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FEDERAL COURT REVIEW

Courts cling to tradition on CAFA removal burden

Circuits keep burden of proof on party seeking federal jurisdiction.

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CONGRESS EXPANDED federal jurisdiction over class actions when it passed the Class Action Fairness Act (CAFA). Whether class actions will fall under federal jurisdiction as a practical matter may depend on which party bears the burden of proving CAFA's jurisdictional requirements for removal from state court. The legislative history suggests that the party opposing jurisdiction should have the burden of proof. Recent opinions by the 9th and 7th U.S. circuit courts of appeals, however, affirm the traditional rule that the party invoking federal jurisdiction has the burden of proof under CAFA. These recent opinions also offer hints about how removing defendants can meet their burden of proof.

The burden of proof may be more important for determining diversity jurisdiction in the class action context than any other context. At the outset of the class action, the parties often have very little information concerning the identity and number of potential class members or the amount of the class members' claims. As a result, the parties may have difficulty showing the amount in controversy or proving diversity of citizenship.

Further, neither side wants to help the other make its case. Plaintiffs often do not want to admit that their aggregate claim is worth less than \$5 million. Similarly, defendants do not want to admit that class members can be ascertained or that class members have substantial claims.

CAFA made three changes to the jurisdictional requirements. First, it eliminated the "no aggregation" rule for proving the amount in

controversy in a class action. 28 U.S.C. 1332(d)(6). No longer must a class action defendant assert that the amount in controversy exceeds \$75,000 for each plaintiff in order to invoke federal jurisdiction. Rather, under CAFA, federal jurisdiction exists if the aggregated class member claims exceed "the sum or value of \$5,000,000." 28 U.S.C. 1332(d)(2) and (d)(6).

Second, CAFA expanded the time limit for removing class actions. Notice of removal must be filed within 30 days of service of the complaint or receipt of information "from which it may first be ascertained that the case is or has become removable." 28 U.S.C. 1446(b). Normally, diversity cases may not be removed "more than 1 year after commencement of the action." *Id.* CAFA eliminated this one-year limitation for removing a class action on diversity grounds. 28 U.S.C. 1453(b).

Third, CAFA eliminated the requirement of "complete diversity" in order to remove a class action. Rather, diversity of citizenship exists if any class member is a citizen of a state different from any defendant. 28 U.S.C. 1332(d)(2)(A). A defendant who is not a citizen of the forum state has diversity of citizenship. *Id.* If the defendant is from the forum state, fewer than two-thirds of the proposed class members can be citizens of the forum state. 28 U.S.C. 1332(d)(3)-(4).

Congressional intent

Several district courts have held that CAFA shifts the burden of proof to the party seeking remand after removal. See, e.g., *Berry v. American Express Publishing Corp.*, 381 F. Supp. 2d 1118 (C.D. Calif. 2005); *Harvey v. Blockbuster Inc.*, 384 F. Supp. 2d 749 (D.N.J. 2005); and *Yeroushalmi v. Blockbuster Inc.*, 2005 WL 2083008 (C.D. Calif. July 11, 2005).

These courts determined that shifting the burden of proof to the plaintiff was needed to effectuate Congress' intent to broaden federal jurisdiction. "Although the burden of proof is

not addressed..., CAFA was clearly enacted with the purpose of expanding federal jurisdiction over class actions." *Berry*, 381 F. Supp. 2d at 1122.

In concluding that the burden should shift to the plaintiff, these courts relied heavily on legislative history, which expressly declared that "the named plaintiffs should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied). And if a federal court is uncertain about whether [the amount in controversy requirement is met], the

Trial judges thought Congress intended to shift the burden.

court should err in favor of exercising jurisdiction over the case." *Id.* (quoting Sen. Rep. 109-14 at 43).

The legislative history concluded that CAFA "should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Id.* Thus, the burden was shifted in light of the legislative history and Congress' intent to broaden federal jurisdiction.

The 9th Circuit and the 7th Circuit agree that CAFA did not alter the traditional rule that the party that invokes federal jurisdiction and opposes remand bears the burden of establishing federal jurisdiction. *Abrego v. The Dow Chemical Co.*, No. 06-55109, 2006 WL 864300 (9th Cir. April 4, 2006); *Brill v. Countrywide Home Loans Inc.*, 427 F.3d 446 (7th Cir. 2005).

Brill was a class action under the federal Telephone Consumer Protection Act (TCPA) seeking to recover penalties for sending fax advertisements. The defendant removed the case under CAFA. The jurisdictional battle

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focused on whether the case met the threshold amount in controversy requirement.

The penalty for violating the TCPA was \$500 per fax, which could be trebled if the plaintiff showed wilfulness as alleged in the complaint. The defendant admitted that it sent 3,800 “junk faxes” and, therefore, if the penalty were trebled, the defendant contended that the amount in controversy could reach \$5.7 million.

The district court ruled that the defendant did not meet its burden of proof because the defendant did not show that the plaintiff would be able to prove wilfulness and because state jurisdiction is exclusive for TCPA claims.

Circuit courts found no language in the statute itself.

Amount in controversy

The 7th Circuit reversed. After rejecting the defendant’s argument that the plaintiff bore the burden of proof, the 7th Circuit ruled that the defendant had met its burden of proof simply by establishing the number of faxes sent and multiplying that number by the trebled per fax penalty of \$1,500. “The question is not what damages the plaintiff will recover, but what amount is ‘in controversy’ between the parties.” *Brill*, 427 F.3d at 448. The court also ruled that the case would have been removable even if CAFA did not apply because it arose under federal law.

