

***CAFA: 2005 and Beyond***  
***The most significant change in class action practice since 1966?***

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## I. INTRODUCTION TO THE CLASS ACTION FAIRNESS ACT

The 2005 Class Action Fairness Act (“CAFA”)<sup>1</sup> altered the landscape for class actions by expanding federal jurisdiction over class actions asserting state law claims, and was designed primarily to curb perceived abuses of the class action device, which in the view of CAFA’s proponents, had often been used to litigate multi-state or even national class actions in state courts.<sup>2</sup> Indeed, pre-CAFA, class counsel tended to shop proposed class actions to different state courts across the country in an effort to elicit certification from the anomalous state court—that is, one anomalous in its inclination to certify when the vast majority of federal courts, other states’ courts, and perhaps even other courts within the same state would not.<sup>3</sup> Congress, by passing CAFA, expressed its firm conviction that the opponents of class actions deserve heightened protection. And despite CAFA’s profession of concern for plaintiffs taken advantage of by lawyers gaming the procedural system, commentators have almost universally labeled the Act pro-defendant.<sup>4</sup>

### A. Expansion of the Federal jurisdiction over Class Actions

CAFA expanded federal court jurisdiction to include actions pleading state law claims that are brought under Federal Rule of Civil Procedure 23 or any similar state rule or statute in which (1) *any* class member is a citizen of a state different from *any* defendant and (2) the total amount in controversy exceeds \$5 million. This changed both the diversity of citizenship and amount in controversy requirements that prevented many class actions from being heard in federal court. Before the Act, federal courts had jurisdiction to hear state law class actions only if *all* named class representatives and *all* defendants were citizens of different states.<sup>5</sup> Federal courts also previously had jurisdiction over state law class actions only if the value of at least one named plaintiff’s claim (or, according to some courts, each proposed class member’s claim) individually exceeded \$75,000. In some common types of class actions, such as those seeking economic damages based on the purchase of consumer products, this requirement was almost never met since individual plaintiffs rarely bought more than \$75,000 worth of those products. Thus, these class actions remained in state court even though the damages sought by the class in aggregate totaled millions, or even billions, of dollars.<sup>6</sup>

Federal diversity jurisdiction under CAFA is subject to several exceptions. The most straightforward are that CAFA does not apply to securities fraud and derivative lawsuits or cases involving states or government officials.<sup>7</sup> The remaining exceptions, all of which involve factual

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<sup>1</sup> Codified at 28 U.S.C. §§ 1332(d), 1335 (a)(1), 1453, 1603(b)(3) & 1711-15.

<sup>2</sup> Class Action Fairness Act § 2, 119 Stat. at 4-5.

<sup>3</sup> See Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 Cornell L. Rev. 1105, 1127-28 (2010).

<sup>4</sup> See, e.g., Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. Pa. L. Rev. 1823, 1867-79 (2008) (arguing that CAFA is unambiguously prodefendant); Edward F. Sherman, *Consumer Class Actions: Who are the Real Winners?*, 56 Me. L. Rev. 223, 230 (2004) (“The intent of the Act is obviously more to shield defendants than to protect class members from abuses.”). *But cf.* Richard L. Marcus, *Assessing CAFA’s Stated Jurisdictional Policy*, 156 U. Pa. L. Rev. 1765, 1789 (2008) ([O]ne could even make an argument that in the long run CAFA will inure to the benefit of consumer plaintiffs.”)

<sup>5</sup> Mark Herrmann & Pearson Bownas, *The Likely Impact of the Class Action Fairness Act*, 47 No. 4 DRI For Def. 26 (2005).

<sup>6</sup> *Id.*

<sup>7</sup> See 28 U.S.C. § 1332(d)(2)-(4), (5), (9).

determinations, turn principally on where the parties reside and where the challenged conduct took place.

