

## **The Class Action Fairness Act: Just Because You Can Remove Doesn't Mean You Should**

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On February 18, 2005, the Class Action Fairness Act ("CAFA") was signed into law. It was the culmination of an extensive lobbying effort over several years by many business organizations. Its aim was to expand federal jurisdiction over class actions and to curb perceived abuses of the class action device. However, as often happens with tort reform legislation, its passage required substantial compromise with organizations representing competing interests, including the American Trial Lawyers Association. The result was a statute that makes removal of class actions to federal court a somewhat more available option than it was before, but at the price of significant risks and burdens for the removing defendant. In addition, the competing demands of those who had a hand in stirring this legislative broth left the statute riddled with substantial ambiguity, and left many important questions open for judicial interpretation.

Unlike the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), which gave federal courts essentially exclusive jurisdiction over most securities class actions, CAFA does not eliminate state court jurisdiction over class actions. Instead, it simply gives class action litigants the opportunity to litigate a broader range of class actions in federal court if either side desires to do so. Despite the prevailing mindset of many large companies that they would rather litigate in federal court than state court whenever possible, the decision of whether to remove a class action to federal court should only be made after careful consideration of all of the implications of successfully asserting that CAFA applies. In addition, other factors such as the different opportunities for appellate review of class certification orders under the applicable state and federal rules should be considered. Finally, the new federal rules on electronic discovery can make even the early phases of federal class litigation both dangerous and expensive for a corporate defendant, and the extent to which these burdens may be reduced if the action is litigated in state court must not be overlooked. Whatever the ultimate decision on CAFA removal may be, the decision should be made on the basis of a comprehensive evaluation of the current pros and cons of litigating in each forum, and not on the basis of outdated negative impressions of particular venues or a general company bias in favor of federal court.

### **I. OVERVIEW OF CAFA**

The complete text of CAFA is reproduced in **Appendix 1**. In order to understand the Act in the context of the prior statutes it amended, see 28 U.S.C. §§ 1711-1715 and 1332 (2007). The provisions of CAFA are more complex and reticulated than they appear at first blush, but some of the key provisions are as follows:

(1) **Minimal Diversity.** Prior to the adoption of CAFA, "complete diversity" of citizenship between all named plaintiffs and all named defendants was required to remove a class action to federal court or to file it in federal court in the first instance. See *Strawbridge v. Curtiss*, 7 U.S. (1 Cranch) 267 (1806), *overruled on other grounds*, 43 U.S. (2 How.) 497 (1844). At least for purposes of removal jurisdiction, most courts agree that CAFA relaxes this complete diversity requirement for class actions involving

alleged classes with at least 100 members, so long as the amount in controversy exceeds \$5,000,000, by allowing such a class action to be filed in or removed to federal court so long as any member of the alleged class is a citizen of a state different from that of any defendant. In determining whether the \$5,000,000 amount in controversy requirement is met, CAFA expressly requires that the claims of all class members be aggregated. Under prior law, class actions could only be filed in or removed to federal court if there was complete diversity between all named plaintiffs and defendants, and the individual claims of the class representatives exceeded \$75,000; aggregation of all class members claims to meet the amount in controversy requirement was generally not permitted. *See, e.g., Exxon-Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 571-72 (2005); *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973) (superseded by statute). *See also* Gregory P. Joseph, *Federal Class Action Jurisdiction After CAFA; Exxon-Mobil and Grable*, 8 DEL. L. REV. 157 (2006). The traditional "complete diversity" remains as a separate and independent ground for removal when the named plaintiff's claim alone exceeds \$75,000, but that is no longer the exclusive basis for removal of the typical class action. *See Saab v Home Depot*, 469 F. 3d 758 (8th Cir. 2006). Additionally, actions which are not originally removable under CAFA but later become removable, for example by virtue of an amended pleading changing purely individual claims to class claims, may be removed without regard to the one-year time limit applicable to normal diversity removals under 28 U.S.C. § 1446(b). *See* 28 U.S.C. § 1453. Likewise, CAFA removal is permitted even if one of the class action defendants is a resident of the forum state, even though 28 U.S.C § 1441(b) would not permit removal under that scenario in an individual action. *Id.* Finally, any defendant can remove under CAFA even if other defendants do not consent. *Id.*

In determining whether minimal diversity exists for purposes of CAFA, corporations and unincorporated associations are considered citizens of both the state in which they are incorporated and the state in which they have their principal place of business. , The Supreme Court has now ruled that a corporation's principal place of business is its "nerve center." *Hertz Corp. v. Friend*, — U.S. —, 130 S. Ct. 1181 (2010). Limited liability companies are generally treated as unincorporated associations for purposes of citizenship issues under CAFA. *See, e.g., Ferrell v. Express Check Advance*, 591 F.3d 698, 699-700 (4th Cir. 2010). At present, there remains some controversy over whether national banks are citizens only of the state in which their main offices are located, or whether they are also deemed citizens of the other states in which they are organized or have their principal places of business. *Compare Wells Fargo Bank v. WMR e-Pin*, 2008 WL 5429134, at \*1 (D. Minn. Dec. 29, 2008) *with Mount v. Wells Fargo Bank*, 2008 WL 5046286, at \*1-2 (C.D. Cal. Nov. 24, 2008). There also continues to be disagreement as to whether minimal diversity exists between a corporate defendant with citizenship that is deemed to exist in two states and a plaintiff who is a citizen of just one of them. *Compare Grupo Dataflux v. Atlas Global Grp.*, 541 U.S. 567, 577 n.6 (2004) (in dicta acknowledging that it is "possible, though far from clear, that one can have opposing parties in a two-party case who are co-citizens, and yet have minimal Article III jurisdiction because of the multiple citizenship of one of the parties"); *Fuller v. Home Depot Servs.*, 2007 WL 2345257, at \*3 (N.D. Ga. Aug. 14, 2007) (finding minimal diversity where defendant was citizen of both Delaware and Georgia, and all plaintiffs were citizens of Georgia) *with Johnson v. Advance Am.*, 549 F.3d 932, 936 (4th Cir. 2008) (rejecting the argument that a corporation's dual citizenship entitles it to rely on its citizenship in one of those states to establish minimal diversity under CAFA); *Smalls v. Advance Am.*, 2008 WL 4177297, at \*4-7 (D.S.C. Sep. 5, 2008) (minimal diversity not met where plaintiff's were citizens of South Carolina and defendant corporation was citizen of both

Delaware and South Carolina).

Until this year, all courts seemed to agree that the traditional “more than \$75,000.00” amount in controversy requirement of 28 U.S.C. §1332(d) had no application to either original jurisdiction or removal jurisdiction of a class action under CAFA.<sup>1</sup> Recently, the Eleventh Circuit dropped a jurisdictional depth charge on that notion, opening debate on the proper interpretation of another of CAFA’s provisions. In *Cappuccitti v. DirectTV*, 611 F.3d 1252 (11th Cir. 2010), the court ruled that at least one named plaintiff must allege more than \$75,000 in controversy as to his or her own claims, in addition to a \$5 million aggregate amount in controversy with respect to the class as a whole, in order to trigger CAFA jurisdiction in class actions originally filed in federal court. The rationale of *Cappuccitti*, such as it is, explicitly applies equally to removal jurisdiction under CAFA. The rationale is a bit hard to follow. The panel observed that CAFA’s *mass action* removal provisions include an explicit “more than \$75,000” amount in controversy requirement, 28 U.S.C. §1132(d)11(B)(1), and therefore the panel concluded that Congress must have intended the preexisting “more than \$75,000” amount in controversy requirement of 28 U.S.C. 1332(a) to remain applicable in establishing both original and removal jurisdiction over all mass actions *and class actions* under CAFA. Otherwise, the Court said, the “more than \$75,000” requirement would apply to the removal of mass actions, but not to original filings of such cases in federal court under CAFA. Besides, the panel suggested, nothing in CAFA reflects an express intent to remove the “more than \$75,000” requirement, and the panel was not about to imply one.

For now, *Cappuccitti* injects major uncertainty into removal disputes under CAFA within the Eleventh Circuit, and to some degree in other jurisdictions as well. However, the decision may not be long for this world. Both sides have petitioned for rehearing *en banc*, making essentially the same arguments that the panel reached its result *sua sponte* and that the result is dead wrong in any event. Commentators have not been shy in voicing the same sentiment.<sup>2</sup> Already, at least one court in another circuit has rejected *Capuccitti*. *Gutierrez v. Wells Fargo Bank*, 2010 WL 3155934, at \*56 (M.D. Cal Aug. 10, 2010). Finally, in addition to being in apparent conflict with the framework used by every other court in discussing CAFA-based class action jurisdiction, *Cappuccitti* conflicts with at least one decision of a prior panel of the Eleventh Circuit. In *Pretka v. Kolter City Plaza II*, 608 F. 3d 744(11th Cir. 2010), much of the opinion is devoted to roundly criticizing and marginalizing the prior panel decision in *Lowery v. Alabama Power Co.*, 483 F. 3d 1184 (11th Cir. 2007),<sup>3</sup> which was another controversial CAFA

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<sup>1</sup> CAFA’s mass action removal provisions, of course, contain their own separate “more than \$75,000” amount in controversy requirement. See Section I(3) *infra*.

<sup>2</sup> See, e.g., A. Rollo, H. Twiford III, R. Freshwater and S. Masley, *An Analysis of Cappuccitti: Eleventh Circuit Panel Adds New Amount in Controversy Requirement to CAFA Jurisdiction*, CLASS ACTION LITIGATION REPORT, 11 CLASS 723, 08/13/2010 (BNA); D. Matthew Allen, *What To Do With Capuccitti?*, Carlton Fields’ Class Action Blog (July 22, 2010); Cory Andrews, *Mass or Class? Misreading the Law or Simply Not Reading It? Eleventh Circuit Panel Subverts CAFA*, The Legal Pulse (July 28, 2010); Donald M. Falk, Archis A. Parasharami & Kevin S. Ranlett, *Eleventh Circuit Decision Threatens to Eliminate Federal Jurisdiction Over Most Consumer Class Actions, Undermining the Goals of the Class Action Fairness Act*, Lexology (July 21 2010); Andrew Trask, *CAFA Opinion Encourages Forum-Shopping—Cappuccitti v. DirectTV*, Class Action Countermeasures (July 27, 2010); Eric Jon Taylor & John Chally, *More Musings on Cappuccitti*, CAFA Law Blog (July 25, 2010); A. Rollo, H. Twiford III, R. Freshwater, *Seismic Alert: 1th Circuit Upends Existing Landscape of CAFA Subject Matter Jurisdiction*, CAFA Law Blog (July 22, 2010).

<sup>3</sup> For a detailed discussion of *Lowery*, see Section II *infra*.

decision authored by the same panelist who authored *Cappuccitti*. However, *Pretka* also expressly lists the jurisdictional elements for CAFA jurisdiction over class actions, and noticeably does not include anything resembling a “more than \$75,000” amount in controversy requirement in that list.

Class action practitioners will want to follow the ongoing *Cappuccitti* saga closely. If it stands, it not only has major implications for future filings and removals premised on CAFA, such as allowing plaintiffs to easily avoid CAFA by disclaiming that any plaintiff has more than \$75,000 in controversy, but since subject matter jurisdiction cannot be created by consent or waiver, it would also leave thousands of pending cases previously filed and removed under CAFA without regard to any “more than \$75,000” requirement subject to renewed jurisdictional attack.

(2) **Securities Litigation and Class Actions Against Governmental Entities Exempted from CAFA’s Expanded Jurisdiction.** Class actions exclusively involving securities or corporate governance, and class actions against primarily governmental entity defendants, are all exempted from the reach of CAFA’s expanded federal jurisdiction and removal provisions. 28 U.S.C. §§ 1332(d)(9)(A)-(d)(9)(C), 1332(d)(5), and 1453(c)-(d).<sup>4</sup> The exemption of securities litigation does not alter the complete preemption and removability of state securities class actions that already exists under prior federal law, such as under SLUSA. Thus, for example, a state court class action involving variable annuities would not be removable under CAFA, but would generally be removable under SLUSA. *See, e.g., Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101 (2d Cir. 2001) (class action involving variable annuities removable under SLUSA); *Herndon v. Equitable Variable Life Ins. Co.*, 325 F.3d 1252 (11th Cir. 2003) (same, with respect to variable life insurance). *Cf. Ring v. AXA Fin.*, 483 F.3d 95 (2d Cir. 2007) (variable life insurance policies, but not children’s term insurance riders thereto, were covered securities within the meaning of SLUSA). The securities exemption does, however, have the important effect of removing securities cases from the expanded appellate review available with respect to remand decisions under CAFA. *See, e.g., Bezich*, 610 F.3d at 451; *Greenwich Fin. Serv. Distressed Mortg. Fund 3 v. Countrywide Fin. Corp.*, 603 F.3d 23 (2d Cir. 2010).

