

Second Circuit CAFA Update: Removing Defendant Bears Burden of Proving Threshold Jurisdictional Requirements Under CAFA

In two recent decisions, the Second Circuit became the latest circuit to hold that a defendant who removes a case to federal court under the Class Action Fairness Act of 2005 ("CAFA") bears the burden of establishing the threshold prerequisites for federal jurisdiction, as the proponent of federal jurisdiction. *Blockbuster, Inc. v. Galeno*, ___ F.3d ___, 2006 WL 3775326 (2d Cir. Dec. 26, 2006); *DiTolla v. Doral Dental IPA of New York, LLC*, 469 F.3d 271 (2d Cir. 2006).

In CAFA, subject to certain exceptions, Congress granted the federal courts diversity jurisdiction over putative class actions involving at least 100 proposed class members where: (1) the citizenship of at least one proposed class member is different from that of any defendant ("minimal diversity"); and (2) the matter in controversy, after aggregating the claims of the proposed class members, exceeds \$5 million, exclusive of interest and costs. P.L. 109-2 § 4(a), codified at 28 U.S.C. § 1332(d). CAFA's text, however, is silent as to which party bears the burden of establishing these threshold prerequisites for federal jurisdiction under CAFA.

In *Blockbuster*, a consumer fraud putative class action removed to federal court under CAFA and arising from Blockbuster's "no-late-fee" video rental program, the Second Circuit vacated the district court's order denying plaintiff's motion to remand on the ground that "[t]he district court made no findings and offered no explanation as to how it calculated the amount in controversy here to be more than \$5 million." 2006 WL 3775326, at *6. The Second Circuit joined the Seventh, Ninth and Eleventh Circuits in holding that "[u]nder CAFA, as under the traditional rule, the party asserting subject matter jurisdiction has the burden of proving it." *Id.*; *Brill v. Countrywide Home Loans, Inc.* 427 F.3d 446 (7th Cir. 2005); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006); *Midema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006). The Court rejected Blockbuster's reliance on CAFA's legislative history, which stated that "the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident." *Blockbuster*, 2006 WL 3775326, at *5. In light of the well-established rule that the proponent of federal jurisdiction bears the burden of establishing jurisdiction, the Court held that it would not shift that burden to the plaintiff in a removed action "[i]n the absence of clear textual directive [in CAFA] to alter such a long established principle of federal jurisdiction." *Id.*

Blockbuster followed on the heels of a more pithy ruling a month earlier by another Second Circuit panel, which "join[ed] three of [its] sister circuits" in holding that the removing defendant bears the burden of establishing CAFA's jurisdictional prerequisites. *DiTolla v. Doral Dental IPA of New York, LLC*, 469 F.3d 271, 275. (2d Cir. 2006). In *DiTolla*, as in *Blockbuster*, the Court found that in light of CAFA's textual "silence" on the issue of which party bore the burden, "Congress chose not to alter [the] rule" placing the burden on the party asserting federal jurisdiction. *Id.*

The class action complaint in *Blockbuster* alleged that the "no-late-fee" program was deceptive because the program charged certain customers who were late in returning rented videos a \$1.25 re-stocking fee, while other customers were required to pay for the cost of the video. The complaint sought the greater of the actual damages to class members or statutory damages of \$50 per customer. Because the district court made

no finding as to how Blockbuster satisfied its burden of proving to a reasonable probability that the amount in controversy in the aggregate exceeded \$5 million, the Second Circuit sent the case back to the federal district court to “explain its calculation of the reasonably probable damages.” 2006 WL 3775326, at *6.

With respect to whether the requisite “minimal diversity” was satisfied, the Second Circuit concluded that Blockbuster had satisfied its burden. Although the complaint alleged only the “residency” of the named plaintiff—as opposed to “citizenship,” which is the linchpin for diversity jurisdiction—the Court held that “it seems plain . . . that Blockbuster is able to meet its burden of showing that there is a reasonable probability that at least one of” the “thousands” of “New York customers” who were putative class members “is a citizen of New York,” and thus is a citizen of a state different from that of Blockbuster (a citizen of Delaware and Texas). 2006 WL 3775326, at *6.

Because CAFA was designed “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” (P.L. 109-2, § 2(b)(2)), many had hoped that courts construing CAFA would shift the burden to those opposing the exercise of federal jurisdiction (*i.e.*, plaintiffs in cases removed to federal court). In light of the recent Second Circuit decisions (and those of three sister circuits), it is now more likely that plaintiffs will prevail in arguing that a removing defendant bears the burden to establish the threshold jurisdictional requirements under CAFA. Nevertheless, because some district courts in other Circuits have found that CAFA shifted that preliminary burden to plaintiffs seeking remand, there is still an opportunity for defendants to litigate this issue and perhaps create a Circuit split for Supreme Court review.¹

Significantly, the Second Circuit noted that it “need not comment” as to which party bore the burden with respect to whether certain enumerated exceptions to federal jurisdiction under CAFA applied. *Id.* Those exceptions, which were not before the Second Circuit in *Blockbuster*, include what are referred to as (i) the “home-state controversy” exception; and (ii) the “local controversy” exception.