Under the first of these exceptions, known as the “interests of justice” exception, jurisdiction is discretionary if more than one-third but less than two-thirds of the plaintiffs are citizens of the forum state, and the “primary” defendants are also citizens of the forum state.<sup>8</sup> In exercising their discretion, courts are to consider: (1) whether the claims asserted involve matters of national or interstate interest; (2) whether the claims asserted are governed by the laws of the state where the action was originally filed or the laws of other states; (3) whether the class action is pleaded to avoid federal jurisdiction; (4) whether the state forum has a distinct nexus with the class, the defendants, or the alleged harm; (5) whether the number of plaintiff class members who are citizens of the forum state is substantially larger than the number from any other state; and (6) whether one or more class actions asserting similar claims have been filed in the prior three years.<sup>9</sup>

The last two exceptions require the court to decline jurisdiction. Under the so-called “home state controversy” exception, the court must decline jurisdiction if: (1) more than two-thirds of the plaintiffs are citizens of the forum state; and (2) all the primary defendants are citizens of the forum state.<sup>10</sup> Similarly, under the “local controversy” exception, the court must decline jurisdiction if at least one defendant from whom significant relief is sought is a resident of the forum state, and (1) the defendant's conduct forms a significant basis of the claims; (2) the principal alleged injuries resulting from the conduct of all defendants occurred in the forum state; and (3) no similar class action has been filed against any of the defendants in the prior three years.<sup>11</sup>

If none of these exceptions apply, there are 100 or more members in the putative class, and one-third or fewer of the class members are citizens of the forum state, jurisdiction is mandatory.<sup>12</sup>

## **B. Fewer Barriers to Removal**

CAFA also changed the rules for removing a class action. A common obstacle to removal before the Act was the rule preventing removal where any defendant was a forum state citizen. Plaintiffs could thus prevent removal by the out-of-state target defendant simply by naming a secondary in-state defendant. The Act removed this obstacle, allowing removal whether or not any defendant is a forum state citizen.<sup>13</sup> The Act also made unincorporated associations, which previously were considered citizens of every state in which their constituents are citizens, citizens of only the states where they are organized and have their principal place of business for these purposes.<sup>14</sup> The Act further eliminated the requirement that all class action

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<sup>8</sup> *Id.* § 1332(d)(3).

<sup>9</sup> *Id.* § 1332(d)(3)(A)-(F).

<sup>10</sup> *Id.* § 1332(d)(4)(A).

<sup>11</sup> *Id.* § 1332(d)(4)(B).

<sup>12</sup> Julia B. Strickland, Lisa M. Simonetti & Scott M. Pearson, *2008 Overview of the Class Action Fairness Act*, 777 *PLI/Lit* 257, 266 (2008).

<sup>13</sup> The Likely Impact of the Class Action Fairness Act, 47 No. 4 *DRI For Def.* 26.

<sup>14</sup> *See* U.S.C. § 1332(d)(10).

defendants must unanimously consent to removal thereby ending the pre-Act ploy of naming a co-defendant friendly to plaintiffs who would not consent to removal. Defendants may, however, disagree among themselves about the strategic benefits of removal in a given case, and there is nothing in the Act that prevents a non-removing defendant from moving to remand. The Act also exempts class actions from the limitation in 28 U.S.C. §1446(b) that diversity cases must be removed, if at all, within one year after the lawsuit is filed. This eliminated a tactic that class action plaintiffs sometimes used of naming a nominal nondiverse defendant or seeking damages of less than the jurisdictional amount to avoid federal jurisdiction, only to jettison this defendant or damages restriction after the one-year removal limitation expired.<sup>15</sup>

### C. Creation of “Mass Actions”

While CAFA did not create this breed of non-class aggregation, it formally recognized “mass action” and extended federal jurisdiction over these cases. Although plaintiffs in a mass action, unlike in a class action, do not seek to represent the interests of parties not before the court, CAFA provides that a qualifying mass action “shall be deemed to be a class action” and may be removed to federal court under the Act, so long as the rest of CAFA’s jurisdictional requirements are met.<sup>16</sup> The apparent purpose of CAFA’s mass action provisions was to prevent plaintiffs from avoiding federal jurisdiction by refusing to certify a class and maintaining an action in hundreds of individual plaintiff’s names.<sup>17</sup> It likely was also designed to ensure that states that do not permit class actions, but allow multi-plaintiff litigation resembling class actions, would nevertheless be subject to CAFA.<sup>18</sup> Congress’s prescription for mass actions was the same they applied to class actions: a broad grant of federal jurisdiction over this breed of non-class aggregate litigation.

