CLASS ACTION FAIRNESS ACT OF 2005 UPDATE: REMOVING CASES TO FEDERAL COURT

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I. General Overview of CAFA Provisions

The Class Action Fairness Act of 2005 ("CAFA") expands jurisdiction and removal for diversity class actions, allowing most large class actions to be filed in, or removed to, federal court.

A. Jurisdiction

Under traditional jurisdictional rules for diversity class actions: 1) joinder of all class members as individual parties must be impracticable;[1] 2) all class members and all defendants must be completely diverse; and 3) the amount in controversy must exceed $75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a).

Under CAFA: 1) there must be more than 100 class members; 2) at least one class member must be diverse from at least one defendant; and 3) the aggregate amount in controversy must exceed $5 million, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2), (d)(5)(B), d(6).

B. Removal

Under traditional removal rules for diversity class actions: 1) only defendants not citizens of the state in which the action was filed may remove to federal court;[2] 2) all defendants must consent to the removal;[3] 3) defendants must remove within 30 days of receiving a removable pleading and not beyond one year of the commencement of the action;[4] 4) removal must be to the federal district embracing the state where the action was originally filed;[5] and 5) parties may not seek appellate review of district court decisions to remand cases to state courts.[6]

Under CAFA, where the jurisdictional rules are met, the rules above apply, except: 1) any defendant can remove; 2) the consent of all the defendants is not required; 3) there is no one year time limit on removal; and 4) parties may seek appellate review of district court decisions to remand to state court, if sought within seven days of entry of order. 28 U.S.C. § 1453(b), (c).

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[1] *See* FED R. CIV. P. 23.

[2] *See* 28 U.S.C. § 1441(b).

[3] *See, e.g., Brierly v. Alusuisse Flexible Packaging, Inc*., 184 F.3d 527, 531-32 n.1 (6th Cir. 1999).

[4] *See* 28 U.S.C. § 1446(b).

[5] *See* 28 U.S.C. § 1441(a).

[6] *See* 28 U.S.C. § 1447(d).

II. Amount In Controversy Under CAFA

A. Burden of Proof

Despite several District Court rulings to the contrary,[7] under CAFA, the Second, Third, Fourth, Sixth, Seventh, Ninth, Eleventh and D.C. Circuits follow the settled practice of placing the burden of proving the amount in controversy requirement on the removing party.[8] Where the plaintiff fails to plead a specific amount of damages, the majority of courts hold that the removing defendant must prove by a "preponderance of the evidence" that the amount in controversy exceeds the jurisdictional requirement.[9] Noting that a plaintiff has the right to limit its monetary claims to avoid the amount in controversy threshold, several courts have held that if a plaintiff claims, in good faith, that its damages fall below the amount in controversy requirement, the removing defendant bears the burden to "prove to a legal certainty" that the amount in controversy exceeds $5 million.[10] Like ordinary diversity cases, the courts have established that, where the underlying statute authorizes an award of attorney's fees and punitive damages, these may be included in the amount in controversy under CAFA.[11] In an action for declaratory or injunctive relief, the amount in controversy is measured by the value of the object of the litigation.[12] According to the Senate Judiciary Committee Report on CAFA, the $5 million amount in controversy requirement may be established "either from the viewpoint of the plaintiff or the viewpoint of the defendant, and regardless of the type of relief sought (e.g., damages, injunctive relief, or declaratory relief)."[13] If the courts cannot discern from the face of the complaint that the amount in controversy has been met, they look to the notice of removal and require specific evidence of the amount in controversy.

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[7] *See, e.g., Dinkel v. Gen. Motors Corp.*, 400 F. Supp. 2d 289 (D. Me. 2005).

