarily remove a case, a defendant without evidence to support its notice of removal could be in the unenviable position of requesting expedited discovery from the same state court that it no longer wants to have hear the case.

On the other hand, plaintiffs seeking to stay in their chosen state court venue would have a strong case for remand whenever a notice of removal is not supported by competent evidence.

The *Dart* case likely will be decided in the court's October 2014 term.