(3) **“Mass Actions” Treated as Class Actions for Purposes of Jurisdiction.** “Mass actions”—

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<sup>4</sup> *See also Lincoln Nat’l Life Ins. Co v. Bezich*, 610 F.3d 448 (7th Cir.2010) (dismissing CAFA appeal related to variable life policy because such policies are “securities” and therefore exempted from CAFA’S appeal provisions, which use the same operative language for the security exemption as CAFA’s removal provisions); *Luther v. Countrywide Home Loans Serv.*, 533 F.3d 1031 (9th Cir. Jul. 16, 2008) (affirming remand of action removed under CAFA alleging claims under Section 22(a) of the Securities Act of 1933); *Genton v. Vestin Realty Mortg. II*, 2007 WL 951838 (S.D. Cal. Mar. 9, 2007) (remanding class action removed under CAFA asserting breach of good faith, fair dealing and fiduciary duty claims against issuer corporation arising from corporate merger); *Indiana State Dist. Council of Laborers and Hod Carriers Pension Fund v. Renal Care Grp.*, 2005 WL 2000658 (M.D. Tenn. Aug. 18, 2005) (same, with respect to breach of fiduciary and self-dealing claims brought against issuer); *Williams v. Texas Commerce Trust Co. of N.Y.*, 2006 WL 1696681 (W.D. Mo. Jun 15, 2006) (same, with respect to breach of fiduciary duty claims brought against indenture trustee); *In re Textainer P’ship Sec.Litig.*, 2005 WL 1791559 (N.D. Cal. July 27, 2005)(applying corporate governance exception). *Accord Estate of Pew v Cardarelli*, 527 F.3d 25 (2d Cir. 2008) (failure to disclose insolvency of issuer in connection with issuance of debt certificates held not to fall within CAFA’s securities-related jurisdictional exception, as the fraudulent marketing claims did not seek to “enforce rights of the [c]ertificate holders as holders”); *Katz v. Gerardi*, 552 F.3d 558 (7th Cir. Jan. 5, 2009) (expressly disagreeing with Luther case above and similar cases from other circuits, and finding that CAFA authorizes removal of otherwise unremovable claims under Section 22(a) the Securities Act if CAFA's removal prerequisites are met).

actions which are not filed as class actions but which name 100 or more plaintiffs whose claims are proposed to be tried jointly in one state court action—are also made removable to federal court if at least one plaintiff and one defendant are from different states, and the aggregate amount in controversy exceeds \$5,000,000. Note that as long as the claims are “proposed to be tried jointly” at the time of removal, it does not matter whether the defendant intends to seek severance for individual trials following removal, or whether such severances are later granted. *See, e.g., Cooper, v. R.J. Reynolds Tobacco Co.*, 586 F. Supp. 2d 1312 (M.D. Fla. 2008). *Accord Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759 (7th Cir. 2008) (a trial of 10 test plaintiffs followed by application of issue or claim preclusion to 90 more additional plaintiffs without another trial would satisfy the “proposed to be tried jointly” language of CAFA); *Aburto v. Midland Credit Mgmt.*, 2009 WL 2252518 (N.D. Tex. Jul. 27, 2009) (same).

CAFA’s definition of “mass action” is complicated by significant statutory ambiguity. Essentially, the definition of “mass action” under CAFA confers federal jurisdiction “except that jurisdiction shall exist only over those plaintiffs in a mass action whose claims in a mass action satisfy the [\$75,000] jurisdictional amount requirements under [28 U.S.C. §1332(a)].” The statute provides no guidance on how the court is to apply both the \$75,000 individual amount in controversy requirement and the \$5,000,000 aggregate amount in controversy requirement at the same time, and the answer is not as simple as it might seem. The Ninth Circuit discussed the many perplexing questions created by this provision in *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006). For example, if the claims of all named plaintiffs exceed \$5,000,000 in the aggregate, but the claims of only those whose claims individually exceed \$75,000 do not add up to \$5,000,000, is the action removable under CAFA in whole or in part? If so, are only the claims of those seeking more than \$75,000 removable, or is the entire action subject to removal, followed by a remand of those claims determined to be under \$75,000? The statute provides no material guidance, and at this time, the questions have not been answered by the courts. Indeed, the Eleventh Circuit has also noted that the proper application of this \$75,000 provision was an open issue, then promptly avoided addressing it. *Lowery v. Ala. Power Co.*, 483 F.3d 1184 (11th Cir. 2007).

There have been some interesting efforts by creative plaintiffs’ attorneys to exploit some of the other particulars of CAFA’s “mass action” provisions. In *Tanoh v. Dow Chemical Co.*, 561 F.3d 945 (9th Cir. 2009), the plaintiff split what would otherwise have been a CAFA “mass action” into seven separate state court actions, each with less than 100 plaintiffs. Because no one action proposed to try the claims of 100 or more plaintiffs jointly, plaintiffs’ counsel was successful in convincing the Ninth Circuit that CAFA jurisdiction was unavailable and remand was required. *Accord Anderson v. Bayer Corp.*, 610 F.3d 390 (7th Cir. 2010); *Villareal v. Dole Food Co.*, 2009 WL 690146 (C.D. Cal Mar. 9, 2009). However, in *Freeman v. Blue Ridge Paper Prods.*, 551 F.3d 405 (6th Cir. 2008), the court found that CAFA jurisdiction did exist over five lawsuits, each of which involved the same 300 or so plaintiffs and the same claims, but each of which sought damages for a discrete six month time period, with damages limited to \$4.9 million for each of the five successive time periods. The court found that CAFA was intended to negate such gamesmanship and aggregated the damages claimed in all five suits to reach the amount in controversy requirement of CAFA. *Accord Proffitt v. Abbott Labs*, 2008 WL 4401367 (E.D. Tenn. Sept. 23, 2008).

An interesting discussion of why § 1332(d)(11)(B)(ii)(I), which states that a “mass action” shall not include any civil action in which “all of the claims in the action arise from an event or occurrence in the

State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State,” does not prevent removal of single state “pattern and practice” tort cases involving more than 100 plaintiffs can be found in *Galstaldi v. Sunvest Communities USA*, 256 F.R.D. 673 (S. D. Fla. 2009). *Accord Lafalier v. Cinnabar Serv. Co.*, 2010 WL 1486900 (N.D. Okla. Apr. 13, 2010), *aff’d.*, 2010 WL 3274438 (10th Cir. Aug. 19, 2010) (finding that resolution of individual insurance claims stemming from tornado did not constitute a “single occurrence,” but remanding case based on CAFA’s “local controversy” exception).

(4) **The “Local Controversy” Exception to CAFA Jurisdiction.** Even if a class action satisfies “minimal diversity” and the amount in controversy satisfies the \$5,000,000 aggregate requirement, CAFA does not guarantee that the class action will remain in federal court. The so-called “local controversy exception” of CAFA provides that a district court “must” decline jurisdiction and remand the case if the following four conditions are met: (1) greater than two-thirds of the members of the putative class are residents of the state where the action was originally filed, and (2) at least one defendant from whom “significant relief” is sought and whose conduct forms a “significant basis” for the claims of the class is also a resident of the forum state, and (3) the “principal injuries” resulting from the conduct of “each defendant” were “incurred” in the forum state, and (4) during the three year period preceding the filing of the complaint, no other class action asserting the “same or similar factual allegations” has been filed against any of the defendants on behalf of the same or other persons. 28 U.S.C. §1332(d)(4)(A). Each of the quoted terms above is left open to substantial judicial interpretation, and provides plenty of fodder for legal wrangling. *See, e.g., Preston v. Tenet Healthsystem Mem’l Med. Ctr.*, 485 F.3d 793 (5th Cir. 2007); *Evans v. Walter Indus.*, 449 F.3d 1159 (11th Cir. 2006). *Cf. Laws v Priority Trustee Serv.*, 2008 WL 3539512 at \*4-6 (W.D.N.C. Aug. 11, 2008), *subsequent determination aff’d.*, 375 Fed. Appx. 345 (4th Cir. 2010) (while noting that “[t]here is little case law that defines ‘significant relief’ or ‘significant basis’ under CAFA,” collecting cases for the proposition that “[t]he local defendant must be a target from whom significant relief is sought by the class as well as being a defendant whose alleged conduct forms a significant basis for the claims asserted by the class.... Additionally, the ‘significant relief’ requirement has been interpreted to mean those defendants from whom plaintiffs seek most of the relief.”) (citations omitted); *Coffey v. Freeport-McMoran Copper & Gold*, 623 F. Supp. 2d 1257 (W.D. Okl. 2009), *aff’d.*, 581 F.3d 1240 (10th Cir. 2009) (defendant found to be a defendant from whom “significant relief” was sought even though defendant had no assets and was therefore not a defendant from whom significant relief could actually be obtained). For recent examples of cases discussing and applying the local controversy exception, albeit not without difficulty, see *Kaufman v. Allstate Ins. Co.*, 561 F. 3d 144 (3d Cir. 2009), *Joseph v. Unitrin, Inc.*, 2008 WL 3822938 (E.D. Tx. Aug. 12, 2008), and *Graphic Commc’ns. Local 1B Health & Welfare Fund A v. CVS Caremark Corp*, 2010 WL 2868505 (D. Minn. July 19, 2010).

(5) **The “Home State Controversy” Exception to CAFA Jurisdiction.** Similar to but separate from the so-called “local controversy” exception to CAFA is the so-called “home state controversy” exception, which again requires the court to decline jurisdiction and remand a class action if “two-thirds or more” of all members of all putative classes in the aggregate are residents of the forum state and the “primary defendant” is also a resident of that state. *See* 28 U.S.C. §1332(d)(4)(B). Note the differences between this exception and the “local controversy exception” discussed in the preceding section. Under the “home state” controversy exception, the inquiry is not whether “significant relief” is

sought from any forum state defendant, but whether the “primary defendant” is from the forum state. If the “primary defendant” is from the forum state, then the under this exception the court is required to decline jurisdiction without regard to whether the “principal injuries” occurred in the forum state or whether a similar class action has been filed in the last three years, so long as two-thirds or more of the class are also citizens of the forum state. Of course, the meaning of the term “primary defendant” remains open to interpretation and debate in any given case. See, e.g. *Frazier v. Pioneer Ams.*, 455 F.3d 542, 546 (5th Cir. 2006); *Laws*, 2008 WL 3539512 at \*4 (noting that “the term ‘primary defendants’ [relates to] those parties that are directly liable to plaintiffs and [the term ‘secondary defendants’] as parties joined under theories of vicarious liability or for purposes of [f] contribution or indemnification.”); *Serrano v. 180 Connect*, 478 F.3d 1018 (9th Cir. 2007) (declining to reach the “primary defendants” issue under the home state exception); *Kearns v. Ford Motor Co.*, 2005 WL 3967998, at \* 7 (C.D. Cal. Nov. 21, 2005) (while noting the phrase “primary defendants” is ambiguous, adopting the reasoning of decisions addressing the same phrase under the Multiparty, Multiforum, Trial Jurisdiction Act of 2002, and concluding that “a ‘primary defendant’ is any with direct liability to the plaintiffs”); *Adams v. Fed. Materials Co.*, 2005 WL 1862378, at \*5 (W.D. Ky. Jul. 28, 2005) (rejecting plaintiffs’ attempt to characterize party as “secondary defendant” where the defendant was alleged to have direct liability to the class); *Moua v. Jani-Kinf of Minn.*, 613 F. Supp. 2d 1103 (D. Minn. 2009) (finding that defendant could not be deemed secondary as opposed to “primary” where the complaint disclosed no principled basis for distinguishing culpability of defendants). The burden of proving that an order remanding the case or declining jurisdiction is justified under the home state controversy exception rests on the party asserting it, and the elements of the exception cannot be proven by mere guesswork, speculation or assumption. See, e.g., *In re Sprint Nextel Corp.*, 593 F.3d 669 (7th Cir. 2010) (too speculative to assume that cell numbers with Kansas area codes and addresses reflected Kansas citizenship for purposes of establishing that two-thirds of class were citizens of Kansas); *Corsino v. Perkins*, 2010 WL 317418 (C.D. Cal. Jan. 19, 2010); *Nicholson v. Prime Tanning Corp*, 2009 WL 2900042 (W.D. Mo. Sept 3, 2009) (where complaint fails to distinguish among defendants, all defendants will be considered primary defendants); *Summerhill v. Terminix, Inc.*, 2008 WL 4809448 (W.D. Ark. Oct. 30, 2008).

