



[The KLJ Blog](#)

[Online Originals](#)

[Submissions](#)

[The Print Archive](#)

[Membership](#) ▾

[Symposium](#) ▾

[Subscriptions](#)

[About](#) ▾

[Home](#) » [Content](#) » [Featured](#) » [CAFA Removal and Jurisdiction: Basic Overview and Practice Points](#)

CAFA Removal and Jurisdiction: Basic Overview and Practice Points

May 21, 2018

CAFA Removal and Jurisdiction: Basic Overview and Practice Points

Article | 107 Ky. L. J. ONLINE | May 20, 2018

Megan Niespodziany ^[1]

Traditionally, when a defendant finds itself being sued in a class action lawsuit, there are two avenues for removal to federal court: traditional diversity grounds and federal question grounds.^[2] The implementation of the Class Action Fairness Act (CAFA) provides additional avenues for accomplishing removal.

I. Parameters

With the enactment of CAFA, Congress significantly expanded federal courts' jurisdiction over class actions and mass actions. The primary CAFA provisions are found in 28 U.S.C. § 1332(d)(B). This section defines a class action under CAFA as "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."^[3] It is important to note that the class action must have been brought by the plaintiff under Federal Rule of Civil Procedure 23 or a similar state statute using the typical class action language (commonality, typicality, numerosity, and so on).^[4] If the action is brought under some other statute, it is not removable under CAFA, but may be removable under diversity or federal question grounds.^[5]

The most important points about CAFA removal and jurisdiction involve a relaxed diversity requirement and a heightened amount in controversy requirement. Under CAFA, a removing defendant must only show that at least one plaintiff is diverse from at least one defendant instead of showing complete diversity.^[6] CAFA also increased the amount in controversy requirement from \$75,000 to \$5 million, and the \$5 million amount can now be satisfied by aggregating each plaintiff's claim amount—something not permitted under traditional diversity rules.^[7] The amount in controversy can be shown by demonstrating several types of damages, including compensatory, statutory, and punitive damages, as well as equitable relief.^[8] Attorney's fees can also be included when authorized by statute.^[9]

There are differences among circuits when it comes to the burden of establishing the amount in controversy. In the Fourth Circuit, the defendant must establish the jurisdictional amount by a preponderance of the evidence when damages are unspecified, as opposed to the legal certainty a



Contact Us

620 S. Limestone
40508 Lexington, Kentucky

editors@kentuckyjournal.org

(859) 257-1678



plaintiff enjoys when initially invoking federal jurisdiction by filing in federal court.^[10] In the Seventh Circuit, courts employ a legal impossibility standard which makes this circuit very removal-friendly.^[11] In the Tenth Circuit, a defendant will satisfy the amount in controversy requirement if it can show the amount is not legally certain to be less than the jurisdictional amount.^[12]

CAFA and traditional diversity jurisdiction can be plead in a removal proceeding in the alternative.^[13] In addition to expanding federal class action jurisdiction under CAFA, Congress also simply provided an *additional* method for class action removal, as the multiple avenues for removal are not mutually exclusive. Moreover, a class does not yet have to be certified in order for defendants to remove under CAFA.^[14] Similarly, post-removal events such as denial of class certification do not divest the court of jurisdiction.^[15]

Traditional methods for determining citizenship apply under CAFA; however, there is one exception. 28 U.S.C. § 1332(d)(10) provides that an unincorporated association is “a citizen of the State where it has its principal place of business and the State under whose laws it is organized.”^[16] This is the standard generally reserved for corporations under traditional removal statutes.

