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Critical Legal Issues: WORKING PAPER SERIES

**NO GOING BACK:
STRATEGIES FOR OPPOSING REMAND
UNDER CAFA'S EXCEPTIONS**

by

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Thompson Hine LLP

WLF

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For the past eight years, plaintiffs and defendants alike have grappled with how to effectively utilize the Class Action Fairness Act of 2005, 28 U.S.C. § 1332 (CAFA). CAFA expanded federal jurisdiction over large class-action lawsuits and mass actions by allowing the removal of those actions to federal court based on incomplete diversity jurisdiction. The statute also provides exceptions to federal jurisdiction that must be affirmatively proven fairly early in the litigation.

Plaintiffs consistently attempt to utilize these CAFA exceptions to remand their class actions back to state court. Although federal courts have gradually constrained the applicability of these CAFA exceptions, they remain divided over whether post-CAFA removal case developments also provide an avenue for remand. This WORKING PAPER explores strategies opposing the remand of class actions removed under CAFA by examining the evidentiary burden faced by plaintiffs who wish to remand their case back to state court.

I. CAFA AND ITS STATUTORY EXCEPTIONS

Under CAFA, federal courts have original jurisdiction over class actions when: (1) there are at least 100 members in the putative class; (2) any class member is a citizen of a state different from any defendant; and (3) in the aggregate, the amount in controversy exceeds the sum or value of \$5 million.¹ CAFA contains several exceptions to the exercise of federal jurisdiction.² Subsection (A), the “local controversy” exception, may apply when at least one significant defendant **and** more than two-thirds of the members of the putative classes are citizens of the state in which the action was originally filed.³ In addition, the principal alleged injuries must have been incurred in the state in which the action was originally filed, and no other class actions alleging similar facts have been filed in the prior three years.⁴ Subsection (B), the “home state” exception, may apply when **all** primary defendants **and** at least two-thirds of the members of the putative classes are citizens of the state in which the action was originally filed.⁵ CAFA also allows courts discretion to remand a case if, after considering certain factors, “greater than one-third but less than two-thirds of the

¹ 28 U.S.C. §§ 1332(d)(5)(B), 1332(d)(2), 1332(d)(6); see *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348 (2013).

² 28 U.S.C. § 1332(d)(4)(A) & (B).

³ 28 U.S.C. § 1332(d)(4)(A).

⁴ *Id.*

⁵ 28 U.S.C. § 1332(d)(4)(B).

members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed.”⁶

II. CAFA’S “LOCAL CONTROVERSY” & “HOME STATE” EXCEPTIONS OFTEN DEFEATED BY FAILURE TO PROVE TWO-THIRDS CITIZENSHIP

It is well established that plaintiffs seeking remand bear the burden of demonstrating by a preponderance of the evidence that a CAFA exception applies.⁷ Moreover, plaintiffs cannot simply rely on their allegations to meet the prerequisites for the CAFA exception; they bear the burden of **proving** each of the prerequisites.⁸ Thus, a defendant seeking to keep the case in federal court often can successfully defeat a CAFA “local controversy” or “home state” exception-based motion for remand by showing that the plaintiff failed to prove the two-thirds citizenship requirement.

⁶ 28 U.S.C. § 1332(d)(3); 28 U.S.C. § 1332(d)(3)(A-F).

⁷ See, e.g., *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 153-54 (3rd Cir. 2009) (holding that once CAFA jurisdiction is established, the party objecting to federal jurisdiction has the burden of showing that the local controversy exception applies); *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007) (“[O]nce federal jurisdiction has been established under [CAFA], the objecting party bears the burden of proof as to the applicability of any express statutory exception under §1332(d)(4)(A) and (B).”); *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 680 (7th Cir. 2006) (same); *Frazier v. Pioneer Ams. LLC*, 455 F.3d 542, 546 (5th Cir. 2006) (same); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1165 (11th Cir. 2006) (same).

⁸ See, e.g., *Anthony v. Small Tube Mfg. Co.*, 535 F. Supp. 2d 506, 517 (E.D. Pa. 2007) (denying motion for remand where plaintiff “relied on the averments in the pleadings” and “bare assertions in its motion”); see also *Standard Fire Ins. v. Knowles*, 133 S. Ct. 1345 (2013) (holding that a plaintiff’s stipulation as to an element of CAFA jurisdiction is not dispositive of CAFA jurisdiction).