(6) **The “Interests of Justice” Exception to CAFA Jurisdiction.** Another “out” for federal judges and plaintiffs wishing to punt CAFA removals back to state court is the highly subjective “interest of justice” exception. It provides that a district court “may” decline to exercise jurisdiction or remand “in the interests of justice and looking to the totality of the circumstances,” provided more than one-third but less than two-thirds of the proposed class and the “primary defendants” are all residents of the forum state. 28 U.S.C. 1332(d)(3); see also *Preston v. Tenet Healthsystem Mem'l Med. Ctr.*, 485 F.3d 804, 810 (5th Cir. 2007) (in affirming remand of class action to state court, noting the discretionary jurisdiction exception to CAFA gives “greater latitude to remand class actions to state court”). A number of factors which the trial court must consider are listed in the statute, but the statute gives the court no specific guidance as to how any of the factors are to be applied, or what weight is to be given to the presence or absence of any of those factors. In other words, this exception leaves plenty of room for both reasoned and result-oriented interpretation. See, e.g., *Sorrentino v. ASN Roosevelt Ctr.*, 588 F. Supp. 2d 350 (E.D.N.Y. 2008) (remanding based on interests of justice exception where some factors were neutral and other factors suggested remand.). Of course, CAFA’s jurisdictional exceptions are not one-sided. If the plaintiff chooses to file the class action in federal court in the first instance, this

discretionary exception and the mandatory exceptions to CAFA's expanded federal jurisdiction discussed above provide opportunities for the defendant to seek discretionary dismissal and force the case into state court, just as they offer opportunities for the plaintiff to seek discretionary remand a removed case. Moreover, since none of CAFA's jurisdictional exceptions include any time limit on raising them, it remains to be seen whether and how these exceptions will be applied when their potential applicability becomes apparent only after months or even years of discovery, or by virtue of subsequent amendments changing the claims, parties or proposed class definition long after the original filing or removal.

**(7) Potential Hidden and Unstated Exceptions to CAFA Jurisdiction.** There are a number of circumstances that may defeat CAFA jurisdiction that are not apparent on the face of the statute itself. First, there is a split of authority on whether a new party added as a defendant to a counterclaim or purported third-party claim, whether properly or improperly designated as a counterclaim or third-party defendant under the particular circumstances of the case, has any right to remove under CAFA. In *Palisades Collections v. Shorts*, 552 F.3d 327 (4th Cir. 2008), *cert. denied*, — U.S. —, 129 S.Ct. 2826 (U.S. 2009), the Fourth Circuit held that counterclaim or third-party defendants cannot remove cases under CAFA, even if the counterclaim or third-party claim expressly asserts class allegations that would have been removable if asserted in an original complaint. *Accord Progressive West Ins. Co. v. Preciado*, 479 F.3d 1014 (9th Cir. 2007); *Ford Motor Credit Co. v. Jones*, 2007 WL 2236618 (N.D. Ohio July 31, 2007); *Wells Fargo Bank v. Gilleland*, 621 F. Supp. 2d 545 (N.D. Ohio 2009); *First Bank v. DJL Prop.*, 2010 WL 380904 (S.D. Ill. 2010), *aff'd* 598 F.3d 915 (7th Cir. 2010), *petition for cert. filed*, Jul. 20, 2010. A strong dissent in *Palisades*, now joined by at least one federal district court in Ohio, *Deutsche Bank Nat'l Trust Co. v. Weickert*, 2009 WL 1954505 (N.D. Ohio July 2, 2009), support the contrary view that such removals should be allowed. *See also* A. Rollo and C. Burnette, *How to Avoid Reaping What You Didn't Sow: CAFA's Solution for Removal of Counterclaim Class Actions*, Consumer Financial Services Law Report, Vol. 13, Issue 16 (Feb. 2010); *A Move in the Right Direction—The Tide Is Turning for Removal by Counterclaim Defendants Under CAFA*, BNA, Inc, Class Action Litigation Report, Vol. 10, No. 22 (Nov. 27, 2009). This issue has particular significance for lenders, who can easily file suit to collect debts in hostile state court venues only to find themselves named in class action counterclaims which may not be removable. Note that several district courts have held that claims that are *improperly* pled as third party claims but do not meet the criteria of Federal Rule of Civil Procedure 14 will not supply a basis for removal by those improperly named as third-party defendants for the independent reason that only those "properly joined as defendants" may remove. *See, e.g. Deutsche Bank Nat'l Trust Co. v. Tyner*, 233 F.R.D. 460 (D.S.C. Jan. 10, 2006); *Bear Lumber Co. v. Headley*, 2009 WL 2448161 (M.D. Ala. Aug 10, 2009).

Next, forum selection clauses specifying specific state courts have been held by some courts to prevent CAFA removal. Such was the holding in *Guenther v. Crosscheck Inc.*, 2009 WL 1248107 (N.D.Cal., Apr 30, 2009), where the court found that a forum selection clause stating that "any action arising out of the negotiation, execution or performance of the terms and conditions of this agreement shall be brought in the courts of Sonoma County, California" was enforceable and precluded the removal of the action to federal court under CAFA. *Accord Norris v. Commercial Credit Counseling Servs.,* 2010 WL 1379732 (E. D. Tex. Mar. 31, 2010); *Piechur v. Redbox Automated Retail*, 2010 WL 706047 (S.D. Ill. Feb. 24, 2010).

Finally, a number of early district court decisions held that even if CAFA removal requirements are



found satisfied at the outset and remand is initially denied, if class certification is ultimately denied, remand is required. See, e.g., *Salazar v. Avis Budget Grp.*, 2008 WL 5054108 (S.D. Cal. Nov. 20, 2008); *Ronat v. Martha Stewart Living Omnimedia*, 2008 WL 4963214 (S.D. Ill. Nov. 12, 2008); *Avritt v. Reliastar Life Ins. Co.*, 2009 WL 1703224 (D. Minn. June 18, 2009), *subsequent determination aff'd.*, 2010 WL 3168453 (8th Cir. Aug. 12, 2010); *Muehlbauer v. Gen. Motors Corp.*, 2009 WL 874511 (N.D.Ill., Mar 31, 2009); *Jones v. Jeld-Wen, Inc.*, 2008 WL 4541016 (S.D. Fla.Oct. 2, 2008); *Clausnitzer v. Fed. Express Corp.*, 621 F. Supp. 2d 1266 (S.D. Fla. 2008); *Arabian v. Sony Elec.*, 2007 WL 2701340 (S.D. Cal. Sept 13, 2007); *Giovanniello v. N.Y. Law Publ'g Co.*, 2007 WL 2244321 (S.D.N.Y. Aug. 6, 2007); *Falcon v. Philips Elec. Corp.*, 489 F. Supp. 2d 367 (S.D.N.Y. 2007), *subsequent determination aff'd.*, 304 Fed. Appx. 896 (2d Cir. 2008); *Gonzalez v. Pepsico, Inc.*, 2007 WL 1100204 (D. Kan. Apr. 11, 2007); *McGaughey v. Treistman*, 2007 WL 24935 (S.D.N.Y. Jan 4, 2007); *M.S. Wholesale Plumbing. v. Univ. Sports Publ'n Co.*, 2008 WL 5225823 (E.D. Ark. Dec. 10, 2008); *Manufacturing, Energy, Allied Industrial & Service Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co.*, 2009 WL 1652975 (C.D. Cal. Jun. 11, 2009), *appeal dismissed as moot*, 593 F.3d 802 (9th Cir. 2010); *Newman v. RCN Telecom Servs.*, 238 F.R.D. 57 (S.D.N.Y. 2006); *Chiropractic Neurodiagnostic, P.C., v. Allstate Ins. Co.*, 2009 WL 210866 (E.D.N.Y. Jan. 26, 2009); *Hoffer v. Cooper Wiring Devices*, 2007 WL 2891401 (N.D. Ohio Sept. 28, 2007). See also *In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 492-93 (1st Cir. 2009) (assuming, but not deciding, that denial of class certification divests the court of CAFA jurisdiction). The reasoning of these cases is that CAFA only confers jurisdiction over cases "before or after the entry of a class certification order" under the express language of 28 U.S.C. §1332(d)(8), and the denial of certification, at least in the absence of any foreseeable possibility of a subsequent order granting class certification, not only destroys federal jurisdiction but establishes that it never existed. More recently, other courts, including several appellate courts, have disagreed, reasoning that class certification has no bearing on the propriety of either removal or jurisdiction, that post-removal events do not affect jurisdiction, and that federal jurisdiction that exists at removal continues through the conclusion of the case. *Manufacturing, Energy, Allied Industrial & Service Workers Int'l Union, AFL-CIO CLC v. Shell Oil Co.*, 602 F.3d 1087 (9th Cir. 2010); *Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750 (7th Cir. 2010); *In re Burlington N. Santa Fe Ry. Co.*, 606 F.3d 379 (7th Cir. 2010); *Cunningham Charter Corp. v. Learjet*, 592 F.3d 805 (7th Cir. 2010); *Vega v. T-Mobile USA*, 564 F.3d 1256 (11th Cir. 2009); *Macula v. Lawyers Title Ins. Corp.*, 2010 WL 1278868 (N.D. Ohio Mar. 30, 2010); *Delsing v. Starbucks Coffee Corp.*, 2010 WL 1507642 (D. Minn. Apr. 14, 2010); *Garcia v. Boyar & Miller, P.C.*, 2007 WL 1556961 (N.D. Tex. May 30, 2007); *Colomar v. Mercy Hosp.*, 2007 WL 2083562 (S.D. Fla Jul. 20, 2007); *Allen-Wright v. Allstate Ins. Co.*, 2009 WL 1285522 (E.D.Pa., May 05, 2009); *Genenbacher v. CenturyTel Fiber Co.*, 500 F. Supp. 2d 1014 (C.D. Ill. 2007); *In re HP Inkjet Printer Litig.*, 2009 WL 282051 (N.D. Cal. Feb. 5, 2009); *Brinston v. Koppers Indus.* 538 F. Supp. 2d 969 (W.D. Tex. 2008); *Quiroz v. Mistras Group*, 2010 WL 2079833 (C.D. Cal. May 21, 2010).

Note that general statutory and prudential prohibitions on the exercise of federal jurisdiction, such as the Rooker-Feldman doctrine, remain applicable even in cases filed under CAFA. See, e.g., *Bergquist v. Mann-Bracken, LLP*, 592 F. 3d 816 (7th Cir. 2010).

