HOT TOPICS, EMERGING PATTERNS, AND UNANSWERED QUESTIONS OF THE CLASS ACTION FAIRNESS ACT OF 2005

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I. INTRODUCTION

The highly anticipated Class Action Fairness Act of 2005 (“CAFA” or the “Act”) was signed into law on February 18, 2005. Considerable debate and commentary over the Act’s likely effects are now giving way to a flurry of litigation concerning the Act – when it can be invoked and how particular provisions are interpreted. There is little disagreement over certain nuts-and-bolts procedural details, which are readily apparent based on a plain reading of the Act, but on many issues, CAFA raises more questions than it answers, as some of its provisions are unclear and operative words are left undefined.

Federal courts have started to provide definitive answers to some of the more significant questions about CAFA’s scope, such as when an action “commences” for purposes of removing cases under CAFA. However, these cases have, in turn, raised new questions, such as whether cases filed before February 18, 2005, can be removed if a new claim or party is added after February 18; which party bears the burden of proof on a motion to remand a removal petition; how to value the amount in controversy when non-monetary relief is sought; and more generally, how pre-CAFA legal precedent applies to cases filed after February 18.

This advisory will focus primarily on CAFA’s emerging patterns and unanswered questions. Part II of this advisory provides a brief overview of CAFA’s jurisdictional provisions and a summary of recent case law addressing the implications of adding a new claim or party to actions filed before February 18, 2005; Part III addresses the challenges raised in multi-defendant class actions by the local controversy and home state exceptions; Part IV discusses how to satisfy CAFA’s amount in controversy requirement; Part V summarizes recent case law regarding which party bears the burden of proof on removal and remand; and Part VI provides concluding thoughts about how defense counsel can most effectively utilize CAFA in the defense of class actions.

CAFA amends the diversity statute, 28 U.S.C. § 1332, to create federal jurisdiction over many (but not all) class actions, creating new opportunities to remove to federal court class actions filed in state court. Pre-CAFA, complete diversity of citizenship of the
parties was required for removal, meaning that removal was not an option if a plaintiff was a citizen of the same state as any defendant. And, the value of individual claims could not be aggregated to satisfy the amount in controversy.\(^4\) CAFA now allows removal where there is minimal diversity so long as any member of the plaintiff class is a citizen of a state different from any defendant, diversity is satisfied,\(^5\) and the citizenship of all members of the putative class are considered, providing even greater elasticity to the minimal diversity requirement.\(^6\) Also under CAFA, courts are required to aggregate the claims of the individual class members to determine whether the amount in controversy exceeds the sum or value of $5 million exclusive of interest and costs.\(^7\)

II. POTENTIAL TRIGGERS FOR REMOVAL OF CASES FILED PRIOR TO FEBRUARY 18, 2005

With the advent of CAFA, corporations now have a fighting chance to remove interstate class actions filed in so-called “magnet state courts” where national classes are routinely certified, notwithstanding rampant violations of due process rights. Given these new and more liberal diversity jurisdiction rules, corporate defendants have not surprisingly attempted to remove class actions filed in state court prior to CAFA’s effective date of February 18, 2005.\(^8\) Below is a brief synopsis of successful and unsuccessful arguments made by defense counsel in seeking removal of “pre-February 18-filed” cases.\(^9\)

A. The Act of Removal Does Not “Commence” A New Action

CAFA applies only to suits “commenced on or after the date of enactment of this Act,”\(^10\) but the Act does not define when an action “commences,” leading to the most litigated CAFA issue to date.\(^11\) In the first circuit case to address the issue, *Pritchett v. Office Depot, Inc.*, 404 F.3d 1232 (10th Cir. 2005), the Tenth Circuit reviewed the appeal of an order granting plaintiff’s motion to remand an action removed to federal district court pursuant to CAFA. In that case, the defendant sought to remove a class action filed in state court on April 2, 2003. The defendant argued that when a preexisting state action is removed to federal court, it is “commenced” in federal court as of the date of removal.\(^12\) The Tenth Circuit disagreed, interpreting the word “commenced” to mean the date on which the case was filed in state court, making CAFA inapplicable to the case.\(^13\) In affirming the district court’s decision below, the Circuit Court relied on Federal Rule of Civil Procedure 3, which states that a civil action is commenced by filing a complaint with the court.\(^14\)

The Tenth Circuit also examined the Act’s legislative history to support its conclusion, observing that an earlier draft of CAFA making it applicable to pending state court lawsuits had been considered, but rejected, thus evidencing an intention that CAFA apply prospectively and not retroactively.\(^15\) To date, every case examining this precise issue has reached the same result as the Tenth Circuit in *Pritchett*.\(^16\)
However, the *Pritchett* court acknowledged that “there exist some unique circumstances in which some action other than filing a complaint in court is deemed to ‘commence’ a lawsuit . . .”17 The Tenth Circuit recognized that, in some states, *service of process* may commence a suit as opposed to the filing of the original complaint in a court of competent jurisdiction.18 The Tenth Circuit’s statement, though *dicta*, bears noting as many class actions were filed immediately before President Bush signed the Act into law, but were not served until on or after February 18, 2005 – many for several months. Depending upon a given state’s laws on service as commencement, some corporate defendants may be able to take advantage of CAFA even though the action was filed before February 18, 2005. The likelihood of succeeding on such an argument is not likely, however, because service is usually not the exclusive means by which an action is commenced.19

