



Class Actions 101: Considerations For Removing a Case To— And Keeping It In—Federal Court Under the Class Action Fairness Act (CAFA)

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When a putative class action complaint hits their desk, among the first things that should cross a defense attorney's mind—whether in-house or outside counsel—is venue. For state-court cases specifically, “can this case be removed to federal court?” Removal is usually beneficial to defendants—though it can sometimes be better not to remove, and that question should be carefully analyzed.

Assuming removal is desirable, the next question is whether it is possible. In class actions, the most likely route is the Class Action Fairness Act (CAFA) (though counsel should not neglect traditional diversity and federal-question principles, which sometimes permit removal even if CAFA does not). But while CAFA has made removal easier in many cases, it is a complicated statute with several exceptions, strict time limits, and difficult procedural and substantive issues that must be addressed quickly. This post will provide a quick overview of CAFA removal.

Forum and Timing

With some exceptions (discussed below), CAFA vests federal courts with jurisdiction over class actions^[1] if (1) the amount in controversy exceeds \$5 million in the aggregate, and (2) there is minimal diversity between the parties.^[2] Such cases can be removed to the federal district court “for the district and division embracing the place where such action is pending.”^[3] That is the correct district court even if venue was improper in the state court in which the case was originally filed.^[4]

Removing defendants must act relatively quickly: typically, they must file a notice of removal within 30 days of service of summons and the complaint.^[5] Although the statute is somewhat ambiguous in this regard, the Supreme Court has held that a defendant is *not* required to remove until it is *formally served* with a summons, even if it earlier received a copy of the complaint through informal channels.^[6] *Each defendant* has 30 days to remove after service, even if a previously-served defendant failed to remove within its 30-day window.^[7]

Sometimes it is not clear from the face of a complaint that a case is removable. In that case, a/the defendant(s) may remove within 30 days after receiving “an amended pleading, motion, order or other paper from which it may first be ascertained that the case is ... removable.”^[8] Importantly, defendants are not obliged to independently investigate removability. They may wait until receiving a filing from which removability can be clearly ascertained.^[9]

Requirements for CAFA Jurisdiction

Aggregate Amount in Controversy Greater Than \$5 Million

Unlike traditional diversity cases, CAFA's \$5 million amount-in-controversy requirement can be met by aggregating the claims of all individual class members.^[10] That can include:

- Compensatory damages;^[11]
- Statutory damages;^[12]
- Punitive damages;^[13]
- Attorneys' fees authorized by statute or contract;^[14] or
- Equitable relief sought by the plaintiff.^[15]

As the party invoking federal jurisdiction, the removing defendant(s) have/has the burden of establishing the requirements of CAFA jurisdiction, including the amount in controversy, though it need only provide a "short and plain statement of the grounds for removal."^[16] Practically speaking, however, (the) defendant(s) should be ready to *prove* the amount in controversy by a preponderance of the evidence because, when a plaintiff contests it or the court questions it, "both sides [must] submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied."^[17]

Sometimes the value of the relief sought is not evident from the complaint. For example:

- Plaintiffs may seek equitable relief—such as an injunction requiring a change to a product label—that is difficult to value. In that case, you must determine how the relevant circuit ascertains the value of such relief. Although some circuits still assess the value of equitable relief from the plaintiff's perspective, a growing number have adopted an "either viewpoint" approach under which the injunctive relief may be valued from either the plaintiff or defendant's perspective.^[18]
- Plaintiffs may also disclaim relief above the amount in controversy, such as through a stipulation not to seek damages of more than \$5 million. Such stipulations, however, are not binding on absent class members and are thus often insufficient to defeat CAFA jurisdiction.^[19]
- Plaintiffs may not specifically plead the amount of damages sought. In such cases, defendants should consult with their counsel about whether there is a good-faith basis to allege that the damages at issue exceed \$5 million given the law governing damages and the known facts.

