

# Class Action Fairness Act

Taking Advantage of Recent Developments Re: Removal Jurisdiction

# Class Action Fairness Act

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1. Updates and practice pointers re: when to remove
2. Nuts & Bolts: Updates on CAFA requirements for the notice of removal
3. Risk of remand – the dreaded exceptions

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## 28 U.S.C. § 1446. Procedure for Removal of Civil Actions

### **(b) Requirements; Generally.-**

(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

...

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

# Triggers For CAFA Removal

## Two Triggers For 30-Day Removal Clocks:

- Initial Pleading
- “[A]mended pleading, motion, order or other paper”

## 30-Day Trigger – “Bright Line” Rule

- “[I]n CAFA cases, the removal clocks . . . are not triggered until the **plaintiff** serves the defendant with an initial pleading or other document that **explicitly** specifies the amount of monetary damages sought or sets forth facts from which an amount in controversy in excess of \$5,000,000 can be ascertained.” *Cutrone v. Mortgage Electronic Registration Systems, Inc.*, 749 F.3d 137 (2d Cir. 2014) (emphasis added).
- “Every circuit that has addressed th[is] question . . . has . . . adopted some form of a bright-line rule that . . . requires a specific, unequivocal statement **from the plaintiff** regarding the damages sought.” *Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 824 (7th Cir. 2013).
- “The plaintiffs’ email was not disqualified from being an ‘other paper’ by the fact that it was based on information provided by the defendant.” *Romulus v. CVS Pharmacy, Inc.*, 770 F.3d 67 (1st Cir. 2014).

## “Other paper” – Expansive Interpretation

- Plaintiff’s correspondence concerning damages can constitute “other paper” for purposes of Section 1446(b)(3). *Romulus v. CVS Pharmacy, Inc.*, 770 F.3d 67 (1st Cir. 2014) (upon first impression, applies expansive construction of the phrase).
- Settlement letter is an “other paper” and is “relevant evidence of the amount in controversy if it appears to reflect a reasonable estimate of the plaintiff’s claim.” *Babasa v. LensCrafters, Inc.*, 498 F.3d 972, 975 (9th Cir. 2007) (removal untimely where made more than 30 days after pre-mediation letter reflecting damages).

# Absent Expiration Of 30-Day Clocks

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## Third Basis For Removal:

- Defendant's Own Investigation



## Third Basis For Removal – Defendant’s Own Investigation

- “We . . . hold that where a plaintiff’s papers fail to trigger the removal clocks of 28 U.S.C. §§ 1446(b)(1) and (b)(3), a defendant may remove a case when, upon its own independent investigation, it determines that the case is removable; thus, **the 30–day removal periods of 28 U.S.C. §§ 1446(b)(1) and (b)(3) are not the exclusive authorizations for removal in CAFA cases.**” *Cutrone v. Mortgage Electronic Registration Systems, Inc.*, 749 F.3d 137 (2d Cir. 2014) (emphasis added).
- “[R]emoval clock never actually started to run” where plaintiff never served document affirmatively specifying damages figure, and removal based on defendant’s own investigation was timely. *Walker v. Trailer Transit, Inc.*, 727 F.3d 819 (7th Cir. 2013).
- “A CAFA case may be removed **at any time**, provided that neither of the two thirty-day periods under § 1446(b)(1) and (b)(3) has been triggered. See 28 U.S.C. 1453(b).” *Roth v. CHA Hollywood Med. Ctr.*, 720 F.3d 1121 (9th Cir. 2013) (emphasis added).

# Timing of Removal:

## Practice Pointers

- Start Early: Early internal investigation of class size and amount in controversy will not trigger removal deadline.
- May remove based on own investigation; *but*, consider downsides, *e.g.*, conceding ascertainability.
- Watch for “other papers” that may trigger removal clock (*e.g.*, settlement demand).

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# Grounds For Removal Under CAFA

Any defendant may remove a class action under CAFA if:

- (1) there are at least 100 class members; and
- (2) the combined claims of all plaintiffs or class members exceed \$5 million.

Any defendant may remove a mass action under CAFA if:

- (1) there are at least 100 plaintiffs; and
- (2) the combined claims of all plaintiffs exceed \$5 million.

But note: In mass actions the court has CAFA jurisdiction only as to plaintiffs who individually satisfy the traditional diversity threshold of \$75,000.