In *Evans v. Walter Indus., Inc.*, for instance, the U.S. Court of Appeals for the Eleventh Circuit reversed the district court’s remand under the “local controversy” exception where plaintiffs “wholly fail[ed] to present a credible estimate of the percentage of the plaintiff class who are citizens of Alabama.”⁹ The court was not persuaded by the plaintiffs’ counsel’s affidavit in which she averred, based on extrapolation, that 93.8 percent of the potential class members interviewed were Alabama residents, but failed to clarify who was considered a “potential plaintiff” and whether any effort was made to estimate the number of people with claims who no longer lived in Alabama.¹⁰

Likewise, in *Dicuio v. Brother Int’l Corp.*, the U.S. District Court for the District of New Jersey rejected the application of the “local controversy” exception where the plaintiff’s class action claim—that a manufacturer designed defective printer ink cartridges—was not limited solely to New Jersey citizens and the plaintiff failed to provide any evidence in support of his contention that two-thirds of the proposed class were New Jersey citizens.¹¹ Moreover, the court specifically recognized that although one can infer the domicile of putative class members, “an inference does not satisfy the plaintiff’s burden of proof.”¹² Thus, in the

⁹ *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1166 (11th Cir. 2006).

¹⁰ *Id.*

¹¹ *Dicuio v. Brother Int’l Corp.*, No. 11-1447, 2011 U.S. Dist. LEXIS 131553, at *22-23 (D. N.J. Nov. 15, 2011).

¹² *Id.* at *13.

absence of the plaintiff's specific proof of the putative class members' citizenship, the court refused to apply the "local controversy" exception.¹³

Recently, in *Brown v. Paducah & Louisville Ry. Inc.*, a district court held that the plaintiffs failed to satisfy their burden of establishing that two-thirds of the members of the proposed class consisted of Kentucky citizens **in the aggregate** where one class consisted of "[a]ll businesses and commercial entities" affected by the train derailment that gave rise to the claims in the case.¹⁴ The court noted that because the train derailment caused an interruption in maritime traffic, the establishment of a no-fly zone in the surrounding airspace, and a temporary state highway closure, there were "potentially thousands, if not tens of thousands" of out-of-state businesses and commercial entities that may be potential class members.¹⁵

In addition, courts have repeatedly held that a property owner's citizenship cannot be assumed for purposes of asserting a CAFA exception simply because property is the subject of a putative class action.¹⁶ In *In re Sprint Nextel Corp.*, 593

¹³ *Id.* at *22-23.

¹⁴ *Brown v. Paducah & Louisville Ry. Inc.*, No. 3:12-CV-00818-CRS, 2013 U.S. Dist. LEXIS 132608 (W.D. Ky. Sept. 17, 2013).

¹⁵ *Id.* at *16.

¹⁶ *See, e.g., Gerstenecker v. Terminix Int'l, Inc.*, No. 07-cv-0164-MJR, 2007 U.S. Dist. LEXIS 69272, at *2 (S.D. Ill. Sept. 19, 2007) (asking the court to conclude that two-thirds of the proposed class members in the aggregate are citizens of Illinois because the real property at issue is located in Illinois "requires a leap of faith this Court cannot make."); *Barfield v. Sho-Me Power Elec. Co-op.*, No. 11-4321-NKL, 2012 U.S. Dist. LEXIS 86036 (W.D. Mo. June 21, 2012) (rejecting presumption that more than two-thirds of a proposed class of current and former Missouri property owners

F.3d 669, 674-75 (7th Cir. 2010), for example, the Seventh Circuit rejected the plaintiffs' argument that remand was appropriate under the "home state" exception, even though the class, as defined, only included individuals with Kansas cell phone numbers and Kansas mailing addresses for cell phone bills.¹⁷ The Seventh Circuit noted that "a court may not draw conclusions about the citizenship of class members based on things like their phone numbers and mailing addresses," especially where, as in *Sprint*, the plaintiffs provided no evidence proving the citizenship of the class members but instead relied on "guesswork" and assumptions.¹⁸