Since *Pritchett*, defendants have employed other strategies to remove pre-February 18-filed state actions, all to no avail. Defendants in two cases filed on February 17, 2005, attempted to remove based on the unsuccessful argument that the Act became effective when it was passed by Congress on February 17th, not when it was signed into law by the president on February 18, 2005.20 And, a corporate defendant was likewise unsuccessful in removing three cases consolidated after CAFA’s effective date but individually filed pre-February 18th.21 The message from the federal courts is very clear – CAFA applies prospectively only, and CAFA will only be applied to actions filed prior to February 18 under unique and limited circumstances.

**B. Amendments to a Complaint May “Commence” a New Action**

Corporate defendants have also argued that amendments to a complaint can “commence” a new action, including without limitation, amendments to add new plaintiffs, new defendants, new theories, and new class definitions. The first circuit court to address these arguments was the Seventh Circuit in *Knudsen v. Liberty Mutual Insurance Co.*, 411 F.3d 805 (7th Cir. 2005).

In *Knudsen*, defendant Liberty Mutual argued that any substantial change to the class definition “commences” a new case, so as to permit removal.22 The Seventh Circuit disagreed, stating that “a doctrine of 'significant change' … would go against the principle that the first virtue of any jurisdictional rule is clarity and ease of implementation.”23 But, the circuit court went on to note as follows:

[A] new claim for relief (a new “cause of action” in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes. Removal practice recognizes this point: an amendment to the pleadings that adds a claim under federal law (where only state claims had been framed before), or adds a new defendant, opens a new window of removal. We imagine, though we need not hold, that a similar approach will apply under the 2005 Act, perhaps modeled on Federal Rule Of Civil
Procedure 15(c), which specifies when a claim relates back to the original complaint ... and when it is sufficiently independent of the original contentions that it must be treated as fresh litigation.  

The dicta in Knudsen gave new hope to corporate defendants that were sued in state class actions filed prior to February 18. But again, without specific guidance from the circuit court, parties were left with more questions than answers. The key question being, “what constitutes a step sufficiently distinct that courts would treat it as independent for limitations purposes and commence a new piece of litigation?” To date, the courts have examined three areas, which are discussed below:

1. Amending the Complaint to Change the Class Definition

Despite the favorable dicta in Knudsen, the Seventh Circuit has consistently found that amendments to class definitions do not commence new suits. In Schorsch v. Hewlett-Packard Co., 417 F.3d 748 (7th Cir. 2005), the circuit court held that a second amended complaint expanding the class definition did not commence a new action. The initial complaint, filed in state court prior to CAFA’s effective date, defined the class based on certain computer chips in printer drum kits. The amended complaint, filed after CAFA’s effective date, amended the basis of the class definition to include those same computer chips found in toner and ink cartridges. With fact-intensive reasoning, the court determined that the new definition simply included chips that allegedly were included by the defendant “in consumables . . . that cause printers to stop working before the consumer has wrung the last iota of use from the product.” That said, the court found that the new class definition related back and that no new action had been commenced.

In contrast, the court in Senterfitt v. Suntrust Mortgage, Inc., 385 F. Supp. 2d 1377 (S.D. Ga. 2005) held that where an amended complaint was filed after CAFA’s effective date, and thereby expanded the initial class definition by adding 16 years of additional claims and significantly increasing the size of the potential class, a new action was commenced, and CAFA applied. To determine whether CAFA applied to the amended complaint, the court first conducted a “relation back” analysis. The court determined that, while the amended complaint alleged the same systematic conduct set forth in the original complaint, it nonetheless did not “relate back” because, it did not meet the Eleventh Circuit’s additional requirements of providing adequate notice and avoiding unfair prejudice. The court also noted that the amendment was made “in retaliation for an argument made by Defendant . . .” and not due to newly discovered evidence or made to correct an earlier mistake.
2. Amending the Complaint to Add a New Plaintiff and New Factual Allegations

In *Heaphy v. State Farm Mutual Automobile Insurance Co.*, No. C05-5404, 2005 WL 1950244 (W.D. Wash. Aug. 15, 2005), the court cited *Knudsen* in support of its holding that a “first amended complaint” commenced a new action.\(^\text{36}\) In *Heaphy*’s somewhat distinct procedural posture, the plaintiffs filed the underlying case in state court on August 10, 2001, and, after preliminary litigation in state court, went to arbitration.\(^\text{37}\) An arbitration award was issued in defendant’s favor in April 2005, and the defendant sought to have the award confirmed as a judgment in state court.\(^\text{38}\) The plaintiffs then filed a “first amended complaint” after CAFA’s effective date, adding a plaintiff, alleging new factual allegations arising out of events different from those in the initial complaint, and stating three additional causes of action.\(^\text{39}\) The state court confirmed the arbitration award, and the defendant then removed the case to federal court.\(^\text{40}\) The plaintiffs moved to remand, arguing that the amended complaint related back to the date of initial filing. The defendant responded that the amended complaint commenced a new action because the plaintiff had already lost all claims in arbitration before the amended complaint was filed.\(^\text{41}\) Citing *Knudsen*, the court held that the amended complaint “was sufficiently independent of the original contentions that it must be treated as fresh litigation” and denied the motion to remand.\(^\text{42}\)