A mass action is a case (other than a class action) in which “monetary relief of claims of 100 or more people are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact...”<sup>19</sup> To meet this statutory definition, a mass action must also satisfy the general threshold CAFA placed on class actions.<sup>20</sup> Thus, the total amount in controversy in aggregate must exceed \$5 million, and minimal diversity must exist among the parties.<sup>21</sup> Cases having four types of claims are excluded from the definition of mass action: (1) claims arising from an event or occurrence in the forum state that resulted in injuries in the forum state or a contiguous state (such as an airplane crash or other mass accident); (2) claims joined at the request of the defendants; (3) claims asserted on behalf of the general public under a state statute specifically authorizing that practice; and (4) claims consolidated or coordinated solely for pretrial proceedings.<sup>22</sup>

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<sup>15</sup> The Likely Impact of the Class Action Fairness Act, 47 No. 4 DRI For Def. 26.

<sup>16</sup> See 28 U.S.C. § 1332(d)(11)(A).

<sup>17</sup> 2008 Overview of the Class Action Fairness Act, 777 PLI/Lit 257, 266.

<sup>18</sup> See *Almeter v. Virginia Department of Taxation*, No. LL-821-4, 2000 WL 1687589, at \*1 n.1 (Va. Cir. Ct. Nov. 6, 2000) (“Class actions are generally not allowed in Virginia”); *Marx v. Broom*, 632 So. 2d 1315, 1322 (Miss. 1994) (“Class action practice is not being introduced into Mississippi trial courts at this time.”)

<sup>19</sup> 28 U.S.C. § 1332(d)(11)(B)(i).

<sup>20</sup> See *id.* § 1332(d)(11)(A).

<sup>21</sup> *Id.* § 1332(d)(2), (6).

<sup>22</sup> *Id.* § 1332(d)(11)(B)(ii).

The mass action provision also limits the handling of an action once it has been successfully removed. Mass actions cannot be transferred to another court as part of MDL post removal unless a majority of plaintiffs request this transfer. The action, however, may be transferred under the MDL statute if the plaintiffs propose to certify the case pursuant to Rule 23 or if the case actually is certified as a class action.<sup>23</sup>

## II. CAFA'S IMPACT ON EXPANDING FEDERAL JURISDICTION

The Federal Judicial Center conducted a study of the impact of CAFA on federal courts from July 2001 through June 2006 and found that overall class action activity in the federal courts increased, as the number of monthly filings and removals of class actions generally increased from around 200 a month in late 2001 to more than 300 a month during several months in 2005 and 2006.<sup>24</sup> Interestingly, the single largest number of filings and removals (376) was observed in March 2005, the first full month after CAFA's effective date.<sup>25</sup>

Indeed, the study's preliminary data found that the number of diversity of citizenship class actions filed in or removed to federal court approximately doubled post-CAFA.<sup>26</sup> Specifically, in the post-CAFA months, the number of diversity original proceedings increased dramatically. Although both diversity removals and original proceedings increased, comparing the pre – and post-CAFA periods, the greater increase was observed in the original proceedings. Pre-CAFA, the average number of monthly removals of diversity class actions was 16.6; post-CAFA, the comparable figure was 23.7, an increase of, on average, about 7 class actions. Further, pre-CAFA, the average number of monthly original proceedings of diversity class actions was 10.8; post-CAFA, the comparable figure was 31.5, an increase of about 20 class actions per month.<sup>27</sup>

Both removal and original proceedings of diversity class actions increased in the post-CAFA period, but original proceedings have remained at their new, much higher level, while removals have tailed off. Interesting, the monthly number of removals in the last months is similar to many months of the pre-CAFA period. The pattern for removals was one of decline, pre-CAFA, then a sharp increase immediately following CAFA, followed by another decrease, post-CAFA, to roughly pre-CAFA levels.<sup>28</sup>

The study concluded that its findings strongly suggested that plaintiffs' attorneys in a large number of cases were choosing, post-CAFA, to file class actions raising state-law causes of action in the federal courts, a marked departure from the pre-CAFA period.<sup>29</sup> The study further concluded that federal courts have seen an increase in diversity removals and, especially, original proceedings in the post-CAFA period as a result of the expansion of the federal courts' diversity

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<sup>23</sup> Guyon Knight, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 Fordham L. Rev. 1875, 1888 (2010).