Under the “home-state controversy” exception, a federal court *must* decline to exercise jurisdiction where two-thirds or more of the members of the putative plaintiff class and the “primary defendants” are citizens of the forum state. 28 U.S.C. § 1332(d)(4)(B). Under the “local controversy” exception, a federal court *must* decline to exercise jurisdiction where the following four conditions are met: (1) more than two-thirds of the members of the proposed plaintiff class are citizens of the forum state; (2) at least one defendant is a defendant from whom members of the proposed plaintiff class seek significant relief, whose alleged conduct forms a significant basis of the asserted claims, and who is a citizen of the forum state; (3) the principal injuries were incurred in the forum state; *and* (4) no other class action asserting the same or similar factual allegations has been filed against any of the defendants within the three years preceding the filing of the case. 28 U.S.C. § 1332(d)(4)(A). In addition to those mandatory exceptions, in cases where more than one-third but less than two-thirds of the putative class members and the “primary defendants” are citizens of the forum state, a federal court *may* decline to exercise jurisdiction “in the interests of justice and looking at the totality of the circumstances” after weighing six statutory factors. 28 U.S.C. § 1332(d)(3).

¹ Compare *Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749, 752 (D.N.J. 2005); *Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161, 168 (D. Mass. 2005), *aff’d on other grounds*, 424 F.3d 43 (1st Cir. 2005) (finding CAFA shifts the burden to plaintiffs seeking remand) with *Pierce v. TTP, Inc.*, 2006 WL 3827517, at *1 (W.D. Mo. Dec. 28, 2006); *Gladstone Florist, LLC v. TTP, Inc.*, 2006 WL 3827518, at *1 (W.D. Mo. Dec. 28, 2006); *Lee v. Carter-Reed Co., L.L.C.*, 2006 WL 3511160, at *2 (D.N.J. Dec. 5, 2006); *Morgan v. Gay*, 2006 WL 2265302, at *3 (D.N.J. Aug. 7, 2006); *Williams v. Texas Commerce Trust Co. of New York*, 2006 WL 1696681, at *3 n.5 (W.D. Mo. June 15, 2006); *Moniz v. Bayer A.G.*, 447 F. Supp. 2d 31 (D. Mass. 2006); *Ongstad v. Piper Jaffray & Co.*, 407 F. Supp. 2d 1085, 1089-90 (D.N.D. 2006); *Werner v. KMPG LLP*, 415 F. Supp. 2d 688, 694-95 (S.D. Tex. 2006); *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310, 1317-18 (E.D. Okla. 2005); *Judy v. Pfizer, Inc.*, 2005 WL 2240088, *2 (E.D. Mo. Sept. 14, 2005); *Schwartz v. Comcast Corp.*, 2005 WL 1799414, *4-7 (E.D. Pa. July 28, 2005) (finding CAFA did not shift the burden from the party removing the action to federal court).

The Second Circuit in *Blockbuster* noted that even though the Seventh and Eleventh Circuits have held that the removing defendant bears the initial burden of establishing the threshold jurisdictional requirements under CAFA (*i.e.*, minimal diversity and that the amount in controversy is greater than \$5 million), once a defendant has satisfied that burden, the burden shifts to plaintiffs seeking remand to “establish[] that they are eligible for one of CAFA’s express exceptions to jurisdiction.” 2006 WL 3775326 at *5; *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 680 (7th Cir. 2006); *Evans v. Walter Indus.*, 449 F.3d 1159, 1164 (11th Cir. 2006). *Accord*, *Frazier v. Pioneer Ams. LLC*, 455 F.3d 542, 546 (5th Cir. 2006).

Blockbuster emphasizes the need for defendants to provide evidentiary support for their assertions that CAFA’s threshold jurisdictional requirements—minimal diversity and more than \$5 million in controversy—are satisfied. Because a growing number of circuits are holding that defendants, and not plaintiffs, bear the burden of proof as to these threshold requirements, given the developing case law placing the burden of proof on the defendant, federal subject matter jurisdiction is likely to be found lacking if there is an absence of evidence on either of these requirements. While the question of the burden of proof still can be litigated outside the Second, Seventh, Ninth and Eleventh Circuits, prudence dictates that defendants provide evidence to support their jurisdictional allegation. On the other hand, even in circuits which place the initial burden on defendants to establish CAFA’s threshold jurisdiction requirements, once those thresholds are satisfied, defendants can still argue that plaintiffs bear the burden of proving an exception to CAFA jurisdiction.

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