(8) **CAFA'S Discretionary Right of Appeal from Remand Orders.** CAFA provides for discretionary appeals from the grant or denial of any motion to remand a class action removed under CAFA. See, e.g., *BP Am., Inc. v. Oklahoma*, 613 F.3d 1029 (10th Cir. 2010). Although the statute unambiguously reads that a petition for such an appeal must be filed "not less than 7 days" from the entry of the order, see 28

U.S.C. §1453(c)(1), most courts have concluded that this is a typographical error which in fact should be read as “no more than 7 days.” See, e.g., *Amalgamated Transit Union v. Laidlaw Transit Servs.*, 435 F.3d 1140 (9th Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006); *Pritchett v. Office Depot*, 420 F.3d 1090 (10th Cir. 2005); *Morgan v. Gay*, 466 F.3d 276 (3d Cir. 2006); *Estate of Pew v. Cardarelli*, 527 F.3d 25 (2d Cir. 2008). Judge Easterbrook and the Seventh Circuit, however, have refused to dismiss an appeal filed more than 7 days after the remand order, noting that Congress has failed to “fix” this apparently unintended but unambiguous language despite it being repeatedly pointed out, and therefore speculation as to Congress real intent should not be used to justify dismissing a claim that is timely under a literal interpretation of the language. See *Spivey v. Vertrue, Inc.*, 528 F. 3d 982 (7th Cir. 2008); see also *Admiral Ins. Co. v. Abshire*, 574 F.3d 267 (5th Cir. 2009). Cf. *Bartnikowski v. NVR, Inc.*, 307 Fed. Appx. 730 (4th Cir. 2009) (noting the split in circuit authority, but declining to resolve it given factual circumstances of appeal).

Leaving aside what this unfortunately worded time limit for filing the petition for appeal really means, CAFA states that the appellate court “may” accept an appeal if sought within that time, which the foregoing cases have interpreted to mean that the appellate court may also decline to accept the appeal as a matter of discretion. If the appeal is accepted, CAFA places a 60-day time limit within which the appellate court must render its decision, with provisions for extensions if the parties consent. The intent of these time limits was to avoid unreasonable delay in resolving the jurisdictional issue. One wonders, however, whether another potential effect may well be to provide an incentive for busy appellate courts to exercise their discretion to decline CAFA appeals more often than they otherwise would. In the Eleventh Circuit, if permission to appeal is allowed and oral argument is allowed on the merits, be prepared for the Panel to ask the parties to agree to an open-ended extension at the conclusion of the oral argument. That has become the norm.

Note that CAFA’s appeal provisions cannot be utilized to appeal remand orders in cases that were not removed under CAFA. See, e.g., *In re UPS Supply Chain Solutions*, 2008 WL 4767817 (6th Cir. 2008); *Wallace v. Louisiana Citizens Prop. Ins. Corp.*, 444 F.3d 697 (5th Cir. 2006). Moreover, issues involving interpretation of federal jurisdictional statutes other than CAFA may not be reviewable in a CAFA appeal. See, e.g., *Peralta v. Countrywide Home Loans*, 375 Fed. Appx. 784 (9th Cir. 2010) (holding that interpretation of the term “located” in 28 U.S.C §1348, in order to determine national bank’s citizenship, was outside the jurisdiction of the appellate court in a CAFA remand appeal). Finally, don’t overlook the obvious: the appeal is discretionary, and therefore the petition for appeal must contain a cogent recitation of reasons why the trial court was wrong and why the appellate court should exercise its discretion to grant the petition, lest the petition become subject to dismissal. *Froud v. Andarko E&P Co.*, 607 F.3d 520 (8th Cir. 2010) (mere recitation of procedural events leading to remand, without discussion of the merits of the legal issues or their importance, was insufficient to enable appellate court to grant discretionary appeal under CAFA).

(9) **CAFA’s Rules for Approval and Enforcement of Class Settlements.** Once federal jurisdiction is established over a class action, CAFA also imposes new substantive requirements for the approval of class action settlements. Some of these rules have serious implications for both plaintiffs and defendants, and make it more difficult to settle a class action under CAFA than was previously the case in either state or federal courts. First, substantial restrictions are imposed upon so-called “coupon settlements,” whereby the primary relief provided to class members comes in the form of free or

discounted future goods or services. See 28 U.S.C. § 1712. Specifically, such settlements must pass heightened judicial scrutiny, and any attorneys' fees awarded class counsel on the basis of such "coupon" relief must be calculated on the basis of the value of the "coupons" actually redeemed, not on the number of coupons made available. *Id.*; see also *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292 (S.D. Fla. 2007) (denying approval of class settlement offering \$19 per unit coupon to buyers of allegedly ineffective air purifiers based in part on reaction of class to the coupon offer). Cf. *Radosti v. Envision EMI, LLC*, 2010 WL 2292343 (D.D.C. Jun 8, 2010) (holding that the judicial scrutiny called for by CAFA imposes no burden greater than that required by Rule 23(e) in considering the propriety of coupon relief). This, of course, makes it far less likely that plaintiffs' attorneys will agree to coupon settlements, which were often the most cost-effective way for a class action defendant to achieve settlement of a class action.

Second, whether the settlement involves coupon relief or not, within ten days of the filing of any proposed class settlement with the trial court, CAFA requires the settling defendants to send to each of their state and federal regulators a detailed written notice of the action, the proposed settlement, and proposed class notice, and, "if feasible," the identities and residences of all class members. 28 U.S.C. § 1715. For an insurance company, for example, this new notice to state and federal regulators might well have to be sent to the SEC, the NASD, the various state insurance commissioners for all 50 states, and state and federal attorneys general, among others, depending on the products and claims involved. If such notice is not given, any class member can choose not to be bound by the proposed settlement regardless of whether it is approved by the trial court. *Id.* at § 1715(e). Once they receive this comprehensive notice and class roster, of course, it then almost certainly becomes a public record, despite the privacy and trade secret interests involved in the class roster. Moreover, the regulators may then seek to intervene in the class action, lodge objections to the settlement, or pursue their own separate actions or investigations, as many of them are increasingly prone to do in response to high-profile civil litigation.<sup>5</sup> This greatly complicates the settlement process, and must be considered when debating the desirability of CAFA removal in a given case. By its very nature, any class action in which class certification is granted is highly likely to settle before trial, given the high stakes typically presented by a classwide liability and damages verdict. Moreover, a class settlement often provides an opportunity for a defendant to resolve a known exposure more broadly and more efficiently than through piecemeal litigation, such that some defendants may actually desire to pursue an early class settlement rather than fight class certification. If there is any significant possibility that the case will eventually be settled on a class basis, state court forums typically offer the opportunity to do so without CAFA's restrictions on coupon settlements, and without any requirement that all relevant state

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<sup>5</sup> Although CAFA requires notice be sent to appropriate regulatory authorities, it is questionable whether such regulators have standing to object to class action settlements. See, e.g., *Feder v. Elec. Data Sys. Corp.*, 248 Fed. Appx. 579, 580 (5th Cir. 2007) ("The text of Fed.R.Civ.P. 23(e) is clear in its grant to class members of the ability to object to a proposed settlement. But only class members have an interest in the settlement funds, and therefore only class members have standing to object to a settlement. Anyone else lacks the requisite proof of injury necessary to establish the 'irreducible minimum' of standing."); *Heller v. Quovadx, Inc.*, 245 Fed. Appx. 839, 842 (10th Cir. 2007); *Tenn. Ass'n of Health Maint. Orgs., Inc. v. Grier*, 262 F.3d 559, 566 (6th Cir. 2001) ("The plain language of the Rule 23(e) clearly contemplates allowing only class members to object to a lack of notice. Thus, under Rule 23(e), non-class members have no standing to object to a lack of notice. ") (citations omitted); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989) ("Beginning from the unassailable premise that settlements are to be encouraged, it follows that to routinely allow non-class members to inject their concerns via objection at the settlement stage would tend to frustrate this goal.").

and federal regulators be notified in advance of the settlement and the class members to whom it applies. Moreover, so long as Due Process requirements are met, a state court class action settlement generally has the same preclusive effect as a federal class action settlement, and can validly release claims broader than those asserted in the complaint. *See, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996); *TBK Partners v. W. Union Corp.*, 675 F.2d 456 (2d Cir.1982); *Williams v. Gen. Elec. Capital Auto. Lease*, 159 F.3d 266 (7th Cir.1998); *Moulton v. U.S. Steel Corp.*, 581 F.3d 344 (6th Cir. 2009); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991).

(10) **CAFA's Effective Date and post-CAFA (or Post-Removal) Amendments.** CAFA was signed into law by the President on February 18, 2005, and applies to class actions or mass actions "commenced" on or after that date. *See, e.g., Patterson v. Dean Morris L.L.P.*, 444 F.3d 365 (5th Cir. 2006); *Bush v. Cheaptickets, Inc.*, 425 F.3d 683 (9th Cir. 2005); *Pfizer v. Lott*, 417 F.3d 725 (7th Cir. 2005); *Pritchett*, 420 F.3d at 1094. However, there has been substantial confusion and a fair amount of disagreement over what constitutes "commencement" of an action in the context of suits filed before that date, but amended after that date to add new allegations or parties. *See, e.g., Knudsen v Liberty Mut. Ins. Co.* ("*Knudsen I*"), 411 F.3d 805, 807 (7th Cir. 2005) ["As we have already hinted, however, a new claim for relief (a new 'cause of action' in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes]; *Knudsen v. Liberty Mut. Ins. Co.* ("*Knudsen II*"), 435 F.3d 755 (7th Cir. 2006) (Post-CAFA amendment expanding class definition to include insureds of defendant's affiliates constituted new action for purposes of CAFA removal, even though the affiliates themselves were not named as parties); *In re Safeco Ins. Co.*, 585 F.3d 326 (7th Cir. 2009) (class certification order expanding scope of class alleged in complaint did not commence a new action and did not trigger right to CAFA removal of pre-CAFA case); *Prime Care of Northeast Kansas v. Humana Ins. Co.*, 447 F.3d 1284 (10th Cir. 2006) (amendment which does not relate back to the filing of the original complaint for limitations purposes triggers new right of removal under CAFA); *Braud v. Transp. Serv. Co.*, 445 F.3d 801 (5th Cir. 2006) (amendment adding a new defendant commences a new action for purposes of CAFA removal); *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748 (7th Cir. 2005) (addition of new defendant opens a "new window of removal" under CAFA, but amendment merely enlarging class definition does not because it does not add new *parties* to the suit); *Schillinger v. Union Pac. R.R.*, 425 F.3d 330 (7th Cir. 2005) (amendment adding new defendant creates new right of removal under CAFA, but amendment changing class from a statewide to a nationwide class does not, and amendment merely correcting the name of a defendant incorrectly named in the original complaint does not); *Phillips v. Ford Motor Co.*, 435 F.3d 785 (7th Cir. 2006) (routine substitution of new plaintiffs did not give rise to new suit where substitution related back for limitations purposes); *Natale v. Gen. Motors Corp.*, 2006 WL 1458585 (7th Cir. 2006) (substitution of new named plaintiff for original named plaintiff who lacked standing did not open a new window for removal under CAFA); *Admiral Ins. Co. v. Abshire*, 574 F.3d 267 (5th Cir. 2009), *cert. denied*, — U.S. —, 130 S.Ct. 756 (2009) (post-CAFA amendment seeking class cert and reviving claims of deceased plaintiffs did not create CAFA jurisdiction in case originally filed prior to CAFA); *Plubell v. Merck & Co.*, 434 F.3d 1070 (8th Cir. 2006) (amendment adding a new class representative without materially changing the underlying claims or class definition does not create a new right of removal under CAFA); *Senterfitt v. Suntrust Mortg.*, 385 F. Supp. 2d 1377, 1379-81 (S.D. Ga. 2005)

(amendment enlarging class period from 4 to 20 years did not relate back to filing of original complaint and therefore “commenced” new action for purposes of CAFA); *Plummer v Farmers Grp.*, 388 F. Supp. 2d 1310, 1315-17 (E.D. Okla. 2005) (amendment changing the case from an individual action to a class action constituted “de facto commencement of a new suit” for purposes of CAFA removal, as did amendment adding new plaintiffs with separate contracts and separate factual allegations from original plaintiffs); *Heaphy v. State Farm Mut. Auto Ins. Co.*, 2005 WL 1950244 (W.D. Wash Aug. 15, 2005) (amendment adding new plaintiff commences new action for purposes of CAFA removal); *Comes v. Microsoft*, 403 F. Supp. 2d 897, 904 (S.D. Iowa 2005) (amendment adding four paragraphs to a 94-page complaint did not create a “wholly distinct claim” sufficient to trigger new right of removal under CAFA); *Dinkel v. Gen. Motors Corp.*, 400 F. Supp. 2d 289 (D. Me. 2005) (addition of new defendant creates new right of removal regardless of any subsequent dismissal of that defendant by plaintiff); *Leal v. Gov. Employees Ins. Co.*, 2009 WL 4852670 (S.D. Tex. Dec. 14 2009) (amendment adding plaintiffs and proposed class members whose claims defendants were not previously on notice of triggers new right to remove under CAFA).