Thus, defendants may successfully defeat a CAFA "local controversy" or "home state" exception-based motion for remand by showing that the plaintiffs failed to meet their burden of **proving** the two-thirds citizenship requirement, even before the class is certified.

were citizens and noting that "out-of-state individuals or corporate entities may own significant property within the state"); see also *Schwartz v. Comcast Corp.*, No. 05-2340, 2006 U.S. Dist. LEXIS 7499, at *3-6 (E.D. Pa. Feb. 28, 2006) (rejecting plaintiff's argument that two-thirds of "[a]ll persons and entities residing or doing business in the Commonwealth of Pennsylvania who subscribed to Comcast's high-speed internet service" must be Pennsylvania citizens), *aff'd*, 256 F. Appx. 515 (3d Cir. 2007); *Phillips v. Severn Trent Env'tl. Servs.*, 2007 WL 2757131, at *3-4 (E.D. La. Sept. 19, 2007) (plaintiffs failed to carry their burden of proving two-thirds of class composed of parish residents affected by contaminated drinking water were Louisiana citizens).

¹⁷ *In re Sprint Nextel Corp.*, 593 F.3d 669, 674-75 (7th Cir. 2010).

¹⁸ *Id.*

III. THE “HOME STATE” AND “DISCRETIONARY” EXCEPTIONS MAY BE DEFEATED BY FAILURE TO PROVE THAT *ALL* PRIMARY DEFENDANTS ARE LOCAL

The “home state” exception applies where the plaintiff can prove that “two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and **the primary defendants**, are citizens of the State in which the action was originally filed.”¹⁹ Likewise, the “discretionary” exception allows a court to decline CAFA jurisdiction if “greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and **the primary defendants** are citizens of the state in which the action was originally filed.”²⁰ Although CAFA does not define whether “the primary defendants” includes all or some of the defendants, courts have generally held that the plural use of “defendants” means that **all** primary defendants must be citizens of the state in which the action was originally filed.²¹ In other words, defendants may oppose the application of the “home state” exception or the “discretionary” exception where

¹⁹ 28 U.S.C. § 1332(d)(4)(B) (emphasis added).

²⁰ 28 U.S.C. § 1332(d)(3) (emphasis added).

²¹ See, e.g., *Brown v. Paducah & Louisville Ry. Inc.*, No. 3:12-CV-00818-CRS, 2013 U.S. Dist. LEXIS 132608, at *22, 26; *Adams v. Macon County Greyhound Park, Inc.*, 829 F. Supp. 2d 1127, 1137-1138, fn 13 (M.D. Ala. 2011) (collecting cases); *Meiman v. Kenton County*, No. 10-156, 2011 U.S. Dist. LEXIS 10251, *28 (E.D. Ky. Feb. 2, 2011) (“The home state and discretionary exceptions require, in pertinent part, that *all* the primary defendants are citizens of the State in which the action was originally filed); *Pate v. Huntington Nat’l Bank*, No. 5:12CV1044, 2013 U.S. Dist. LEXIS 18877 (N.D. Ohio Feb. 12, 2013); *Kurth v. Arcelormittal USA, Inc.*, No. 2:09-CV-108RM, 2009 U.S. Dist. LEXIS 99126, *17-18 (N.D. Ind. Oct. 14, 2009) (citing cases) (“CAFA’s home state exception is fairly narrow, encompassing only those suits where . . . all of the primary defendants are citizens of the same state. Suits involving a primary defendant who is not a citizen of the forum state cannot qualify for the exception.”).

at least one primary defendant is diverse and the court must retain federal jurisdiction.

IV. A MAJORITY OF COURTS HOLD THAT POST-REMOVAL CASE DEVELOPMENTS DO NOT AFFECT CAFA JURISDICTION

The Supreme Court recently emphasized that the jurisdictional inquiry under CAFA “is limited to examining the case ‘as of the time it was filed in state court.’”²² Even before CAFA, it was long established that diversity jurisdiction is determined “at the time of removal.”²³ The analysis of whether a court has CAFA jurisdiction over a case therefore generally focuses on the operative complaint at the time the case was removed, and numerous courts have held that post-removal case developments do not generally alter jurisdiction after removal under CAFA. For instance, a growing number of federal courts, including five federal circuit courts, have held that in a case removed under CAFA, jurisdiction is determined at the time of removal, and federal jurisdiction is retained even if the district court subsequently denies class certification.²⁴

²² *Standard Fire Ins. v. Knowles*, 133 S. Ct. at 1349 (quoting *Wisconsin Dep’t of Corrections v. Schacht*, 524 U.S. 381, 390 (1998)).