Notwithstanding the *Heaphy* case, the court in *Judy v. Pfizer, Inc.*, No. 4:05CV1208, 2005 WL 2240088 (E.D. Mo. Sept. 14, 2005) held that routine amendments to a petition did not commence a new action. In *Judy*, the plaintiff amended her petition to include additional factual allegations that “elaborate[d] her original claims. . . .” and refined class allegations.\(^\text{43}\) The court observed that the amendments did “not change the substance of [her] claims but merely provide[d] further information.”\(^\text{44}\) Because the changes did not present a novel claim for relief or add a new party, the court held that, under *Knudsen*, a new action had not commenced.\(^\text{45}\) Even when the plaintiff amended the complaint by adding claims for negligence and breach of warranty, the court found that these claims were either contemplated in the original petition seeking relief for common law and statutory fraud, or that the claims related back to the initial petition.\(^\text{46}\)

Corporate defendants should take note of the *Judy* case because, unlike *Heaphy*, it is more analogous to the work-a-day amendments that plaintiffs routinely file in class actions. As the court in *Morgan v. American International Group, Inc.*, No. C-05-2798, 2005 WL 2172001, at *3 (N.D. Cal. Sept. 8, 2005) observed, “Plaintiffs routinely amend their complaints and proposed class definitions, without any suggestion that they have restarted the suit . . . .”\(^\text{47}\) Like *Judy*, the *Morgan* case held that adding class representatives and adding claims that related back to the initial complaint did not commence a new action for CAFA purposes.\(^\text{48}\) These cases suggest that defendants will be hard pressed to identify amendments that are so novel as to commence a new action for CAFA purposes.
3. Amending the Complaint to Add a New Defendant

In *Adams v. Federal Materials Co.*, No. 5:05CV-90-R, 2005 WL 1862378 (W.D. Ky. July 28, 2005), a federal district court held that an action “commenced” after CAFA’s effective date, even though the initial class action was filed March 11, 2004. As in *Heaphy*, the procedural posture of *Adams* is unique. On March 11, 2004, plaintiffs filed a class action against defendants Federal and Hanson in Kentucky state court. On February 25, 2005, defendant Federal filed a third-party complaint against Rogers Group based on Roger’s alleged acquisition of a quarry from Hanson. On April 1, 2005, plaintiffs filed an amended complaint adding Rogers Group as a defendant in the case. On May 2, 2005, Rogers Group, joined by Federal and Hanson, removed the state court action to federal court. The defendants successfully argued that a new suit was commenced as to the later-added defendant. The court held that this later-added defendant “presents precisely the situation in which it can and should be said that a new action has “commenced” for purposes of removal pursuant to the CAFA.” The court cited *Knudsen* for the proposition that “an amendment to the pleadings that adds a claim under federal law (where only state claims had been framed before), or adds a new defendant, opens a new window of removal.”

4. How Will the Law Develop?

Without question, federal courts are reluctant to apply CAFA to actions filed prior to February 18. One of the most disappointing cases to date is *Weekley v. Guidant Corp.*, 392 F. Supp. 2d 1066 (E.D. Ark. 2005). In *Weekley*, the court remanded a case that was filed originally as an individual claim and was amended post-CAFA to add class allegations, stating:

A civil action . . . can only be commenced once. Pleadings may be amended, but amending pleadings does not commence a civil action. . . . Other claims may be added during the course of the action. Those new claims may dramatically change the action. Those claims may or may not “relate back” to the original complaint. . . . Nevertheless, a civil action . . . commenced when the initial complaint was filed.

Notwithstanding *Weekley*, it is anticipated that even more creative theories of removability for actions filed prior to February 18, 2005, will develop, and the federal courts will render a range of decisions, likely driven in large part by the specific factual circumstances in a particular case. It is simply inevitable, given the new legislation and the considerable discretion vested in the district courts in determining the propriety of federal subject-matter jurisdiction. Because of the anticipated “fact-specific” decisions, there are likely limitations to the relevance of the legal precedent now developing. However, there is ample opportunity to make new law, and defense counsel should attempt removal, as there is no real downside in attempting to do so.
III. CAFA’S UNDEFINED JURISDICTIONAL TERMS: A CRITICAL PIECE IN ESTABLISHING EXCEPTIONS TO FEDERAL JURISDICTION

While CAFA greatly liberalizes diversity jurisdiction requirements, it also contains provisions requiring federal courts to decline jurisdiction in some cases and permitting federal courts to decline jurisdiction in others. A federal court must decline to exercise jurisdiction when:

- two-thirds or more of the putative class members are citizens of the state where the case was filed and at least one defendant:
  - is a defendant from whom significant relief is sought;
  - is accused of conduct that forms a significant basis for the claims asserted by the putative class; and
  - is a citizen of the state in which the action was filed; and
- principal injuries resulting from the alleged conduct of each defendant were incurred in the state in which the action was originally filed; and
- during the three-year period preceding the filing of the class action, no other class action has been filed asserting the same or similar factual allegations.