[8] *See, e.g., DiTolla v. Doral Dental IPA of N.Y., Inc.*, 469 F.3d 271 (2d Cir. 2006); *Morgan v. Ga*y, 471 F.3d 469 (3d Cir. 2006); *Strawn v. AT&T Mobility LLC*, 530 F.3d 293 (4th Cir. 2008); *Smith v. Nationwide Prop. and Cas. Ins. Co.*, 505 F.3d 401 (6th Cir. 2007); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005); *Lowdermilk v. United States Bank Nat'l Ass'n*, 479 F.3d 994 (9th Cir. 2007); *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006); *Wexler v. United Air Lines*, 496 F. Supp. 2d 150 (D. D.C. 2007).

[9] *See, e.g., DiTolla v. Doral Dental IPA of N.Y., Inc.*, 469 F.3d 271 (2d Cir. 2006); *Morgan v. Ga*y, 471 F.3d 469 (3d Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005); *Lowdermilk v. United States Bank Nat'l Ass'n.*, 479 F.3d 994 (9th Cir. 2007); *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006).

[10] *See e.g., Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005); *Morgan v. Ga*y, 471 F.3d 469 (3d Cir. 2006); *Lowdermilk v. United States Bank Nat'l Ass'n.*, 479 F.3d 994 (9th Cir. 2007).

[11] *See, e.g., Lowdermilk v. United States Bank Nat'l Ass'n*, 479 F.3d 994 (9th Cir. 2007); *Nowak v. Innovative Aftermarket Sys., L.P.*, No 4:06CV01622 (ERW), 2007 WL 2454118 (E.D. Mo. Aug. 23, 2007).

[12] *See, e.g., DiTolla v. Doral Dental IPA of N.Y., LLC*, 469 F.3d 271, 276 (2d Cir. 2006) (citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977)).

[13] S. Rep. No. 109-14, at 42 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 40.

B. Cases

1. *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006)

The plaintiff brought a putative class action in Florida state court against the defendant, the manufacturer of a range oven, alleging a defect in the door latch assembly and asserting claims for negligence, breach of express warranty, and violation of the state unfair trade practices statute. *Id.* at 1324-25. The defendant removed the action to the United States District Court for the Southern District of Florida, pursuant to CAFA. *Id.* The District Court granted the plaintiff's motion for remand because the amount in controversy requirement had not been met. *Id.* at 1325. The defendant appealed the ruling to the United States Court of Appeals for the Eleventh Circuit. *Id.* at 1325-26. The Eleventh Circuit affirmed, holding that the removing defendant had failed to prove "by a preponderance of the evidence" that the amount in controversy exceeded $5 million. *Id.* at 1332.

Specifically, the Court analyzed the defendant's notice of removal, which relied on the affidavit of the defendant's employee, and found that the affidavit was insufficient. *Id.* at 1331. The Court noted that neither the employee's affidavit, nor her deposition testimony offered an explanation for the total value of the range ovens. *Id.* at 1331. The Court stated: "As [the employee]'s deposition reveals, that figure is merely a guess based on (1) [the defendant]'s receipt of a total of 2,943 product registrations from Florida consumers for the range/oven models at issue, and (2) [the defendant]'s estimate that, nationwide, only about 43.6% of the units it manufactures are registered by consumers. Even if we assume that this kind of estimation is reliable, it presumes that the rate of registration by Florida consumers closely parallels [the defendant]'s national average." *Id.* at 1332. The Court concluded that "great uncertainty" remained about the amount in controversy. *Id.*

2. *Nowak v. Innovative Aftermarket Sys., L.P.*, No. 4:06CV01622 (ERW), 2007 WL 2454118 (E.D. Mo. Aug. 23, 2007)

The plaintiffs filed a putative class action in Missouri state court against the defendant, a guaranteed automobile contract dealer, alleging violation of the state merchandising practices statute for denying the plaintiffs payment in accordance with their contracts, under which defendant agreed to release automobile purchasers from liability for any outstanding deficiency on their retail installment contract, loan, or lease, in the event the automobile was totaled, stolen or otherwise deemed a complete loss. *Id.* at *1. The defendant removed the action to the United States District Court for the Eastern District of Missouri, pursuant to CAFA. *Id.* The plaintiffs filed a motion to remand the action back to state court, based in part, on the defendant's alleged failure to establish the amount in controversy requirement of $5 million. *Id.* The District Court remanded the case because the defendant "failed to prove by a preponderance of the evidence, or with legal certainty," that the amount in controversy met CAFA's requirements. *Id.* at *6.