II. Primary Exceptions/Exclusions

There are certain class actions and subject matters that that cannot be removed under CAFA. These excepted actions include claims arising *solely* under:

- A covered security as defined by the Securities Act of 1933 and the Securities Exchange Act of 1934;
- Relation to the internal affairs or governance of a corporation or other business entity and brought under the laws of the state in which the business entity is organized or incorporated; or
- Relation to the rights, duties and obligations related to any security as defined by the Securities Act of 1933 and associated regulations.^[17]

There are three other exceptions under CAFA that require or allow a federal court to decline jurisdiction. These three exceptions include (1) the home state controversy exception,^[18] (2) the local controversy exception,^[19] and (3) the interest of justice exception.^[20] The home state controversy exception mandates federal courts decline jurisdiction if two-thirds or more of the members of a proposed plaintiff class and the primary defendants are citizens of the state where the action was originally filed.^[21] The local controversy exception mandates federal courts decline jurisdiction where several criteria are met:

- Greater than two-thirds of the members of all proposed plaintiff classes are citizens of the state in which the class action was originally filed;
- At least one defendant is a defendant:
 - From whom significant relief is sought by members of the plaintiff class;
 - Whose alleged conduct forms a significant basis for the claims asserted; and
 - Who is a citizen of the state in which the action was originally filed.
- The principal injuries resulting from the alleged conduct were incurred in the State in which the action was originally filed; and
- During the three year period preceding the filing of the class action, no other class action has been filed asserting the same or similar allegations against any of the defendants on behalf of the same or other persons.^[22]

The interest of justice exception, sometimes called the discretionary exception, allows a federal court to decline jurisdiction when greater than one-third, but less than two-thirds, of the members of the proposed plaintiff class and the primary defendants are citizens of the state in which the class action was originally filed.^[23] The court may do so after considering the following factors:

- Whether the claims asserted involve matters of national or interstate interest;
- Whether the claims asserted will be governed by the laws of the state where the action was originally filed or by the laws of other states;
- If the class action has been pleaded in a manner that seeks to avoid federal jurisdiction;

- If the action was brought in a forum with a distinct nexus to the class members, alleged harm, or defendants;
- The number of citizens of the state in which the action was originally filed in all proposed plaintiff classes is substantially larger than the number of citizens from any other state, and the citizenship of the other members of the proposed class is dispersed among a substantial number of states.^[24]

Additionally, should there exist a statutory bar to removal separate from the CAFA provisions, it is clear in most circuits that those removal bars will apply to bar removal under CAFA. In other words, CAFA's removal statute does not seem to impliedly repeal other statutory bars,^[25] although there could be room to argue this is not the case. For example, in *Passarella v. Ginn Co.*, the court held that the bar to removal under 15 U.S.C. § 1719, dealing with the Interstate Land Sales Full Disclosure Act (ILSA) was impliedly repealed by CASA because CASA was more recently enacted and provided a more general removal right for qualifying class actions.^[26]

III. Pitfalls and Special Considerations

The following includes some pitfalls and special considerations that may be encountered when removing a CAFA class action to federal court:

- Plaintiffs attempt to plead around CAFA jurisdiction in many ways—some of these are permitted and some are not. First, plaintiffs are not permitted to disclaim a recovery greater than \$5 million prior to class certification in order to avoid CAFA jurisdiction.^[27] Regarding splitting up a class action into several smaller class actions, circuits are divided. The Sixth Circuit suggests that this practice would be allowed if the segmentation was not arbitrary and not meant to solely frustrate CAFA, while the Eighth Circuit holds that aggregation of amounts from separate class actions is not permitted because the statutory language of CAFA did not contemplate such a scenario.^[28] Plaintiffs can permissibly structure the putative class in a way that will invoke either the local controversy or home state controversy exceptions described.
- The law is unclear when determining whether a federal judge must dismiss or remand to state court when they realize neither they nor the state court have jurisdiction, making remand futile. This debate is centered on 28 U.S.C. § 1447(c) which states that a case shall be remanded if it appears the court lacks jurisdiction prior to final judgment. The First, Fifth, and Ninth Circuits have recognized the “futility exception” which supports dismissal rather than remand of a case that lacks viable state claims.^[29] Other circuits have rejected the “futility exception” and support a more literal read of 28 U.S.C. § 1447(c).^[30] If a defendant is in the latter group, they could end up having to re-litigate the dispositive finding that a class plaintiff lacks jurisdiction, wasting time and money.
- CAFA provides that a district court's order denying CAFA jurisdiction is appealable— this is a large departure from traditional rules regarding the appealability of remand orders.^[31]
- There are several traditional removal rules that do not apply when a class action is removed under CAFA. Therefore, if defense counsel is attempting to remove under multiple bases, they will need to ensure that the traditional rules are satisfied. These rules include (1) the requirement that removal happen within one year, (2) the rule that no defendant can be a citizen of the forum state, and (3) the rule that all defendants must consent to removal.^[32]
- Finally, it can be counter-intuitive for removing counsel to tally potential damages in order to reach the \$5 million threshold for CAFA jurisdiction, especially when it comes to punitive damages. Putting statements on the record that punitive or other damages may exist that the plaintiff class has not alleged can be dangerous. It is also obviously not a position any attorney wants to put their client in, regardless of whether or not these statements are legally binding.