Defendants must think critically about contentions made in their removal papers about the amount in controversy, because those statements or evidence may be used against them later in the case. In one Ninth Circuit wage-and-hour case, for example, the appellate court reversed a district court's denial of class certification in part because the defendant's notice of removal calculated the amount in controversy using data from its "payroll and time-keeping database" that "would enable the court to accurately calculate damages and related penalties for each claim," which the court later found defeated the defendant's predominance arguments at the class certification stage.^[20]

Minimal Diversity

The second requirement for CAFA jurisdiction—minimal diversity—is met when *any* member of a plaintiff class is diverse from *any* defendant.^[21] Like traditional diversity jurisdiction, citizenship is determined as of the filing date of the operative complaint.^[22] Corporations and unincorporated associations are dual citizens of the states of their principal place of business and incorporation or organization.^[23]

Although minimal diversity is typically met in putative nationwide class actions, plaintiffs sometimes file single-state classes in forums in which the defendant is a citizen to defeat minimal diversity (or satisfy one of the geography-based exceptions to CAFA jurisdiction discussed below). In those instances, counsel should review the class definition and other allegations in the complaint carefully, as there may be grounds to argue that plaintiffs have not

alleged that every class member is a *citizen* of the defendant's home state (as opposed to residents, consumers, or the like).^[24]

Statutory Exceptions to CAFA Jurisdiction and How to Overcome Them

Even if the requirements for CAFA jurisdiction are met, Plaintiffs can rely on several statutory exceptions to CAFA jurisdiction to challenge removal of class actions. Importantly, it is the plaintiffs' burden to demonstrate the applicability of an exception by a preponderance of the evidence.^[25] In other words, once a defendant has plausibly alleged grounds for CAFA jurisdiction, the burden shifts to the plaintiff seeking remand to refute those allegations.

Geography-Based Exceptions

One category of exceptions prohibits removal based on the citizenship of the parties and their relationship to the forum state or the dispute. Although the exceptions go by varying and confusing names, we refer to them here as the mandatory home-state controversy exception, the discretionary home-state controversy exception, and the local controversy exception. The basic elements of each are summarized in the chart below:

GEOGRAPHY-BASED EXCEPTION	BASIC ELEMENTS OF EXCEPTION
Mandatory Home-State Controversy Exception ^[26]	Court <u>must</u> decline jurisdiction if: (1) <i>two-thirds or more</i> of the members of all proposed plaintiff classes in the aggregate and (2) the primary defendant(s) ... are citizens of the state where the class action was originally filed.
Discretionary Home-State Controversy Exception ^[27]	Court <u>may</u> decline jurisdiction if: (1) <i>greater than one-third but less than two-thirds</i> of the members of all proposed plaintiff classes in the aggregate and (2) the primary defendant(s) ... are citizens of the state in which the class action was originally filed, considering six enumerated factors.

**Local Controversy
Exception** ^[28]

Court must decline jurisdiction if:

- (1) *greater than two-thirds* of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the class action was originally filed;
- (2) at least one defendant is a defendant

“ (a) from whom significant relief is sought by members of the plaintiff class;

(b) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(c) who is a citizen of the state in which the action was originally filed; ”

(3) the principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the state in which the action was originally filed; and

(4) during the three-year period preceding the filing of the class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.

The issues that can arise in litigating the geography-based exceptions are too numerous to enumerate completely here. However, several issues that arise frequently are:

- **The citizenship of the requisite percentage of the class.** Because each geography-based exception depends in part on the citizenship of a percentage of the proposed class, issues of proving citizenship versus residence can arise in litigating geography-based exceptions.^[29] Several courts have held, for example, that citizenship cannot be established from class members’ addresses alone.^[30] The Eleventh Circuit has held that “generalized studies and surveys” and “census data” alone are insufficient to establish class members’ citizenship.^[31] That court has also held that any limitations to the class to citizens of a certain state must be made within the definition of the proposed class itself, and not other portions of the complaint.^[32]
- **The “primary defendants.”** All primary defendants must be citizens of the state where the action was filed for either the mandatory or discretionary home-state controversy exceptions to apply.^[33] What it means to be “primary” defendant, however, is subject to dispute. Several circuits have held that the primary defendants are those with “potential exposure to a significant portion of the class and [that] would sustain a substantial loss as compared to other defendants if found liable”;^[34] are “the ‘real target’ of the plaintiffs’ accusations,” considering whether plaintiffs seek to hold them directly as opposed to vicariously liable and the defendant’s potential loss relative to other defendants;^[35] or are “the ‘real target’ of the litigation” considering “the controversy’s ‘primary thrust.’”^[36]
- **Prior similar class actions.** Two circuit courts have held that the requirement in the local controversy exception that “no other class action ... asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons” have been filed in the preceding three years does not require the two cases to assert “the same legal theories or causes of action,” but only “the same or similar factual allegations.”^[37] The Seventh Circuit recently took it a step further, holding that the local controversy exception does not apply even if the alleged “misconduct occurred in two different states” and the plaintiffs asserted violations of different