Abrego was a “mass action” asserted by 1,160 Panamanian banana plantation workers arising from their alleged exposure to toxic chemicals. CAFA requires that in a “mass action” the aggregate amount in controversy must exceed \$5 million, with the additional restriction that federal jurisdiction exists only over those individual plaintiffs whose claims exceed \$75,000, as required by § 1332(a). 28 U.S.C. 1332(d)(11)(B). The defendant removed the case to federal court under CAFA.

The district court remanded the case to state court because the defendant failed to meet its burden of proving CAFA’s jurisdictional requirements. The 9th Circuit affirmed.

After rejecting the defendant’s argument that the plaintiff had the burden of proving that removal was improvident, the 9th Circuit addressed the merits of the jurisdictional question. The court noted that the case was filed in California as an “unlimited civil case” for which the amount in controversy must exceed \$25,000.

The 9th Circuit ruled that the first prong of the jurisdictional requirement was easily met. “The amount in controversy, therefore, is at least \$25,000 per plaintiff or, given 1,160 plaintiffs, at least \$29,000,000, an amount which clearly satisfies the jurisdictional amount requirement of § 1332(d)(2).” *Abrego*,

2006 WL 864300, *10.

The defendant, however, failed to establish that even one plaintiff satisfied the additional \$75,000 jurisdictional requirement for “mass actions.” The 9th Circuit rejected the defendant’s argument that it did not have the burden of proving the amount of each plaintiff’s claim. In this case, the assignment of the burden of proof appears to have been dispositive of the jurisdictional issue.

The defendant also argued that the district court erred by not permitting “jurisdictional discovery” on this issue. The 9th Circuit determined that, while jurisdictional discovery is allowed, it is not required. Further, by lifting the one-year bar on removal, CAFA clearly contemplates that state courts may be burdened with cases that ultimately will be removed. The 9th Circuit concluded that there is sufficient time to develop the facts needed to support federal jurisdiction while in the state court.

‘Opinion poll of legislators’

So, why did *Abrego* and *Brill* reject the defendants’ argument that the plaintiff should have the burden of proof? *Abrego* and *Brill* both start with the proposition that, in cases removed from state court, “the removing defendant has ‘always’ borne the burden of establishing federal jurisdiction, including any applicable amount in controversy requirement.” *Abrego*, 2006 WL 864300, *5; *Brill*, 427 F.3d at 447. Both courts noted that CAFA does not contain any language that is “even arguably relevant” to the burden-shifting argument. *Id.*

Like the defendants in *Berry* and *Yeroushalmi*, the defendants in *Abrego* and *Brill* relied exclusively on CAFA’s purpose and the Senate committee’s legislative history. Unlike those prior cases, however, *Abrego* and *Brill* refused to defer to the legislative history to shift the traditional burden of proof. Resort to legislative history is only justified when the face of the act is ambiguous. *Abrego*, 2006 WL 864300, *5. “[W]hen the legislative history stands by itself, as a naked expression of ‘intent’ unconnected to any enacted text, it has no more force than an opinion poll of legislators.” *Brill*, 427 F.3d at 448.

Because CAFA was silent on which party should have the burden of proof on removal, the courts “presume that Congress is aware of the legal context in which it is legislating.” *Abrego*, 2006 WL 864300, *6. Here, the legal context featured “a longstanding, near-canonical rule” that the burden on removal rests with the removing defendant. *Abrego*, 2006 WL 864300, *6. As a result, the *Abrego* and *Brill* courts refused to alter the long-standing rule that “the party seeking to invoke federal jurisdiction on removal bears the burden of establishing that jurisdiction.” *Id.*

Given the rulings in *Abrego* and *Brill*, Congress may need to amend CAFA if it wants to shift the burden of proof. At this time, defendants cannot rely with confidence on CAFA’s legislative history. The key issue for the

future is what evidence will satisfy the jurisdictional requirements.

Practical guidance

Abrego and *Brill* offer some practical guidance for how to meet the burden of proving the amount in controversy. Under the traditional burden of proof, the removing defendant must provide evidence that “it is ‘more likely than not’ that the amount in controversy” satisfies the federal diversity requirement. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996).

To determine the amount in controversy, the starting point for analysis is the plaintiff’s complaint, particularly the class definition. The class definition is usually broad and includes class members who often will not end up having any claim. Further, the named plaintiff’s claim is supposed to be typical of the class. Applying the named plaintiff’s claim and any minimum jurisdictional requirements to the total number of potential class members appears to satisfy the burden of proof.

Also, if the plaintiff seeks injunctive relief, the value of the injunctive relief to the defendant can be used to satisfy the jurisdictional requirements.

Plaintiffs should want the jurisdictional issue to be resolved sooner rather than later, because a defendant can remove at any time. To avoid removal, a plaintiff will need to take care in crafting its complaint by not including out-of-state plaintiffs if the defendant is from the forum state; by not alleging the amount of damages; and by narrowly defining the class.

‘Near-canonical rule’ cited in rejecting trial courts’ conclusions.

However, plaintiffs will need to be careful, because attempting to plead around CAFA may thwart class certification.

Defendants also need to heed the lessons of *Abrego* and *Brill*. If the complaint does not establish federal jurisdiction on its face, they should consider taking jurisdictional discovery in state court to establish removal jurisdiction.

Defendants, however, must be careful not to waive their right to remove by litigating the case in state court. *Yusefzadeh v. Nelson Mullins Riley & Scarborough LLP*, 365 F.3d 1244, 1246 (11th Cir. 2004). **N.M.**

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