Post-removal amendments which eliminate class allegations or CAFA’s jurisdictional prerequisites have generally been held not to defeat CAFA jurisdiction, since federal subject matter jurisdiction is judged at the time of filing or removal in federal court. *See, e.g. In re Burlington N. Santa Fe Ry. Co.*, 606 F. 3d 379 (7th Cir. 2010) (and cases discussed therein). On the other hand, when post removal amendments cure prior jurisdictional defects, many courts hold that the federal court may keep the case. *See, e.g., Moffitt v. Residential Funding Co.*, 604 F.3d 156 (4th Cir. 2010) (and cases discussed therein). None of this alters the right of the district court, in its discretion, to remand pendent state law claims that are beyond the reach of CAFA at the time the federal claims on which jurisdiction was originally premised are dismissed. *Higdon v. Pacific Bell Tel. Co.*, 2010 WL 2077195 (N.D. Cal. May 20, 2010).

## II. THE BURDEN OF PROOF ON CAFA REMOVAL ISSUES

CAFA expresses a legislative intent to change prior federal jurisprudence by expanding federal jurisdiction over class actions. However, the statute is otherwise silent on who bears the burden of proof on each of the requirements for CAFA removal (such as the \$5,000,000 aggregate amount in controversy and minimal diversity requirements), and who bears the burden of proof as to whether any of the various mandatory or discretionary exceptions to CAFA jurisdiction apply (*e.g.*, whether more than two-thirds of the class reside outside the original forum state, whether individual plaintiffs in a removed mass action have individual claims exceeding \$75,000, and so on).

The broad and expansive purposes of CAFA might suggest that doubts regarding federal jurisdiction were intended to be resolved in favor of the federal court retaining jurisdiction, and that the burden of proof should lie with those opposing federal jurisdiction. *See, e.g.* H. Twiford, III, A. Rollo, and J. Rouse, *CAFA’S New “Minimal Diversity Standard for Interstate Class Actions Creates A Presumption That Jurisdiction Exists, With the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 MISS. C. L. REV. 7 (2006). Indeed, a Senate Committee report concerning CAFA states just such an intent. *See* S. Rep. No. 109-14, at 42 (Feb. 28, 2005), reprinted in 2005 U.S.C.C.A.N. 3, 40, 44.

However, the federal courts have not accepted these arguments. Finding no express language on the face of CAFA expressly allocating the burden of proof, thus far all of the appellate courts addressing the issue have declared that established jurisprudence for other types of removals is controlling, and that therefore the burden of establishing CAFA jurisdiction is on the party claiming jurisdiction. *See, e.g., Strawn v. AT & T Mobility*, 530 F.3d 293, 298 (4th Cir. 2008) (“the party seeking to invoke federal jurisdiction [under CAFA] must allege it in his notice of removal and, when challenged, demonstrate the basis for federal jurisdiction”); *Smith v. Nationwide Prop. and Cas. Ins. Co.*, 505 F.3d 401 (6th Cir. 2007); *Blockbuster v. Galeno*, 472 F.3d 53 (2d Cir. 2006); *Morgan*, 471 F. 3d at 473 (“Under CAFA, the party seeking to remove the case to federal court bears the burden to establish that the amount in controversy requirement is satisfied.”); *Abrego Abrego*, 443 F.3d at 685 (“under CAFA the burden of establishing removal jurisdiction remains, as before, on the proponent of federal jurisdiction”); *Frazier*, 455 F.3d at 546; *Miedema*, 450 F.3d at 1328-29; *Brill v. Countrywide Home Loans*, 427 F.3d 446 (7th Cir. 2005).

On the other hand, the appellate courts have largely held that a party who opposes federal jurisdiction bears the burden of establishing the applicability of one of CAFA’s jurisdictional exceptions. *See, e.g., Serrano*, 478 F.3d at 1019 (“[T]he party seeking remand bears the burden of proof as to any exception under CAFA.”); *Hart v. FedEx Ground Package Sys.*, 457 F.3d 675 (7th Cir. 2006); *Frazier*, 455 F.3d at 546; *Evans v. Walter Indus.*, 449 F.3d 1159 (11th Cir. 2006). The Second Circuit has acknowledged the foregoing decisions, but has expressly declined to say whether it agrees with them. *See Blockbuster*, 472 F.3d at 58. Before these appellate decisions, some district courts initially viewed the burden as resting with the party asserting that the exceptions did not apply. *See, e.g., Lao v. Wickes Furniture Co.*, 455 F. Supp. 2d 1045, 1050 (C.D. Cal. 2006) (effectively overruled by *Serrano, supra*). However, the majority of district courts had already held that the party opposing federal jurisdiction has the burden of proving the applicability of one of CAFA’s jurisdictional exceptions. *See, e.g., Natale v. Pfizer Inc.*, 379 F. Supp. 2d 161 (D. Mass. 2005), *aff’d on other grounds*, 424 F.3d 43 (1st Cir. 2005); *Mattera v. Clear Channel Commc’ns*, 239 F.R.D. 70 (S.D.N.Y. 2006); *Harvey v. Blockbuster Inc.*, 384 F. Supp. 2d 749 (D.N.J. 2005); *Eakins v. Pella Corp.*, 455 F. Supp. 2d 450 (E.D.N.C. 2006).

What level of proof must a removing defendant provide to establish CAFA jurisdiction, and what level of proof must a plaintiff offer to establish the applicability of one of CAFA’s jurisdictional exceptions? This is the subject of considerable and continuing controversy. As a general rule, the consensus standard of proof for both a defendant seeking to invoke CAFA jurisdiction, and a plaintiff seeking to invoke one of CAFA’s jurisdictional exceptions, is by a preponderance of the evidence. *See, e.g., Abrego Abrego*, 443 F.3d at 683 (party seeking to invoke federal jurisdiction under CAFA “must prove by a preponderance of the evidence that the amount in controversy requirement has been met”); *Lowery*, 483 F.3d at 1208-09; *Frederico v. Home Depot*, 507 F.3d 188, 197-98 (3d Cir. 2007); *Preston*, 485 F.3d at 813-14 (“we hold that the party moving for remand under the CAFA exceptions to federal jurisdiction must prove the citizenship requirement by a preponderance of the evidence”). *Cf. Blockbuster*, 472 F.3d at 57 (2d Cir. 2006) (stating that the proponent of jurisdiction must prove the amount in controversy to a “reasonable probability”); *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F. 3d 41 (1st Cir. 2009) (same).

However, several circuits have held that where a plaintiff specifically alleges damages *less than* the jurisdictional threshold, a removing defendant must show “to a legal certainty that the amount in controversy exceeds the statutory minimum.” *Morgan*, 471 F.3d at 474; *see also Lowdermilk v. U.S. Bank Nat’l Assoc.*, 479 F.3d 994 (9th Cir. 2007); *Brill*, 427 F.3d at 448-49; *Ortiz v. Menu Foods*, 525 F. Supp. 2d 1220, 1234 (D. Hawaii 2007) (“Given that Plaintiff, in her Complaint, specifically disclaims damages in excess of \$5 million, it

is incumbent on MFH to prove with legal certainty that CAFA's jurisdictional amount is met.") (citations omitted). Acceptance of such a heightened standard is not universal, however. *See, e.g., Smith v. Nationwide Prop. & Cas. Co.*, 505 F.3d at 407 ("A disclaimer in a complaint regarding the amount of recoverable damages does not preclude a defendant from removing the matter to federal court upon a demonstration that damages are 'more likely than not' to 'meet the amount in controversy requirement,' but it can be sufficient absent adequate proof from defendant that potential damages actually exceed the jurisdictional threshold."); *Bell v. Hershey Co.*, 557 F. 3d 953, 958 (8th Cir. 2009) ("a party seeking to remove under CAFA must establish the amount in controversy by a preponderance of the evidence regardless of whether the complaint alleges an amount below the jurisdictional minimum.").

Cases such as *Morgan, Brill*, and *Lowdermilk* illustrate another danger for defendants in attempting CAFA removals, one that applies even under the "preponderance" standard but is particularly acute when the "legal certainty" test applies. In picking apart the defendant's proof and finding it wanting under the applicable standard of proof, the reasoning of each of these courts essentially requires that a defendant affirmatively prove plaintiff's damages in excruciating detail with virtually unassailable proof in order to stay in federal court. More broadly, courts applying CAFA have generally refused to entertain arithmetic based on pure assumptions or inapposite statistics as satisfying the amount in controversy, but instead have insisted upon admissible evidence of potentially recoverable damage based on the personal knowledge of a defense witness, company records, or the like. *See, e.g. Bartnikowski*, 307 Fed. Appx. at 734-39; *D&J Plastics v. Veolia ES Solid Waste*, 2010 WL 1257734 (M.D. Ga. Mar. 26, 2010); *Mathews v. ALC Partner, Inc.*, 2009 WL 2390526 (E.D. Mich. July 31, 2009); *Amezcuca v. Cellco P'ship*, 2009 WL 1190553 (N.D. Cal. May 4, 2009); *Freebird, Inc. v. Cimarex Energy Co.*, 599 F. Supp. 2d 1283 (D. Kan. 2008); *Myrick v. Nationwide Mut. Ins. Co.*, 2008 WL 53183 (W.D. Wash. Jan. 3, 2008); *Chochorowski v. Home Depot*, 585 F. Supp. 2d 1085 (E.D. Mo. 2008); *Stroh v. Colonial Bank*, 2008 WL 4831752 (M.D. Ga., Nov. 4, 2008); *Philpot v. Best Buy Stores*, 2008 WL 2811972 (W.D. Ky. Jul. 21, 2008); *Coit v. Fidelity Assurance Assoc.*, 2008 WL 3286978 (N.D. Cal. Aug. 6, 2008); *Cannon v. Dow Chem. Co.*, 2008 WL 2308897 (E.D. La. June 2, 2008); *Hauer v. Priceline.com*, 2008 WL 3286980 (N.D. Cal. Aug. 6, 2008); *Munoz v. J.C. Penney Corp.*, 2008 WL 2782879 (C.D. Cal. July 15, 2008); *C & E, Inc. v. Friedman's Jewelers*, 2008 WL 64632 (S.D. Ga. Jan. 4, 2008); *Simenz v. Amerihome Mortg. Co.*, 2007 WL 3129725 (E.D. Wis. Oct. 23, 2007); *Fiddler v. AT&T Mobility*, 2008 WL 2130436 (N.D. Ill. May 20, 2008); *Apodaca v. Allstate Ins. Co.*, 2008 WL 113844 (D. Colo. Jan. 8, 2008); *Paz v. Playtex Prods.*, 2008 WL 111046 (S.D. Cal. Jan. 10, 2008); *Bates v. SendMe, Inc*, 2009 WL 942342 (N.D. Cal. Apr. 6, 2009). To attempt this type of evidentiary showing based on your own client's affidavits and documents is to provide the plaintiff with substantial "free discovery" at the very beginning of the case, risk admissions as to the amount of damages and their ease of calculation that may be used against the defendant at the summary judgment stage, the class certification stage or at trial, and identify through affidavits and exhibits numerous witnesses and documents that the plaintiff might not otherwise have asked for or focused upon in the normal course of discovery. *See, e.g., Lorah v. SunTrust Mortg.*, 2009 WL 413113 (E.D. Pa. Feb. 18, 2009) (denying motion to remand where defendant submitted detailed affidavits identifying 168 specific loans covered by the allegations of the complaint, their respective monthly payments, and their principal balances to show that CAFA's numerosity and amount in controversy elements were satisfied). This can be a heavy price to pay for an uncertain chance at a federal forum.