IV. Conclusion

CAFA is still in its infancy, and there is still much to be learned and gaps will continue to be discovered. The above points are only some of the issues to be considered when attempting to remove a class action to federal court through CAFA. Always consult the rules in your circuit prior to determining whether removal is best for your client.

[1] Megan Niespodziany is a member of Dinsmore & Shohl LLP's litigation practice group in Lexington, Kentucky, where she focuses on commercial litigation and commercial disputes. Her experience includes litigation surrounding contract disputes, coal related litigation, banking litigation, and class actions. She is experienced in all aspects of the litigation process, including motion practice and discovery. She is a graduate of the University of Kentucky College of Law.

[2] See 28 U.S.C. §§ 1331-1332.

[3] 28 U.S.C. § 1332(d)(1)(B) (2011).

[4] See, e.g., *Zuniga v. Bernalillo Cty.*, 319 F.R.D. 640, 645 (D.N.M. 2016); Fed. R. Civ. P. 23.

[5] See, e.g., *West Virginia v. CVS Pharm., Inc.*, 646 F.3d 169, 172 (4th Cir. 2011) (refusing to exercise CAFA jurisdiction over an action brought under a West Virginia statute that regulated pharmacy practice and state consumer protection acts, neither of which involved "provisions providing for a typical class action, such as provisions addressing the adequacy of representation, numerosity, commonality, and typicality requirements").

[6] 28 U.S.C. § 1332(d)(2) (2011); see *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1021 (9th Cir. 2007).

[7] 28 U.S.C. § 1332(d)(2) (2011); see, e.g., *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 571 (2005) (superseded by statute on other grounds) (recognizing that CAFA "abrogates the rule against aggregating claims").

[8] See, e.g., *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 512 (7th Cir. 2006) (where plaintiff's complaint alleged a variety of types of damages, including compensatory, punitive, and attorney's fees).

[9] *Baker v. Equity Residential Mgmt., L.L.C.*, 996 F. Supp. 2d 1,7 (D. Mass. 2014) (explaining that an exception to the general rule of not including attorney's fees in calculation of damages is when allowed by state statute).

[10] *Bartnikowski v. NVR, Inc.*, 307 Fed. Appx. 730, 734 (4th Cir. 2009).

[11] *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 831 (7th Cir. 2011).

[12] *Ullman v. Safeway Ins. Co.*, 995 F. Supp. 2d 1196, 1215 (10th Cir. 2013).

[13] See, e.g., *Gentry v. Hyundai Motor Am., Inc.*, 2017 U.S. Dist. LEXIS 8609, *167 (W.D. Va. 2017); *Stell v. Gibco Motor Express, LLC*, 2016 U.S. Dist. LEXIS 61124, *4-7 (S.D. Ill. 2016).

[14] *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806-07 (7th Cir. 2010).

[15] *Id.*

[16] 28 U.S.C. § 1332(d)(10) (2011).

[17] 28 U.S.C. § 1332(d)(9) (2011).

[18] 28 U.S.C. § 1332(d)(4)(B) (2011).

[19] 28 U.S.C. § 1332(d)(4)(A) (2011).

[20] 28 U.S.C. § 1332(d)(3) (2011).

[21] 28 U.S.C. § 1332(d)(4)(B) (2011).

[22] 28 U.S.C. § 1332(d)(4)(A) (2011).

[23] 28 U.S.C. § 1332(d)(3) (2011).