<sup>24</sup> Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. Pa. L. Rev. 1723, 1750 (2008).

<sup>25</sup> *See id.*

<sup>26</sup> *See id.* at 1750-62.

<sup>27</sup> *Id.* at 1752.

<sup>28</sup> *Id.* at 1754.

<sup>29</sup> *Id.* at 1753.

of citizenship jurisdiction. The dramatic nature of the increase, again especially in diversity original proceedings, the authors concluded, provides further support for the conclusion that CAFA is the cause of the observed trends.<sup>30</sup>

When the Federal Judicial Center updated its findings through June 30, 2007, its preliminary findings were consistent with its previous study's hypothesis that CAFA has caused an increased number of class actions based on diversity of citizenship jurisdiction to be filed in federal courts.<sup>31</sup> Diversity class action removals (after an initial spike post-CAFA), however, continued to trend down towards levels similar to those pre-CAFA.<sup>32</sup>

CAFA's impact on the jurisdictional balance between state and federal courts is still being assessed and it is important to note that these studies only included data up to June 2007. Moreover, while the study observed a dramatic increase in the number of original proceedings post-CAFA, the number of removals (after an initial spike after CAFA) has pretty much tapered off to pre-CAFA levels. This may indicate that CAFA did not have the intended effect of allowing defendants to remove large numbers of class and mass actions to federal court.

### III. THE COURTS' APPLICATION OF CAFA

While Congress's intent for broad application of CAFA to expand federal jurisdiction for both class and mass actions was clear, the statute is anything but. And while its legislative history provides certain guidance to "filling the blanks," whether to look towards the legislative history to add in statutory interpretation is a hotly debated subject. In reviewing how courts interpreted certain provision of the Act, proponents of CAFA will not have difficulty arguing that much of Congress's intent, to expand federal jurisdiction for class and mass actions, has been disregarded.<sup>33</sup>

#### A. Burden of Proof

##### 1. Diversity jurisdiction

The Senate report accompanying the bill that became CAFA squarely places the burden of demonstrating an exception to jurisdiction on the party opposing federal jurisdiction.<sup>34</sup>

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<sup>30</sup> *Id.* at 1754.

<sup>31</sup> Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules*, Federal Judicial Center (2008) (pre-CAFA average was 11.9; post-CAFA average was 34.5 per month).

<sup>32</sup> *Id.*

<sup>33</sup> Most courts limited their focus to the Senate Report, but many give the Report little weight or disregard it entirely often asserting that the Report was not presented to the Senate until after CAFA's passage and enactment. *See, e.g., Tanoh v. Dow Chemical Co.*, 561 F.3d 945, 954 n.5 (9<sup>th</sup> Cir.), *cert. denied*, 130 S. Ct. 187 (2009) ("Dow relies heavily on a Senate Committee report that was not printed until ten days after CAFA's passage into law ... The Report is therefore of minimal, if any, value in discerning congressional intent, as it was not before the Senate at the time of CAFA's enactment"; *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) (rejecting reliance on the Senate Report, in large part because the court believed it was only considered after CAFA's passage).

<sup>34</sup> *See* S. Rep. No. 109-14, available at 2005 WL 627977 ("It is the Committee's intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption"; and again, "If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident").

CAFA, however, is silent on this issue. Despite the legislative intent, courts have consistently held that the party seeking removal, i.e., the defendant, has the burden of proof regarding federal subject matter jurisdiction.<sup>35</sup>

## 2. Amount-in-controversy

The same goes for establishing the amount in controversy. CAFA is silent on who bears the burden of proving the amount in controversy and courts have placed that burden on the party seeking removal.<sup>36</sup> The courts' reasoning has been straightforward: (1) on its face, CAFA does not contain language that shifts the burden of proof; and (2) traditionally, the removing defendant has born that burden.<sup>37</sup>