In support of its claim that the amount in controversy had been satisfied, the defendant submitted calculations based on the allegations in the plaintiffs' petition. *Id.* *3. The Court held, however, that the calculations were "based on conjecture," "mere speculation," and lacked "the detail required," because the defendant "erroneously relie[d] on the class representatives'

average claim amount to calculate the other class members' actual damage amount" and merely asserted that the number of class members was in the "hundreds, if not thousands," without evidence of the actual number. *Id.* at *5. The Court also held that the same shortcomings applied to the defendant's affidavit, noting that the affidavit provided no evidence in support of its "good faith estimate of the financial impact relating to GAP waiver contracts currently in force and contracts that may be sold over the next three years." *Id.* Regarding attorney's fees and punitive damages, the Court noted that the defendant "provide[d] no evidence in support of its calculation and relie[d] solely on prior dealings with [p]laintiffs' counsel." *Id.* at *6. Without sufficient evidence of actual damages, the Court could not determine the amount of attorney's fees and punitive damages in controversy. *Id.*

3. *Morgan v. Gay*, 471 F.3d 469 (3d Cir. 2006)

The plaintiff filed a putative class action in New Jersey state court seeking trebled compensatory and punitive damages, interest, attorney fees, and other relief against the defendants, manufacturers of a skin cream. *Id.* at 471. The defendants removed the action to the District Court for the District of New Jersey, pursuant to CAFA. *Id.* The District Court granted the plaintiff's motion for remand on the grounds that the defendants did not prove that the amount in controversy exceeded $5 million. *Id.* The defendants appealed to the United States Court of Appeals for the Third Circuit and the Third Circuit affirmed, holding that the defendants failed to carry their burden to prove to a "legal certainty" that the complaint exceeded the amount in controversy requirement, because the defendants relied on three inconclusive assumptions. *Id.* at 476.

Specifically, the Court stated that the defendants concluded that the plaintiff would seek an award of punitive damages, but failed to prove what kind of punitive damages could possibly be awarded when no harmful side effects were being alleged. *Id.* at 475. The Court also noted that the affidavit of the chief financial officer of one of the defendants did not provide information about how much profit from New Jersey sales of the skin cream would be available for disgorgement. *Id.* Finally, the Court stated that, with respect to compensatory damages, the defendants did not provide "statistical sales information" regarding the amount of skin cream sold in New Jersey and did not state the actual price paid by class members. *Id.* at 475-76.

4. *Lowdermilk v. United States Bank Nat'l Ass'n*, 479 F.3d 994 (9th Cir. 2007)

The plaintiff brought a putative class action in Oregon state court against the defendant, a former employer, alleging violations of state wage laws. *Id.* at 996. The defendant removed the action to the United States District Court for the District of Oregon, pursuant to CAFA, but the District Court granted the plaintiff's motion to remand. *Id.* The defendant appealed the ruling to the United States Court of Appeals for the Ninth Circuit. *Id.* The Ninth Circuit affirmed on the grounds that the plaintiff alleged damages of less than $5 million in good faith and defendant "failed to prove with legal certainty that the amount in controversy [met] CAFA's jurisdictional requirements." *Id.* at 1002.

The Court analyzed the affidavit of a human resources employee of the defendant, but found that the calculations therein were insufficient and unreliable. *Id.* at 1001. The Court noted that while the affidavit stated how many employees were terminated in a given time period, it did not specify how many were hourly employees that would qualify as class members. *Id.* In addition, the Court noted that the defendant assumed that all class members would be entitled to the maximum amount of damages, but did not provide evidence in support. *Id.* Ultimately, the Court concluded that the defendant could not meet the legal certainty standard because it had left the Court to speculate as to the size of the class and amount of damages. *Id.* at 1002. Importantly, the Court noted that if the defendant, the only party with access to the employment records, could not accurately approximate the class size and hourly wages, there was no reason that the plaintiff should have been able to plead its case with more specificity. *Id.*