²³ *Westmoreland Hosp. Ass’n v. Blue Cross of W. Pa.*, 605 F.2d 119, 123 (3d Cir. 1979) (“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.”) (citing *Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939)).

²⁴ *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n. 12 (11th Cir. 2009); *Cunningham Charter Corp. v. LearJet, Inc.*, 592 F.3d 805, 806 (7th Cir. 2010); *United Steel v. Shell Oil Co.*, 602 F.3d 1087, 1091-92 (9th Cir. 2010) (“We think it more likely that Congress intended that the usual and long-standing principles apply – post-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing.”); *Buetow v. A.L.S. Enters., Inc.*, 650 F.3d 1178, 1182 n. 2 (8th Cir. 2011); *Metz v. Unizan Bank*, 649 F.3d 492, 500 (6th Cir. 2011); *Carter v. Allstate Ins.*

On the other hand, numerous district courts have dismissed or remanded cases that were removed under CAFA after denying class certification by treating the denial of class certification not as a post-filing or post-removal change in jurisdictional facts, but as a legal determination that the plaintiffs' claims did not constitute an actual or potential class action, and therefore CAFA jurisdiction never existed in the first place.²⁵ Thus, the federal courts remain conflicted as to whether they retain CAFA jurisdiction after denial of class certification, although the Circuit courts that have considered the issue have held that federal jurisdiction is retained.

Federal courts have also leaned toward retaining CAFA jurisdiction after other subsequent case developments, such as post-removal amendment of the complaint or motions to strike portions of the complaint. In *In re Burlington N. Santa Fe R. Co.*, 606 F.3d 379 (7th Cir. 2010), for instance, the plaintiffs sought leave to amend their complaint to omit the class allegations after their motion for

Co., No. 5:12-CV-72, 2012 U.S. Dist. LEXIS 117288, *28 (N.D. W. Va. Aug. 21, 2012) (finding no reason to depart from the time-of-removal rule; defendants' Motion to Strike Class Action Allegations did not divest the court of the jurisdiction it had under CAFA at the time of removal); *Allen-Wright v. Allstate Ins. Co.*, No. 07-4087, 2009 U.S. Dist. LEXIS 39555, *17-18 (E.D. Pa. May 7, 2009) (retaining jurisdiction after denial of class certification; "Case developments subsequent to removal do not generally alter the jurisdiction under CAFA").

²⁵ *Avritt v. Reliastar Life Ins. Co.*, No. 07-1817, 2009 U.S. Dist. LEXIS 51524, *5 (D. Minn. June 18, 2009) (citing cases); *Ronat v. Martha Stewart Living Omnimedia, Inc.*, No. 05-520-GPM, 2008 U.S. Dist. LEXIS 91814, *21 (S.D. Ill. Nov. 12, 2008) (dismissing case where, having denied class certification, the court held that it did not retain subject matter jurisdiction under CAFA) (citing cases).

remand was denied.²⁶ The district court allowed the amendment, and then remanded the case based on analysis of the amended complaint.²⁷ In reversing the lower court's remand, the Seventh Circuit held that consideration of the post-removal amended complaint was in error because "[t]he well-established general rule is that jurisdiction is determined at the time of removal, and nothing filed after removal affects jurisdiction."²⁸ Moreover, the Seventh Circuit noted that:

[C]onsiderations of expense and delay apply, and in addition, allowing plaintiffs to amend away CAFA jurisdiction after removal would present a significant risk of forum manipulation. CAFA's legislative history reflects an awareness of the latter concern, citing the existing rule that jurisdiction cannot be 'ousted' by later events, and explaining that if the rule were otherwise, plaintiffs who believed the tide was turning against them could simply always amend their complaint months (or even years) into the litigation to require remand to state court.²⁹

Numerous courts have followed *In re Burlington*, holding that the plaintiff's complaint at the time of removal governs, and amendments of the plaintiff's complaint after CAFA removal do not divest the court of federal jurisdiction.³⁰

²⁶ *In re Burlington N. Santa Fe R. Co.*, 606 F.3d 379 (7th Cir. 2010).