A district court may, in its discretion, decline jurisdiction when more than one-third but less than two-thirds of the class members and the “primary defendants” are citizens of the state in which the action was filed. The Act identifies a number of factors that a court should consider in determining whether to decline jurisdiction in such a case, including:

1. whether the claims involve national and interstate interests;
2. whether the forum state’s laws apply to the action;
3. whether the action was pled in a way that seeks to avoid federal jurisdiction;
4. the forum state’s nexus with putative class members, the alleged harm, and defendants;
5. whether the number of class members from the forum state is substantially greater than the number of class members from any other state; and,
6. whether similar class actions have been filed in the previous three years.58
Because the Act does not define the terms “primary defendants,” “significant relief,” “significant basis,” or “principal injuries,” there are very real challenges in identifying the citizenship of so-called primary defendants and defendants from whom significant relief is sought and whose alleged conduct forms a significant basis for the claims asserted by the class. Corporations involved in multi-defendant class actions – in which some defendants are citizens of the state in which the action was originally filed and other defendants are not – are faced with the challenge of how to oppose a motion to remand where plaintiff contends that remand is warranted based upon the local controversy or home state exceptions.

In the removal petition or remand opposition how do defense counsel identify who the “primary defendants” are? Would any corporate defendant be willing to be identified as a “primary defendant” in order to effectuate removal when such an admission may be used against that corporation in the litigation at a later stage? What is the citizenship of the class members and how is that determined within 30 days? Is there a way to avoid remand to state court under the “home state” or “local controversy” exceptions without having to denominate certain corporate defendants as “primary” or defendants from whom “significant relief” is sought and whose alleged conduct forms a “significant basis” for the class claims? Only a few cases have started to answer these questions.

A. When Is an Action a “Local Action?”

In *Schwartz v. Comcast Corp.*, No. 05-2340, 2005 WL 1799414 (E.D. Pa. July 28, 2005), the plaintiff argued that the case could not be removed because it fell within CAFA’s home state or local controversy exceptions requiring district courts to decline to exercise jurisdiction. In evaluating the propriety of federal jurisdiction, the court refused to rely on the class definition in the amended complaint, filed after the notice of removal, and looked only at in the initial complaint, which defined the class as: “All persons and entities who are citizens of the Commonwealth of Pennsylvania, who resided or did business in the Commonwealth of Pennsylvania, and who subscribed to Comcast’s high-speed internet system for service in Pennsylvania . . .” In construing the class definition, the court observed that numerous members of the proposed class may have been citizens of different states while residing or doing business in Pennsylvania, thereby raising the possibility that jurisdiction was appropriate under CAFA because more than two-thirds of the plaintiff class may have been citizens of a state other than the state where the action was originally filed. Without deciding the issue, the court ordered limited discovery for the purpose of determining the citizenship of members of the proposed class.

B. Who Is a Primary Defendant?

The *Adams v. Federal Materials Co.* case, discussed previously in Part II, B. 3, *supra*, answers this question in the most detail. In that case, of the three defendants: Federal was a Kentucky citizen; Hanson was a Kentucky citizen; and Rogers Group was a non-Kentucky citizen. Plaintiffs argued that Rogers Group was a “secondary defendant,”
because it entered that case as a third-party defendant for indemnity purposes. Plaintiffs argued that the primary defendants were the two Kentucky defendants, and therefore, the action was “local” in nature and not subject to removal under CAFA because of the “home state” exception. The court observed that the plaintiffs later amended their complaint to include claims against defendant Rogers Group and that the complaint included claims against all the defendants, meaning that defendant Rogers Group’s liability was not limited to indemnifying defendant Federal. The court, stating that there was a “lack of principled distinction between the position” of the three defendants and noting that one count of plaintiffs’ complaint was directed at Rogers, held that it was not required to decline to exercise diversity jurisdiction under CAFA.

C. Why CAFA’s Undefined Terms Matter.

The challenges associated with removal and remand in light of CAFA’s undefined terms are best illustrated by the following examples.

Assume multiple chemical companies with manufacturing operations in close geographic proximity are all named as defendants in a toxic tort state class action. Some of the defendants are citizens of the state in which the case was originally filed, but others are not. Plaintiff asserts various state law claims on behalf of the class for personal injuries and property damages and contends that all the defendants (in-state and out-of-state) are jointly and severally liable. At the conclusion of the litigation, through settlement or otherwise, the defendants may have claims against each other for contribution. While it may have initially sounded like a good idea for the out-of-state defendants to assert that they were the “primary defendants” or the defendants whose conduct formed a “significant basis” for the claims asserted for purposes of removal, in subsequent claims for contribution among the defendants, the out-of-state defendants will want to take the position that their conduct was not the primary cause of the class members’ injuries and their contribution to the harm was insignificant in order to minimize the extent of their liability. In this example, the “judicial admissions” that were helpful for purposes of removal are now harmful in defending claims for contribution.