While the federal courts of appeal unanimously concluded that defendants bear the burden, they split on what is the correct standard of proof for determining whether the amount in controversy is satisfied.<sup>38</sup> The Third Circuit embraced the legal certainty test,<sup>39</sup> four circuits – the Fourth, Sixth, Eighth and Eleventh – adopted the preponderance of the evidence test;<sup>40</sup> and the First, Second and Seventh Circuits approved the reasonable probability test.<sup>41</sup> The Ninth

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<sup>35</sup> See *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 752 (11<sup>th</sup> Cir. 2010) (CAFA does not change the traditional rule that the party seeking removal bears the burden of establishing federal jurisdiction: *Frederico v. Home Depot*, 507 F.3d 188, 193 (3d. Cir. 2007) (party asserting federal jurisdiction in removal case under CAFA bears burden of showing, at all stages of litigation, that case is properly before federal court); *Galeno*, 472 F.3d at 58 (CAFA did not shift the burden of proof regarding federal subject matter jurisdiction from the removing defendant to plaintiff).

<sup>36</sup> In *Anthony c. Mengine Law, Inc. v. Healthport*, 695 F. Supp. 2d 225 (W.D. Pa. 2010), a law firm brought a class action alleging defendant breached an implied contract by charging fees for medical record retrieval services in excess of the actual and reasonable costs of those services. The complaint, however, was silent on a sum certain at issue in action and defendant's affidavit in support of removal contained no indication of costs it actually and reasonably incurred in the performance of its services as opposed to amounts it invoiced for those services. The court held that defendant did not carry its burden of establishing by a preponderance of evidence that the amount in controversy in law firm's class action against it met the \$ 5 million threshold for jurisdiction under CAFA. *Id.* at 231. See also *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7<sup>th</sup> Cir. 2008)(removing party, as proponent of federal jurisdiction under CAFA, bears burden of describing how the controversy exceeds \$5 million); *Lowdermilk v. U.S. Bank National Ass'n.*, 479 F.3d 994, 999 (9<sup>th</sup> Cir. 2007); *Mapp v. American General Assur. Co.*, 589 F. Supp. 2d 1257, 1265 (M.D. Ala. 2008).

<sup>37</sup> See e.g., *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7<sup>th</sup> Cir. 2005) (noting that “none [of CAFA's language] is even arguably relevant to the burden of proof issue).

<sup>38</sup> Diane B. Bratvold & Daniel J. Supalla, *Standard of Proof to Establish Amount in Controversy When Defending Removal under the Class Action Fairness Act*, 36 Wm. Mitchell L. Rev. 1397, 1402 (2010).

<sup>39</sup> See *Frederico v. Home Depot*, 507 F.3d 188, 198 (3d. Cir. 2007); *Morgan v. Gay*, 471 F.3d 469, 473 (3d. Cir. 2006). Because the plaintiff is the master of the case and may limit his claims to keep the amount in controversy below the threshold, the removing party must “show not only what the stakes of the litigation could be, but also what they are given the plaintiff's actual demands.” *Morgan*, 471 F.3d at 474.

<sup>40</sup> See *Bell v. Hershey Co.*, 557 F.3d 953, 959 (8<sup>th</sup> Cir. 2009); *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 297-98 (4<sup>th</sup> Cir. 2008); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 404 (6<sup>th</sup> Cir. 2007); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1330 (11<sup>th</sup> Cir. 2006). This standard requires the removing party to show that the amount in controversy more likely than not exceeds \$5 million.

<sup>41</sup> See *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 43 (1<sup>st</sup> Cir. 2009); *Galeno*, 472 F.3d at 58; *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448-49 (7<sup>th</sup> Cir. 2005). This test requires the removing party to show what is at stake in the litigation, considering both “what the stakes of the litigation could be” and what the stakes of the litigation “are given the plaintiff's actual demands.” *Brill*, 427 F.3d at 449. In other words, the removing party must “sufficiently demonstrate” that the amount in controversy is greater than CAFA's jurisdictional minimum. *Amoche*, 556 F.3d at 50.