5. *Bartnikowski v. NVR, Inc.*, No. 1:07CV00768, 2008 WL 2512839 (M.D. N.C. June 19, 2008)

The plaintiff brought a class action in North Carolina state court against the defendant, an employer, alleging that the defendant failed to pay time-and-one-half of the regular rate of compensation for hours worked exceeding 40 in one week. *Id.* at *1. The defendant removed the action to the United States District Court for the Middle District of North Carolina, pursuant to CAFA. *Id.* The plaintiff brought a motion to remand, which was granted because the defendant failed to show, by a preponderance of the evidence, that the amount in controversy exceeded $ 5 million. *Id.* at *6.

In support of its claim that the amount in controversy requirement was met, the defendant relied on an affidavit from its Payroll Director, which stated the average annual amount of compensation paid to North Carolina employees. *Id.* at *4-5. The defendant used those figures to calculate the average rate of potential overtime compensation. *Id.* The defendant "then [made] the assumption, without explanation or evidentiary support, that [employees] working in North Carolina during those time periods are claiming to have worked an average of 5 hours of overtime per week." *Id.* at 4. The court went on to state that there was no evidence available to estimate the amount in controversy, "[o]ther than defendant's speculative calculations." *Id.* at *6.

6. *Rippee v. Boston Market Corp.*, 408 F. Supp. 2d 982 (S.D. Cal. 2005)

The plaintiff brought a putative class action in California state court against her employer-defendant alleging wage claims under the California Labor Code. *Id.* at 982. The defendant removed the action to the United States District Court for the Southern District of California. *Id.* at 983. The Court issued an Order to Show Cause why the case should not be remanded for lack of jurisdiction on the grounds that the $5 million amount in controversy requirement had not been established. *Id.* To prove that the amount in controversy was not met, the plaintiff requested that a class survey be conducted, including the last known address and telephone number of all members of the proposed class. *Id.* at 984.

The Court cited the Senate Judiciary Committee's Report on CAFA, which cautioned that jurisdictional discovery should be limited in scope and precisely focused. *Id.* at 985 (citing S.

Rep. No. 109-14, at 44). The Court denied the plaintiff's request, holding that the amount of overtime claims in controversy could be calculated without a class survey, using instead, a combination of the defendant's own numbers (previously provided) and the plaintiff's allegations. *Id.* at 986. The Court stated that "[a]llowing a class survey during the period of expedited discovery, while the Court's jurisdiction remains unsettled, would be contrary to the principle of limited discovery as provided under existing case law and the Senate Judiciary Committee Report on CAFA." *Id.* The Court further stated that because the defendant bears the burden of demonstrating that the amount in controversy exceeds $5 million, it is the defendant and not the plaintiff that must produce the requisite evidence. *Id.* at 987. In addition, the Court stated that "permitting a class survey now would require the consideration of a host of disputed issues including, *inter alia*, attorney-client privilege issues, issues concerning whether Defendant is entitled to vet the survey prior to its issuance, and statistical analysis issues, which are clearly not contemplated by a limited and expedited discovery period." *Id.*

III. Exceptions to CAFA

CAFA reserves for the state courts five types of class actions, even though they would otherwise meet the CAFA requirements for removal to federal court:

A. Local Controversies

Federal courts must decline to exercise jurisdiction when: 1) more than 2/3 of the class members are citizens of the forum state; and 2) either the primary defendant is a citizen of the forum state or a significant defendant is a citizen of the forum state, the principal injuries occurred in the forum state, and no class action has been filed regarding the same issue in the prior 3 years. 28 U.S.C. § 1332(d)(4)(A).

B. Defendant's Home State

Federal courts *must* decline to exercise jurisdiction when: 1) more than 2/3 of the class members are citizens of the forum state; and 2) the primary defendants are citizens of the forum state. 28 U.S.C. § 1332(d)(4)(b).