states' laws.^[38] Nor does the phrase “same or other persons” require “some connection” between the plaintiffs in the two class actions.^[39] In the Seventh Circuit at least, the “implications” of these holdings are clear: “A series of class actions making similar factual allegations against a defendant in different states can fall outside the exception, allowing removal and perhaps making possible pretrial coordination under the federal multidistrict litigation process.”^[40]

Finally, and importantly for defendants, courts have held that the geography-based exceptions are not jurisdictional and thus can be waived by plaintiffs if not raised within a reasonable time.^[41]

Party-Based Exceptions

Although typically less relevant to private litigants than the geography-based exceptions, the statute also contains several exceptions to CAFA jurisdiction based on the identity or number of parties in the case, including for actions in which:

- The number of members of all proposed plaintiff classes in the aggregate is less than 100; or
- The primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.^[42]

Claims-Based Exceptions

Finally, the statute includes several claims-based exceptions related to securities litigation and disputes among business entities and their officers, directors, or shareholders. Those provisions exempt from CAFA jurisdiction class actions that *solely involve* a claim:

- Concerning a covered security as defined under certain enumerated provisions of the federal securities laws;
- That relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or
- That relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security.^[43]

Takeaway

Although CAFA helps defendants remove class actions filed in state court, it contains complicated provisions that can lead to hard-fought pretrial disputes and traps for the unwary. Defense counsel faced with a new class-action complaint should carefully—and quickly—analyze the removability of the case, the evidence potentially required to support removal, and the applicability of the exceptions to CAFA jurisdiction.

This article is part of Winston’s ongoing **Class Actions 101 series**, a collection of reference pieces for those in need of an introduction (or a refresher) on navigating the intricate waters of a class action lawsuit. Additional installments will explore plaintiff’s depositions, class settlements, and more.

^[1] CAFA defines a “class action” to include “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,” whether certified or proposed. 28 U.S.C. § 1332(d)(1) (B), (d)(8).

^[2] 28 U.S.C. § 1332(d)(2), (d)(6).

^[3] *Id.* § 1441(a).

¹⁴¹ *PT United Can Co. Ltd. v. Crown Cork & Seal Co.*, 138 F.3d 65, 72 (2d Cir. 1998). However, once removed, either party can move to transfer or consolidate the case in another federal under other federal statutes.

¹⁴² 28 U.S.C. § 1446(b)(1) (requiring notice of removal to be filed within the shorter of: (a) “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” (b) “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.”).

¹⁴³ *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48, 354-56 (1999) (“[W]e hold that a named defendant’s time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, ‘through service or otherwise,’ after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service.”).

¹⁴⁴ 28 U.S.C. § 1446(b)(2)(B), (b)(2)(C).

¹⁴⁵ *Id.* § 1446(b)(3). Unlike traditional diversity removal, where a case may not be removed more than a year after filing except in limited circumstances, there is no outer time limit on removal under CAFA so long as the 30-day requirement is met.

¹⁴⁶ See *Portnoff v. Janssen Pharm., Inc.*, 237 F. Supp. 3d 253, 260-61 (E.D. Pa. 2017) (collecting cases).

¹⁴⁷ 28 U.S.C. § 1332(d)(6)

¹⁴⁸ See, e.g., *Schutte v. Ciox Health, LLC*, 28 F.4th 850, 856 (7th Cir. 2022).

¹⁴⁹ See, e.g., *Hammond v. Stamps.com, Inc.*, 844 F.3d 909, 911, 912 (10th Cir. 2016).

¹⁵⁰ See, e.g., *Schutte*, 28 F.4th at 855-56; *Greene v. Harley-Davidson, Inc.*, 965 F.3d 767, 771-73 (9th Cir. 2020).

