

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 JURISDICTION¹

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I. INTRODUCTION

The Class Action Fairness Act of 2005⁵ (CAFA) has reshaped the class-action landscape so dramatically that it will take years for class-action practitioners and the courts to understand its wholesale changes in the law and broad ramifications. These new provisions constitute the most sweeping changes to class-action practice in a generation, rendering obsolete many preexisting standards and practices. This landmark tort reform legislation has two principal components. First, CAFA "federalizes" most interstate class actions now in the state courts. It accomplishes this transformation through its revolutionary "minimal-diversity" jurisdictional provisions that substantially expand federal jurisdiction over class actions,

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5. Pub. L. 109-2, 119 Stat. 4 (2005).

and through its drastically liberalized rules for removal of class actions. Second, CAFA enacts a “Consumers’ Class Action Bill of Rights” that provides new consumer-protection standards in the context of class-action settlement practices.⁶

This article analyzes the critical interplay between CAFA’s new, expansive minimal-diversity and removal standards for interstate class actions on the one hand, and the preexisting, restrictive “complete diversity” and related removal standards on the other. Among other things, CAFA amended 28 U.S.C. 1332, which prior to CAFA allowed for complete-diversity jurisdiction only. CAFA adds the new minimal-diversity jurisdictional grant under amended 28 U.S.C. 1332(d). Specifically, section 1332(d)(2) now vests original minimal-diversity jurisdiction in the federal courts over interstate class actions that, generally, are those class actions with 100 or more plaintiffs in which the amount in controversy exceeds \$5,000,000 and at least one plaintiff and one defendant are citizens of different states.⁷

Since enactment of CAFA’s jurisdictional centerpiece—28 U.S.C. § 1332(d)—a critically important disagreement has arisen in the courts between plaintiffs and defendants over which party bears the burden of establishing the existence or nonexistence of minimal-diversity jurisdiction under CAFA. The face of new 28 U.S.C. § 1332(d) is silent on this precise point. Generally speaking, many jurisdictional contests involve close facts or close legal issues, and the outcome in these instances is often decided against the party who bears the burden of proof. In a class-action context,

6. For a more detailed discussion of the various changes in class-action practice brought about by CAFA, see Anthony Rollo & Gabriel A. Crowson, *Mapping the New Class Action Frontier—A Primer on the Class Action Fairness Act and Amended Federal Rule 23*, 59:1 & 2 Consumer Fin. L.Q. Rep. (2005); Anthony Rollo & Gabriel A. Crowson, *The Newly Enacted Class Action Fairness Act, Part 1*, 8:17 Consumer Fin. Servs. L. Rep. (2005); Anthony Rollo & Gabriel A. Crowson, *The Newly Enacted Class Action Fairness Act, Part 2*, 8:18 Consumer Fin. Servs. L. Rep. (2005); John T. Kolinski, *The Class Action Fairness Act of 2005*, 80 APR FLBJ 18 (2006); David F. Herr & Michael C. McCarthy, *The Class Action Fairness Act of 2005—Congress Again Wades into Complex Litigation Management*, 228 F.R.D. 673 (2005); Warren W. Harris & Erin Glenn Busby, *Highlights of the Class Action Fairness Act of 2005—The Future of Class Actions in America*, 72 DEF. COUNS. J. 228 (2005); Aashish Y. Desai, *The Class Action Fairness Act*, 47-JUL OCLAW 20 (2005); Linda Pissott Reig, Charles E. Erway III, & Brian P. Sharkey, *The Class Action Fairness Act of 2005: Overview, Historical Perspective, and Settlement Requirements*, 40 TTIPLJ 1087 (2005).

7. Once minimal-diversity subject matter jurisdiction is established at the threshold, CAFA procedurally allows a federal district court to “decline to exercise” its minimal-diversity jurisdiction on a discretionary or mandatory basis, under certain conditions. Section 1332(d)(3) provides that the district court **may** decline to exercise jurisdiction over a class action in which more than one-third, but less than two-thirds, of the proposed class members in the aggregate and the primary defendants are citizens of the forum state, subject to certain judicial considerations. Section 1332(d)(4) provides that the district court **shall** decline to exercise jurisdiction over a class action (1) when more than two-thirds of the members of the class in the aggregate are citizens of the forum state and at least one defendant from whom significant relief is sought or whose alleged conduct forms a significant basis for the claims asserted is also a member of the forum state, and the principal injuries resulting from the alleged conduct or any related conduct were incurred in the forum state; or (2) when two-thirds or more proposed class members and the primary defendants are citizens of the forum state. This analysis involves abstention principles that assume that subject matter jurisdiction exists at the threshold. See Anthony Rollo, H. Hunter Twiford, III & Gabriel A. Crowson, *Practitioners Review “Abstention Procedure” under Sections 1332(d)(3) and (4)*, 9:2 Consumer Fin. Servs. L. Rep. (2005).

where the stakes are very high, the outcome of motion practice to determine whether the case proceeds in federal or state court can have enormous implications for both parties.

Historically, under well-settled jurisprudence in the complete-diversity context, the party asserting federal jurisdiction bears the burden of establishing that all jurisdictional requirements have been met, with all doubts resolved against a finding that jurisdiction exists. For purposes of this article, this test with its presumption against jurisdiction is referred to as the “**Complete Diversity Standard.**”

The Complete Diversity Standard—which applies both to class actions and non-class actions alike brought in federal court on complete-diversity grounds—flows from Congress’s intent to limit access to the federal courts on federalism grounds under its statutory grant of complete-diversity jurisdiction. In practice, the Complete Diversity Standard favors a plaintiff who files a class action in state court and then seeks remand following the defendants’ removal to federal court on complete-diversity grounds, where the defendants bear the jurisdictional burden of proof.

Under CAFA, however, Congress sought to sweepingly expand access to the federal courts for the narrow category of interstate class actions by creating minimal-diversity jurisdiction. Among other things, in Section 2 of the Act, “Findings and Purposes,” Congress stated that prior abuses in class actions undermined “the concept of diversity jurisdiction as intended by the Framers of the United States Constitution,” in that state and local courts kept cases of national importance out of federal court and sometimes demonstrated bias against out-of-state defendants. Also in Section 2 of CAFA, Congress stated that one purpose of the Act is 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.”

Congress’s “Findings and Purposes” expressly reflect a goal of **changing** the jurisdictional status quo for class actions. Section 2 and the other operative provisions of CAFA, along with CAFA’s legislative history, clearly show that Congress intended to extend federal jurisdiction over interstate class actions which, prior to CAFA’s enactment, could not be maintained in or removed to federal court under the existing—and restrictive—Complete Diversity Standard.

Today, defendants who remove class actions under CAFA contend that, in light of this congressional intent to give special treatment to interstate class actions by sweeping them into federal court, the Complete Diversity Standard does not apply in any jurisdictional contest. Instead, they argue that the jurisdictional burden of proof falls on the party opposing federal jurisdiction to establish that the requirements for minimal diversity have **not** been met, with all doubts to be decided in favor of a finding that

jurisdiction exists. For purposes of this article, this new standard, applicable only to interstate class actions under CAFA, with a presumption in favor of jurisdiction, is called the “**Minimal Diversity Standard.**”⁸

Plaintiffs, on the other hand, contend that the Complete Diversity Standard should still be applied when evaluating jurisdiction under CAFA. As a result, a split in the courts has developed over whether to apply the Complete Diversity Standard or the Minimal Diversity Standard to interstate class actions under CAFA. The answer to this question, as a practical matter, often determines the jurisdictional outcome of the case.

This article reviews the separate statutory bases for complete- and minimal-diversity jurisdiction, discusses the congressional intent behind the enabling statutes for both, and analyzes all the cases to date that have addressed the burden-of-proof question under CAFA.

The authors conclude that the courts should apply the Minimal Diversity Standard in interstate class actions under CAFA. That is, correctly interpreted, CAFA’s statutory text, purpose, and legislative history create a presumption in favor of finding that minimal-diversity jurisdiction exists, with all doubts resolved in favor of jurisdiction, and with the burden of proof on the party opposing jurisdiction. Any other result would defeat Congress’s clear intent in crafting this special-purpose statute.⁹

II. WELL-SETTLED PRINCIPLES OF COMPLETE DIVERSITY

The concept of diversity jurisdiction has its genesis in Article III of the United States Constitution, which gives the federal courts authority to hear cases between citizens of different states. Prior to February 18, 2005, 28 U.S.C. 1332 (and its predecessor statutory provisions) limited original federal diversity jurisdiction solely to those cases in which there was “complete diversity” of citizenship among the litigants and the amount in controversy exceeded \$75,000, exclusive of interest and costs.

This grant of complete-diversity jurisdiction is found in section 1332(c), which reads in part as follows:

- (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—

8. The U.S. Supreme Court permits the creation of jurisdictional “presumptions,” which can be “rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility.” These presumptions may be in favor of or against the exercise of federal jurisdiction. See *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (presumption of concurrent state and federal jurisdiction); *Michigan v. Long*, 463 U.S. 1032, 1044 (presumption of federal jurisdiction “in the absence of a plain statement [from a state court] that the decision below rested on an adequate and independent state ground”); *Hans v. Louisiana*, 134 U.S. 1, 18 (1890) (common-law doctrine of sovereign immunity creates presumption against jurisdiction).

9. The authors rely in large part on Section 2 of CAFA in concluding that the decisions stating to the contrary are incorrectly decided. Section 2’s clear statement of Congressional “Findings and Purposes,” which is part of the text of the Act itself, has been overlooked by most of the courts that have considered the burden-of-proof issue to date.

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States" as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.¹⁰

10. 28 U.S.C. § 1332 (1988).

Complete-diversity jurisdiction under section 1332(c) historically has provided limited access to the federal courts for that small group of class actions whose litigants met those jurisdictional requirements. Complete diversity remains a separate and independent ground for federal jurisdiction over class actions following CAFA's enactment. But complete-diversity jurisdiction is a doorway to federal court that, for many class actions, never opens due to its strict limitations. The courts in this context consistently apply the Complete Diversity Standard, holding that the party invoking complete-diversity jurisdiction in a class action has the burden to demonstrate that the court possesses subject matter jurisdiction, with all doubts to be resolved against a finding that federal jurisdiction exists.¹¹

Significantly, the requirements for complete diversity are **statutory** limitations—not constitutional—and the burden of proof under the Complete Diversity Standard as articulated by the courts flows from the congressional intent underpinning the complete-diversity statute. The United States Constitution does not mandate complete diversity for a case to proceed in federal court; all the Constitution requires is “minimal diversity.”¹² While the Supreme Court has recognized that Congress may enact laws that require complete diversity, it has also noted that Congress may promulgate laws requiring only minimal diversity—such as in CAFA—thus permitting suits to proceed in federal court as long as “any two adverse parties are not co-citizens.”¹³

When complete diversity is the basis for federal court jurisdiction,¹⁴ the courts have been forced to grapple with the dichotomy between allowing the plaintiff to choose the forum in which to litigate, and the defendant's right to remove the case to federal court and to have the “equal benefit” of federal court jurisdiction.¹⁵ In addressing this issue, courts over time have had to determine the congressional intent behind the statute creating complete-diversity jurisdiction. The Supreme Court has held that the requirements of the complete-diversity statute were intended by Congress to “drastically restrict” access to a federal forum, in part based on federalism concerns.¹⁶ The Court noted that this congressional intent to limit federal court access is found in the complete-diversity statute and in the

11. See *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182–83 (1936); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); and *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998).