# CAFA Removal v. Traditional Diversity Removal

	TRADITIONAL REMOVAL	CAFA REMOVAL
DIVERSITY	Complete diversity required	May remove if “any member of a class of plaintiffs is a citizen of a State different from any defendant.”
AMOUNT IN CONTROVERSY	Total “matter in controversy” must exceed \$75,000	Total amount in controversy must exceed \$5,000,000; additionally, in “mass actions” jurisdiction applies only to those plaintiffs who individually satisfy the \$75,000 requirement
CONSENT OF PARTIES	Requires consent of all defendants	Does not require consent from other defendants
PRESUMPTION OF REMOVAL	On motion for remand, there is a presumption against finding removal jurisdiction	No anti-removal presumption

# Recent Cases Under CAFA

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- Determining the Amount in Controversy (“AIC”)
  - Measuring AIC where only declaratory relief is sought
  - Effect of allegation in complaint that named plaintiff will not seek damages in excess of \$5 million
  - Burden of proof for establishing AIC

## Measuring AIC where only declaratory relief sought

*South Florida Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312 (11th Cir. 2014)

- Where only declaratory relief is sought, CAFA jurisdiction is based on “the monetary value of the benefit that would flow to the plaintiff if the relief he is seeking were granted.”
- To make this determination “[a] court may rely on *evidence* put forward by the removing defendant, as well as *reasonable inferences and deductions* drawn from that evidence[.]”
- The *South Florida* court found persuasive an affidavit by the defendant attesting that if the plaintiff’s theory was correct, the defendant had underpaid the putative class by \$68 million. Even though the lawsuit itself would not result in money damages, the court inferred that a judgment in the named plaintiff’s favor would lead to future lawsuits by affected health care providers far in excess of the \$5 million CAFA threshold.

## Effect of damages affidavit on amount in controversy

### *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013)

- An individual plaintiff in a putative class action may not avoid removal under CAFA by attesting, in either the complaint or an accompanying declaration, that he will not seek damages in excess of \$5 million.
- This rule stems from the fact that “a plaintiff who files a proposed class action cannot legally bind members of the proposed class *before* the class is certified.” As a result, any pre-certification stipulation to cap damages is not binding and cannot be a basis for remand to state court.
- *Knowles* has been relied upon by numerous courts, including the 7<sup>th</sup> and 9<sup>th</sup> Circuits. *See, e.g., Johnson v. Pushpin Holdings, LLC*, 748 F.3d 769 (7th Cir. 2014) (Posner, J.); *Rodriguez v. AT & T Mobility Services LLC*, 728 F.3d 975 (9th Cir. 2013).



## Evidentiary requirements for establishing AIC

- In a 5-4 decision, the Supreme Court held that there is *no* requirement that a notice of removal under CAFA introduce evidence of the AIC. The removal statute requires only a “short and plain statement of the grounds for removal.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014).
- In ruling for the defendant, the Court observed that a notice of removal “need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.” Evidence is required under CAFA only “when the *plaintiff contests*, or the *court questions*, the defendant's allegation” concerning AIC—in which case *both* sides may produce evidence.
- Note, however, that the dissenting justices believed the question of whether evidence was required in the notice of removal was not properly before the Court, and thus questioned the propriety of the majority opinion.

# Notice of Removal:

## Practice Pointers

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- When removing an action for declaratory relief, prove up “the monetary value of the benefit that would flow to the plaintiff if the relief he is seeking were granted” by identifying the likely financial implications of an adverse judgment.
- Evaluate and consider challenging any representations by the plaintiff that seek to cap the AIC to avoid CAFA jurisdiction.
- Consider pros and cons of including detailed explanation of the proffered AIC in the notice of removal. On the one hand, you may stave off a motion for remand or an OSC re: jurisdiction. On the other hand, you may be arming your adversaries with free discovery and information to counter arguments in opposition to class certification.

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# Exceptions To CAFA Jurisdiction

- “Local Controversy” Exception
- “Home State” Exception
- “Discretionary” Exception

## “Local Controversy” Exception (28 U.S.C. § 1332(d)(4)(a))

- If the action is properly removed under CAFA, the plaintiff can move for remand on the basis that the Complaint involves a “local controversy.” Plaintiff bears the burden of proving that:
  - At least 2/3 of the class members are citizens of the state in which the plaintiff filed the action;
  - At least one defendant is a citizen of the state in which the plaintiff filed the action (i.e., a “local” defendant); and
  - The complaint seeks “significant relief” against a local defendant whose conduct forms a “significant basis” for the claims.
- Three-year rule: This exception can only be invoked if “during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants.”
- If the plaintiff carries his/her burden, remand is mandatory.