¹⁵¹ See, e.g., *Fritsch v. Swift Transportation Co. of Arizona, LLC*, 899 F.3d 785, 793-94 (9th Cir. 2018).

¹⁵² *Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333, 347 (1977).

¹⁵³ *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 87 (2014) (quoting 28 U.S.C. § 1446(a)).

¹⁵⁴ *Id.* at 88.

¹⁵⁵ See, e.g., *JTH Tax, Inc. v. Frasier*, 624 F.3d 635, 639 (4th Cir. 2010); *Cleveland Hous. Renewal Project v. Deutsche Bank Tr. Co.*, 621 F.3d 554, 560 (6th Cir. 2010); *Golin v. Neptune Mgmt. Corp.*, 704 F. App’x 591, 595 (7th Cir. 2017); *Corral v. Select Portfolio Servicing, Inc.*, 878 F.3d 770, 775 (9th Cir. 2017); *Lovell v. State Farm Mut. Auto. Ins. Co.*, 466 F.3d 893, 897 (10th Cir. 2006); *Smith v. Washington*, 593 F.2d 1097, 1099 (D.C. Cir. 1978).

¹⁵⁶ *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 592-93 (2013); *Simring v. GreenSky, LLC*, 2022 WL 894206, at*3 (11th Cir. Mar. 28, 2022).

¹⁵⁷ *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013).

¹⁵⁸ 28 U.S.C. § 1332(d)(2)(A)-(C).

¹⁵⁹ *Id.* § 1332(d)(7).

¹⁶⁰ *Id.* § 1332(c)(1), (d)(10).

¹⁶¹ See, e.g., *Hargett v. RevClaims, LLC*, 854 F.3d 962, 965 (8th Cir. 2017) (holding that “citizens” are different than “residents” with regards to CAFA and that a class comprised of Missouri residents may be minimally diverse from a Missouri defendant in a way a class of Missouri citizens are not).

¹⁶² See, e.g., *Schutte*, 28 F.4th at 858; *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 619 (7th Cir. 2012).

¹⁶³ 28 U.S.C. § 1332(d)(4)(B).

^[27] *Id.* § 1332(d)(3).

^[28] *Id.* § 1332(d)(4)(A).

^[29] See *Hargett*, 854 F.3d at 966 (reversing district court order remanding case based on local controversy exception because plaintiff had only alleged residency of class members).

^[30] See *Hood v. Gilster-Mary Lee Corp.*, 785 F.3d 263, 265 (8th Cir. 2015) (reversing the district court who relied on last-known addresses to conclude that over two-thirds of the potential class members were Missouri citizens); *In re Sprint Nextel Corp.*, 593 F.3d 669, 674 (7th Cir. 2010) (“[A] court may not draw conclusions about the citizenship of class members based on things like their phone numbers and mailing addresses.”).

^[31] *Smith v. Marcus & Millichap, Inc.*, 991 F.3d 1145, 1157 (11th Cir. 2021).

^[32] *Simring*, 2022 WL 894206, at *4.

^[33] See, e.g., *Smith v. Marcus & Millichap, Inc.*, 991 F.3d 1145, 1162 (11th Cir. 2021).

^[34] *Id.* at 1162 (quoting *Hunter v. City of Montgomery, Alabama*, 859 F.3d 1329 (11th Cir. 2017)).

^[35] *Vodenichar v. Halcon Energy Properties, Inc.*, 733 F.3d 497, 505 (3d Cir. 2013).

^[36] *Madison v. ADT, L.L.C.*, 11 F.4th 325, 328-29 (5th Cir. 2021).

^[37] *Schutte*, 28 F.4th at 859; *Dutcher v. Matheson*, 840 F.3d 1183, 1191-92 (10th Cir. 2016).

^[38] *Schutte*, 28 F.4th at 860-62.

^[39] *Id.* at 862-63.

^[40] *Id.* at 863.

^[41] See, e.g., *Gold v. New York Life Ins. Co.*, 730 F.3d 137, 142 (2d Cir. 2013).

^[42] 28 U.S.C. § 1332(d)(5).

^[43] *Id.* § 1332(d)(9).

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