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Defendant's Removal Burden

CAFA defendants must prove minimum amount in controversy for removal

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Several days after the passage of the Class Action Fairness Act (CAFA), the Senate ordered the printing of its committee's report on the final legislation. In addition to describing the provisions of the bill and stating the general purpose of the legislation, the report noted:

[CAFA's] provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant. As noted above, it is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court." S. Rep. 109-14, 42-43 (Feb. 28, 2005).

The managers of the bill in the House similarly submitted a statement

in the Congressional Record during debate on the bill on Feb. 17, 2005, stating:

If a purported class action is removed under these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improper....[The] court should err in favor of exercising jurisdiction over the case." 151 Cong. Rec. H723-02, at H727 (Feb. 17, 2005).

The "findings" of the Congress, as expressed in the preamble to the statute, also stated that one of the purposes of CAFA was to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." 119 Stat. 4 (2005), reprinted at Notes to 28 U.S.C. § 1711.

Defendants that have removed actions to federal court on the basis of

CAFA, when faced with remand motions, have seized upon this language to argue that plaintiffs seeking remand must prove that the \$5 million jurisdictional minimum amount in controversy requirement cannot be satisfied. In other words, defendants have attempted to change — for CAFA cases — the traditional rule that the party asserting federal subject matter jurisdiction has the burden of proving jurisdiction. Defendants have not fared well in this battle, and the Third Circuit in *Morgan v. Gay*, 2006 U.S. App. LEXIS 30843, 2006 WL 3692552 (3d Cir. Dec. 15, 2006), and the Second Circuit in *Blockbuster, Inc. v. Galeno*, 2006 U.S. App. LEXIS 31757 (Dec. 26, 2006), recently joined other Circuits, see *Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005), in holding that CAFA did not shift the burden of proof from a removing defendant to the class action plaintiffs.

Given the above findings and legislative history, what went wrong (from the defendants' point of view)?

First and foremost, precedent favors placing the burden of proof on a party seeking the court's jurisdiction. Overcoming precedent requires a higher authority, such as a holding from the United States Supreme Court or a statute. Here, the Circuits found no Supreme Court case overruling precedent and defendants had conceded that the statute itself was silent as to the burden of proof — words or concepts that do not appear in CAFA's text.

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All Circuits considering the issue have concluded that CAFA's legislative history was insufficient to overcome this hurdle. The Second Circuit minimized the authoritativeness of a statement of some members of the Senate Committee reporting the bill, which it said (incorrectly, since the report had been submitted on Feb. 3, 2005) had been issued after enactment of the final bill. The Third Circuit, which unlike some Circuits *did* look to the findings, said that the statutory language was unambiguous — by its silence — in not changing the long-established rule placing the burden of proving jurisdiction on the party asserting it. Additionally, the Third Circuit noted that the findings did not address burden shifting: “It should take more than a few lines in a [report] and some vague language in a statute’s ‘Findings and Purposes’ section to reverse [a] well-established proposition....” The court drew a contrast to its earlier opinion in the same case that legislative history should guide its decision where the statute contained a “typographic error” regarding the time to appeal. *See Morgan v. Gay*, 466 F.3d 276, 279 (3d Cir. 2006).

Readers also may note that the findings can be read as describing the numerous specific provisions in CAFA that do provide for greater jurisdiction for identified categories of class actions. Since courts have considered that Congress is presumed to know the existing rule and how to draft language to change it, the absence of such language can best be understood as maintaining the status quo, either as one of several legislative compromises (including raising the jurisdictional minimum of \$3 million in earlier bills to the final \$5 million) or as a simple omission to address the issue.

Moreover, there are jurisprudential reasons for placing the burden of proof as to the amount of controversy on defendants in CAFA cases. Because federal courts are courts of limited jurisdiction, they are especially wary of accepting jurisdiction and seeing a case to conclusion in the district court, only to find

that all was for naught when the appellate court finds that jurisdiction was lacking. Also, as the Second Circuit noted, “[a]n old proverb teaches that ‘Heaven suits the back to the burden.’” 2006 U.S. App. LEXIS 31757 at *13. *See also Caldwell v. Haynes*, 136 N.J. 422, 437 (1994) (“We generally have imposed the burden of persuasion and production on the party best able to satisfy these burdens.”).