For those thinking they can avoid this dilemma by making a less detailed showing of the amount in controversy and then asking for remand-related discovery of the plaintiffs and putative class members if a motion to remand is filed, you certainly want to read a series of cases beginning with the Eleventh Circuit's

opinion in *Lowery v. Alabama Power Co*, 483 F. 3d 1184 (11th Cir. 2007). In a 77-page opinion, the reasoning of which expressly applies to both CAFA and non-CAFA removals, an Eleventh Circuit panel purported to outlaw remand-related discovery altogether. Joining the rationale of *Morgan, Brill*, and *Lowdermilk* above, the *Lowery* panel ruled that if no specific amount of damages is pled, the removing defendant need only prove by a “preponderance of the evidence” that the amount in controversy exceeds \$5,000,000, but must prove it to a “legal certainty” if the plaintiff specifically pleads less than \$5,000,000. After ruling that the preponderance of the evidence standard applied, the court then dropped this bombshell: the determination of whether the defendant has met the applicable standard of proof as to the amount in controversy must be made from the pleadings, the notice of removal, and the accompanying documents alone, and that resort to remand-related discovery was not permitted in deciding any motion to remand, under CAFA or otherwise. Because the defendant’s notice of removal and accompanying exhibits contained no document clearly indicating that the aggregate value of the plaintiffs’ claims exceeded \$5,000,000, the court declared that the defendant had failed to satisfy even the preponderance of the evidence standard. Proof of verdicts in similar mass tort actions which had exceeded \$5,000,000 was contained in the defendant’s removal papers, but was deemed insufficient. Moreover, the court went out of its way to prohibit any form of speculation or assumptions in calculating whether the amount in controversy was met. *See also Schiller v. David’s Bridal*, 2010 WL 2793650, at \*4-5 (E.D. Cal. July 14, 2010) (finding that plaintiff’s refusal to stipulate to an amount in controversy less than \$5 million is not competent proof that CAFA’s amount in controversy requirement has been met, since it is defendant’s burden to prove that amount and plaintiff is under no obligation to help defendant meet it).

Prior to *Lowery*, defendants routinely asked for remand-related discovery if plaintiffs sought remand on amount in controversy grounds, and many courts routinely granted it. After *Lowery*, federal district courts within the circuit quickly observed that its prohibition on remand-related discovery is equally applicable to non-CAFA removals of even individual actions. *See Constant v. Int’l House of Pancakes*, 487 F. Supp. 2d 1308 (N.D. Ala. 2007). The court in *Constant* even issued a broad warning that all future removals in that court based on speculative calculations of the amount in controversy would be sanctioned. *Id.* at 1313. This echoed Judge Tjoflat’s admonition in *Lowery* itself that notices of removal that do not comply with *Lowery*’s standards would be sanctionable under Federal Rule of Civil Procedure 11. The irony is that Rule 11 explicitly allows one to sign a pleading or motion on the bases that “the factual contentions have evidentiary support, or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery,” yet *Lowery* simultaneously prohibited such discovery and threatened sanctions for relying on it.

Though not squarely addressing the other jurisdictional prerequisites of CAFA, the *Lowery* view of permissible evidence on remand seemed to apply with equal force to any effort to establish or rebut the applicability of the “home state,” “local controversy,” and “interests of justice” exceptions to CAFA jurisdiction. Whether two-thirds or more of the putative class members reside in the forum state as of the date of removal, for example, arguably must now be decided on the face of the pleadings, the notice of removal, and the accompanying affidavits and exhibits. *Cf. Preston*, 485 F.3d at 798-803 (reversing remand after concluding that patient billing addresses offered by class counsel were insufficient to establish the two-thirds citizenship requirement of CAFA’s “local controversy” exception). The option of resorting to discovery to ascertain this often elusive information would appear foreclosed to the extent that *Lowery* stands as the controlling law. In fact, several district courts within the Eleventh Circuit have gone even further, and



interpreted *Lowery* as restricting a removing defendant to proving the amount in controversy and other prerequisites to CAFA removal solely from the complaint and other documents supplied by plaintiff, and prohibiting the defendant from relying on its own affidavits and documents. See, e.g., *King v. Board of Pensions of Presbyterian Church*, 2010 WL 339779, at \*2 (M.D. Ga. Jan. 22, 2010) (“It would be improper for the Court to consider Defendant’s Affidavit because the document was not received by Defendant from Plaintiff.”); *Innovative Heath & Wellness v. State Farm Mut. Auto. Ins. Co.*, 2008 WL 3471597 (S.D. Fla. 2008); *Thrifty Auto Repair v. U.S. Bancorp*, 2007 WL 2788465 (N.D. Ga. Sept. 21, 2007). Another panel of the Eleventh Circuit later issued an opinion that seemed to provide further support for this interpretation of *Lowery*. *Thomas v. Bank of Am. Corp.*, 570 F.3d 1280 (11th Cir. 2009).

To say that *Lowery*’s prohibition of remand-related discovery is debatable on its merits would be a bit of an understatement. First, it is a notion that undeniably conflicts with the Senate committee report concerning CAFA’s purpose. See Sen. Rep. 109-14 at 44 (in making jurisdictional determinations, noting that “a federal court may have to engage in some fact-finding, not unlike what is necessitated by the existing jurisdictional statutes.”). Second, it is a notion that has not caught on with courts in other jurisdictions.<sup>6</sup> Third, prohibiting remand-related discovery is a notion that conflicts with a host of prior decisions, including those of the Supreme Court, all of which have historically treated remand-related discovery as an appropriate consideration in determining federal jurisdiction.<sup>7</sup> Disagreement with *Lowery* continues to expand, and recently became evident even within the Eleventh Circuit itself. Although rehearing *en banc* was denied in *Lowery*, as was a petition for certiorari to the U.S. Supreme Court, subsequent decisions by the U.S. Supreme Court and opinions by other panels of the Eleventh Circuit have left *Lowery* a badly leaking hull of a ship with virtually no one left on board but its captain, who seems determined not to acknowledge the inevitable.

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<sup>6</sup> See, e.g., *Abrego Abrego*, 443 F.3d at 691 (noting that in the CAFA context, jurisdictional discovery is within the discretion of district courts); *Anwar v. Fairfield Greenwich, Ltd.*, 2009 WL 1181278 (S.D.N.Y. May 1, 2009) (rejecting *Lowery*, and granting limited remand-related discovery); *Canard v. Rothman Furniture Stores*, 2010 WL 2835565 (E.D. Mo. July 16, 2010) (remanding after limited remand-related discovery showed that more than two-thirds of the putative class were Missouri residents, triggering CAFA’s home state controversy exception); *Cram v. Elec. Data Sys. Corp.*, 2007 WL 2904250 (S.D. Cal. Oct. 3, 2007) (permitting jurisdictional discovery by both parties as to the amount in controversy); *Martin v. Lafon Nursing Facility of the Holy Family*, 244 F.R.D. 352 (E.D. La. 2007) (compelling production of documents necessary for CAFA jurisdiction determination); *Hooks v. Am. Med. Sec. Life Ins. Co.*, 2006 WL 2504903 (W.D.N.C. Aug. 29, 2006) (deferring ruling on motion to remand pending completion of jurisdictionally-related discovery); *Schwartz v. Comcast Corp.*, 2006 WL 487915 (E.D. Pa. Feb. 28, 2006) (denying motion to remand in action removed under CAFA based on results of jurisdictionally-related discovery).

<sup>7</sup> See, e.g., *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 n.13 (1978) (“[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues.”); *U.S. Catholic Conference v. Abortion Rights Mobilization*, 487 U.S. 72, 79-80 (1988) (“Nothing we have said puts in question the inherent and legitimate authority of the court to issue process and other binding orders, including orders of discovery directed to nonparty witnesses, as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter.”); *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140-41 (2005) (noting a plaintiff’s “failure to disclose facts necessary to determine jurisdiction” could justify denying fee-shifting under 28 U.S.C. § 1447(c)); *Opelika Nursing Home v. Richardson*, 448 F.2d 658, 667 (5th Cir. 1971) (“the blueprint of the method of determining the length and breadth of the amount in controversy . . . entirely within the discretion of the trial court.”) (emphasis added); *Cantor Fitzgerald, L.P., v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996) (discovery may be necessary in deciding a motion to remand following removal on the basis of diversity). See also 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2009, at 124 & n.2 (1994) (“Although there was once doubt on this point, it has long been clear that discovery on jurisdictional issues is proper.”); 16 MOORE’S FEDERAL PRACTICE 3D § 107.14[2][g][i][A] (2006) (“A defendant seeking removal can usually determine an appropriate range of damages through discovery.”).

While *Lowery's* author, Judge Tjoflat, continued to cite *Lowery* with approval in his equally controversial recent opinion in *Cappuccitti*, the United States Supreme Court itself has recently said that “[w]hen challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof,” which is an implicit rejection of *Lowery's* prohibition against jurisdictional discovery. *Hertz Corp. v. Friend*, — U.S. —, 130 S.Ct 1181, 1194-95 (2010). Moreover, in *Pretka v. Kolter City Plaza II*, 608 F.3d 744 (11th Cir. 2010), Judges Edmondson, Carnes and Pryor combined to throw a chain around the mast of *Lowery*. The *Pretka* panel reinterpreted *Lowery* as applying only to removals under the “other paper” prong of 28 U.S.C. §1446—that is, only when removal is based upon an “other paper” that is “received from the plaintiff” after the case is originally filed. Affidavits of the defendant and the like are not “received from the plaintiff” and therefore not a competent basis for an “other paper” removal. Any language in *Lowery* going beyond that proposition, the *Pretka* panel said, was purely dicta and conflicted with prior Eleventh Circuit panel precedent, and as such has no binding effect. The panel then provided a lengthy resurrection of everything else *Lowery* had laid asunder:

When the complaint does not claim a specific amount of damages, removal from state court is [jurisdictionally] proper if it is facially apparent from the complaint that the amount in controversy exceeds the jurisdictional requirement.” *Williams*, 269 F.3d at 1319. “If the jurisdictional amount is not facially apparent from the complaint, the court should look to the notice of removal and may require evidence relevant to the amount in controversy at the time the case was removed.” *Id.*; see also, e.g., 16 James Wm. Moore et al., *Moore's Federal Practice* § 107.14[2][g], at 107-86.4 to 107-86.5 (3d ed. 2010) (“When determining if the defendant has satisfied this burden [to establish jurisdiction by a preponderance of the evidence], the court will consider first whether it is facially apparent from the complaint that the jurisdictional amount is in controversy. If it is not, the court may consider facts alleged in the notice of removal, judicial admissions made by the plaintiffs, non-sworn letters submitted to the court, or other summary judgment type evidence that may reveal that the amount in controversy requirement is satisfied.”).

The substantive jurisdictional requirements of removal do not limit the types of evidence that may be used to satisfy the preponderance of the evidence standard. Defendants may introduce their own affidavits, declarations, or other documentation—provided of course that removal is procedurally proper. See *Williams*, 269 F.3d at 1319; *Miedema*, 450 F.3d at 1330; *Sierminski*, 216 F.3d at 949 (the district court may “require parties to submit summary-judgment-type evidence relevant to the amount in controversy at the time of removal” (quotation marks omitted)); *Fowler v. Safeco Ins. Co. of Am.*, 915 F.2d 616, 617 (11th Cir.1990) (“Defendants have the opportunity to submit affidavits, depositions, or other evidence to support removal.”); see also *De Busk v. Harvin*, 212 F.2d 143, 146 (5th Cir.1954) (holding, in a case removed under 28 U.S.C. § 1442, that the district court had properly denied the plaintiff's motion to remand based on “[t]he uncontroverted affidavits of appellees, attached as exhibits to the amended petition for removal”). We do not read *Lowery* as holding to the contrary. If we did, there would be a serious prior panel precedent problem. See *United States v. Ohayon*, 483 F.3d 1281, 1289 (11th Cir.2007) (“When a decision of this Court conflicts with an earlier decision that has not been overturned en banc, we are bound by the earlier decision.”); *United States v. Hornaday*, 392 F.3d 1306, 1316 (11th Cir.2004) (“Where there is a conflict between a prior panel decision and those that came before it, we must follow the earlier ones.”)....

The substantive jurisdictional requirements, however, are not the only hurdles that a removing

defendant must clear. There are also procedural requirements regarding the timeliness of removal. See 28 U.S.C. §§ 1446, 1453(b). It was on the basis of those procedural requirements that this Court in *Lowery* rejected evidence submitted by the defendant, Alabama Power. We held that Alabama Power's evidence could not be considered because it was not a document received from the plaintiffs. ...