Generally speaking, the nature of plaintiff’s claim must be evaluated, and the propriety of remand decided on the basis of the record as it stands at the time the petition for removal is filed. In other words, whether federal subject matter jurisdiction exists is to be decided according to the allegations in the complaint. Assume that a complaint contains broad and sweeping allegations against multiple defendants, asserting that “all defendants” committed fraud, engaged in unfair and deceptive trade practices, or breached their contracts with members of the class without specifying which particular defendants are responsible for what alleged conduct. Some of the defendants are in-state, while others are out-of-state. The complaint is completely devoid of detail regarding the actions of the out-of-state defendants versus the in-state defendants, and does not identify from whom significant relief is sought or who the primary defendants are. Arguably, there is no need for corporate defendants to identify any specific co-defendants as the so-called “primary defendants” in the petition for removal.
Instead, the corporate defendant removing the case can argue that there is an utter lack of specificity in the complaint regarding what any particular defendant did and the extent of its responsibility for plaintiffs’ alleged damages. Assuming plaintiff does not tender any evidence into the record at the time of filing her motion to remand, but rather simply relies on her complaint as originally filed, there would be no basis for the assertion that the “primary defendants” are citizens of the state in which the action was originally filed. Similarly, such a broad, conclusory complaint would not support the argument that any defendant from whom significant relief is sought and whose alleged conduct forms a significant basis for the claims asserted by the class is a citizen of the state in which the action was originally filed. These arguments are grounded in the premise that, according to the Senate Report, the plaintiff bears the burden of proof to establish that a case should be remanded to state court. Assuming plaintiff does bear the burden of proof on remand, she would have to establish that the in-state defendants and not the out-of-state defendants are the real targets of all class members. Unless she carries that burden, the federal court should retain jurisdiction, consistent with the legislative intent that federal subject matter jurisdiction be extended under CAFA.

If, however, the complaint is more detailed and identifies who the primary defendants are, then the arguments in opposition to a motion to remand become vastly more complicated. The removing defendant will have to tender evidence into the record demonstrating that the in-state defendants are not primary or the in-state defendants are not the parties from whom significant relief is sought or whose conduct forms a significant basis for the claims asserted by the class. The statute’s failure to define these terms makes this analysis quite complicated. Without a definition of “primary” how does one know what evidence will be sufficient to demonstrate that your client is “secondary”? Without a definition of “significant relief,” how does counsel know what quantifiable amount is insignificant by comparison?

**IV. SATISFYING CAFA’S AMOUNT IN CONTROVERSY REQUIREMENT**

Pursuant to new subsection 1332(d)(6), the claims of the individual class members in any class action shall be aggregated to determine whether the amount in controversy exceeds the sum or value of $5 million (exclusive of interests and costs). It is presumed by most counsel that the jurisdictional amount will be uncontestable or easy to demonstrate in most multi-state or nationwide class actions. However, depending upon the complaint, it may not be self evident that “all matters in controversy” in the aggregate exceed the sum or value of $5 million.

For example, in *Berry v. American Express Publishing Corp.*, 381 F. Supp. 2d 1118 (C.D. Cal. 2005), the court found that CAFA did not detail the appropriate means of valuing the amount in controversy, particularly where the plaintiff is seeking non-monetary relief. The court observed that the traditional pre-CAFA rule required that, in a class action case seeking injunctive relief, the amount in controversy was determined from the perspective of the value to the plaintiff. The *Berry* court, however, held that the amount
in controversy can be determined either from the view of the aggregate value to the class members or defendants. The *Berry* court found that the complaint specifically stated that the class did not seek to recover more than $5 million, that the value of recovery to the putative class was nominal, and that the cost of compliance to the defendants was too speculative. In light of these facts, the court ruled that the plaintiff had proven that the amount in controversy was less than $5 million and remanded the case to state court. Similarly, in *Holland v. Cole National Corp.*, No. 7:04CV-246, 2005 WL 1242349 (W.D. Va. May 24, 2005) (report and recommendation of magistrate judge), the court found that CAFA’s amount in controversy requirement was not met because the plaintiff did not allege that more than $5 million was in controversy in the complaint.

Counsel generally presume that the jurisdictional amount will be uncontestable or easy to demonstrate in most multi-state or nationwide class actions. However, depending upon the complaint, it may not be self-evident that all matters in controversy in the aggregate exceed $5 million. Accordingly, just as in pre-CAFA days, corporate defendants often may be required to submit affidavits demonstrating satisfaction of the amount in controversy. But, corporate defendants should also consider the impact that this comparatively early treatment of valuation of the case in the notice of removal might have on later aspects of the litigation. Although a defendant must present sufficient evidence to convince the court that the jurisdictional amount is satisfied, the defendant does not want to assist the plaintiffs by helping to establish class-wide damages or presenting arguments that support plaintiffs’ theory of the case. A court should not construe removal arguments as admissions, but it is expected that plaintiffs will use defendant’s jurisdictional proof against that same defendant at the class certification stage and on the merits. A corporate defendant must therefore be careful in providing proof of the jurisdictional amount. In pleadings, the defendant should conspicuously and repeatedly indicate that plaintiff’s theory is assumed *arguendo*, that the valuation for purposes of removal is not dispositive of the propriety of class treatment of plaintiff’s claims, and that it is defendant’s position that class certification should be denied either in state or federal court.

