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CAFA: FOR WHOM THE (REMOVAL) BURDEN TOLLS

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Under a well-established principle of federal jurisprudence, "the party invoking federal jurisdiction bears the burden of establishing its existence."[1] Thus, in actions removed from state to federal court, it had always been the removing defendant—the proponent of federal jurisdiction—who "must take and carry the burden of proof" that the prerequisites for federal jurisdiction have been satisfied.[2]

Removing defendants seeking to shift this burden to plaintiffs found a glimmer of hope with the enactment of the Class Action Fairness Act of 2005 ("CAFA").[3] 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,"[4] CAFA represents a rare instance of a statutory expansion of federal subject matter jurisdiction. In CAFA, Congress granted the federal courts diversity jurisdiction over putative class actions where: (1) the putative class action consists of at least 100 proposed class members; (2) the citizenship of at least one proposed class member is different from that of any defendant ("minimal diversity"); and (3) the matter in controversy, after aggregating the claims of the proposed class members, exceeds $5 million, exclusive of interest and costs.[5] However, there are exceptions to CAFA's broad grant of federal jurisdiction, where a threshold number of class members, and certain defendants, are citizens of the forum state.[6] Thus, a key question under CAFA is who bears the burden of establishing CAFA's applicability to the removed action.

CAFA's text is silent as to this question. But CAFA's legislative history provides that the purpose of CAFA is to "*encourage* the exercise of federal jurisdiction over class actions."[7] The Senate Judiciary Committee Report expressly addressed the burden shifting issue in stating that "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. . . . Allocating the burden in this manner is important to ensure that the named plaintiffs will not be able to evade federal jurisdiction . . . [and] the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption."[8]

In the year since CAFA's enactment, courts have been split on the burden-shifting issue, notwithstanding the clear legislative history shifting the burden to plaintiffs seeking remand to state court.[9]

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The rationale of those courts ignoring the clear legislative history shifting the burden to plaintiffs seeking remand has been simple: "The text of CAFA says nothing about the burden of proof on removal."[10] This "contrasts with Congress's express provisions changing a number of aspects of removal practice for cases that fall under CAFA [*e.g.*, eliminating the requirement that all defendants consent to removal].[11] Moreover, in light of the general rule imposing the burden of proving federal jurisdiction on the proponent of federal jurisdiction, "Congress is presumed to be aware of existing law when it passes legislation. . . . Had Congress intended to make a change in the law with respect to the burden of proof, it would have done so expressly in the statute."[12]

Courts finding that CAFA shifts the burden of proof to plaintiffs seeking remand have relied on the "clear intention [in the legislative history] to place the burden of removal on the party opposing removal to demonstrate that an interstate class action should be remanded to state court."[13] As one court explained, "the failure to address the burden of proof in the statute reflects the Legislature's expectation that the clear statements in the [legislative history] would be sufficient to shift the burden of proof."[14] In fact, the diversity jurisdiction statute never addressed which party bears the burden to establish federal diversity jurisdiction, and thus, "the failure [of CAFA] to explicitly legislate changes on the burden of proof in interstate class actions has little interpretative value."[15]

As plaintiffs and defendants continue to fight over the turf on which class actions are litigated (*i.e.*, whether in state or federal court), the parties will attempt to shift the burden of establishing (or refuting) the application of CAFA to removed actions. Thus, on whom that burden falls is likely to be an evolving area in the growing body of CAFA jurisprudence.

ENDNOTES

1 *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104, 118 S. Ct. 1003, 1017 (1998).

2 *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97, 42 S. Ct. 35, 37 (1921).

3 CAFA applies equally to actions originally filed in federal court, but challenges to federal jurisdiction are most often asserted in remand motions in actions originally filed in state court and removed to federal court, rather than in motions to dismiss for lack of subject matter jurisdiction in actions originally filed in federal court.

4 P.L. 109-2, § 2(b)(2).

5 P.L. 109-2 § 4(a), codified at 28 U.S.C. § 1332(d). CAFA also applies to "mass actions"—actions involving the joinder of 100 or more individual plaintiffs.

6 28 U.S.C. § 1332(d)(3)&(4).

7 S. Rep. 108-123 at 45 (emphasis added).

8 S. Rep. No. 109-14 at 42-44.

[9] *Compare Harvey v. Blockbuster, Inc*., 384 F. Supp. 2d 749, 752 (D.N.J. 2005); *In re Textainer Partnership Sec. Litig*, 2005 WL 1791559, *3 (N.D. Cal. Jul. 27, 2005); *Waitt v. Merck & Co., Inc.*, 2005 WL 1799740, *2 (W.D. Wash. Jul. 27, 2005); *Yeroushalmi v. Blockbuster, Inc*., 2005 WL 2083008, *3 (C.D. Cal. Jul. 11, 2005); *Berry v. Am. Express Pub'g., Corp*., 381 F. Supp. 2d 1118, 1122-23 (N.D. Cal. 2005); *see also 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) (all finding that CAFA shifts the burden to plaintiffs seeking remand) *with Abrego v. The Dow Chemical Co*., 2006 WL 864300 (9th Cir. Apr. 4, 2006); *Brill v. Countrywide Home Loans, Inc*., 427 F.3d 446, 448 (7th Cir. 2005); *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); *Ongstad v. Piper Jaffray & Co*., 407 F. Supp. 2d 1085, 1089-90 (D.N.D. 2006); *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); *see also In re Expedia Hotel Taxes and Fees Litig*., 377 F. Supp. 2d 904, 905 (W.D. Wash. 2005); *Sneddon v. Hotwire, Inc*., 2005 WL 1593593, *1 (N.D. Cal. June 29, 2005) (all finding that CAFA did not shift the burden from the party removing the action to federal court).

[10] *Werner*, 415 F. Supp. 2d at 694.

[11] *Id.* at 695.

[12] *Schwartz*, 2005 WL 1799414, at *6-7.

[13] *Berry*, 381 F. Supp. 2d at 1122.

[14] *Id.*

[15] *Id.* at 1123.