Circuit applied two different standards depending on the circumstances – a legal certainty standard if a plaintiff alleges damages less than the jurisdictional amount,<sup>42</sup> and a preponderance of the evidence standard if a plaintiff fails to plead a specific amount.<sup>43</sup> The Fifth and Tenth circuits have not reached this issue.<sup>44</sup>

Placing the burden on defendants can prove to be a big loophole for plaintiffs. Subject to a good faith requirement in pleading, a plaintiff may sue for less than the amount she may be entitled to if she wishes to avoid federal jurisdiction and remain in state court, or simply fail to plead a specific amount of damages. Against such artful pleading, proving that the amount in controversy is actually above the jurisdictional amount is a difficult hurdle for defendants to overcome. Moreover, the non-uniformity of standard among the circuits allows plaintiffs to manipulate federal jurisdiction by choosing a forum with favorable analysis. To a certain extent, the Federal Judicial Center’s statistics suggest this is happening since significantly more plaintiffs are actually choosing to file in federal court while fewer removals are happening now than when CAFA was first enacted. This is exactly the sort of manipulation Congress intended to prevent when enacting CAFA.

## **B. Counting to 100: the Numerosity Requirement in Mass Actions**

Another reason defendants face a difficult time removing cases to federal courts under CAFA is because courts adopted a strict and narrow reading of the “100 or more persons” requirement necessary for removal. In *Tanoh v. Dow Chemical Co.*, 664 foreign nationals brought seven separate toxic tort actions in state court, each with fewer than 100 plaintiffs.<sup>45</sup> The Ninth Circuit specifically rejected Dow’s argument that allowing plaintiffs to evade CAFA by artificially structuring their lawsuits to avoid removal to federal court would be inconsistent with the congressional purpose. It held that Congress appears to have foreseen the situation presented in the case and specifically decided the issue in plaintiffs’ favor.<sup>46</sup> In support, the court pointed to the fact that CAFA, in addition to requiring that a “mass action” include the claims of at least one hundred plaintiffs “proposed to be tried jointly,” specifically provides that the term mass action shall *not* include any civil action in which ... the claims are joined upon motion of a defendant.<sup>47</sup> Second, CAFA contains similar language regarding claims “consolidated or coordinated solely for pretrial proceedings,” again specifying that such actions do not qualify as “mass actions.”<sup>48</sup> Other courts have followed the Ninth Circuit’s holding and reasoning.<sup>49</sup>

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<sup>42</sup> See *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 701 (9<sup>th</sup> Cir. 2007); *Lowdermilk*, 479 F.3d at 999.

<sup>43</sup> See *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 683 (9<sup>th</sup> Cir. 2006); *Davis v. Chase Bank U.S.A., N.A.*, 453 F. Supp. 2d 1205, 1208 (C.D. Cal. 2006) (“[T]he defendant must provide evidence that it is ‘more likely than not’ that the amount in controversy satisfies the federal diversity jurisdictional amount requirement”).

<sup>44</sup> *Standard of Proof to Establish Amount in Controversy When Defending Removal under the Class Action Fairness Act*, 36 Wm. Mitchell L. Rev. at 1401. For district court decisions on this issue, see *Freebird, Inc. v. Cimarex Energy Co.*, 599 F. Supp. 2d 1283, 1286 (D. Kan. 2008) (applying a reasonable probability standard); *Apodaca v. Allstate Ins. Co.*, No. 07-CV\*00937-EWN-MEH, 2008 WL 113844, \*2 (D. Colo. Jan. 8, 2008) (applying a preponderance of the evidence standard); *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310, 1318 (E.D. Okla. 2005) (applying a preponderance of the evidence standard).

<sup>45</sup> *Tanoh*, 561 F.3d at 950.

<sup>46</sup> *Id.* at 953.

<sup>47</sup> *Id.* (citing 28 U.S.C. §1332(d)(11)(B)(ii)(II) (emphasis added)).

<sup>48</sup> *Id.* at 954 (citing 28 U.S.C. §1332(d)(11)(b)(ii)(IV)).