Federal courts *may* decline to exercise jurisdiction when: 1) greater than 1/3 but less than 2/3 of the class members are citizens of the forum state; 2) the primary defendant is a citizen of the forum states; and 3) in the interests of justice and looking to the totality of the circumstances, the action is best suited to state court. 28 U.S.C. § 1332(d)(3).

C. Securities' Cases

CAFA does not apply to class actions solely involving claims: 1) that concern a covered security as defined by federal securities laws; or 2) that relate to the internal affairs or governance of a corporation that arise under the laws of the state in which the corporation is incorporated or organized; or 3) that concern fiduciary duties created by securities laws. 28 U.S.C. § 1332(d)(9).

D. Sovereign Immunity

CAFA does not grant federal courts jurisdiction in cases against states, state officials, or other governmental entities if the state would otherwise have the benefit of sovereign immunity. 28 U.S.C. § 1332(d)(5).

IV. Remand Based On Exceptions to CAFA

A. Burden of Proof and Discovery Requirements

All Circuit Courts that have addressed the issue have held that once federal jurisdiction has been established, the party opposing jurisdiction bears the burden of showing that one of the exceptions apply, and therefore, remand is appropriate.[14] The Circuit Courts have relied on the "longstanding § 1441(a) doctrine placing the burden on plaintiff to show exceptions to jurisdiction."[15] They have further relied on the Senate Judiciary Committee Report on CAFA's unambiguous statement that the burden of providing an exception to CAFA should lie with the plaintiff objecting to federal jurisdiction:

> [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).[16]

With respect to the party seeking remand conducting jurisdictional discovery to prove that the elements of the CAFA exceptions are met, the Senate Judiciary Committee Report states:

> Allowing substantial, burdensome discovery on jurisdictional issues would be contrary to the intent of these provisions to encourage the exercise of federal jurisdiction over class actions. For example, in assessing the citizenship of the various members of a proposed class, it would in most cases be improper for the named plaintiffs to request that the defendant produce a list of all class members (or detailed information that would allow the construction of such a list), in many instances a massive, burdensome undertaking that will not be necessary unless a proposed class is certified. Less burdensome means (e.g., factual stipulations) should be used in creating a record upon which the jurisdictional determinations can be made.[17]

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[14] *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 804 (5th Cir. 2007); *Hart v. FedEx Ground Package Sys.*, 457 F.3d 675 (7th Cir. 2006); *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018 (9th Cir. 2007); *Evans v. Walter Indus.*, 449 F.3d 1159 (11th Cir. 2006), *reh'g and reh'g en banc denied*, 180 Fed. Appx. 146 (11th Cir. 2006).

[15] *Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 546 (5th Cir. 2006) (citations omitted).

[16] S. Rep. No. 109-14, at 43; cited in *Hart*, 457 F.3d at 681, *Frazier* 455 F.3d at 545 n.5, *Evans* 449 F.3d at 1163.

[17] S. Rep. No. 109-14, at 44.

Notwithstanding this legislative history, lower courts have adopted different positions as to whether and to what extent defendants may be compelled to participate in discovery and produce information that plaintiffs could use in seeking remand based on the exceptions to CAFA.

B. Cases

1. *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 463 F. Supp. 2d 583 (E.D. La. 2006)

Patients and relatives of deceased patients filed a putative class action in Louisiana state court against a hospital and operator of an acute care unit alleging negligence and intentional misconduct, reverse patient dumping under the Emergency Medical Treatment and Active Labor Act ("EMTALA"), and involuntary euthanization. *Id.* at 583. After the defendants removed the case to the United States District Court for the Eastern District of Louisiana pursuant to CAFA, the plaintiff moved to remand on the grounds that that the "local controversy" and "home state controversy" exceptions to CAFA were met. *Id.* at 592-93 (citing 28 U.S.C. § 1332(d)(4)(A) and (B)).