We now turn to what, if any, limits the removal statute places on the types of evidence that may be used by a defendant that removes the case within the time specified by the first paragraph of § 1446(b), a question not presented by the facts of the *Lowery* case.

...[W]e do not believe that Congress, when it enacted § 1446, altered the traditional understanding that defendants could offer their own affidavits or other evidence to establish federal removal jurisdiction....

There is another way that Kolter carried its burden of establishing federal jurisdiction by a preponderance of the evidence. The unnamed plaintiffs' contracts and the Gutierrez declaration, which Kolter attached to its opposition to remand, are themselves sufficient to prove that there is more than \$5 million in controversy. The district court read *Lowery* as barring it from considering that post-removal evidence, but we disagree.

According to the district court, *Lowery* requires a removing defendant to submit all of its jurisdiction-supporting evidence *before* the plaintiff files a motion to remand. That interpretation is based on this language from *Lowery*: "In assessing whether removal was proper in ... a case [where the plaintiffs file a timely motion to remand], the district court has before it *only the limited universe of evidence available when the motion to remand is filed*-i.e., the notice of removal and accompanying documents." 483 F.3d at 1213-14 (emphasis added).

To the extent that *Lowery* would bar the consideration of evidence submitted after the case is removed, it conflicts with our decision in *Sierminski v. Transouth Financial Corp.*, 216 F.3d 945 (11th Cir.2000), which came seven years before the *Lowery* decision. And, of course, where two of our decisions conflict, we must follow the earlier of them. See, e.g., *Ohayon*, 483 F.3d at 1289; *Hornaday*, 392 F.3d at 1316.

*Pretka*, 608 F. 3d at 756-774. Judge Pryor, joined by Judge Carnes, also wrote a special concurrence expressly opining that *Lowery* was also wrong, in conflict with prior panel precedent, and dicta when it purported to outlaw remand-related discovery. *Id.* at 774-776.

Following the release of *Pretka*, Judges Black, Hull and Kravitch lobbed another devastating bar shot at *Lowery*. In *Roe v. Michelin*, 613 F.3d 1058 (11th Cir. 2010), this separate panel explicitly agreed with *Pretka*, and further held that a district court does not have to blindly accept a plaintiff's allegations about the amount in controversy where the complaint seeks unspecified sums of damages, but can use both evidence submitted by the defendant and its own judicial experience and common sense in deciding whether the amount in controversy is met in a given case.

Where does all of this leave us? What is the continued significance of *Lowery*? Well, odds are *Lowery* is listing badly, but not yet sunk. Future panel decisions are sure to come, and perhaps only a future *en banc* or Supreme Court decision will finally send *Lowery* to the bottom to spend eternity in Davy Jones' locker. Until then, removing defendants presumably have little fear of sanctions in removing on the basis of *Pretka* rather than refraining because of *Lowery* as it was originally written, at least in cases where the removal is based

upon an original complaint filed after *Pretka*. Beware, however, post-*Pretka* attempts to remove cases that were originally filed before *Pretka*. The authors' firm tried this, arguing that removal of the original complaint was barred by *Lowery* at the time of the original filing, but became removable after *Pretka* by virtue of the receipt of an "other paper" making it clear that removal was now proper under the newly described standards. Senior District Judge Propst, of the Northern District of Alabama, found in no uncertain terms, that *Pretka* is the law of the Eleventh Circuit, and that under its rationale, the case had actually been removable to begin with, despite *Lowery's* contrary language, despite the fact that *Pretka* had not yet been issued, and despite the fact that one of his fellow judges, Senior District Judge Acker, had threatened to sanction any defendant who removed an action without strictly complying with *Lowery's* mandates. Therefore, Judge Propst ruled, the "other paper" provision of 28 U.S.C. §1446(b), which expressly applies only when the case as originally pleaded was not removable, could not possibly be applicable.

Of course, even under the more recent panel opinions, *Lowery* still has some wood above water when it comes to "other paper" removals. Until *Lowery* is scuttled altogether by an en banc or Supreme Court broadside, those attempting other "paper removals" in the Eleventh Circuit will have to pay it tribute.

### III. MORE ON POTENTIAL PITFALLS OF CAFA REMOVAL

We have already seen that removing cases under CAFA presents some significant drawbacks for the class action defendant. The defendant must attempt to prove that the amount in controversy exceeds \$5,000,000 with detailed evidence, largely from its own records. This provides abundant free discovery to the plaintiff, along with the identities of possible deponents, information as to various records to request in subsequent discovery, a roadmap to proving damages, and possible admissions that can be used against the defendant at class certification, summary judgment or trial stages of the litigation, whether or not remand is granted. The more the defendant tries to hedge its statements as to the amount in controversy to avoid such admissions and consequences, the less likely it is that the defendant's burden of proving that the amount in controversy exceeds \$5,000,000 will be found satisfied.

Even if the removing defendant carries that burden, the plaintiff no longer has any incentive to cap the damages of the class, and an amendment eliminating any prior damage limitations is very likely. Regardless, defendant is now in a venue where any appeal from class certification is solely within the discretion of the appellate court. Fed. R. Civ. P 23(f). The federal courts have made clear that such interlocutory appeals will be granted only sparingly, and only in the most compelling circumstances. *See, e.g., Vallario v. Vandehey*, 554 F.3d 1259, 1262 (10th Cir. 2009) ("the grant of a petition for interlocutory review constitutes "the exception rather than the rule.") (citations omitted); *Asher v. Baxter Int'l*, 505 F.3d 736, 741 (7th Cir. 2007) ("The final-decision rule of § 1291 is the norm, and Rule 23(f) is an exception that, like § 1292(b), must be used sparingly lest interlocutory review increase the time and expense required for litigation."); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) ("Rule 23(f) review should be granted sparingly"); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002); *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000). By contrast, some states allow appeals as of right from any grant or denial of class certification. *See, e.g.,* ALA CODE § 6-5-642; 12 OKLA. STAT. ANN. § 993(A)(6); TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(3); FLA. R. APP. P. 9.130(a)(3)(c)(vi) and (a)(6). In other states, petitions for mandamus or discretionary interlocutory appeals from class certification may be granted much more often than in the relevant federal court. An appeal as of right (or its functional equivalent) can be monumentally important, since class certification and denial of a

discretionary interlocutory appeal often forces the defendant to settle rather than bet the company on the outcome of a classwide trial, and the deleterious effects of an adverse classwide verdict on publicly traded stock. See *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1298-1302 (7th Cir. 1995). Worse yet, after class certification has already been granted and interlocutory review denied, the defendant is forced to negotiate with class counsel at a time when class counsel's leverage is at its highest point.

Moreover, if a class action defendant is successful in removing a class action under CAFA, the defendant will now find it more difficult to settle on a class basis under CAFA than would be the case in most state courts. Because of its restrictions on attorneys' fees, CAFA makes even legitimate coupon settlements much less feasible and much less attractive to class counsel. See, e.g., *Cox v. Microsoft Corp.*, 2007 WL 7045224 (N.Y. Sup. Ct. Feb. 02, 2007). In addition, CAFA requires that all relevant state and federal regulators of the defendant be provided with detailed notice of *any* proposed settlement and the identities of the class members it affects before the settlement is approved. This can make the terms of settlement much more expensive for the defendant, and can easily generate both adverse publicity and additional collateral individual litigation, both at the hands of class members who "opt-out" and regulators who choose to pursue their own separate investigations or lawsuits. Moreover, the potential for intervention or objection by such regulators — some of whom may be elected officials — may derail or greatly complicate the settlement process. The ability of class members to reject the settlement for failure to properly provide notice to state and federal regulators is another significant concern, particularly to companies regulated by more than one state or federal agency. The risk of guessing wrongly as to which regulators are due notice rests squarely on the defendant, forcing over-inclusive notice to the regulators as the wisest recourse. Moreover, as part of this rigorous notice process, settling defendants may be forced to put their customer lists into what may well amount to the public domain.

In Alabama, the benefits of staying in state court do not end there. Under Alabama's class action statute, a defendant is entitled to a virtually automatic bifurcation of discovery that limits discovery to class certification issues in the first instance. ALA. CODE § 6-5-641. The Alabama Supreme Court has historically been much more willing than the Eleventh Circuit to entertain mandamus review of disputed discovery orders, a fact which enhances the discovery benefits of state court. Moreover, absent the defendant's consent, no class certification hearing is allowed to be held in Alabama state court until motions to dismiss are resolved, the defendant then files an answer, and the court then holds a scheduling conference and issues a scheduling order which sets an evidentiary hearing for class certification, which cannot be set less than 90 days after the order is issued. *Id.* Such protections are far less certain for the defendant in federal court.

These are only a few of the potential "downsides" that must be considered before deciding to remove a class action under CAFA. Other potential "pitfalls" abound. Federal courts in a given circuit may well be more prone to certify classes than the state forum where the class action was originally filed, even where the state forum has developed a reputation as a "judicial hellhole" in the past. See, e.g., *Williams v. Mohawk Indus.*, 568 F.3d 1350 (11th Cir. 2009) (reversing denial of class certification in RICO case and endorsing certification of a "hybrid" (b)(2) class for injunctive relief and damages); *In Re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004) (reversing denial of class certification regarding "race-distinct premium" claims and remanding for further proceedings, and in the process finding that 23(b)(2) certification is permissible even where class members seek substantial individual monetary awards, thus negating class counsel's need to prove predominance and superiority); *Klay v. Humana*, 382 F.3d 1241 (11th Cir. 2004) (upholding 23(b)(3)

certification of RICO claims of classes of physicians against various HMO's); *Morgan v. Family Dollar Stores*, 551 F.3d 1233 (11th Cir. 2009), *cert. denied*, — U.S. —, 130 S.Ct. 59 (2009) (affirming certification of collective action under FLSA seeking recovery of unpaid overtime for store managers); *Negrete v. Allianz Life Ins. Co.*, 238 F.R.D. 482 (C.D. Cal. 2006) (upholding 23(b)(3) class certification of fraud and RICO claims involving the sale of deferred annuities to seniors); *Cooper v. Pacific Life Ins. Co.*, 229 F.R.D. 245 (S.D. Ga. 2005) (certifying a class alleging systemic violation of duty to determine suitability by variable annuity issuer); *Carnegie v. Mutual Sav. Life Ins. Co.*, 2002 WL 32989594 (N.D. Ala. Nov. 1, 2002) (certifying state and federal race-distinct premium class action under 23(b)(3)). Compare G. Cook, *The Alabama Class Action: Does It Exist Any Longer? Does It Matter?*, 66 ALA. LAW. 289 (July 2005) (discussing the paucity of Alabama Supreme Court decisions upholding class certification, and the abundance of Alabama Supreme Court decisions rejecting class certification, that have been handed down since 1998); *Ex parte Cincinnati Ins. Co.*, 2010 WL 2342418 (Ala. June 11, 2010) (granting mandamus review, and dismissing putative class action based on the filed-rate doctrine); *Ex parte Attorney Gen. King*, 2010 WL 1641084 (Apr. 23, 2010) (granting mandamus review, and ordering dismissal of putative class action); *Wyeth, Inc. v. Blue Cross & Blue Shield of Ala.*, 2010 WL 152123 (Ala. Jan. 15, 2010) (in reversing class certification, concluding that common issues of fact did not predominate over the individual issues inherent in an unjust enrichment claim brought on behalf of a putative class); *Eufaula Hosp. Corp. v. Lawrence*, 32 So. 3d 30 (Ala. 2009) (vacating class certification in case where challenging health care provider's patient admission contract as one providing for an undefined and ultimately unreasonable price thereby allegedly breaching the contract and its implied-price term); *Banker v. Circuit City Stores*, 7 So. 3d 992 (Ala. 2008) (affirming denial of class certification for breach of contract, Magnuson-Moss, and unjust enrichment claims of nationwide class of consumers who purchased extended service plans); *State Farm Fire & Cas. Co. v. Evans*, 956 So. 2d 390 (Ala. 2006) (reversing nationwide class certification of unjust enrichment claims arising from alleged overcharges for homeowner's insurance); *Lackey v. Cent. Bank of the South*, 710 So. 2d 419 (Ala. 1998) (decertifying contract claims against bank where contract was ambiguous and intent of each class member was relevant to contract interpretation).