[24] *Id.*

[25] *See, e.g.,* Marquez v. GNS & Assocs., 2017 U.S. Dist. LEXIS 101211, at *15 (S.D. Ala. June 27, 2017) (explaining that the 28 U.S.C. § 1445(c) removal bar for claims arising under worker's compensation applies with CAFA because the CAFA removal statute, § 1453, "does not cite § 1445(c), reference § 1445(c)'s subject matter as being repealed, or contain a general repealing clause."); *see also* Yalley v. Liberty Life Assur. Co., 2017 U.S. Dist. LEXIS 117217, *5-6 (N.D. Cal. 2017) (holding that the 28 U.S.C. § 1445(c) removal bar for claims arising under worker's compensation applies with CAFA because § 1445(c) is the more specific statute and is not therefore "implicitly controlled by CAFA's general statement of jurisdiction or of the process for removal").

[26] Passarella v. Ginn Co., 637 F. Supp. 2d 352, 355 (D.S.C. 2009).

[27] Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1348-49 (2013).

[28] *Compare* Freeman v. Blue Ridge Paper Prods., Inc., 551 F.3d 405, 407-09 (6th Cir. 2008) ("Our holding is limited to the situation where there is no colorable basis for dividing up the sought-for retrospective relief into separate time periods, other than to frustrate CAFA. . . . But where recovery is expanded, rather than limited, by virtue of splintering of lawsuits for no colorable reason, the total of such identical splintered lawsuits may be aggregated.") *with* Marple v. T-Mobile Central LLC, 639 F.3d 1109, 1110-11 (8th Cir. 2011) ("In light of the CAFA's detailed instructions for determining jurisdiction and aggregating class member claims within a class action, we think Congress would have similarly outlined how courts should aggregate between class actions had it intended for courts to do so.").

[29] *See, e.g.,* Boaz Legacy, L.P. v. Roberts, 628 F. App'x 318, 320 (5th Cir. 2016) (per curiam); Bell v. City of Kellogg, 922 F.2d 1418, 1425 (9th Cir. 1991); Maine Ass'n of Interdependent Neighborhoods v. Comm'r, Maine Dep't of Human Servs., 876 F.2d 1051, 1054-55 (1st Cir. 1989). In some instances, courts assert that the futility exception has been overruled, however this often appears *in dicta* and should be approached with caution. For example, some courts have said that *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72 (1991) overruled the futility exception, but this is not entirely correct. The Court in *Int'l Primate* explained that "uncertainties . . . preclude a finding that a remand would be futile" because "[w]hether NIH is correct in arguing that either it or one of its officers will be deemed an indispensable party in state court turns on a question of Louisiana law, and we decline to speculate on the proper result." *Id.* at 89. Although the Court reflects a preference for a literal reading of § 1447(c), the basis of its holding that remand is appropriate on the fact that state law would determine the outcome. *Id.*

[30] *E.g.,* Hill v. Vanderbilt Capital Advisors, LLC, 702 F.3d 1220, 1225-26 (10th Cir. 2012); Coyne v. Am. Tobacco Co., 183 F.3d 488, 496-97 (6th Cir. 1999); Univ. of S. Alabama v. Am. Tobacco Co., 168 F.3d 405, 410-11 (11th Cir. 1999); Bromwell v. Michigan Mut. Ins. Co., 115 F.3d 208, 213 (3d Cir. 1997); Roach v. West Virginia Reg'l Jail & Correctional Facility Auth., 74 F.3d 46, 49 (4th Cir. 1996); Smith v. Wisconsin Dep't of Agriculture, 23 F.3d 1134, 1139 (7th Cir. 1994). Confusion lies here, again, with *Int'l Primate*, as discussed. A lot of these cases rest upon *Int'l Primate*, but the holding in that case was based on the fact that remand was not, in fact, futile. *See supra*, note 29. It can be argued that the Court's assertion that the futility exception is not viable, if this assertion can even be said to exist, appears *in dicta*.

[31] 28 U.S.C. §§ 1453(c) (2011); 28 U.S.C. 1447(d) (2011).

[32] 28 U.S.C. § 1453(b) (2011).

Tags: [CAFA](#), [Class Actions](#), [Megan Niespodziany](#), [practice points](#)

Related Posts