Regardless of whether placing the burden of proving the amount in controversy fits this proverb in a non-CAFA removal — where the plaintiff may be most knowledgeable regarding the severity of his injuries or the amount of medical bills or lost profits, for example — in the archtypical CAFA consumer class action context, the defendant corporation may have best access to information from which an aggregate estimate of class damages might be based, such as the number of consumers that might be implicated, the cost and profit on each item or service or the cost to refund or remedy the alleged wrong. Placing the burden of *coming forward* with such evidence on the CAFA defendant therefore may make sense. Whether the CAFA defendant also should bear the burden of *persuasion*, and under what standard of proof, may be a different matter, as illustrated by the Third Circuit’s particularized scrutiny of the defendant’s offered evidence.

Thus, applying the rule in CAFA cases has proven to be difficult — and may raise questions whether, in fact, adhering to the pre-existing “burden-on-defendant” rule is frustrating the purposes of CAFA. In *Blockbuster*, the Second Circuit stated that it could not determine whether the District Court’s calculation that the \$5 million minimum amount in controversy had been satisfied was correct; it remanded to the District Court with directions to: “explain its calculation of the reasonably probable damages,” noting: “To satisfy its burden, defendant must prove to a reasonable probability that there is the necessary minimal diversity and that the amount in controversy exceeds \$5 million.” The

declaration by defendant’s controller, filed “under seal” in the District Court, may well provide the necessary basis for removal.

The Third Circuit appears to have taken a more antagonistic stance toward removal under CAFA — a position that would appear to be inappropriate both given CAFA’s findings and legislative history and in light of a Supreme Court opinion holding that courts may not impose exceptions to the removal statute not in the language itself. Unlike the statement in *Blockbuster* that the defendant must prove “reasonably probable damages,” the Third Circuit in *Morgan* held that the defendant must “prove to a legal certainty that the amount in controversy exceeds the statutory threshold.”

In a 2004 case, the Third Circuit held that *factual* findings as to damages are to be governed by a preponderance of the evidence standard, as established in *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178 (1936). *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 398 (3d Cir. 2004). Once findings of fact have been made, then the legal certainty test for jurisdiction, set out in *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938), can be applied.

Morgan did not mention *McNutt*; nor did the Third Circuit opinion indicate that its application of the *Red Cab* legal certainty test was in any way tempered by its prior acceptance of the *McNutt* standard in *Samuel-Bassett* and in a more recent case, *McCann v. George W. Newman Irrevocable Trust*, 458 F.3d 281, 286-89 (3d Cir. 2006) (relying on *McNutt*, rejecting a “clear and convincing” standard regarding domicile, and articulating the distinction between the burden of coming forward with evidence and the burden of persuasion).

In a warning to future defendants presenting factual materials to substantiate CAFA’s \$5 million minimum amount in controversy requirement and overcome plaintiffs’ disclaimer (in order to stay in state court), *Morgan* described defendant’s proofs there as conclusory, based on inconclusive assumptions, and

absent actual evidence of price and costs.

The Third Circuit attempted to mitigate the impact of plaintiff's assertion that the CAFA minimum was not met by discussing "whether the plaintiffs, in state court [on remand] will be able to recover more than \$5 million in damages even with the express limitation in the complaint." The Third Circuit noted that plaintiffs who oppose removal may manipulate the CAFA minimum requirement by stating a lower damage claim and, then, attempt to take advantage of

R. 4:42-6 and *Lang v. Baker*, 101 N.J. 147 (1985), to the effect that a jury may award an amount greater than demanded in the complaint. The Third Circuit described the prejudice to a defendant by such tactics: "[W]e admonish that a verdict in excess of the demand could well be deemed prejudicial to the party that sought removal to federal court when the party seeking remand uses a damages-limitation provision to avoid federal court." Such a tactic is described as possible "bad faith" and grounds for "judicial estoppel."

Thus, given the unlikely review of these "burden of proof" issues by the Supreme Court, unless CAFA is amended, defendants in the Third Circuit will face a more difficult time removing class actions at the margin of CAFA's jurisdictional requirement. Plaintiffs asserting damages at trial above CAFA's jurisdictional minimum, after avoiding federal court by disclaiming damages above \$5 million, may find that such efforts will be met with significant difficulty if the state court honors the Third Circuit's admonition in *Morgan*. ■