## “Home State” Exception (28 U.S.C. § 1332(d)(5))

- To obtain remand under the “home state” exception, Plaintiff bears the burden of proving that:
  - At least 2/3 of the class members are citizens of the state in which the plaintiff filed the action; and
  - The *primary* defendants are citizens of the state in which the plaintiff filed the action.
- If the plaintiff carries his/her burden, remand is mandatory.

## “Discretionary” Exception (28 U.S.C. § 1332(d)(3))

- The Court has discretion to remand if the plaintiff carries the burden of proving that:
  - Between 1/3 and 2/3 of the class members are citizens of the state in which the plaintiff filed the action; and
  - The *primary* defendants are citizens of the state in which the plaintiff filed the action.
- The Court considers six factors: (1) do the claims implicate interstate interest; (2) will the forum state’s law govern; (3) has the plaintiff pleaded to avoid federal jurisdiction; (4) is there a logical connection between the forum and the case; (5) what is the relative balance of in-state v. out-of-state class members (and how many other states have members); and (6) whether “other class action[s have] been filed asserting the same or similar factual allegations against any of the defendants” in the past three years.

## Plaintiffs Generally Must Provide Citizenship Evidence In Order To Obtain Remand (*Mondragon v. Capital One Auto Finance, et al.*, 736 F.3d 880 (9th Cir. 2013))

- Defendant removed an action to federal court under CAFA, and the plaintiff moved to remand under the “local controversy” exception. The class definition included only “consumers who purchased and registered cars in California” but did not restrict membership to California citizens. *Id.* at 883. Plaintiff relied on this definition in moving to remand and did not submit any extrinsic evidence.
- The district court granted the motion to remand, and Defendant sought permission to appeal under 28 U.S.C. § 1453(c). The Ninth Circuit agreed to hear the interlocutory appeal.
- The Ninth Circuit reversed the district court. “Joining the other three circuits that have considered the issue, [the Ninth Circuit] conclude[d] that there must ordinarily be at least some facts in evidence from which the district court may make findings regarding class members' citizenship for purposes of CAFA's local controversy exception.” *Id.* at 884 (citing *In re Sprint Nextel Corp.*, 593 F.3d 669, 673–76 (7th Cir. 2010); *Preston v. Tenet Healthsystem Mem'l Med. Center*, 485 F.3d 793, 798–802 (5th Cir. 2007); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1165–66 (11th Cir. 2006)).



## Courts Are Increasingly Unforgiving When Plaintiffs Fail To Produce Evidence And Blame Resource Constraints (*Myrick v. WellPoint, Inc.*, 764 F.3d 662 (7th Cir. 2014))

- The plaintiffs moved to remand under the “home state” exception on the basis of the language of particular insurance policies without presenting any extrinsic evidence on class member citizenship. The district court denied the motion to remand.
- The Seventh Circuit affirmed, making clear that parties cannot use cost or burden as an excuse for not submitting evidence on the citizenship of the putative class members. “Lawyers who launch class actions are not in a good position to complain about the expenses they entail; plaintiffs and their counsel must be prepared to meet them or be deemed inadequate representatives. . . . Law firms representing would-be class representatives have portfolios of suits. Some will be settled for considerable sums; others will fail. Paying the costs of failure is part of being in this business.” *Id.* at 665 & 667.

## Post-Removal Conduct Generally Will Not Affect Remand

- *Doyle v. OneWest Bank, FSB*, 764 F.3d 1097 (9th Cir. 2014) (concluding that analysis of citizenship of class members was not affected by filing of amended complaint in federal court because, “[f]or the purpose of considering the applicability of the exceptions to CAFA jurisdiction, the District Court should have determined the citizenship of the proposed plaintiff class based on Doyle's complaint ‘as of the date the case became removable’” (quoting *Mondragon*, 736 F.3d at 883)).
- *Cedar Lodge Plantation, LLC v. CSHV Fairway View I, LLC*, 768 F.3d 425 (5th Cir. 2014) (holding that adding a new local defendant after removal did not affect “local controversy” exception analysis).

# CAFA Exceptions:

## Practice Pointers

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- Orders granting remand under the CAFA exceptions may only be appealed interlocutorily under 28 U.S.C. § 1453(c).
- Unless the class definition includes only citizens of the forum state, the plaintiff must support a motion to remand with extrinsic evidence on class member citizenship.
- Post-removal amendments or changes of citizenship generally will not affect the motion to remand.
- Courts have not been receptive to arguments from plaintiffs that it is too costly to assemble citizenship evidence. Consider opposing motions to remand and appealing remand orders if the plaintiff does not present actual extrinsic evidence.

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Hunter R. Eley

Doll Amir & Eley

1888 Century Park East, Suite 1850

Los Angeles, CA 90067