12. U.S. CONST. art. III, § 2, cl. 1 applies to controversies “between Citizens of different States.”

13. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967).

14. For a historical view of federal court diversity jurisdiction, consult Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1923).

15. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 348 (1816). See also *Ry. Co. v. Whitton*, 80 U.S. 270, 287 (1871) (protection against local prejudice is secured by giving plaintiff an election of courts before suit is brought, and “where the suit was commenced in a State court[,] a like election to the defendant afterwards”); *Ins. Co. v. Dunn*, 86 U.S. 214, 224 (1873) (“The [removal] statute is remedial, and must be construed liberally.”).

16. *Healy v. Ratta*, 292 U.S. 263, 270 (1934) (“The policy of the [complete diversity] statute calls for its strict construction.”); see also *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938).

successive amendments to that statute that raised the minimum amount in controversy in complete-diversity cases.¹⁷

To ensure adherence to Congress's intent to limit access under diversity jurisdiction to only those cases in which there is complete diversity, the courts over time have imposed a burden-of-proof requirement on the party seeking to invoke federal jurisdiction to establish complete diversity. Thus, the burden of proof in complete-diversity cases flows directly from the courts' understanding that the congressional intent under the enabling statute was to limit access to federal courts and to favor state forums whenever possible.¹⁸

Significantly, just like the minimal-diversity provisions under CAFA found at 28 U.S.C. 1332(d), the complete-diversity provisions of 28 U.S.C. 1332(c) are silent as to which party bears the burden of proving whether jurisdiction exists.

III. MINIMAL DIVERSITY: CAFA SUBSTANTIALLY EXPANDS FEDERAL JURISDICTION OVER INTERSTATE CLASS ACTIONS

Just as the courts were required to determine congressional intent under the complete-diversity statute before they could conclude that the jurisdictional burden of proof should be allocated to the proponent of federal jurisdiction, the courts must now separately examine the burden-of-proof question under CAFA's new minimal-diversity statutory provisions.

From its effective date of February 18, 2005,¹⁹ CAFA profoundly changed the existing rules and principles governing jurisdiction over interstate class actions by introducing the new vehicle of minimal diversity,

17. *Healy*, 292 U.S. at 270. To further that end, the Supreme Court has instructed the federal courts to narrowly construe the amount-in-controversy provision so as not to frustrate congressional purpose. See *id.* at 269-70; *Snyder v. Harris*, 394 U.S. 332, 339-40 (1969).

18. Congress's historical intent to "drastically" restrict federal jurisdiction in controversies between citizens of different states by its adherence to the complete-diversity principles has always been "rigorously enforced by the courts." See *St. Paul Mercury*, 303 U.S. at 288; *Snyder*, 394 U.S. at 340-41; *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941) ("The policy of the [complete diversity] statute calls for its strict construction, and in defining the boundaries of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy.").

19. Section 9 of CAFA, Pub. L. No. 109-2, 119 Stat. 14, states that the amendments made by the Act shall apply to any civil action commenced on or after the date of enactment. CAFA became effective on February 18, 2005, the date of its signature by the President. If a lawsuit was "commenced" prior to February 18, 2005, the federal district court does not have subject matter jurisdiction under the minimal-diversity provisions of CAFA and there is no basis for removal to federal court. If the case was "commenced" on or after February 18, 2005, the minimal-diversity provisions of CAFA clearly apply, and the case is subject to removal. The courts have uniformly upheld the fact that CAFA's effective date was February 18, 2005. See, e.g., *Natale v. Pfizer, Inc.*, 424 F.3d 43 (1st Cir. 2005); *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805 (7th Cir. 2005) (in some circumstances the suit may be considered "commenced" anew after February 18, 2005, even though initially filed earlier, in order to be removable under CAFA); *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, (9th Cir. 2005); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090 (10th Cir. 2005); *Awaida v. Pfizer, Inc.*, No. Civ. 05-425 (not available on Westlaw or LexisNexis) (W.D. Okla. June 7, 2005); *Isaacs v. Pfizer, Inc.*, No. Civ. 05-0426 (not available on Westlaw or LexisNexis) (W.D. Okla. June 21, 2005). A more thorough discussion of the "date of commencement" issue is beyond the scope of this article, but individual case summaries along with the full text of each case may be found at <http://www.cafalawblog.com>.

which effectively “federalizes” interstate class actions. Numerous class actions that could not be brought in or removed to federal court based on complete-diversity jurisdiction can now be brought in or removed to federal court on the basis of minimal diversity.²⁰

A. *New 28 U.S.C. 1332(d)(2)*

CAFA amended the jurisdictional provisions of section 1332 to add new section 1332(d). The provisions of this section specifically apply to interstate class actions filed under Federal Rule of Civil Procedure 23 or similar state statutes, and to mass actions involving 100 or more plaintiffs. Section 1332(d)(2), which enables minimal-diversity jurisdiction, now reads as follows:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—

- (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
- (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
- (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.²¹

Congress drastically liberalized the inherent constraints under the Complete Diversity Standard that previously prevented interstate class actions from being filed in, or removed to, federal court. That this was Congress’s intent is shown by the dramatic and sweeping changes it made throughout the operative language of the statute. These significant departures from pre-CAFA law as it existed under the Complete Diversity Standard are aimed, in part, at preventing or minimizing what Congress viewed, in Section 2 of the Act, as abuses involving class actions implicating interstate commerce that belonged in federal court but were trapped in state courts.

20. It is now possible for a federal court to exercise complete-diversity jurisdiction over a class action where minimal-diversity jurisdiction is lacking, to exercise minimal-diversity jurisdiction over a class action where complete-diversity jurisdiction is lacking, and/or to exercise jurisdiction over a class action alternatively on both complete- and minimal-diversity grounds.

21. CAFA’s minimal-diversity grant, however, does not apply to all interstate class actions. Specifically, minimal diversity is inapplicable to (1) cases where the primary defendants are state or government entities; (2) cases where the aggregate number of class members is less than 100; (3) cases involving certain covered securities under the federal securities laws; and (4) cases relating to the internal affairs or governance of a corporation arising under the law of the state in which the corporation is incorporated. 28 U.S.C. 1332(d)(5) and (9).

For example, as noted above, federal jurisdiction now exists as long as any single named plaintiff or putative class member is a citizen of a different state from any one defendant, and the numerosity and \$5,000,000 jurisdictional amount-in-controversy requirements are satisfied. In other words, diversity of citizenship is no longer required to be "complete" for interstate class actions. CAFA further now permits the aggregation of class members' claims, statutorily overruling for interstate class actions existing jurisprudence in the complete-diversity context that had previously limited the prospect for federal court treatment of many class actions by requiring either that each plaintiff in a class action independently satisfy the \$75,000 amount-in-controversy requirement, or that at least one named plaintiff satisfy this requirement.²²

In addition to its changes eliminating the need for complete diversity of citizenship and allowing aggregation of class member claims, CAFA further expands federal jurisdiction through its new definition of "class action,"²³ and by inviting to federal courts for the first time "mass actions" with more than 100 plaintiffs, which is a new category coined under this law.²⁴ Similarly, CAFA now exempts interstate class actions from the one-year time limitation for removal that otherwise applies under the Complete Diversity Standard.²⁵ And, contrary to the preexisting rule under the Complete Diversity Standard, CAFA now provides that a class action "may be removed by any defendant without the consent of all defendants, and further, without regard to whether any defendant is a citizen of the state where the action is brought."²⁶

In addition to this broad expansion of federal jurisdiction at the trial court level, CAFA creates sweeping new federal appellate jurisdiction over orders remanding class actions that were removed under the Act. Prior to CAFA, 28 U.S.C. 1447(d) barred appellate review of virtually all remand

22. In *Exxon-Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 2627-28 (2005), the Supreme Court acknowledged that CAFA "abrogates the rule against aggregating claims" first recognized in *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), and "reaffirmed" in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). See also Gregory P. Joseph, *Federal Class Action Jurisdiction After Cafa; Exxon Mobil and Grable*, 8 DEL. L. REV. 157 (2006).

23. 28 U.S.C. § 1332(d)(1), as amended by CAFA, which tracks the language of new 28 U.S.C. § 1711, provides:

"In this subsection—

- (A) the term "class" means all of the class members in a class action;
- (B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;
- (C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and
- (D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action."

24. The term "mass action" means "any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." 28 U.S.C. § 1332(11)(B)(i).

25. 28 U.S.C. § 1453(c).

26. 28 U.S.C. § 1453(b).

orders in matters removed on complete-diversity jurisdiction grounds. New 28 U.S.C. 1453(c), however, now permits discretionary appeals of orders denying or granting motions to remand class actions. This new provision also requires that the courts of appeals expedite resolution of CAFA appeals, showing an unusually heightened concern by Congress over this special category of cases.

*B. Congress's "Findings and Purposes" Behind CAFA
Are Found in the Text of CAFA*

Significantly, Congress wrote in the text of CAFA, in Section 2, a clear statement of its "Findings and Purposes" with respect to enacting CAFA. Surprisingly, Section 2 has been mentioned or referenced by only a few courts in connection with a ruling on the burden-of-proof question. Section 2, which now appears in the Historical and Statutory Notes section of new 28 U.S.C. 1711, reads as follows:

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS. Congress finds the following:

- (1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.
- (2) Over the past decade, there have been abuses of the class action device that have
 - (A) harmed class members with legitimate claims and defendants that have acted responsibly;
 - (B) adversely affected interstate commerce; and
 - (C) undermined public respect for our judicial system.
- (3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where
 - (A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;
 - (B) unjustified awards are made to certain plaintiffs at the expense of other class members; and
 - (C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.
- (4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the

framers of the United States Constitution, in that State and local courts are

- (A) keeping cases of national importance out of Federal court;
- (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
- (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES. The purposes of this Act are to

- (1) assure fair and prompt recoveries for class members with legitimate claims;
- (2) 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; and
- (3) benefit society by encouraging innovation and lowering consumer prices.