²⁷ *Id.*

²⁸ *Id.* at 380.

²⁹ *Id.* at 381.

³⁰ See, e.g., *Casias v. Distribution Management Corp., Inc.*, No. 1:11-CV-0084, 2012 U.S. Dist. LEXIS 142693 (D. NM Sept. 26, 2012) (denying motion to amend and remand where plaintiff's withdrawal of class allegations did not divest the court of its original removal jurisdiction pursuant to CAFA); *Schwartz v. Comcast Corp.*, No. 05-2340, 2005 U.S. Dist. LEXIS 15396, *10-11 (E.D. Pa. July 29, 2005) (allegations in amended complaint filed after removal are not considered in determining whether to remand under CAFA exceptions; court must "determine whether

Other courts have similarly held that other post-removal changes or developments in the case, such as the dismissal of class allegations,³¹ the voluntary dismissal of the removing defendant,³² stipulations or amendments to the amount in controversy,³³ and motions to strike portions of the complaint,³⁴ do not divest the federal court of jurisdiction once the case was removed pursuant to CAFA. Thus, depending on the jurisdiction, defendants may successfully oppose remand by arguing that post-removal case developments do not divest a federal court of jurisdiction if CAFA jurisdiction was proper at the time of remand.

CONCLUSION

Although CAFA does include exceptions that may allow plaintiffs to remand of their claims to state court in certain instances, Congress's overriding purpose in

federal subject matter jurisdiction exists . . . according to the allegations set forth in [plaintiff's] original complaint.”).

³¹ *Louisiana State v. AAA Ins.*, No. 07-5528, 2011 U.S. Dist. LEXIS 131010 (E.D. La. Oct. 28, 2011) (denying remand where court dismissed class allegations but recognized that “[f]ederal courts examine jurisdictional facts as they exist as of the time the case was filed.”).

³² *Robinson v. Holiday Universal, Inc.*, No. 05-5726, 2006 U.S. Dist. LEXIS 7252, at *9 (E.D. Pa. Feb. 27, 2006) (plaintiff could not “unring the bell” by voluntarily dismissing the removing defendant in an attempt to obtain remand after removal).

³³ *Mitchell v. Skyline Homes*, No. CIV S-09-2241, 2012 U.S. Dist. LEXIS 4451 (E.D. Cal. Jan. 13, 2012) (retaining CAFA jurisdiction and denying motion to remand where plaintiffs dismissed their class allegations and reduced their claims below the jurisdictional amount for diversity jurisdiction); *Lamond v. Pepsico, Inc.*, No. 06-3043, 2007 U.S. Dist. LEXIS 42023, at *17 (D. N.J. June 8, 2007) (CAFA jurisdiction, specifically whether the amount-in-controversy requirement is initially met, must be evaluated based on “the allegations at the time of removal” rather than the “current stage of the litigation”).

³⁴ *Carter v. Allstate Ins. Co.*, No. 5:12-CV-72, 2012 U.S. Dist. LEXIS 117288 (N.D. W. Va. Aug. 21, 2012) (concluding that granting Motion to Strike Class Action Allegations did not divest the court of the jurisdiction it had under CAFA at the time of removal).

adopting CAFA was to channel more class actions to federal court. Such legislative intent has arguably prevailed in cases where federal judges have interpreted and applied CAFA's statutory exceptions. Courts have gradually constrained the use of these exceptions by requiring plaintiffs objecting to CAFA jurisdiction to prove each of the elements of a CAFA exception, even before reaching the issue of class certification or the merits of the case. Moreover, numerous courts have refused to allow plaintiffs to amend their way out of CAFA jurisdiction or to rely on post-CAFA removal case developments to release them from federal CAFA jurisdiction. As federal courts continue to refine the scope of CAFA's exceptions, targets of class actions and mass actions, and their counsel, should pay close attention to how jurisprudence in this area develops and act to influence it where opportunities arise.