The Burden of Proof Under CAFA:
Removal and Remand

By Howard S. Suskin, Esq., and Marisa K. Perry, Esq.*

The Class Action Fairness Act substantially expanded federal jurisdiction over certain class-action lawsuits filed in state court. While defendants hurry into federal courthouses and plaintiffs fight to remain in state court, a critical debate remains over which party bears the burden of proving that a particular class action belongs in, or should remain in, federal court. CAFA is silent on the subject, giving scant guidance to courts looking to assign the burden. The majority of courts to address the issue have adopted a burden-shifting approach where the party seeking removal bears the burden of establishing federal jurisdiction; the burden then shifts to the remand-seeking party to establish that an exception to federal jurisdiction applies.

Overview

CAFA significantly impacts federal jurisdiction over class actions filed in state court by lowering the threshold for removing cases to federal court. The federal diversity statute, 28 U.S.C. § 1332, previously required complete diversity and one claim in excess of the minimum amount in controversy, $75,000. Under the pre-CAFA version of the statute, the party seeking to remove a case to federal court bore the burden of establishing jurisdiction. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (“The party invoking federal jurisdiction bears the burden of establishing these elements.”).

With CAFA, Congress amended Section 1332 such that federal jurisdiction is proper where:

- The class has no fewer than 100 members;
- The aggregate of each class member’s claims totals at least $5 million; and
- There is “minimal diversity,” meaning that one class member is a citizen of a state different from any one of the defendants.

The amendment left open the question of who bears the burden of establishing federal jurisdiction for CAFA cases.

Removal under CAFA is not a one-way street. Congress qualified the minimal-diversity rule for class actions in which more than two-thirds of the plaintiff class and all primary defendants are citizens of the state where the plaintiff sued. See 28 U.S.C. § 1332(d)(4)(B). This is the “home-state controversy” exception, which applies where the case is “essentially local in nature.” Hart v. FedEx Ground Package Sys., 457 F.3d 675, 677 (7th Cir. 2006).

The “local controversy” exception requires that federal courts decline jurisdiction where more than two-thirds of the plaintiff class and at least one primary defendant are residents of the state where the action was brought and:

- The defendant’s conduct forms a significant basis of the claims;
- The primary injuries occurred in the filing state; and
- No similar class action has been filed against any of the defendants within three years.


Federal courts also must decline jurisdiction where the primary defendants are states, state officials or other governmental entities against whom the court may be foreclosed from ordering relief. See 28 U.S.C. § 1332(d)(5).

This article discusses decisions under CAFA resolving the burden-of-proof issue for removal and remand. It focuses first on the nearly uniform proposition that the party seeking remand bears the burden of establishing federal jurisdiction and discusses the less-uniform standards by which removing parties meet that burden. The article
then discusses remand and the current trend in which the party seeking to invoke an exception to federal jurisdiction must prove that remand is appropriate.

Removal

The U.S. Court of Appeals for the 7th Circuit was the first federal appellate court to assign the burden of proof for federal jurisdiction under CAFA. Brill v. Countrywide Home Loans Inc., 427 F.3d 446 (7th Cir. 2005). There, James Brill filed a class action in state court, alleging that Countrywide Home Loans had violated the Telephone Consumer Protection Act by faxing unsolicited advertisements. Countrywide moved to remove the case, but the federal judge remanded, finding that the company failed to prove that the stakes exceeded $5 million. Countrywide appealed and the 7th Circuit reversed, rejecting Countrywide’s argument that CAFA had shifted the burden of proof to the party opposing removal.

The court held that the party seeking federal jurisdiction must establish its propriety. Judge Frank Easterbrook wrote for a unanimous court, “Whichver side chooses federal court must establish jurisdiction; it is not enough to file a pleading and leave it to the court or the adverse party to negate jurisdiction.” Id. at 447. Placing the burden on the removing party was consistent with “well-established” precedent under the general removal statute. Id. Further, the court reasoned that applying the general rule made “practical sense” in the class-action context given that the removing party would generally be in a better position to calculate its maximum exposure. Id. at 447-48.