V. THE BURDEN OF PROOF ON MOTION TO REMAND REMOVAL PETITIONS UNDER CAFA

The text of 28 U.S.C. § 1332 is silent on the issue of which party – plaintiff or defendant – bears the burden of demonstrating federal subject-matter jurisdiction exists and there is a split of authority among the courts on this issue. While pre-CAFA case law squarely places the burden on the corporate defendant to prove federal subject-matter jurisdiction on a motion to remand, CAFA’s legislative history states, “It is the intent of the committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court.”
A. Cases Holding the Party Seeking Remand Bears the Burden of Proof

The first case to address which party bears the burden of proof was Berry v. American Express Publishing Corp., No. SA CV 05-302AHS, 2005 WL 1941151 (C.D. Cal. June 15, 2005). Berry reasoned that because CAFA creates an interpretive issue about whether it shifted the burden of proof, referral to the legislative history was proper. In holding that the plaintiff bore the burden of proof to establish a lack of federal jurisdiction, the court noted that the Senate Report expressed a clear intention to place the burden of removal on the party opposing removal to demonstrate that an interstate class action should be remanded to state court. Significantly, the court also noted with irony that the original diversity statute is likewise silent on which party bears the burden of proof, but found that placing the burden on the plaintiff is also consistent with the tradition of placing the burden on the moving party in motions practice generally. Several other cases have agreed with Berry, placing the burden of proof on the plaintiff in a motion to remand to which CAFA applies.

B. Cases Holding the Removing Party Bears the Burden of Proof

The Seventh Circuit in Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005), however, reached the opposite result. The Brill court began its discussion of the burden of proof issue by observing the well-settled rule, which CAFA has not changed, that removing party bears the initial burden of establishing the right to be in federal court. The Brill court then went on to discuss which party bears the burden of proof on a Motion to Remand under CAFA. Recognizing that “a dozen or so district judges” have held that the remanding party bears the burden of proof under CAFA, the Brill court held that CAFA’s legislative history alone was not sufficient to change the pre-CAFA rule allocating the burden of proof to defendants on a motion to remand.

The court in Schwartz v. Comcast Corp., No. 05-2340, 2005 WL 1799414 (E.D. Pa. July 28, 2005), reached the same result as the Brill court. The Schwartz court refused to refer to legislative history, reasoning that the traditional burden of proof rule was not altered by CAFA’s statutory text and that using legislative history was inappropriate because the Act was not ambiguous on its face. The court went on to reason that Congress is presumed to be aware of the existing burden of proof standard, and that because it failed to make any changes to the standard explicit in the Act, Congress must have intended to maintain the status quo.

Because CAFA is silent on this issue, and even though the legislative history appears clear, defense counsel should be prepared to bear the burden of proof to show facts establishing jurisdiction, consistent with pre-CAFA case law.
VI. CONCLUDING THOUGHTS

In the nine months since CAFA’s enactment, several CAFA cases have been decided, creating an emerging pattern about how courts resolve CAFA’s unanswered questions. In litigating CAFA’s unanswered questions, one key question corporate defendants will uniformly confront is: to what extent is pre-CAFA authority binding on post-CAFA cases? In the opinion of these authors, pre-CAFA law is of limited authority, as there has been a monumental swing of the pendulum in Congress’s treatment of federal jurisdiction. It is our opinion that the Senate Report should guide the courts in their interpretation of CAFA. While diversity jurisdiction was previously tightly controlled, and there was a presumption against removal, Congress has made clear its intention to “restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction . . .” through CAFA. As such, corporate defendants should consistently argue that, there is a presumption that interstate class actions should be in federal court, notwithstanding plaintiff’s choice of forum, and take every opportunity to remove under CAFA.

End Notes

1 This paper represents the state of the law as of November 10, 2005. Readers should be aware that rapid changes in this area of law are expected to continue, in part due to the expedited appeals available under CAFA.


4 See, e.g., Lundquist v. Precision Valley Aviation, Inc., 946 F.2d 8, 10 (1st Cir. 1991) (stating that diversity of citizenship exists when the plaintiff is a citizen of a different state than all of the defendants); In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 607 (7th Cir. 1997) (stating that at least one named plaintiff must satisfy the jurisdictional minimum to meet the traditional amount in controversy requirement); But see Exxon Mobile Corp. v. Allapattah Servs., 125 S. Ct. 2611 (2005) (holding that, under 28 U.S.C. § 1367, a federal court in a diversity action may exercise supplemental jurisdiction over additional plaintiffs whose claims do not satisfy the minimum amount in controversy requirement, provided the claims are part of the case or controversy as the claims of plaintiffs who do allege a sufficient amount in controversy).