When determining the citizenship of the plaintiffs, the Court looks to citizenship at the time the complaint or amended complaint was filed, or if the case stated by the initial pleading is not subject to federal jurisdiction, citizenship is determined as of the date of service by plaintiffs of an amended pleading, motion, or other paper indicating the existence of federal jurisdiction. *Id.* at 592 (citing 28 U.S.C. § 1332(d)(7)). For purposes of diversity, citizenship has the same meaning as domicile. *Id.* Residence establishes *prima facie* indication of domicile, but it must be accompanied by an intent to remain in that state. *Id.*

The Court found that the information required to show whether the patients, their relatives and other beneficiaries were citizens of Louisiana was most likely in the hands of the defendants and, therefore, ordered the defendants to produce this information. *Id.* at 592-93. Specifically, the Court ordered the hospital to provide the addresses and phone numbers of those patients who died at the hospital within the relevant time period and the phone numbers of the patients' emergency contacts listed on their medical forms. *Id.* at 593. The Court also ordered the hospital to provide the percentage of patients in the entire hospital with Louisiana addresses. *Id.*

The Court found persuasive evidence that only two out of 35 patients that died during the relevant time period provided addresses outside the state of Louisiana. *Id.* In addition, out of 256 patients hospitalized during the relevant time period, only seven indicated that they were residents of states other than Louisiana. *Id.* Although there was evidence that a large number of proposed class members currently resided outside Louisiana, every single one of these individuals indicated that they were forced to evacuate due to Hurricane Katrina, but intended to return. *Id.*

The Court found that the "local controversy" and "home state" exceptions applied because the evidence showed that more than two-thirds of the proposed class members were citizens of Louisiana, both defendants were citizens of the state, and the injuries took place in Louisiana. *Id.* at 594. The Court, therefore, remanded the case to state court. *Id.*

2. *Martin v. Lafon Nursing Facility of the Holy Family, Inc.*, No. 05-5108, 2007 WL 162813 (E.D. La. Jan. 18, 2007)

The plaintiffs brought a putative class action against a nursing home alleging that the nursing home committed negligence in failing to take necessary precautions to protect residents of the home from Hurricane Katrina's effects in Louisiana state court. The defendant removed the action to the United States District Court for the Eastern District of Louisiana under CAFA, and the plaintiff thereafter filed a motion to remand to Louisiana state court pursuant to CAFA's local controversy exception.

The plaintiff contended that more than two-thirds of the members of the putative class were Louisiana citizens, but offered no support for this proposition. *Id.* at *2. The plaintiff argued, instead, that the defendant was in possession of information regarding the citizenship and/or domicile of the members of the putative class and should be forced to produce it. *Id.* The Court noted that the Court in *Preston* ordered the defendant to produce information regarding citizenship, but nonetheless declined to do so in the present case. *Id.* at *3. The Court noted, however, that the defendant had already indicated that the local controversy exception may not be met because many of the nursing home residents, family members, and heirs were no longer living in Louisiana. *Id.* The Court held that it "finds no need . . . to require the production of any information from defendant or expedite the discovery process that the parties will undoubtedly conduct. Plaintiff is free to move for remand if and when the appropriate information relevant to subject matter jurisdiction becomes available." *Id.* The Court found that, based on the record before it, the plaintiff could not establish the elements of CAFA's "local controversy" exception and denied the plaintiff's motion for remand. *Id.*

3. *Hirschbach v. NVE Bank*, 496 F. Supp. 2d 451 (D. N.J. 2007)

Holders of state bank's certificate of deposits brought a putative class action in New Jersey state court, claiming that the defendant-bank fraudulently applied lower than market interest rates to renewed certifications, in violation of the New Jersey Consumer Fraud Act. The defendant removed the case to the United States District Court for the District of New Jersey and the Court *sua sponte* issued an Order to Show Cause why the suit should not be remanded.