This bright line rule will allow most plaintiffs' lawyers to structure complaints in order to evade CAFA's reach by including fewer than 100 plaintiffs in any one suit. Indeed, some plaintiffs' lawyers are predicting that this tactic will essentially neuter the mass action device.<sup>50</sup>

There is also a certain ambiguity in CAFA regarding this requirement and while normally counting to 100 is a simple exercise, in the context of CAFA and mass actions, this can be a difficult exercise. By using the amorphous "person" rather than a more precise word, e.g., plaintiffs, parties, etc., CAFA opened the possibility that nonparties or nonclaimants could be counted towards the 100-person threshold.<sup>51</sup> Indeed, creative defendants pressed an argument asking courts to look past the face of the pleadings to find the true parties in interest to a case. By including unnamed claimants, these defendants argued that courts can find mass actions even where only a single plaintiff appears in the caption.<sup>52</sup> This argument was accepted by the Fifth Circuit in *Louisiana ex rel. Caldwell v. Allstate Insurance Company*.<sup>53</sup> This case, however, remains the sole case and other courts in deciding this issue have not found federal jurisdiction, some courts rejecting the Fifth Circuit's analysis outright and even expressing alarm at its connotations.<sup>54</sup> One court, however, did show a willingness to expand on the idea of mass action even though its ultimate holding went against the Fifth Circuit.<sup>55</sup> These cases demonstrate the obvious tension between arguments based on a strict reading of CAFA's language and a broader reading aided by the Senate Report.

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<sup>49</sup> See also *Anderson v. Bayer Corp.*, 610 F.3d 390 (7<sup>th</sup> Cir. 2010); *Brown v. Bayer Corp.*, Civ. No. 09-989-GPM, 2010 WL 148629 (S.D. Ill. Jan. 13, 2010).

<sup>50</sup> See David A.P. Brower, the 2003 Amendments to Rule 23 of the Federal Rules of Civil Procedure and the Class Action Fairness Act of 2005, in 2 Civil Practice and Litigation Techniques in Federal and State Courts 1467, 1488 n.20 (ALI-ABA Course of Study Materials No. SL081, May 31 – June 1, 2006) ("Since plaintiffs can avoid this provision simply by joining only 99 plaintiffs, it is unlikely to have great impact in practice").

<sup>51</sup> See *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 Fordham L. Rev. at 1896-97. "Tried jointly" can also be ambiguous. While the statute's plain language excludes defendants from making the proposal, the statute leaves open the possibility of the court proposing to try claims jointly, thereby creating a CAFA mass action. *Id.* at 1894.

<sup>52</sup> *Id.* at 1908.

<sup>53</sup> See 536 F.3d 418 (5<sup>th</sup> Cir. 2008). The dispute at issue in *Caldwell* concerned an alleged conspiracy among several insurance companies, a consulting firm, and an information management company to illegally undervalue and underpay the claims of Louisiana policyholders. See *id.* at 421-23. Louisiana's Attorney General, aided by four private plaintiffs' law firms, brought a parens patriae action in state court seeking injunctive relief, forfeiture of illegal profits, and treble damages on behalf of policyholders. See *id.* at 423. Simultaneously, the plaintiffs' firms were pursuing "nearly identical claims" in purported class actions filed in federal court. See *id.* In its holding, the Fifth Circuit relied heavily on the Act's legislative history highlighting the Senate Report's instructions that "the term 'class action' ... be defined broadly to prevent 'jurisdictional gamesmanship.'" *Id.* at 424 (quoting S. Rep. No. 109-14, at 35 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 34)). Finding that the policyholders were real parties in interest, the Fifth Circuit noted in its ruling that the district court needed to add individual policyholders to make the action into a mass action. *Id.* at 430.

<sup>54</sup> *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 Fordham L. Rev. at 1914 (citing *California Public Employees Retirement System v. Moody's Corp.*, Nos. C 09-03628 SI, C 09-03629 JCS, 2009 WL 3809816 (N.D. Cal. Nov. 10, 2009); *Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp. 2d 285 (S.D.N.Y. 2009)).

<sup>55</sup> In *Kitazato v. Black Diamond Hospitality Investments, LLC.*, CV. No. 09-00271 DAE-LEK, 2009 WL 3824851 (D. Haw. Nov. 13, 2009), despite the fact that the court reached the opposite result from *Caldwell*, the U.S. District Court for the District of Hawaii accepted at least the premise of the Fifth Circuit's holdings.