6 Id. But note that under CAFA, the traditional rules for determining citizenship still apply. In Moll v. Allstate Floridian Insurance Co., No. 3:05CV160, 2005 WL 2007104 (N.D. Fla. Aug. 16, 2005), the only defendant removed under CAFA and the plaintiff argued that the case should be remanded because two-thirds of the plaintiff class were citizens of Florida and the defendant was a citizen of Florida. The defendant insurance company responded that it was incorporated and had its principal place of business in Illinois. The court engaged in a traditional citizenship analysis, determining the defendant’s principal place of business was in Florida, and holding that diversity jurisdiction did not exist.


Notwithstanding CAFA’s expansion of removal rights for corporations, much of the process of removal remain the same. CAFA does not modify the 28 U.S.C. § 1446(a) requirements for content of removal petitions. A defendant corporation seeking to remove a civil action from state court to federal court must include in the notice of removal a “short and plain statement of the grounds for removal….” CAFA also does not modify the provision of 28 U.S.C. § 1446(b), which requires corporate defendants to file their notice of removal within 30 days of learning facts demonstrating the removability of a case to federal court. The removing defendant is still required to demonstrate in its notice of removal the bases for the number of class members, diversity and jurisdictional amount as set forth in CAFA. However, the Act provides that in a multi-defendant case, a single defendant can remove a class action without the consent of all defendants, and the one-year limitation for removal under § 1446(b) no longer applies.


Despite the recent enactment of CAFA, there are a number of appellate decisions published to date on the issue of whether or not the act of removal commences an action for purposes of removal under CAFA. The number of appellate decisions is a direct result of Section 1453 of CAFA. Under that Section, remand orders are appealable. Section 1453(c)(1) provides that “Notwithstanding Section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the state court from which it was removed if application is made to the court of appeals not less than seven days after entry of the order.” Pre-CAFA, most remand orders could not be appealed. Appeals of remand orders under CAFA are expedited. The appellate court must decide the propriety of removal within sixty days, and failure to decide within 60 days means the appeal has been denied, assuming no extension of the time period has been granted.

Pritchett, 404 F.3d at 1234.

Id. at 1235.

Id.

Pritchett, 404 F.3d at 1235-36 (citing S. 5, 109th Cong. § 9 (2005), § 9, 199 Stat. at 14).

See Bush v. Cheaptickets, Inc., 377 F. Supp. 2d 807 (C.D. Cal. 2005), aff’d 425 F. 3d 683 (9th Cir. 2005) (same); Pfizer, Inc. v. Lott, 417 F.3d 725, 726 (7th Cir. 2005) (stating that holding otherwise would result in “radical judicial surgery on the statute”); Natale v. Pfizer, Inc., 424 F.3d 43 (1st Cir. 2005) (holding that commencement of an action refers to the date the action is filed in state court, not when the case is removed to federal courts and remanding case); Lander and Berkowitz, P.C. v. Transfirst Health Servs., Inc., 374 F. Supp. 2d 776 (E.D. Mo. 2005) (holding that the Class Action Fairness Act was enacted on the day that it was signed into law by the president and granting plaintiff’s motion to remand a case filed in state court on February 17, 2005, one day before President Bush signed the Act into law); Sneddon v. Hotwire, Inc., No. 05-0951, 2005 WL 1593593, at *2 (N.D. Cal. June 29, 2005) (holding that commencement of an action refers to the date the action is filed in state court, not when the case is removed to federal courts and remanding case); Yescavage v. Wyeth, Inc., No. 205CV294FTM33SPC, 2005 WL 2088429, at *4 (M.D. Fla. Aug. 30, 2005) (same); Zuleski v. Hartford Accident and Indemn. Co., No. 2:05-0490, 2005 WL 2739076, at *3 (S.D.W. Va. Oct. 24, 2005) (same).

Pritchett, 404 F.3d at 1235.

Id.; see also Eufaula Drugs, Inc. v. Scripsolutions, No. 2:05CV370-A, 2005 WL 2465746, at *4 (M.D. Ala. Oct. 6, 2005) (analyzing “commencement” under Alabama law, which provides that a complaint is commenced when it is filed with the intention of having process served in due course).

See In re Expedia Hotel Taxes and Fees Litig., 377 F. Supp. 2d 904, 906 (W.D. Wash. 2005) (stating that under Washington law, a civil action is commenced by service of a summons or by filing a complaint) (emphasis added).


22 411 F.3d at 806.

23 Id.

24 Id. at 807.

25 Schorsch v. Hewlett-Packard Co., 417 F.3d 748, 751 (7th Cir. 2005) (holding that a second amended complaint expanding the class definition did not commence a new action); see also Judy v. Pfizer, Inc., No. 04:05CV1208, 2005 WL 2240088 (E.D. Mo. Sept. 14, 2005) (holding that amendments to complaint that simply refined factual and class allegations did not commence new action and remanding case).

26 417 F.3d at 751.

27 Id. at 749.

28 Id. Even so, the court noted that there may be an argument that two limitations periods applied, one to the claims in the initial complaint and another to the claims in the amended complaint, meaning that the claims in the amended complaint alone could be removed.