Brill also considered and squarely rejected the argument that CAFA’s legislative history should guide interpretation. Countrywide attempted to argue that a Senate Judiciary Committee report supporting a burden-shift to the party opposing removal was evidence of congressional intent. Id. at 448. Judge Easterbrook acknowledged that multiple district courts had treated the report as equivalent to a burden-shifting statute, but he said “naked legislative history has no legal effect.” Id. To change the rule “that a proponent of federal jurisdiction bears the risk of non-persuasion,” he said, “Congress must enact a statute with the president’s signature.” Id.

Every circuit court that has considered the issue has reached the same conclusion and placed the risk of non-persuasion on the party seeking removal. For example, in Blockbuster v. Galeno, 472 F.3d 53, 57 (2d Cir. 2006), the 2nd Circuit rejected the removing party’s argument that the plaintiff must prove the absence of federal jurisdiction. Without a clear statutory directive changing the rule, the court declined to shift the burden of proving (or disproving) federal jurisdiction to the plaintiff. Id. The 3rd Circuit agreed, finding “no reason to create an exception for CAFA to the well-settled practice in removal actions.” Morgan v. Gay, 471 F.3d at 473 (3d Cir. 2006); see also Abrego v. Dow Chem. Co., 443 F.3d 676 (9th Cir. 2006) (per curiam); Evans v. Walter Indus. Inc., 449 F.3d 1159 (11th Cir. 2006).

The U.S. Supreme Court and six of the circuit courts have not yet decided this precise issue. In the six circuits, however, district courts appear to be following the majority approach of placing the burden on the removal-seeking party. District courts in the 1st, 4th, 5th, 6th, 8th and 10th circuits have all held that the party requesting removal bears the burden of establishing jurisdiction. See, e.g., Terry v. Chicago Title Ins. Co., 2007 WL 656308, at *1 (D.N.H. 2007) (“nothing in the text of CAFA suggests that Congress intended to depart from the well-established principle” that the party invoking federal jurisdiction bears the burden of proof); Adams v. Ins. Co. of N. Am., 426 F. Supp. 2d 356, 367 (S.D. W. Va. 2006) (“the removing party has the burden of showing the propriety of removal”) (citing Delgado v. Shell Oil Co., 231 F.3d 165, 178 n. 25 [5th Cir. 2000]); Brown v. Jackson Hewitt Inc., 2007 WL 642011, at *2 (N.D. Ohio 2007); Ongstad v. Piper Jaffray & Co., 407 F. Supp. 2d 1085, 1090 (D.N.D. 2006); Plummer v. Farmers Group Inc., 388 F. Supp. 2d 1310, 1317-1318 (E.D. Okla. 2005) (citing Martín v. Franklin Capital Corp., 251 F.3d 1284, 1290 [10th Cir. 2001]).

Still, there are scattered district courts that have shifted the burden to the party opposing jurisdiction. Indeed, the first federal court to address the issue looked to the legislative history of CAFA before finding that plaintiffs were responsible to demonstrate that removal from state court was improper. Waitt v. Merck & Co. Inc., 2005 WL 1799740, *2 (W.D. Wash. 2005); see also Berry v. Am. Express Pub. Corp., 381 F. Supp. 2d 1118, 1122-23 (C.D. Cal. 2005) (explaining that with respect to CAFA, the Senate report “expresses 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”); Natale v. Pfizer Inc., 379 F. Supp. 2d 161 (D. Mass. 2005), aff’d on other grounds, 424 F.3d 43 (1st Cir. 2005). These are all early decisions, decided in the absence of the majority that now exists among the circuits, and therefore are not likely to have long-term impact.