Thus, Section 2 of CAFA evidences Congress's plain desire to **change** and to **correct** the problems with the jurisdictional status quo when the restrictive Complete Diversity Standard kept interstate class actions from making their way to the federal courts where Congress felt they belonged.

C. Congress Expressly Allocated the Burden of Proof to the Party Opposing Jurisdiction in CAFA's Legislative History

CAFA's legislative history includes both a House Sponsors' Statement and a Senate Judiciary Committee Report, each of which shows that Congress expressly allocated the jurisdictional burden of proof in minimal-diversity contests on the party opposing jurisdiction.

On February 17, 2005, Representative F. James Sensenbrenner (R. Wis.) inserted a statement of the intent of the creators of CAFA into the House record.²⁷ The Senate Judiciary Committee published its separate report on CAFA on February 28, 2005.²⁸ Both state that the drafters of CAFA intended that a new standard apply for the jurisdictional burden of proof, one different from the existing rule for complete diversity that had previously blocked interstate class actions from access to federal court.

This legislative history reflects Congress's desire that there be a presumption in favor of a finding that jurisdiction exists. The extent to which this unambiguous legislative history should be considered by the courts in determining which party bears the jurisdictional burden of proof under

27. 151 Cong. Rec. H723-02, at H727-29 (daily ed. Feb. 17, 2005).

28. S. Rep. 109-14 (2005). Although the Senate Committee Report was "ordered to be printed on" February 28, it was submitted to Congress before CAFA became law. See 151 Cong. Rec. S978 (Feb. 3, 2005).

CAFA is now the subject of considerable controversy, and perhaps may not be resolved conclusively until decided by the Supreme Court.

The Senate Judiciary Committee Report, published on February 28, 2005,²⁹ states:

Pursuant to new subsection 1332(d)(6), the claims of the individual class members in any class action shall be aggregated to determine whether the amount in controversy exceeds the sum or value of \$5,000,000 (exclusive of interest and costs). **The Committee intends this subsection to be interpreted expansively. If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied).** And if a federal court is uncertain about whether “all matters in controversy” in a purported class action “do not in the aggregate exceed the sum or value of \$5,000,000,” **the court should err in favor of exercising jurisdiction over the case.**

* * *

Overall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its 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 (e.g., the burden of demonstrating that more than two-thirds of the proposed class members are citizens of the forum state). Allocating the burden in this manner is important to ensure that the named plaintiffs will not be able to evade federal jurisdiction with vague class definitions or other efforts to obscure the citizenship of class members.**

* * *

It is the Committee’s intention with regard to each of these exceptions that the party opposing federal jurisdiction shall

29. S. Rep. 109-14 (2005). The Seventh Circuit, speaking through Judge Easterbrook, declined to consider the statements in the Senate Report in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005), in its observations that “[t]hirteen Senators signed this report and five voted not to send the proposal to the floor. Another 82 Senators did not express themselves on the question; likewise 435 Members of the House and one President kept their silence.” However, the Seventh Circuit erred in its ruling by applying an incorrect canon of statutory construction, see discussion *infra* Section V.A., where the correct standard specifically required that court to look to and follow the congressional intent behind CAFA. In addition, the Seventh Circuit in *Brill* erred by not considering Congress’s specific intent stated in Section 2 of the Act.

have the burden of demonstrating the applicability of an exemption. Thus, if a plaintiff seeks to have a class action remanded under section 1332(d)(4)(A) on the ground that the primary defendants and two-thirds or more of the class members are citizens of the home state, **that plaintiff shall have the burden** of demonstrating that these criteria are met by the lawsuit. Similarly, if a plaintiff seeks to have a purported class action remanded for lack of federal diversity jurisdiction under subsection 1332(d)(5)(B) (“limited scope” class actions), **that plaintiff should have the burden of demonstrating** that “all matters in controversy” do not “in the aggregate exceed the sum or value of \$5,000,000, exclusive of interest and costs” or that “the number of all proposed plaintiff classes in the aggregate is less than 100.”³⁰

The House Sponsors’ Statement was inserted, rather than read, into the House record as a result of debate-related time constraints. Representative Sensenbrenner began the statement by explaining, “I have a lengthy additional statement explaining how this bill is to work. We do not have the time in general debate for me to give this statement on the floor, so I will insert the statement relative to the intent of the managers of the bill in the record at this point.”³¹ The House Sponsors’ Statement begins its section-by-section analysis of CAFA with the new jurisdictional provisions to be added as new 28 U.S.C. 1332(d), found in Section 4 of CAFA:

Section 4 gives Federal courts jurisdiction over class action lawsuits in which the aggregate amount in controversy exceeds \$5 million, and at least one plaintiff and one defendant are diverse. **Overall, new section 1332(d) is intended to expand substantially Federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if removed by any defendant. 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.** And if a Federal court is uncertain about whether the \$5 million threshold is satisfied, **the court should err in favor of exercising jurisdiction over the case.**³²

Both the House Sponsors’ Statement and the Senate Committee Report unmistakably state congressional intent to assign the burden of proof squarely upon the shoulders of the party opposing the existence of federal

30. S. Rep. No. 109-14, at 42–44 (2005) (emphasis added).

31. 151 Cong. Rec. H723-02, at H727 (daily ed. Feb. 17, 2005).

32. *Id.* (emphasis added).

jurisdiction under CAFA's new minimal-diversity provisions. This uniform legislative history is entirely consistent with CAFA's statutory "Findings and Purposes," the other operative provisions of the Act, and Congress's objective of minimizing class-action abuses in the state courts by sweeping interstate class actions into federal court where those matters previously could not be maintained.

IV. THE COURTS ARE NOW SPLIT OVER WHO BEARS THE JURISDICTIONAL BURDEN OF PROOF UNDER CAFA

Some courts addressing the question of which party bears the burden of proof have concluded that the party opposing minimal-diversity jurisdiction under CAFA bears the burden of establishing that jurisdiction does not exist. Under this Minimal Diversity Standard, those courts suggest that CAFA creates a presumption of federal jurisdiction over interstate class actions, with all doubts to be resolved in favor of a finding of federal jurisdiction.

Other courts addressing this issue have concluded to the contrary, and applied the Complete Diversity Standard to interstate class actions asserting minimal-diversity jurisdiction. Those courts have found that the party asserting minimal-diversity jurisdiction under CAFA bears the burden of establishing that all jurisdictional requirements have been met, and have applied the Complete Diversity Standard's attendant presumption against federal jurisdiction, with all doubts to be resolved against a finding of jurisdiction. Many of these courts have mechanically applied the Complete Diversity Standard in a CAFA context, seemingly with no recognition or analysis that the test for this category of cases may now be different under CAFA.

To date, only a few of the many decisions that have actually analyzed the burden-of-proof question while considering whether CAFA changed the rules have referenced or discussed Section 2 of CAFA with its statement of congressional "Findings and Purposes." Many of these decisions fail to reference CAFA's legislative history.³³ In most decisions where the courts applied the Complete Diversity Standard, however, overlooking Section 2 likely was outcome-determinative, especially in those instances where the court based its ruling in part on its view that no words in CAFA's text reflected Congress's intent on the burden-of-proof issue.

A. *Decisions Applying the Minimal Diversity Standard (While Discussing, and Following, CAFA's Legislative History)*

1. *Berry v. American Express Publishing Corp.*³⁴

Berry, the first case to decide the burden-of-proof question in keeping with the legislative history of CAFA by placing the burden on the party challenging federal jurisdiction, has been followed by a number of other

33. See, e.g., the discussion of *Miedema v. Maytag Corp.*, *infra* text accompanying notes 235-56.

34. *Berry v. Am. Express Publ'g Corp.*, 381 F. Supp. 2d 1118 (C.D. Cal. 2005).

courts as authoritative on the burden-of-proof issue. In *Berry*, United States District Judge Alicemarie H. Stotler examined a California class action premised on an alleged unlawful business practice in which credit card holders were charged for unsolicited magazine subscriptions unless the cardholders took contrary affirmative action to ensure exclusion.³⁵

Judge Stotler stated, “[t]hese new additions to the diversity jurisdiction statute create various interpretative issues, such as whether the burden of proof has shifted post-CAFA in favor of federal jurisdiction . . .”³⁶ With no prior decisions on point to look to for guidance, Judge Stotler undertook the “difficult task of reconciling previously established, judicially-developed [sic] principles of diversity jurisdiction with the purpose and structure of the recent CAFA-amendments to the statute.”³⁷ Judge Stotler expressed some hesitation with statutory interpretation, but noted that legislative history such as “Committee Reports are ‘the authoritative source for finding the Legislature’s intent,’ and may be consulted as one important resource in the quest for faithful statutory interpretation.”³⁸

Contesting removal under CAFA, the *Berry* plaintiffs argued that an examination of the legislative history violated Article III,³⁹ to which Judge Stotler disagreed for two reasons:

First, a statute cannot address all possible outcomes and situations, and language inevitably contains some imprecision Second, if legislative intent is clearly expressed in Committee Reports and other materials, judicial disregard for the explicit and uncontradicted statements contained therein may result in an interpretation that is wholly inconsistent with the statute that the legislature envisioned. . . . Where both plaintiffs’ and defendants’ interpretations of the burden of proof . . . are constitutionally permissible, the role of the Court is to faithfully implement the law as intended by the Legislature. In these circumstances, the legislative history is a proper tool of statutory interpretation.

* * *

Although the burden of proof is not addressed in either the text of the original or the text of the new statute, the CAFA was clearly enacted with the purpose of expanding federal jurisdiction over class actions. . . . [quoting from the Senate Committee Report:] (“The Framers were concerned that state courts might discriminate against interstate business

35. *Id.* at 1120.

36. *Id.* at 1121.

37. *Id.*

38. *Id.* (citing *Garcia v. United States*, 469 U.S. 70, 76 (1984); *accord City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802, 805 (9th Cir. 1994)).