### C. Amount-in-Controversy

Another tension in CAFA is its amount-in-controversy requirement for mass actions. CAFA states that its “jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy” the \$75,000 jurisdictional minimum.<sup>56</sup> The mass action threshold, however, is only \$5 million. If every plaintiff had to satisfy the \$75,000 minimum individually, then the de facto amount in controversy would be \$7.5 million. In examining this issue, the Ninth Circuit in *Abrego v. Dow Chemical Co.*, held that defendant did not meet its initial burden of proving that even one of plaintiff’s claimed damages exceeded \$75,000.<sup>57</sup> The Ninth Circuit specifically left open the question whether the \$5 million clause requires defendant to show that each plaintiff or only one plaintiff satisfies the \$75,000 amount-in-controversy requirement for diversity jurisdiction.<sup>58</sup> In resolving this ambiguity, the Eleventh Circuit in *Lowery v. Alabama Power Co.*, suggested that “mass actions” may be removed without a showing that each plaintiff in a mass action can meet the \$75,000 amount-in-controversy threshold.<sup>59 60</sup>

### IV. HAS CAFA MET ITS OBJECTIVES?

The principal objective of CAFA was to end alleged forum shopping abuses by plaintiffs’ lawyers as federal courts became perceived by both plaintiff and defendant lawyers as less sympathetic to class actions and to plaintiffs’ cases than certain state courts.<sup>61</sup> From the Federal Judicial Center’s statistical findings, one can conclude that CAFA is doing what it set out to do, mainly having more class actions be heard in federal court rather than in state court. However, the increase in the number of class actions filed in federal court post-CAFA is, except for a temporary increase in removals in the first months following CAFA, due entirely to cases originally filed in federal court. It is the authors’ view that this has occurred because narrow judicial interpretations of CAFA make it very difficult to successfully remove under CAFA a cleverly pled case, either as a class action or a mass action. That the initial spike in the number of diversity removals was quickly followed by a return to pre-CAFA levels of diversity removals speaks to the defense bar’s disappointment with CAFA.

### V. CONCLUSION

CAFA has been called “the most significant change in class action practice since the federal class action rule was amended in 1966,”<sup>62</sup> and there was certainly a very loud controversy

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<sup>56</sup> 28 U.S.C. § 1332(d)(11)(B)(i).

<sup>57</sup> 443 F.3d 676 (9<sup>th</sup> Cir. 2006).

<sup>58</sup> See *Tanoh*, 561 F.3d at 952-53, n.4; *Abrego*, 443 F.3d at 686-88.

<sup>59</sup> 483 F.3d 1184, 1205 (11<sup>th</sup> Cir. 2007) (the court reasoned that requiring a showing that each plaintiff’s claim exceeds \$75,000 would negate the need for the \$5 million aggregate amount which CAFA applies to mass actions).

<sup>60</sup> The requirement that defendants must show at least one plaintiff meets the \$75,000 amount-in-controversy only applies to mass actions. “There is no requirement in a class action brought originally or on removal under CAFA that any individual plaintiff’s claim must exceed \$75,000.” See *Cappuccitti v. DIRECTV, Inc.*, 623 F.3d 1118, 1122 (11<sup>th</sup> Cir. 2010) (*citing* 14AA Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedures* § 3704 (Supp. 2010) (“CAFA ... extends federal subject matter jurisdiction to class actions when there is minimal diversity and the total amount in controversy exceeds \$5,000,000, exclusive of interests and costs, and provides for aggregation even if no individual class member asserts a claim that exceeds \$75,000.”)).

<sup>61</sup> Edward. F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 Tul. L. Rev. 1593, 1595 (2006).

<sup>62</sup> *Class Actions after the Class Action Fairness Act of 2005*, 80 Tulane L. Rev. at 1597.

about it when first adopted. The result of the cases interpreting CAFA to date, however, means that defendants are left with little guidance as to how to remove class actions and mass actions effectively. Moreover, empirical data indicates that while original proceedings under CAFA have increased dramatically, removal of cases based on diversity of citizenship jurisdiction remain at pre-CAFA levels indicating that CAFA did not have its intended effect. Such data indicates that, notwithstanding that it was generally perceived as pro-defendant, CAFA has mainly worked to plaintiffs' advantage by allowing plaintiffs to select a federal forum if they wish, but to avoid removal by clever pleading if a state forum is preferred.