Although the majority approach dictates where to place the burden, courts still disagree about exactly what the removal-seeking party must prove. At one extreme is the
Brill court, which stated that after the proponent of jurisdiction sets out the amount in controversy, “only a legal certainty that the judgment will be less forecloses federal jurisdiction.” 427 F.3d at 448 (quotations and citations omitted). The 2nd Circuit requires proof to a “reasonable probability,” Blockbuster, 472 F.3d at 58, and the 9th and 11th circuits require that the removing defendant prove the amount in controversy “by a preponderance of the evidence.” Abrego, 443 F.3d at 683; Lowery v. Ala. Power Co., 2007 WL 1062769, *16 (11th Cir. 2007). In contrast, the 3rd Circuit requires that the amount in controversy be proved to a “legal certainty.” Morgan, 471 F.3d at 475. Defendants in the 3rd Circuit should therefore be aware that obtaining removal may be an uphill battle.

Remand

CAFA allows plaintiffs who originally filed in state court the opportunity to challenge removal and seek remand. As noted above, CAFA requires courts to decline jurisdiction over cases where the action is a “home-state controversy,” a “local controversy,” or against a state, state officials or other governmental entities. Once the removal-seeking party establishes jurisdiction, courts are split as to who bears the burden of proving that the case triggers one of the exceptions. Most courts give the burden to the remand-seeking party, applying the traditional rule that the party seeking exception to federal jurisdiction must establish why remand is proper.

In Evans v. Walter Industries the 11th Circuit became the first appellate court to consider the second half of the jurisdictional puzzle, namely, who bears the burden of proving that a jurisdictional exception applies. In Evans the plaintiffs filed a class action in Alabama state court, alleging personal injury and property damage. Walter Industries removed under CAFA, claiming minimal diversity, and the plaintiffs sought remand under the local-controversy exception. The federal court granted remand, and Walter Industries appealed.

The 11th Circuit affirmed that plaintiffs bear the burden of establishing that they fall within CAFA’s local-controversy exception. 449 F.3d at 1164. The court relied on the Supreme Court’s decision Breuer v. Jim’s Concrete of Brevard Inc., 538 U.S. 691, 697-98 (2003), which held that when a defendant removes a case under 28 U.S.C. § 1441(a), the burden is on the plaintiff to find an express exception to federal jurisdiction. The 11th Circuit reasoned that once the defendant established federal jurisdiction, shifting the burden to the plaintiff was consistent with the statutory design, and it placed the burden on the parties “most capable of bearing it.” Evans, 449 F.3d at 1164 n.3. The 5th Circuit likewise adopted the Evans analysis. Frazier v. Pioneer Americas LLC, 455 F.3d 542, 546 (5th Cir. 2006) (holding that the burden of establishing an exception to federal jurisdiction lies with the plaintiff “for the reasons explained by the 11th Circuit”).

Two other circuits followed the 11th Circuit’s lead, though not on the same grounds. In Serrano v. 180 Connect Inc., 478 F.3d 1018 (9th Cir. 2007) the 9th Circuit cited the structural similarity between Section 1332 and the general removal statute, Section 1441, noting that each separated the sections pertaining to jurisdiction from those sections pertaining to exceptions. 2007 WL 601984, at *4 (9th Cir. 2007). The court concluded that the “well-established rule that the party seeking remand must prove the applicability of such exception governs with equal force in the context of CAFA as with the general removal statute.” Id. In Hart v. FedEx Ground the 7th Circuit agreed with the Evans conclusion but declined to adopt its reasoning, noting that “although we are not persuaded [by all the Evans analysis] we nonetheless agree with the result they reached.” 457 F.3d 675, 680 (7th Cir. 2006).


Conclusion

In general, the party seeking to move a class action from one place to another will bear the burden of establishing either federal jurisdiction or that an exception to federal jurisdiction applies. These rules comport with the traditional rules of removal and appear to be nearly uniform across the circuits. It seems likely, given wide district court approval of the general trend, that those circuits not yet addressing the issue will follow suit, giving both plaintiffs and defendants a stake in the shuffle of cases between state and federal court.