39. *Id.*

and commercial activities . . . both of these concerns—judicial integrity and interstate commerce—are strongly implicated by class actions . . . [thus] class action legislation expanding federal jurisdiction over class actions would fulfill the intention of the Framers”)

To this end, the Committee Report expresses a clear intention to place the burden of removal on the party opposing removal to demonstrate that an interstate class action should be remanded to state court. The Committee Report states that “[i]t is the Committee’s intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption.” . . . “[T]he named plaintiffs should bear the burden of demonstrating that a case should be remanded to state court”⁴⁰

The plaintiffs also argued that “the failure to incorporate this directive on the burden of proof into the statute evinces an explicit intent to maintain the status quo”⁴¹ The court, however, disagreed, stating:

[M]ore plausibly, the failure to address the burden of proof in the statute reflects the Legislature’s expectation that the clear statements in the Senate Report would be sufficient to shift the burden of proof. The Court notes, with some irony, that the original diversity statute does not contain any reference to the burden of proof. Plaintiff fails to explain how the failure to incorporate the burden of proof in Section 1332(d) should be assigned more or less meaning than the failure to incorporate any burden of proof into the original text. In these circumstances, the Court finds that the failure to explicitly legislate changes on the burden of proof in interstate class action has little interpretive value.⁴²

Following the conclusion that the burden of proving federal jurisdiction shifted for interstate class actions under CAFA to the plaintiff seeking remand, the court examined the amount in controversy, and remanded the action, noting that

Although the Court is aware that the burden is on plaintiffs to demonstrate that the amount in controversy does not exceed \$5,000,000, the claims in this dispute are so difficult to value that any monetary valuation could only be wholly speculative. Accordingly, the court finds that the amount in

40. *Id.* at 1122 (quoting Sen. Pub. 109-14, at 8, 43–44) (internal citations omitted).

41. *Id.*

42. *Id.* at 1123.

controversy, from either the perspective of the class members or the defendants, is less than the requisite \$5,000,000.⁴³

2. *Yeroushalmi v. Blockbuster, Inc.*⁴⁴

On March 4, 2005, Ronit Yeroushalmi filed a complaint in the Superior Court of Los Angeles County, seeking class certification of issues arising out of Blockbuster, Inc.'s "No More Late Fees" policy. On April 6, 2005, Blockbuster removed the California class action, claiming minimal-diversity jurisdiction under CAFA.⁴⁵ United States District Judge A. Howard Matz held that, under CAFA, the federal court had jurisdiction over the case.⁴⁶

Judge Matz analyzed the burden-of-proof issue by first noting that "CAFA is silent as to whether the burdens of proving or disproving removal jurisdiction previously in place when an action is removed pursuant to § 1332 have changed."⁴⁷ "The courts previously placed the burden on the removing defendants to establish jurisdiction."⁴⁸ Now, "[i]t is clear that Congress intended CAFA to undo . . . these policies and rules."⁴⁹ Judge Matz also looked to CAFA's legislative history, observing that "[i]n light of the Senate Judiciary Committee Report, it is proper for the Court to "err" in favor of inclusion . . ."⁵⁰ The court recognized the shift in the burden of proof to the plaintiff and that the plaintiff had failed to meet that burden: "plaintiff has not shown that the amount in controversy requirement has not been met or that it will be limited in any way. Therefore, under CAFA the Court has jurisdiction."⁵¹

3. *Waitt v. Merck & Co.*⁵²

On July 27, 2005, United States District Judge Robert S. Lasnik, writing for the Western District of Washington, denied the plaintiff's motion to remand. The action was filed on April 6, 2005 in King County, Washington, alleging that Merck had failed to reimburse the plaintiff for the cost of his unused Vioxx, as promised.⁵³ Merck removed the action to federal court on minimal-diversity grounds under CAFA.⁵⁴

43. *Id.* at 1124-25.

44. *Yeroushalmi v. Blockbuster, Inc.*, No. CV 05-225-AHM(RCX), 2005 WL 2083008 (C.D. Cal. July 11, 2005).

45. *Id.* at *1.

46. *Id.* at *6.

47. *Id.* at *2.

48. *Id.* at *3 (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)).

49. *Id.*

50. *Id.* at *5.

51. *Id.*

52. *Waitt v. Merck & Co.*, No. C05-0759L, 2005 WL 1799740 (W.D. Wash. July 27, 2005).

53. *Id.* at *1.

54. *Id.*

Waite moved to remand for lack of subject matter jurisdiction, arguing that CAFA “does not modify the existing standard for remand because the statute itself is void of language providing for such modification.”⁵⁵ Merck countered “that it was Congress’ [sic] intent, as evidenced by CAFA’s legislative history to place the burden of showing that removal was improper upon the party moving for remand.”⁵⁶ The court noted that it could not find any federal case law on point, but conducted its own extensive analysis using canons of statutory construction.

In cases of statutory construction, the Court’s task is to “interpret the words of the statute in light of the purposes Congress sought to serve.” CAFA, which is codified at various places in Title 28 of the United States Code, effects its relevant changes upon 28 U.S.C. § 1332, colloquially known as the diversity jurisdiction statute. Regarding these changes, the Senate Committee on the Judiciary stated: “[o]verall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its 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.” That is, CAFA is designed to permit federal courts to hear more interstate class actions and to relax the barriers facing defendants who seek to remove qualifying class actions to federal court.

With specific regard to removal and remand, plaintiff correctly points out that CAFA itself lacks burden-shifting language. However, notwithstanding the absence of explicit statutory provisions, it is not difficult to divine Congressional intent from CAFA’s legislative history:

Pursuant to new subsection 1332(d)(6), the claims of the individual class members in any class action shall be aggregated to determine whether the amount in controversy exceeds the sum or value of \$5,000,000 The Committee intends this subsection to be interpreted expansively. If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied). And if a federal court is uncertain about whether ‘all matters in controversy’ in a purported class action ‘do not in the aggregate exceed the sum or value of \$5,000,000,’ the

55. *Id.*

56. *Id.*

court should err in favor of exercising jurisdiction over the case.

The Senate Committee on the Judiciary also stated:

It is the Committee's intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption. Thus, if a plaintiff seeks to have a class action remanded under section 1332(d)(4)(A) on the ground that the primary defendants and two thirds or more of the class members are citizens of the home state, that plaintiff shall have the burden of demonstrating that these criteria are met by the lawsuit. Similarly, if a plaintiff seeks to have a purported class action remanded for lack of federal diversity jurisdiction under subsection 1332(d)(5)(B) . . . that plaintiff should have the burden of demonstrating that 'all matters in controversy' do not 'in the aggregate exceed the sum or value of \$5,000,000, exclusive of interest and costs' or that 'the number of all proposed plaintiff classes in the aggregate is less than 100.' . . .

[I]t 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 (e.g., the burden of demonstrating that more than two-thirds of the proposed class members are citizens of the forum state).

Based on the foregoing legislative history, the Court holds that Merck's reading of CAFA is the correct one and that it is plaintiff's responsibility to demonstrate that removal from state court was improvident.⁵⁷

Judge Lasnik then denied Waitt's motion to remand, finding that he, as the party challenging minimal-diversity jurisdiction, had not met his burden of proving that the court did not have jurisdiction over the case. Waitt also argued that his damages did not meet the \$5,000,000 requirement, but Judge Lasnik noted that the "plaintiff's reply fails to include any of the economic damages suffered by the nationwide class he purportedly represents and similarly fails to mention that his complaint requests treble and/or punitive damages."⁵⁸

57. *Id.* at *1-2 (internal citations omitted).

58. *Id.* at *2.

4. *In re Textainer Partnership*⁵⁹

United States District Judge Maxine M. Chesney remanded a California class action from the Northern District of California on July 27, 2005, holding that CAFA did not apply because the action was covered by an exception in CAFA relating to corporate governance suits.⁶⁰ As part of Judge Chesney's *Order Granting Motion to Remand*, she discussed the burden-of-proof issue, explaining:

While courts ordinarily are required to "strictly construe [a] removal statute against removal jurisdiction," rejecting jurisdiction "if there is any doubt as to the right of removal in the first instance," the legislative history of CAFA instructs that CAFA's jurisdictional provisions "should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if removed by any defendant." "[I]f a Federal court is uncertain . . . the court should err in favor of exercising jurisdiction over the case."

Similarly, while the defendant ordinarily bears the burden of proving that removal was proper, CAFA's legislative history indicates that the plaintiff has the burden of proving that an action removed under CAFA should be remanded. "If a purported class action is removed pursuant to these jurisdictional provisions . . . 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."⁶¹

5. *Natale v. Pfizer*⁶²

On July 28, 2005, United States District Court Chief Judge William G. Young, writing for the District Court of Massachusetts, analyzed a class action removed prior to enactment of CAFA and noted as part of his analysis:

Under the Act, the burden of removal is on the party opposing removal to prove that remand is appropriate. [W]ith respect to the Act, "the Committee Report expresses a clear intention to place the burden of removal on the party *opposing* removal to demonstrate that an interstate class action should be remanded to state court." . . . "It is the

59. *In re Textainer P'ship*, No. C 05-0969 MMC, 2005 WL 1791559 (N.D. Cal. July 27, 2005).

60. Section 5 of CAFA, codified as 28 U.S.C. § 1453(d)(2), provides an exception to removal of CAFA-based class actions for "a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the state in which such corporation or business enterprise is incorporated or organized."

61. *Textainer*, 2005 WL 1791559, at *3 (internal citations omitted).

62. *Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161 (D. Mass. 2005).

Committee's intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption." . . . "The named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court."⁶³

Chief Judge Young then continued by stating that "[t]he amendments and expansion of federal diversity jurisdiction, including the expansion of removal of state actions, are '[t]he most publicized changes associated with the . . . Act.'"⁶⁴ The *Natale* opinion also contains an in-depth analysis of CAFA and the cases to date interpreting the "date of commencement" issue for CAFA-removal purposes. The court held, in line with the developing case law,⁶⁵ that "a case is 'commenced' for purposes of the Class Action Fairness Act when it is filed with the state court."⁶⁶ However, the court chose not to remand the case, but rather to certify the question to the United States Court of Appeals for the First Circuit.⁶⁷

6. *Lussier v. Dollar Tree Stores, Inc.*⁶⁸

On September 8, 2005, United States District Judge Anna J. Brown remanded an Oregon class action removed from state court because the action was commenced on February 14, 2005, four days before CAFA's effective date. Judge Brown did, however, consider the burden-of-proof issue in her opinion:

The court ordinarily is required to "strictly construe [a] removal statute against removal jurisdiction" and reject jurisdiction "if there is any doubt as to the right of removal in the first instance." The legislative history of CAFA, however, "instructs that CAFA's jurisdictional provisions 'should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if removed by any defendant.'"

In addition, although the removing defendant ordinarily bears the burden of proving that removal was proper, "CAFA's legislative history indicates . . . the plaintiff has the burden of proving . . . an action removed under CAFA

63. *Id.* at 168 (quoting the Senate Committee Report) (internal citations omitted). The judge noted that the *Berry* opinion was not signed or dated by the court. *Id.* at 168 n.10.

64. *Id.* (internal citations omitted).

65. *See supra* note 19.

66. *Natale*, 379 F. Supp. 2d at 183.

67. *Id.* The First Circuit, in a per curiam opinion, affirmed the District Court of Massachusetts in its remand decision, but did not address the burden-of-proof analysis, as that issue was not included in the question of law certified to the First Circuit. *See Natale v. Pfizer, Inc.*, 424 F.3d 43 (1st Cir. 2005).