The Court noted that Congress contemplated that in making jurisdictional determinations under CAFA, "'a federal court may have to engage in some fact-finding, not unlike what is necessitated by the existing jurisdictional statutes.'" *Id.* at 460 (quoting S. Rep. No. 109-14, at 44). The Court further noted that while some jurisdictional discovery may be necessary, this determination "'should be made largely on the basis of readily available information.'" *Id.* Nonetheless, the Court made specific requests for information. *Id.*

After collecting documentation from the parties, the Court held that the information in the amended complaint and subsequent submissions indicated that the "home state" exception applied. *Id.* The Court found persuasive that the defendant-bank was chartered and licensed in New Jersey and only operated in New Jersey; and less than 30% of the bank's customers with CD's dating back to December 31, 2004 used account mailing addresses outside of New Jersey. *Id.*

The Court stated that it recognized "the limitations in the information available to it about the citizenship of the entire plaintiff class and conclud[ed] that it need not base its decision to remand this action on such a precise determination regarding the composition of the putative class." *Id.* at 461. The Court stated that it "logically follows from the facts available about the defendant bank and its CD customers that no fewer than one-third of the putative class are domiciled in New Jersey." *Id.* The Court concluded that, under section 1332(d)(3), it had the discretion to decline to exercise jurisdiction based on the "home state controversy" exception and remanded the case to state court. *Id.*

4. *Schwartz v. Comcast Corp.*, No. Civ.A. 05-2340, 2005 WL 1799414 (E.D. Pa. Jul. 28, 2005) and *Schwartz v. Comcast Corp.*, No. Civ.A. 05-2340, 2006 WL 487915 (E.D. Pa. Feb. 28, 2006)

The plaintiff filed a putative class action in Pennsylvania state court alleging that the defendant, Comcast, breached its contract and was unjustly enriched in violation of Pennsylvania's Consumer Protection Law by failing to provide high speed internet service to various businesses and residents in Pennsylvania. The defendant removed the action to the United States District Court for the Eastern District of Pennsylvania pursuant to CAFA and the plaintiff moved to remand to state court pursuant to the "local controversy" and "home state controversy" exceptions to federal court jurisdiction under CAFA. *Id.* at *1-3.

Contrary to the majority Circuits, the Eastern District of Pennsylvania held that, regarding the exceptions to CAFA, notwithstanding its legislative history, CAFA does not shift the burden of proof from a removing defendant to a remanding plaintiff. *Id.* at *7.

The Court noted that the defendant had control over the information that would establish the citizenship of members of the proposed class. *Id.* The Court, therefore, allowed the plaintiff to engage in limited discovery with respect to the exceptions. *Id.* The Court stated, however, that the original interrogatories that the plaintiff sent the defendant were not "sufficiently tailored to lead to discovery of the citizenship of plaintiff's proposed class members as of the *date* the complaint was filed" and ordered the plaintiff to amend these interrogatories. *Id.* (citing 28 U.S.C. § 1332(d)(7)) (emphasis added). The original interrogatories asked Comcast to state the number of subscribers "(1) receiving internet service from Comcast in the Commonwealth of Pennsylvania; (2) for whom the billing address for such internet service is the same as the address where such service is provided; and (3) for whom the billing address is not the same as the address where such service is provided." *Id.* (internal quotations omitted).

After discovery was conducted, the plaintiff argued that because Comcast's service subscriber agreement provided that residential service be delivered to the customer's residence,

98% of the residential service customers were also Pennsylvania residents. *Schwartz*, No. Civ.A. 05-2340, 2006 WL 4879152005, at *5. The plaintiff further argued that because 86.5% of the class members maintained Comcast service over a five month period, they intended to remain residents in Pennsylvania, and thus met the definition of being domiciled in Pennsylvania. *Id.* The Court disagreed, finding that the intent to maintain internet service does not suggest an intent to remain permanently in one state, as required for domicile. *Id.* The Court noted that many students who maintain internet service at colleges and universities have no intent to remain in Pennsylvania beyond graduation. *Id.* The Court simply refused to accept residence as a proxy for domicile and held that it was most likely that Pennsylvania citizens comprised less than one-third of the class members. *Id.* at *6. The Court did not, therefore, further address the "home state controversy" and "local controversy" exceptions, but simply denied the plaintiff motion for remand. *Id.*