29 Id. at 751.

30 Id.

31 Schorsch, 417 F.3d at 751; see also Phillips v. Ford Motor Co., No. 05-CV-503-DRH, 2005 WL 2654247 (S.D. Ill. Oct. 17, 2005) (following Schorsch and remanding case when amendment added two named plaintiffs and made routine changes to class definition).

32 385 F. Supp. 2d at 1378, 1381.

33 Id., at 1379-1381.

34 Id., at 1379-1381.

35 Id. at 1381 n.6; see also Plummer v. Farmers Group, Inc., 388 F. Supp. 2d 1310 (E.D. Okla. 2005) (holding that amended complaint did not relate back, and therefore CAFA applied, when complaint initiated class action and added thousands of new parties and two causes of action).


37 Id., at *1.

38 Id.

39 Id.

40 Id.

41 Id.


43 Id., at *3.

44 Id.

45 Id.


47 2005 WL 2172001, at *3

2005 WL 1862378, at *1.

Id., at *2.

Id., at *4.

Id., at *3. But see Morgan, 2005 WL 2172001, at *3-4 (holding that amended complaint adding defendant did not commence a new action because it did not “substantively change the nature of the action”); Robb v. Stericycle, Inc., 2005 WL 2304475, at *4 (stating in dicta that “there is the more literal and commonsense reading . . . that a civil action is commenced only once, no matter how often it may later be amended or have new parties joined.”); New Century Health Quality Alliance, Inc. v. Blue Cross and Blue Shield of Kansas City, Inc., No. 05-0555, 2005 WL 2219827, at *5 (W.D. Mo. Sept. 13, 2005) (holding that amended petition, where original petition sued the right party by the wrong name, did not commence a new action and remanding case to state court); Eufaula Drugs, Inc. v. Scripsolutions, No. 2:05CV370-A, 2005 WL 2465742, at *4 (M.D. Ala. Oct. 6, 2005) (holding that court did not have jurisdiction under CAFA when defendant was misnamed in original complaint but had notice of complaint); Schillinger v. Union Pac. RR Co., 425 F.3d 330 (7th Cir. 2005) (holding that scrivener’s error adding defendant and amended complaint expanding class definition did not commence new action); Brown v. Kerkhoff, No. 05-00274. 2005 WL 2671529, at *16 (S.D. Iowa Oct. 19, 2005) (remanding case when amended complaint added new defendants but asserted the same claims as in the initial complaint).

Note that the Weekley court rejected the relation-back concept as the test for whether a pre-CAFA filed case is removable.

392 F. Supp. 2d at 1066.

Interestingly, plaintiffs can remain masters of their complaint under CAFA. In Price v. Berkeley Premium Nutraceuticals, No. 05-73169, 2005 WL 2649205, at *2-4 (E.D. Mich. Oct. 17, 2005), the court found it had jurisdiction under CAFA when the plaintiffs voluntarily dismissed their first complaint and filed a new complaint with the same allegations after CAFA’s effective date.


Id.

Id.

2005 WL 1799414, at *2.

Id., at *3.

See id., at *3, 7; see also Harvey v. Blockbuster, Inc., 384 F. Supp. 2d 749 (D.N.J. 2005) (holding that action was not a class action within CAFA’s definition because it was brought by the state attorney general under the parens patriae power).

Id., at *7.

2005 WL 1862378, at *5.

Id.

Id.

Id.


381 F. Supp. 2d at 1123.
2005 WL 1242349, at *15; see also Brill v. Countrywide Home Loans, Inc., No. 05C2713, 2005 WL 2230193, at *2 (N.D. Ill. Sept. 8, 2005) (holding that amount in controversy was not met and remanding case when plaintiff did not allege willful misconduct, such that damages would be trebled, and defendant provided no evidence to suggest a reasonable probability of treble damages); but cf Plummer v. Farmers Group, Inc., No. 05-242, 2005 WL 2292174, at *7 (reasoning that amount in controversy was met by multiplying number of class members by potential damages and observing that plaintiff did not stipulate otherwise and denying motion to remand).

See De Aguilar v. Boeing Co., 47 F.3d 1404, 1409 n.6 (5th Cir. 1995); Burns v. Windsor Ins. Co., 31 F.3d 1092, 1094 (11th Cir. 1994). There is some difference of opinion in the circuits as to exactly what to call this burden of proof. The Fifth, Sixth, and Eleventh Circuits require a preponderance of the evidence, see De Aguilar, 47 F.3d at 1409; Gafford v. Gen. Elec. Co., 997 F.2d 150, 158 (6th Cir. 1993); Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1357 (11th Cir. 1996), whereas the Third Circuit applies the legal certainty test. Whatever the jurisdiction or terminology, the defendant must do more than make a conclusory statement in the notice of removal that the amount in controversy has been met. See Lupo v. Human Affairs Int'l, Inc., 28 F.3d 269, 273-74 (2d Cir. 1994); see also Huffman v. Saul Holdings Ltd P'ship, 194 F.3d 1072 (10th Cir. 1999) (burden varies on whether amount exceeds limit).
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