68. *Lussier v. Dollar Tree Stores, Inc.*, No. CV 05-768-BR, 2005 WL 2211094 (D. Or. Sept. 8, 2005).

should be remanded.” “If a purported class action is removed pursuant to these jurisdictional provisions, . . . 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.” “It is plaintiff’s responsibility to demonstrate that removal from state court was improvident.”⁶⁹

7. *Dinkel v. General Motors Corp.*⁷⁰

On November 9, 2005, United States District Judge D. Brock Hornby denied a motion to remand a class action filed in a Kansas state court and consolidated in the District Court of Maine by the Judicial Panel on Multidistrict Litigation.⁷¹ The court determined that, under the Kansas Rules of Civil Procedure, the action commenced as to the defendants that were not served within ninety days of filing of the complaint at the moment they were served.⁷² The court stated, “Dinkel did not serve the Removing Defendants within the ninety days. As to them, the Kansas lawsuit was not ‘commenced’ until they were actually served . . . which was after the effective date of CAFA. For them ‘a new window of removal’ was opened.”⁷³ Judge Hornby held that Dinkel could not “unring the bell” by dismissing the removed defendants to attempt to return the lawsuit to its status on February 17, 2005, before CAFA’s enactment date.⁷⁴

As to the burden-of-proof issue, Judge Hornby stated:

My conclusion flows from CAFA’s plain language and removal principles generally. But CAFA’s legislative history also strongly supports it. As stated in the Senate Report on CAFA:

The law is clear that, once a federal court properly has jurisdiction over a case removed to federal court, subsequent events generally cannot “oust” the federal court of jurisdiction. While plaintiffs undoubtedly possess some power to seek to avoid federal jurisdiction by defining a proposed class in particular ways, they lose that power once a defendant has properly removed a class action to federal court.

Moreover, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its

69. *Id.* at *1 (quoting from both House and Senate legislative histories) (internal citations omitted).

70. *Dinkel v. Gen. Motors Corp.*, 400 F. Supp. 2d 289 (D. Me. 2005).

71. *Id.*

72. *Id.* at 292.

73. *Id.* at 293 (internal citations omitted) (quoting *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 807 (7th Cir. 2005)).

74. *Id.* at 294.

provisions [according to the Senate Report] should be read broadly, with a strong preference that interstate class actions should be heard in federal court if properly removed by any defendant. [F]ederal courts should “err in favor of exercising jurisdiction.” “[I]f a Federal court is uncertain . . . the court should err in favor of exercising jurisdiction over the case.” According to the Report, “The Committee intends this subsection to be interpreted expansively. If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied”).⁷⁵

*B. Decisions Mechanically Applying the Complete Diversity Standard
(Without Discussing CAFA's Legislative History)*

1. *In re Expedia Hotel Taxes and Fees Litigation*⁷⁶

On April 15, 2005, the Western District of Washington, in an Order by United States District Judge John C. Coughenour, held that this class action filed prior to February 18, 2005, but consolidated after that date, could not be removed under CAFA.⁷⁷ However, in looking at the burden-of-proof issue, Judge Coughenour simply referenced the Complete Diversity Standard: “The burden of establishing federal jurisdiction is on the party seeking removal, and the removal statute is strictly construed against removal jurisdiction.”⁷⁸ The court did not consider in its ruling the differences between complete and minimal diversity and did not examine the language of Section 2 of CAFA or its legislative history, but instead mechanically applied the traditional burden of proof to the party invoking federal jurisdiction in a complete-diversity setting.

2. *Awaida v. Pfizer, Inc.*⁷⁹

On June 7, 2005, Judge Lee R. West, United States District Judge for the Western District of Oklahoma, denied a plaintiff's motion to remand a class action filed on February 18, 2005.⁸⁰ The plaintiff filed on CAFA's effective date in the District Court of Canadian County, Oklahoma, and Pfizer timely removed to federal court, alleging federal subject matter jurisdiction under Title 28 Section 1332, asserting both complete- and minimal-diversity jurisdiction under CAFA.⁸¹ In his motion to remand, Awaida

75. *Id.* at 294–95 (internal citations omitted).

76. *In re Expedia Hotel Taxes and Fees Litig.*, 377 F. Supp. 2d 904 (W.D. Wash. 2005).

77. *Id.*

78. *Id.* at 905 (quoting *Prize Frize, Inc. v. Matrix, Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999)).

79. *Awaida v. Pfizer, Inc.*, No. Civ-05-425-W (W.D. Okla. June 7, 2005) (not available on Westlaw or LexisNexis).

80. *Id.*

81. *Id.* at 1.

“contended that because congressional legislation does not become law until the precise moment it is approved by the executive branch . . . the Act was not in effect at the time this lawsuit was filed.”⁸² Judge West held CAFA applicable because it states that it “shall apply to any civil action commenced on or after the date of [its] enactment.”⁸³

Judge West briefly considered the burden-of-proof issue and mechanically applied the Complete Diversity Standard, stating that “[o]nce the issue of jurisdiction has been raised, the party seeking to invoke this Court’s subject matter jurisdiction ‘bear[s] the burden of establishing that the requirements for the exercise of diversity jurisdiction are present.’ In this case, the burden falls upon Pfizer.”⁸⁴ The court did not, however, separately consider the burden-of-proof issue under CAFA, nor did it address Section 2 of CAFA or its legislative history. The court did, however, deny the motion to remand, finding that minimal-diversity and the amount-in-controversy requirements under CAFA had been established.⁸⁵

3. *Sneddon v. Hotwire, Inc.*⁸⁶

On June 29, 2005, United States District Judge Susan Illston issued an opinion examining CAFA’s date of “commencement” issue. The judge remanded the class action against defendant Hotwire, Inc., filed in the Superior Court for the County of San Francisco, California, on January 10, 2005.⁸⁷ The opinion did not analyze the burden of proof under CAFA, but merely noted in passing that “[t]he court may remand sua sponte or on motion of a party, and the party who invoked the federal court’s removal jurisdiction has the burden of establishing federal jurisdiction.”⁸⁸

C. *Decisions Applying the Complete Diversity Standard (While Discussing, but Rejecting, CAFA’s Legislative History)*

1. *Schwartz v. Comcast Corp.*⁸⁹

In this case, “[p]laintiff Adam Schwartz[] filed a class action complaint on April 18, 2005 in the Pennsylvania Court of Common Pleas for Philadelphia County alleging that defendant, Comcast Corporation, breached its contract with plaintiff, was unjustly enriched, and violated Pennsylvania’s

82. *Id.* at 2.

83. *Id.* (quoting 119 Stat. 4, 114) (the Supreme Court has held that with such language “[f]ractions of the day are not recognized.” (quoting *Lapeyre v. United States*, 84 U.S. 191, 198 (1872))).

84. *Id.* at 5 (quoting *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290 (10th Cir. 2001)).

85. *Id.*

86. *Sneddon v. Hotwire, Inc.*, No. C 05-0951 SI, C 05-0952 SI, C 05-0953-SI, 2005 WL 1593593 (N.D. Cal. June 29, 2005).

87. *Id.*

88. *Id.* at *1 (citing *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988) (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921)); *Salveson v. W. States Bankcard Ass’n*, 525 F. Supp. 566, 571 (N.D. Cal. 1981), *aff’d in part, rev’d in part*, 731 F.2d 1423 (9th Cir. 1984); *SCHWARZER, TASHIMA, & WAGSTAFFE, FEDERAL CIVIL PROCEDURE BEFORE TRIAL*, 2:1093 (1992)).

89. *Schwartz v. Comcast Corp.*, No. Civ.A. 05-2340, 2005 WL 1799414 (E.D. Pa. July 28, 2005).

Consumer Protection Law”⁹⁰ Schwartz alleged specifically that Comcast had violated the company’s promise to provide “service that was always on, 24 hours a day, 7 days a week, 365 days a year.”⁹¹ Comcast, a Delaware corporation with its principal place of business in Pennsylvania, filed its notice of removal, asserting minimal diversity under CAFA. Schwartz moved to remand.⁹²

Comcast argued that the class included citizens of other states that were “merely doing business in Pennsylvania or temporarily residing in Pennsylvania,” and that therefore the minimal-diversity-of-citizenship requirements were met under CAFA.⁹³ Schwartz then filed an amended complaint, attempting to limit his original complaint to citizens of the state of Pennsylvania. Comcast asserted that “CAFA’s legislative history demonstrates Congress’s intent to alter this rule and place the burden of proof with respect to jurisdiction on a remanding plaintiff.”⁹⁴ Comcast cited the Judiciary Committee’s section-by-section analysis from the committee’s report in which it states:

Overall, new section 1332 is intended to expand substantially federal court jurisdiction over class actions. Its 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 bear the burden of demonstrating that a case should [sic] be remanded to state court (e.g., the burden of demonstrating that more than two-thirds of the proposed class members are citizens of the forum state). Allocating the burden in this manner is important to ensure that the named plaintiffs will not be able to evade federal jurisdiction with vague class definitions or other efforts to obscure the citizenship of class members. The law is clear that, once a federal court properly has jurisdiction over a case removed to federal court, subsequent events generally cannot “oust” the federal court of jurisdiction. While plaintiffs undoubtedly possess some power to seek to avoid federal jurisdiction by defining a proper class in particular ways, they lose that power once a defendant has properly removed a class action to federal court.

* * *

90. *Id.* at *1.

91. *Id.* (internal quotations omitted).

92. *Id.*

93. *Id.* at *2 (internal quotations omitted).

94. *Id.* at *4.

It is the Committee's intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption. Thus, if a plaintiff seeks to have a class action remanded under section 1332(d)(4)(A) on the ground that the primary defendants and two-thirds or more of the class members are citizens of the home state, that plaintiff shall have the burden of demonstrating that these criteria are met by the lawsuit.⁹⁵

Comcast also cited *Berry v. American Express Publishing Corp.*⁹⁶ in support of its arguments that the jurisdictional burden of proof under CAFA is on the party opposing removal. Judge O'Neil conducted an extensive analysis of the *Berry* opinion, writing:

In *Berry*, Judge Stotler interpreted CAFA's legislative history—specifically the Judiciary Committee Report—to hold that CAFA has shifted the burden of proof to the party seeking remand. Acknowledging that “determining legislative ‘intent’ is a process not without the potential for selective interpretation, where the statute does not squarely address the issue,” Judge Stotler determined that “legislative history is an essential tool for statutory interpretation.” Finding support in the Supreme Court's opinion in *Garcia v. United States* and an opinion from the Court of Appeals for the Ninth Circuit in *City of Edmonds v. Wash. State Bldg. Code Council*, Judge Stotler held that the [Judiciary Committee Report is] “‘the authoritative source for finding the Legislature's intent,’ and may be consulted as one important resource in the quest for faithful statutory interpretation.” In support of this conclusion, Judge Stotler added:

First, a statute cannot address all possible outcomes and situations, and language inevitably contains some imprecision; where the text does not provide a clear answer, a faithful interpretation of the statute necessarily involves more than the text itself. Second, if legislative intent is clearly expressed in Committee Reports and other materials, judicial disregard for the explicit and uncontradicted statements contained therein may result in an interpretation

95. *Id.* at *4 (internal citations omitted) (quoting the Senate Judiciary Committee Report, S. Rep. No. 109-14, at 42-44 (2005)). These sentiments were echoed by Representative Sensenbrenner, 151 Cong. Rec. H727-730, and Representative Goodlatte, *id.* at H732, in the House of Representatives.