Indeed, there is some thought that federal courts may become even more prone to certify classes under CAFA. For example, prior to CAFA, the fact that the laws of many different states would have to be applied was considered a major reason not to certify class actions in federal court. See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, (7th Cir. 1995); *Andrews v. AT&T Co.*, 95 F.3d 1014 (11th Cir. 1996). However, the express intent of CAFA is to funnel more multistate class actions into federal court. Some think this could lead federal judges to give the "varying state laws" defense to class certification significantly less weight in CAFA class actions. See, e.g., A. McGuinness & R. Gottlieb, *Class Action Fairness Act 2005—Potential Pitfalls for Defendants*, 13 ANDREWS CLASS ACTION LITIG. REP. No.9 at 16.

At least one recent Alabama Supreme Court decision gives Alabama state court somewhat more potential as a class action venue for would-be class counsel. See *CIT Commc'n Fin. Corp. v. McFadden, Lyons & Rouse LLC*, 37 So. 3d 114 (Ala. 2009) (where lessor used the same standard lease agreement with each class member and charged each class member a monthly amount for insurance, so there was no need for individualized evidence to address lessee's claims that lessor's methods violated the lease agreement and the duty of good faith, and common questions predominated sufficiently to make class treatment superior to individual litigation). Likewise, at least one recent class certification decision in the Eleventh Circuit makes that federal venue somewhat safer for defendants. See *Sacred Heart Health Sys. v. Humana Military Healthcare Serv.*, 601 F. 3d 1159 (11th Cir. 2010) (class certification of contract claims reversed, because there was a substantial

variation in material contractual terms, and a need for individualized extrinsic evidence on ratification and waiver defenses, each of which were fatal to any finding of predominance or superiority). The class certification landscape can evolve quickly, and in making any removal or original filing decision, it is critical to judge the pros and cons of each potential venue with the most up-to-date information possible as to how each venue currently views class certification in cases of the type at issue.

The United States Supreme Court's opinion in *Shady Grove Orthopedic Associates v. Allstate Ins. Co.*, —U.S.—, 130 S.Ct. 1431 (2010), certainly makes federal court more attractive for some state statutory causes of action. In *Shady Grove*, the Court held that state statutory prohibitions of class actions seeking to recover statutory penalties, or statutory minimum damages for each violation, do not prevent federal courts from granting class certification in such cases. The Court reasoned that class certification is procedural, and Federal Rule of Civil Procedure 23, and not state law, governs which cases may and may not be certified in federal court, even in diversity cases. This potentially opens up major new federal opportunities for enterprising would-be class counsel. State unfair trade practice statutes, for example, often provide statutory per violation penalties or minimum damage amounts, but prohibit class treatment. Alabama has exactly this kind of statute. See ALA. CODE §§ 8-19 to 8-19-15, and particularly 8-19-10. The statute includes a long laundry list of activities that can constitute a deceptive trade practice under this statute, some of which arguably involve issues of individual reliance, but others of which may not, and it culminates with the catch-all violation of "engaging in any other unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce." *Id.* at § 8-19-5. Provided the requirements for either CAFA or traditional diversity jurisdiction can be met, and assuming the home state and local controversy exceptions can be avoided in CAFA cases, *Shady Grove* potentially opens up a wide array of conduct to potential class treatment in federal court under state consumer protection statutes, even though those same claims could not be brought on a class basis in state court. Expect the plaintiff's bar to explore this promising and previously untilled ground in the coming months.

Another issue for defendants to weigh in deciding whether to remove is whether the federal rules on electronic discovery, compared to the realities of electronic discovery practice in the relevant state court, will make federal court more expensive and more dangerous from a discovery standpoint. Essentially, the federal rules make electronic discovery a mandatory subject of the required initial discovery and scheduling conference and initial evidentiary disclosures each side is required to provide at the beginning of a case, explicitly provide for sanctions for failure to preserve electronic data and documents when litigation is filed or reasonable anticipated, and make a defendant's entire computer system, computer archives, email systems, hard drives, backup tapes, and databases potentially subject to forensic colonoscopy in the normal course of discovery. Even the laptop computers of officers and employees used for both business and personal purposes are potentially fair game.

Naturally, the burdens of electronic discovery typically fall primarily upon corporate defendants, since they rely heavily upon electronic data systems to do business. Although it is extremely difficult to know what potentially relevant data may be lurking in the bowels of a complex computer system at the very beginning of unanticipated litigation, failure to exercise exacting diligence to preserve potentially relevant electronic data can lead to severe sanctions and large verdicts. See, e.g., *U.S. v. Phillip Morris*, 327 F. Supp. 2d 21 (D.D.C. 2004) (awarding \$2,995,000 in monetary sanctions and precluding key defense witnesses from testifying based upon failure to preserve electronic data); *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004) (willful destruction of relevant email, late production of relevant email, and other failures to preserve and

produce electronic evidence results in jury be instructed that emails deliberately destroyed and that they were entitled to infer that they would have been harmful to the defendant's case—jury later returned verdict of \$29.3 million).

Moreover, locating and producing relevant electronic information and ensuring that privileged electronic documents are not produced can be a time-consuming and expensive process, often requiring the retention of forensic computer experts and thousands of hours of attorney time. While the new federal rules do allow the court to shift some costs of electronic discovery or disallow overly expensive efforts to fish for small amounts of potentially relevant data in electronic archives or legacy files, for example, in most instances the defendant will bear the lion's share of electronic discovery costs. Knowing this, some plaintiffs' attorneys have now begun to use electronic discovery as a weapon of extortion, seeking to raise the cost and other burdens of defense to unacceptably high levels for the defendant by aggressively pursuing every conceivable avenue of electronic discovery. Other plaintiffs' counsel will focus as much or more on finding and creating a "spoliation of electronic evidence" argument as on the merits of the case, knowing the severity of the sanctions that can be imposed for spoliation and the difficulty a large corporate defendant will have in ensuring that no relevant data is lost through archiving systems, programs with automatic deletion and overwriting features, disk defragmentation, panicked employees who want to ensure that their visits to questionable websites while at work are not discovered in the process of examining their hard drives for relevant data, and so on.

Given the federal e-discovery rules, it is of course now imperative that companies develop a comprehensive system for managing electronic discovery. One important part of this is to create and implement a sound document retention policy that controls the amount of electronic information that is kept in their databases, email systems, backup tapes, and archives. The lower the volume of data stored, the less expensive electronic discovery is, and the less likely that thoughtless comments in stray emails will become a problem in litigation. The new federal rules provide a safe harbor for good faith compliance with a document retention policy, subject to the requirement of a thorough "litigation hold" on potentially relevant data once litigation is filed or reasonably anticipated. Company IT personnel must become versed in the location and preservation of relevant data and preventing deletion of that data by automatic deletion programs, disk defragmentation, and any of the myriad of other ways that data can be intentionally or inadvertently lost. They also must be employed to assist the company in making sure that litigation holds are in fact being followed by employees. Employees must be educated and periodically re-educated on the dangers of deleting their own files or emails or wiping or defragmenting their own hard drives in the face of litigation, and more importantly, on the importance of getting in the habit of not creating emails that they are not comfortable having to produce in discovery one day. Employees need to be made to understand that even if files or emails are deleted, there is almost always a record that they have been deleted, and often a way to reconstruct the deleted information from metadata files or otherwise, such that failure to comply with a litigation hold will eventually come to light, with severe consequences for the company and the employee. In-house counsel and outside counsel must work closely with internal or external information technology experts to make sure outside counsel understand the company's electronic data systems thoroughly at the outset of a case, so they can help ensure that potentially relevant data is preserved, reviewed for substance and privilege on a timely basis, and produced as necessary.

While electronic discovery is also fair game in most state courts, and diligent litigation holds to preserve electronic data in the face of litigation are certainly equally necessary in state court, state discovery regimes



often place much less mandatory emphasis upon electronic discovery as the federal rules now do. Indeed, as a matter of day-to-day practice, substantial electronic discovery in many state court systems is still the exception rather than the rule, and to the extent it occurs, it is generally less onerous and proceeds at a slower pace. State trial judges typically have wide discretion to disallow expensive and intrusive electronic fishing expeditions on grounds of burdensomeness and expense, for example, and in some cases may be more likely to exercise that discretion than their federal counterparts. While some state courts will be more accommodating than others to plaintiffs' attorneys seeking broad electronic discovery, and all state court systems are likely to become more experienced with electronic discovery issues in the coming years, for the time being state courts are generally viewed as the forum where electronic discovery tends to be less rushed, less extensive and less burdensome.

None of this should be taken to mean that willful destruction of electronic data or failure to preserve electronic data will be tolerated in state courts. It won't be. For example, in *Coleman (Parent) Holdings, v Morgan Stanley & Co.*, 2005 WL 674885 (Fl. Cir. Ct. Mar. 23, 2005), the defendant's gross mishandling of backup tapes and emails and inaccurate statements about electronic data led the trial court to shift the burden of proof on the merits of the claims from the plaintiff to the defendant, in addition to giving the jury an "adverse inference" instruction. The jury later returned a verdict of 1.4 billion dollars, and \$850,000,000 in punitive damages. While the verdict was reversed on appeal for inadequate evidence of plaintiff's damages, the lesson is clear—once litigation is filed or known to be imminent, no court is going to tolerate willful or reckless failure to preserve electronic data that is potentially relevant to the case before its discoverability has been addressed by the court.

### **CONCLUSION: DON'T REMOVE JUST BECAUSE YOU CAN**

The foregoing discussion is not intended to suggest that removal under CAFA is never the best choice. Often it will be. However, even in traditionally bad venues, the decision as to whether to attempt a CAFA removal, or any removal to federal court for that matter, should be made with careful consideration of all the pros and cons of each venue, and the unique facts of the case at hand, using the most current information possible. Who are the potential trial judges in the federal venue, and how do their track records on class certification and electronic discovery compare with the track record of the state court judge? Does class counsel have a string of favorable results when appearing before any of the potential judges? Which venue tends to set the case for class certification hearing and trial sooner? Does the state appellate system offer appeals as of right from class certification orders, or regularly entertain mandamus petitions or interlocutory appeals on class certification? Which appellate system has the better track record on class certification? How often does each appellate system grant discretionary appeals from class certification orders? In which forum is electronic discovery more expensive and more likely to be used as an offensive weapon in its own right by class counsel? Which forum has the better precedent for denying class certification in this particular kind of case? What regulators will have to be notified of any class settlement if the case is successfully removed under CAFA, and how many of them are likely to launch their own investigations or lawsuits as a result? Is the case a good candidate for a settlement involving "coupon" relief, and might that be the most cost-effective way for the defendant to settle the case if settlement proves necessary or desirable at any point? What evidence will you have to adduce to establish the amount in controversy required for CAFA removal, and what will you be giving away to the plaintiffs' counsel by putting it in the record voluntarily at the very

beginning of the case? Can that evidence you will need to adduce and the statements you make about it come back to haunt you in the discovery process, at the class certification stage, at the summary judgment stage, or at trial? Is the plaintiff likely to abandon any current damage limitations in the complaint altogether if you successfully remove under CAFA? Could you enforce those damage limitations if you remained in state court? Would you have a new opportunity to remove under the law of this federal circuit if you stay in state court now and plaintiff later amends the complaint in the future to remove those damage limitations? Does federal court provide opportunities for class treatment that are foreclosed by statute, rule or case law in state court, or vice versa?

All of these questions and more should be carefully considered before undertaking any CAFA removal. Even though CAFA was passed to address runaway class certifications in some state court venues by making federal court a more available option, that does not mean that federal court is the best option for every defendant in every case. CAFA has its own downsides, and venues that were bad in the past may not be as bad today. The political pendulum is constantly moving to and fro, whether quickly or slowly, and neither the state nor the federal judicial system is immune from that phenomenon. Every decision you make on whether to remove under CAFA should be an individual one tailored to that particular case, and should be based upon the most current information possible as to the relative merits of both the courts and the law in each venue.