96. *Berry v. Am. Express Publ'g Corp.*, 381 F. Supp. 2d 1118 (C.D. Cal. 2005) (discussed *supra* text accompanying notes 34-43).

that is wholly inconsistent with the statute that the legislature envisioned. Where the source of legal authority is statutory and not constitutional, such as with the diversity statute, Congress retains the ability to create and direct the law, so long as it is consistent with constitutional principles, and it is particularly important for the Court to follow that directive. Where both plaintiffs' and defendants' interpretations of the burden of proof . . . are constitutionally permissible, the role of the Court is to faithfully implement the law as intended by the Legislature. In these circumstances the legislative history is a proper tool of statutory interpretation.

With this statutory interpretation framework in place, Judge Stotler found that "the Committee Report expresses a clear intention to place the burden of removal [sic] on the party opposing removal to demonstrate that an interstate class action should be remanded to state court." Rejecting plaintiffs' arguments "that the failure to incorporate this directive evinces an explicit intent to maintain the status quo," Judge Stotler held that "this contention cannot be squared with the uncontradicted statements contained in the Committee Report." Judge Stotler further opined:

Although the lack of any burden-shifting provisions may be an opaque means of preserving the status quo . . . it is equally possible that it was due to legislative oversight, the inability of the Legislature to foresee, or for statutes to address all circumstances. Alternatively, and more plausibly, the failure to address the burden of proof in the statute reflects the Legislature's expectation that the clear statements in the Senate Report would be sufficient to shift the burden of proof. The Court notes, with some irony, that the original diversity statute does not contain any reference to the burden of proof. Plaintiff fails to explain how the failure to incorporate the burden of proof in Section 1332(d) should be assigned more or less meaning than the failure to incorporate any burden of proof in the original text.

Judge Stotler thus concluded that "the failure to explicitly legislate changes on the burden of proof in interstate class actions has little interpretive value." Judge Stotler also observed "that her interpretation is consistent with the tradition of placing the burden on the moving party."⁹⁷

97. *Schwartz*, 2005 WL 1799414, at *5-6 (internal citations omitted).

Judge O'Neil disagreed, however, with Judge Stotler's analysis in *Berry*, and pointed to "Justice Jackson's concurrence in *Schwegmann Bros.*: 'Resort to legislative history is only justified where the face of the Act is inescapably ambiguous.'"⁹⁸ He further noted that "[w]here the statutory language is plain and unambiguous, further inquiry is not required, except in the extraordinary case where a literal reading of the language produces an absurd result."⁹⁹ Judge O'Neil found neither ambiguity in section 1332(d) nor absurdity in its result, "because it is consistent with courts' long standing application of the burden of proof for establishing diversity jurisdiction."¹⁰⁰ However, in looking solely at new section 1332(d), Judge O'Neil overlooked the specific congressional intent expressed in the text of Section 2 of CAFA.

Judge O'Neil also considered a number of Supreme Court cases, noting that "Congress is presumed to be aware of existing law when it passes legislation."¹⁰¹ In contrast to Judge Stotler, Judge O'Neil concluded that he could not "assume that, with the Judiciary Committee's understanding of the operation of diversity jurisdiction, Congress was unaware that courts have uniformly placed the burden of proof on a removing defendant."¹⁰²

Judge O'Neil found that "a court may depart from the plain language of a statute only by an extraordinary showing of a contrary congressional intent in the legislative history."¹⁰³ Instead of following Judge Stotler, Judge O'Neil held that

with a plain, nonabsurd construction of a statute in view, I need not construe this statute in a manner that would enlarge its meaning "so that what was omitted, presumably by inadvertence, may be included within its scope." I am, therefore, hesitant to read into the statute a Congressional intent to shift the longstanding burden of proof for establishing diversity jurisdiction, where Congress expressly enacted numerous other intended changes discussed by the Judiciary Committee in its Report to the exclusion of the change with respect to the burden of proof.¹⁰⁴

98. *Id.* at *6 (citing *Garcia v. United States*, 469 U.S. 70, 77 (1984) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring). See also *In re First Merch. Acceptance Corp.*, 198 F.3d 394, 402 (3d Cir. 2000) ("Supreme Court cases declaring that clear [statutory] language cannot be overcome by contrary legislative history are legion.")).

99. *Id.* (quoting *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (1998)).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at *7 (quoting *Idahoan Fresh*, 157 F.3d at 202) (citing *Garcia*, 469 U.S. at 75)).

104. *Id.* (internal citation omitted).

By “failing to express a concomitant change in the burden of proof, Congress implicitly acknowledged and adopted the longstanding rule that a removing defendant bears the burden of proof for establishing diversity jurisdiction.”¹⁰⁵

Judge O’Neil concluded his analysis of statutory interpretation by holding:

Had Congress intended to make a change in the law with respect to the burden of proof, it would have done so expressly in the statute. “If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result.” I therefore hold that, notwithstanding its legislative history, CAFA does not shift the burden of proof from a removing defendant to a remanding plaintiff.¹⁰⁶

2. *Moll v. Allstate Floridian Insurance Co.*¹⁰⁷

In *Moll v. Allstate Floridian*, United States Senior District Judge Roger Vinson, writing for the Northern District of Florida, granted the plaintiffs’ motion to remand.¹⁰⁸ The plaintiffs asserted claims of breach of contract and breach of the implied covenant of good faith, based on Allstate Floridian’s alleged intentional underestimation of claims related to hurricanes in Florida during 2004.¹⁰⁹ The plaintiffs filed the action in Florida state court, and Allstate Floridian removed the action to the District Court of the Northern District of Florida on minimal-diversity jurisdiction grounds.¹¹⁰

On the plaintiffs’ motion for remand, the court placed the burden of establishing federal jurisdiction squarely on Allstate Floridian (AFIC), stating that “AFIC, as the party removing this action to federal court, has the burden of establishing federal jurisdiction.”¹¹¹ The court ultimately held that Allstate Floridian bore the burden of proving federal jurisdiction “[b]ecause the removal statutes are strictly construed against removal [and] all doubts about removal must be resolved in favor of remand.”¹¹²

105. *Id.*

106. *Id.* (internal citations omitted).

107. *Moll v. Allstate Floridian Ins. Co.*, No. 3:05CV160RVMD, 2005 WL 2007104 (N.D. Fla. Aug. 16, 2005).

108. *Id.*

109. *Id.* at *1–2.

110. *Id.*

111. *Id.* at *2 (citing *Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242 (11th Cir. 2005)) (citing *McCormick v. Aderholt*, 293 F.3d 1254, 1257 (11th Cir. 2002)).

112. *Id.* (citing *Sweet Pea Marine*, 411 F.3d 1242; *McCormick*, 293 F.3d 1254; *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994)).

The court explained that “the sole basis for federal subject matter jurisdiction in this case is premised upon diversity of citizenship as set forth in Title 28, United States Code, Section 1332, and as amended by the Class Action Fairness Act.”¹¹³ The court did acknowledge in a footnote, however, that “CAFA was undoubtedly intended to expand federal diversity jurisdiction over multi-state actions. However, the CAFA still incorporates the corporate citizenship requirements of Title 28, United States Code, Section 1332(c)(1), and it preserves state courts’ jurisdiction over class actions that predominantly involve plaintiffs and defendants in the same state.”¹¹⁴

The court determined that the defendants seeking removal satisfied CAFA’s \$5,000,000 amount-in-controversy requirement, but that they failed to prove that diversity jurisdiction existed, since Allstate Floridian’s principal place of business was in Florida.¹¹⁵

3. *Judy v. Pfizer, Inc.*¹¹⁶

On September 14, 2005, U.S. District Judge Rodney W. Sipple of the Eastern District of Missouri held that CAFA does not apply to a petition amended post-CAFA to assert new claims for relief.¹¹⁷ Pfizer had previously removed the litigation on other grounds prior to enactment of CAFA, but the case was remanded when Judge Sipple found no federal question or complete-diversity jurisdiction.¹¹⁸ Thereafter, Elizabeth Judy, the plaintiff, filed her amended petition on July 22, 2005, several months after CAFA’s enactment date, to refine the factual allegations and to assert additional common-law claims for relief surrounding the prescription drug Neurontin.¹¹⁹ Pfizer again removed, this time on minimal-diversity grounds under CAFA based on the amended complaint, in an attempt to consolidate multi-district litigation involving Neurontin.¹²⁰ The court followed *Knudsen v. Liberty Mutual Insurance Co.*,¹²¹ holding that the amendment of the state court action did not “commence” a new action in the state court, and remanded the case.¹²²

Judge Sipple, in examining Pfizer’s arguments that the burden of proof fell on plaintiffs, stated:

Pfizer asserts that the CAFA places the burden of proof in support of remand upon Judy. Settled case law regarding removal, however, places the burden of proof on the party invoking federal jurisdiction, Pfizer in this matter. Pfizer’s

113. *Id.* at *3-4.

114. *Id.* at *1 n.1.

115. *Id.* at *13-14.

116. *Judy v. Pfizer, Inc.*, No. 4:05CV1208RWS, 2005 WL 2240088 (E.D. Mo. Sept. 14, 2005).

117. *Id.*

118. *Id.* at *1.

119. *Id.*

120. *Id.*

121. *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 806 (7th Cir. 2005).

122. *Judy*, 2005 WL 2240088, at *3.

argument turns this settled case law on its head. In support of shifting the burden of proof to Judy, Pfizer cites to four district court cases, three from California and one from Washington. These cases hold that, although the CAFA is silent about the burden of proof in cases removed under the Act, a [Senate] Committee Report contemplates the shifting of the burden to the plaintiff seeking remand.¹²³

Judge Sipple began his analysis by noting that “[a]t the time of the enactment of the CAFA, Congress was presumed to be aware of the well settled case law regarding the burden of proof in removed actions.”¹²⁴ Using that general concept as his cornerstone, Judge Sipple continued his statutory interpretation: “A court may resort to legislative history to interpret a statute when it contains an ambiguity. Absent some ambiguity in the statute, there is no occasion to look to legislative history.”¹²⁵ Judge Sipple concluded:

The omission of a burden of proof standard in the CAFA does not create an ambiguity inviting courts to scour its legislative history to decide the point. By failing to specifically address the burden of proof in the Act, especially in light of discussing the issue in a Committee Report, Congress is deemed to have not intended to change the settled case law on that issue. Had Congress wished to change which party bears the burden of proof in a removal action under the CAFA, it could have explicitly done so.

As a District Court Judge, I am compelled to follow the precedent of the Eighth Circuit Court of Appeals which places the burden on the party seeking removal. Moreover, the burden of proof issue in this case is not a decisive issue because my determination of whether Judy’s amendment of her petition commenced a new case for purposes of removal under the CAFA can be resolved by simply viewing her original and amended state court petitions.¹²⁶

4. *Plummer v. Farmers Group, Inc.*¹²⁷

On September 15, 2005, United States District Judge Ronald A. White, writing for the Eastern District of Oklahoma, denied plaintiff’s motion to remand, holding that an amended complaint adding a request for

123. *Id.* at *1 (internal citations omitted).

124. *Id.* at *2 (citing *Contract Freighters, Inc. v. Sec’y of U.S. Dep’t of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001) (Congress is presumed to know the legal background in which it is legislating)).

125. *Id.* (citing *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1032 (8th Cir. 2003)).

126. *Id.*

127. *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310 (E.D. Okla. 2005).

class certification constituted “commencement” under CAFA.¹²⁸ The plaintiff originally filed the suit on August 15, 2003, as a single-plaintiff case concerning an automobile insurance policy and an insurance company computer program that allegedly undervalued her automobile.¹²⁹ Plummer amended her complaint on May 23, 2005, seeking class certification under Oklahoma law.¹³⁰ Farmer’s Group then removed the case to federal court, claiming minimal-diversity jurisdiction under CAFA.¹³¹ The court examined both the date of commencement issue and the amount in controversy. As to the date of commencement, the court agreed with the Seventh Circuit in *Knudsen v. Liberty Mutual Insurance Co.*¹³² that the amended complaint did not relate back and was the equivalent of filing a new cause of action.¹³³

As part of the court’s consideration of the amount-in-controversy issue, it looked to the burden-of-proof question raised by the defendants. Judge White began by acknowledging the Complete Diversity Standard: “Typically, the party invoking federal jurisdiction bears the burden of demonstrating it exists.”¹³⁴

Several courts have held that it is the intent of Congress that “if a purported class action is removed pursuant to [CAFA], the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident.” This Court agrees this view better comports with the purpose of CAFA. This Court is not, however, sanguine about the reliance by these courts on CAFA’s legislative history rather than the precise language of the statute itself.¹³⁵

The plaintiff, on the other hand, cited *Schwartz v. Comcast Corp.*¹³⁶ for two propositions: first, that “Congress implicitly acknowledged and adopted the longstanding rule that a removing defendant bears the burden of proof for establishing diversity jurisdiction,”¹³⁷ and second, “[h]ad Congress intended to make a change in the law with respect to the burden of proof, it would have done so expressly in the statute It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result.”¹³⁸

128. *Id.*

129. *Id.* at 1312.

130. *Id.* at 1313.

131. *Id.*

132. *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 808 (7th Cir. 2005).

133. *Plummer*, 388 F. Supp. 2d at 1316.

134. *Id.* at 1317 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998)).

135. *Id.* (quoting *Waitt v. Merck & Co.*, No. C05-0759L, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005); *Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749, 752 (D.N.J. 2005); *In re Textainer P'ship*, No. C 05-0969 MMC, 2005 WL 1791559, at *3 (N.D. Cal. July 27, 2005).

136. *Schwartz v. Comcast Corp.*, No. Civ.A. 05-2340, 2005 WL 1799414 (E.D. Pa. July 28, 2005).

137. *Plummer*, 388 F. Supp. 2d at 1316 (quoting *Schwartz*, 2005 WL 1799414, at *7).

138. *Id.*

Judge White, without acknowledging the existence of Section 2 of CAFA and its clear statement of congressional intent behind its passage of CAFA, held:

While the Court does not necessarily agree that Congress's failure to "expressly" modify the law with respect to the burden of proof constitutes an implicit adoption of the traditional rule, the Court agrees that it is not the role of the judiciary to correct drafting errors. The Tenth Circuit has stated that the removing party, at a minimum, has the burden to prove by a preponderance of the evidence that the jurisdictional amount has been satisfied. This showing must be evident from the face of the petition or the notice of removal itself. While the purpose of CAFA may arguably militate in favor of reversing this burden, Congress did not expressly say so in the statute. This Court is loath to ignore the long-standing precedent of this Circuit on the ethereal basis of Congressional intent unstated in the actual language of the law. Therefore, the Court will not reverse the burden of proof on this issue.¹³⁹

5. *Brill v. Countrywide Home Loans, Inc.*¹⁴⁰

On October 20, 2005, the Seventh Circuit became the first circuit court to examine the burden-of-proof issue under CAFA.¹⁴¹ Circuit Judges Posner, Easterbrook, and Rovner considered the decision of the Northern District of Illinois written by United States District Judge John W. Darrah.¹⁴² The District Court remanded an Illinois class action removed on minimal-diversity grounds under CAFA, finding that the Telephone Consumer Protection Act provides exclusive state court jurisdiction over its private causes of action.¹⁴³ Judge Darrah's opinion included a statement regarding the burden of proof in a complete-diversity context: "The party seeking to preserve the removal, not the party moving to remand, bears the burden of establishing that the court has jurisdiction."¹⁴⁴

Countrywide filed an appeal under CAFA, which provides for review of remand orders,¹⁴⁵ and the *Brill* court summarily reversed the District Court's decision, without full briefing or argument by the parties.¹⁴⁶ The

139. *Id.* at 1317-18 (internal citations omitted).

140. *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005).

141. *Id.*

142. *Brill v. Countrywide Home Loans, Inc.*, No. 05 C 2713, 2005 WL 2230193 (N.D. Ill. Sept. 8, 2005).

143. *Id.* at *2.

144. *Id.* at *1 (citing *Jones v. Gen. Tire and Rubber Co.*, 514 F.2d 660, 664 (7th Cir. 1976)).

145. 28 U.S.C. 1453(c)(1).

146. *Brill*, 427 F.3d at 447.

Brill court did not, however, reverse the District Court's observations regarding the burden of proof. Judge Easterbrook, writing for the court, explained:

Countrywide maintains that the Class Action Fairness Act reassigns that burden to the proponent of remand. It does not rely on any of the Act's language, for none is even arguably relevant. Instead it points to this language in the report of the Senate Judiciary Committee: "If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional provisions are not satisfied)." This passage does not concern any text in the bill that eventually became law. When a law sensibly could be read in multiple ways, legislative history may help a court understand which of these received the political branches' imprimatur. But when the legislative history stands by itself, as a naked expression of "intent" unconnected to any enacted text, it has no more force than an opinion poll of legislators—less, really, as it speaks for fewer. Thirteen Senators signed this report and five voted not to send the proposal to the floor. Another 82 Senators did not express themselves on the question; likewise 435 Members of the House and one President kept their silence.

We recognize that a dozen or so district judges have treated this passage as equivalent to a statute and reassigned the risk of non-persuasion accordingly. But naked legislative history has no legal effect, as the Supreme Court held in *Pierce v. Underwood*, 487 U.S. 552, 566–68 . . . (1988). A Committee of Congress attempted to alter an established legal rule by a forceful declaration in a report; the Justices concluded, however, that because the declaration did not correspond to any new statutory language that would change the rule, it was ineffectual. Just so here. The rule that the proponent of federal jurisdiction bears the risk of non-persuasion has been around for a long time. To change such a rule, Congress must enact a statute with the President's signature (or by a two-thirds majority to override a veto). A declaration by 13 Senators will not serve.¹⁴⁷

Nowhere in its analysis of the burden-of-proof issue did the *Brill* court reference or otherwise indicate that it was aware of CAFA's "Findings and Purposes" in Section 2, which text reveals that CAFA's legislative history is

147. *Id.* at 448 (some internal citations omitted).

not a “naked expression of ‘intent’ unconnected to any enacted text.” The *Brill* court further did not apply the correct canon of statutory construction.¹⁴⁸ The court, nevertheless, concluded that even under the Complete Diversity Standard, Countrywide had satisfied the minimum jurisdictional requirement of \$5,000,000 in controversy, and remanded to the district court for a decision on the merits.¹⁴⁹

6. *Ongstad v. Piper Jaffray & Co.*¹⁵⁰

On January 4, 2006, United States District Judge Daniel L. Hovland, writing for the District Court of North Dakota, examined a class action filed on September 29, 2005 that was removed on minimal-diversity grounds pursuant to CAFA.¹⁵¹ The action alleged that Piper Jaffray, a securities broker and investment banking firm, traded securities without authorization, resulting in a loss.¹⁵² Judge Hovland examined the burden-of-proof arguments and the amount-in-controversy requirement. The court placed the jurisdictional burden of proof on Piper Jaffray as the removing party and held that it could not demonstrate the requisite amount in controversy as required by CAFA.¹⁵³

In his examination of the burden-of-proof issue, Judge Hovland outlined the jurisprudence of the Complete Diversity Standard within the Eighth Circuit and the disagreement among the courts on this issue in the CAFA context, concluding, “[r]emoval statutes are strictly construed in favor of state court jurisdiction and federal district courts must resolve all doubts concerning removal in favor of remand. The removing party bears the burden of showing that removal was proper.”¹⁵⁴ The court acknowledged that some courts have held that CAFA shifts the burden of proof to the party seeking remand, and pointed to the legislative history of CAFA in doing so.¹⁵⁵ The court also stated that other courts have determined that “CAFA does nothing to alter the traditional rule of law that the party opposing remand bears the burden of establishing federal jurisdiction.”¹⁵⁶

148. See discussion of the correct approach *infra* Section V.A.

149. *Brill*, 427 F.3d at 452.

150. *Ongstad v. Piper Jaffray & Co.*, 407 F. Supp. 2d 1085 (D.N.D. 2006).

151. *Id.* at 1085.

152. *Id.* at 1086.

153. *Id.* at 1092–93.

154. *Id.* at 1087–88 (citing *In re Bus. Men's Assurance Co. of Am.*, 992 F.2d 181, 183 (8th Cir. 1993); see also *Green v. Ameritrade, Inc.*, 279 F.3d 590, 595 (8th Cir. 2002) (citing *Bus. Men's Assurance*, 992 F.2d at 183) (the party opposing remand has the burden of establishing federal subject-matter jurisdiction)).

155. *Id.* at 1088 (citing *Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749, 752 (D.N.J. 2005); *In re Textainer P'ship*, No. C 05-0969 MMC, 2005 WL 1791559, at *3 (N.D. Cal. July 27, 2005); *Waitt v. Merck & Co.*, No. C05-0759L, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005); *Yeroushalmi v. Blockbuster, Inc.*, No. CV 05-225-AHM(RCX), 2005 WL 2083008, at *3 (C.D. Cal. July 11, 2005); *Berry v. Am. Express Publ'g Corp.*, 381 F. Supp. 2d 1118, 1122–23 (C.D. Cal. 2005)).

156. *Ongstad*, 407 F. Supp. 2d at 1088 (citing *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310, 1317–18 (E.D. Okla. 2005); *Judy v. Pfizer, Inc.*, No. 4:05CV1208RWS, 2005 WL 2240088, at *2 (E.D. Mo. Sept. 14, 2005); *Schwartz v. Comcast, Corp.*, No. Civ.A. 05-2340, 2005 WL 1799414, at *4 (E.D. Pa. July 28, 2005); *In re Expedia Hotel Taxes and Fees Litig.*, 377 F. Supp. 2d 904, 905 (W.D. Wash. 2005); *Sneddon v. Hotwire, Inc.*, No. C 05-0951 SI, C 05-0952 SI, C 05-0953 SI, 2005 WL 1593593,

Observing that “the United States Supreme Court and the Eighth Circuit Court of Appeals have not yet addressed this issue,”¹⁵⁷ Judge Hovland began a step-by-step approach with his reasoning, but like the *Brill* court, apparently overlooked Congress’s “Findings and Purposes” in Section 2 of the Act: “At the time of the enactment of the CAFA, Congress was presumed to be aware of the well settled case law regarding the burden of proof in removed actions.”¹⁵⁸ The court also acknowledged that legislative history may be considered to interpret a statute when the statute contains an ambiguity, but absent some ambiguity in the statute, there is no occasion to look to the legislative history.¹⁵⁹

Following the road taken in *Brill*, Judge Hovland concluded that “[t]he omission of a burden of proof standard in the CAFA does not create an ambiguity inviting courts to scour its legislative history to decide the point. By failing to specifically address the burden of proof in the Act, especially in light of discussing the issue in a Committee Report, Congress is deemed to have not intended to change the settled case law on that issue. Had Congress wished to change which party bears the burden of proof in a removal action under the CAFA it could have explicitly done so.”¹⁶⁰ Judge Hovland then cited *Brill* at length in discounting the authoritative value of CAFA’s legislative history, and held that “[t]his Court is persuaded by the holdings in *Judy* and *Brill*. The Court will decline Piper Jaffray’s invitation to break from the well-established rule of law that the removing party bears the burden of establishing federal subject-matter jurisdiction. There is simply nothing in CAFA that contemplates such a change.”¹⁶¹

7. *Rogers v. Central Locating Service Ltd.*¹⁶²

On February 1, 2006, United States District Judge John C. Coughenour of the Western District of Washington remanded a wage-and-hour action back to Washington state court that had been removed pursuant to CAFA.¹⁶³ Central Locating Service (CLS) asserted the existence of minimal-diversity jurisdiction “because there were more than 100 putative class members, at least one named plaintiff was diverse from CLS, and the aggregated amount in controversy exceeded \$5,000,000.”¹⁶⁴ In analyzing the

at *1 (N.D. Cal. June 29, 2005); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005)).

157. *Id.*

158. *Id.* at 1089 (citing *Contract Freighters, Inc. v. Sec’y of U.S. Dep’t of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001) (Congress is presumed to know the legal background in which it is legislating)).

159. *Id.* (citing *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1032 (8th Cir. 2003)).

160. *Id.* (citing *Judy v. Pfizer, Inc.*, No. 4:05CV1208RWS, 2005 WL 2240088, at *1–2 (E.D. Mo. Sept. 14, 2005)).

161. *Id.* at 1090.

162. *Rogers v. Cent. Locating Serv. Ltd.*, No. C05-1911C (W.D. Wash. Feb. 1, 2006).

163. *Id.*

164. *Id.* at 3.

motion to remand, Judge Coughenour examined whether the Complete Diversity Standard applied to interstate class actions removed under CAFA.¹⁶⁵

The court began its analysis by pointing out that prior to CAFA, the “well established rule in all cases was that district courts were to approach remand motions with a “‘strong presumption’ against removal jurisdiction and assign to the removing defendant ‘the burden of proving the existence of jurisdictional facts.’”¹⁶⁶ The court cited *Brill* for the proposition that “[p]rinciples of fairness and judicial efficiency also support this presumption, particularly when jurisdiction rests on the defendant’s own calculations of potential exposure under the plaintiffs’ claims.”¹⁶⁷ The jurisdictional dispute in *Rogers* centered around the cost of CLS’s compliance with an injunction.¹⁶⁸

CLS argued that CAFA reversed the presumption against removal by shifting the burden to the opponents of federal court jurisdiction.¹⁶⁹ CLS argued that the shift is evident from the statute. However, the court stated that “CLS has not identified, nor can the Court locate, anything in the text of § 1332(d) creating a new presumption in favor of removal jurisdiction or relieving the defendant of its burden of persuasion.”¹⁷⁰ The court thus framed the question: “Should the Court interpret Congress’s silence as enacting an implicit change to the well-established presumption against removal jurisdiction? In the usual course, attempting ‘to divine congressional intent from congressional silence’ is ‘an enterprise of limited utility that offers a fragile foundation for statutory interpretation.’”¹⁷¹

Judge Coughenour stated, “because § 1332 has *always* been silent on the applicable presumptions and burdens, both before and after CAFA, the presumption against removal jurisdiction must be considered a judicial gloss on the original (silent) statutory language.”¹⁷² He noted that the court in *Berry* held that due to the silence in the original statute, Congress did not have to explicitly address the burden of proof to effect a change.¹⁷³ This assumption, the judge wrote, ignores the “uniform body of precedent

165. *Id.* at 5.

166. *Id.* (quoting *Berry v. Am. Express Publ’g Corp.*, 381 F. Supp. 2d 1118, 1120 (C.D. Cal. 2005) (quoting *Gaus v. Miles, Inc.*, 980 F.2d 564, 556 (9th Cir. 1992))).

167. *Id.* (quoting *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447–48 (7th Cir. 2005) (“When the defendant has vital knowledge that the plaintiff may lack, a burden that induces the removing party to come forward with the information—so that the choice between state and federal court may be made accurately—is much to be desired.”)).

168. *Id.* at 6.

169. *Id.*

170. *Id.*

171. *Id.* at 6–7 (citing *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 717 (9th Cir. 2004)).

172. *Id.* at 7 (citing 14B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721 at 324 (3d ed. 2005) (citing “ample support” “at all levels of the federal courts—the Supreme Court, the courts of appeals, and the district courts—for the proposition that removal statutes will be strictly construed.”)).

173. *Id.* (citing *Berry v. Am. Express Publ’g Corp.*, 381 F. Supp. 2d 1118, 1122–23 (C.D. Cal. 2005)).

applying a clear presumption against removal . . .”¹⁷⁴ The court concluded that “[w]hen a consistent statutory interpretation has been so long settled, the courts are justifiably reluctant to read a repeal of that interpretation into a statutory amendment that is completely silent on the subject.”¹⁷⁵

The court then examined the interpretive value of CAFA’s legislative history. CLS argued that “the text of § 1332(d) is so ambiguous that the Court must turn to CAFA’s legislative history for guidance” and cited *Waitt v. Merck & Co.*¹⁷⁶ for the proposition that “it is not difficult to divine Congressional intent from CAFA’s legislative history.”¹⁷⁷ The court noted CLS’s citation of *Waitt* and other district court rulings that reversed the presumption against removal and the burden of establishing jurisdiction, but found no ambiguity “requiring resort to CAFA’s legislative history.”¹⁷⁸ The court concluded that there was “no basis to conclude that CAFA imposed new presumptions and burdens by silent implications or through bare legislative history.”¹⁷⁹

Once again, this court in its analysis apparently overlooked the guidance of Congress as to its intent expressly stated in the “Findings and Purposes” in Section 2 of CAFA.

8. *Werner v. KPMG, LLP*¹⁸⁰

On February 7, 2006, United States District Judge Lee H. Rosenthal, writing for the Southern District of Texas, examined the burden-of-proof issue as an initial consideration in her review of the “commencement” of a Texas state court action for purposes of determining CAFA jurisdiction.¹⁸¹ The court held that CAFA did not apply “because this action ‘commenced’ as to the removing defendants before CAFA’s enactment and the plaintiffs’ amended pleading filed after CAFA did not ‘commence’ a new action.”¹⁸²

As to the burden-of-proof issue, Judge Rosenthal summarized recent decisions, beginning by noting the Complete Diversity Standard: “The established rule is that because the party seeking to invoke federal jurisdiction has the burden of proof, the removing party has the burden of showing the propriety of removal.”¹⁸³ Additionally, the court wrote that “[t]he text of CAFA says nothing about the burden of proof on removal. Several

174. *Id.*

175. *Id.* at 8 (*cf. Globe & Rutgers Fire Ins. Co. v. Draper*, 66 F.2d 985, 991 (9th Cir. 1933) (noting that “repeals by implication are not favored”); *Pierce v. Underwood*, 487 U.S. 552, 567 (1988) (reenactment of statute that had been given “consistent judicial interpretation” is deemed to incorporate “the settled judicial interpretation.”)).

176. *Waitt v. Merck & Co.*, No. C05-0759L, 2005 WL 1799740 (W.D. Wash. July 27, 2005) (discussed *supra* text accompanying notes 52–58).

177. *Rogers*, No. C05-1911C, at 8 (quoting *Waitt*, 2005 WL 1799740, at *1).

178. *Id.* at 8–9 (citing *Berry*, 381 F. Supp. 2d at 1122–23; *Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161, 168 (D. Mass. 2005)).

179. *Id.* at 10.

180. *Werner v. KPMG, LLP*, 415 F. Supp. 2d 688 (S.D. Tex. 2006).

181. *Id.*

182. *Id.* at 710.

183. *Id.* at 694 (citing *Delgado v. Shell Oil Co.*, 231 F.3d 165, 178 n.25 (5th Cir. 2000); *Frank v. Bear Stearns & Co.*, 128 F.3d 919, 921–22 (5th Cir. 1997)); *see also Coury v. Prot*, 85 F.3d 244, 248 (5th

