

## CAFA UPDATE: 2009-2010

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**Amount in Controversy Requirement (28 U.S.C. § 1332(d)(2))**

The matter in controversy must exceed the sum or value of \$5,000,000, exclusive of interest and costs.

**Cappuccitti v. DirectTV, Inc.**, No. 09-14107, 2010 WL 4027719 (11th Cir. Oct. 15, 2010)

- The Eleventh Circuit reconsidered and reversed its infamous July 19, 2010 decision holding that CAFA jurisdiction requires that at least one plaintiff allege individual damages in excess of \$75,000. A passage you will not often hear from a court of appeals: “We based our decision on our interpretation of the jurisdictional requirements of the Class Action Fairness Act . . . , which we have elsewhere called a ‘statutory labyrinth.’ Subsequent reflection has led us to conclude that our interpretation was incorrect.”
- The Court reaffirmed what most of us have known for some time. There are four essential elements to CAFA jurisdiction: (1) a class action; (2) a putative class in excess of 100 individuals; (3) damages **in the aggregate** of more than \$5,000,000; and (4) minimal diversity.
- There “is no requirement in a class action brought originally or on removal under CAFA that any individual plaintiff’s claim exceed \$75,000.”
- Substantively, the court rejected Cappuccitti’s contention that the arbitration agreement at issue, which contained a class waiver, was unconscionable because the cost of individual arbitration would exceed the damages available to him under the claims he plead. Under Georgia law, the question of whether a contract is unconscionable must be analyzed under the circumstances existing at the time of the making of the contract. At that time, Cappuccitti had remedies available to him under that included attorneys’ fee awards. The fact that he and his attorneys subsequently chose not to plead the claims that would entitle him to those remedies did not render the arbitration agreement and class waiver unconscionable.

### Amount in Controversy - Standard of Proof

Split exists on whether a removing defendant must establish CAFA's \$5,000,000 amount in controversy by a **legal certainty** or by a **preponderance of the evidence** when the complaint specifically alleges that the amount controversy does not exceed \$5,000,000.

**Fluke v. Cashcall, Inc.**, No. 08-5776, 2009 WL 637461 (E.D. Pa. Mar. 10, 2009).

- Fluke alleged violations of Pennsylvania's Loan Interest and Protection Law and Consumer Discount Company Act, while disclaiming any damages in excess of CAFA's \$5,000,000 threshold.
- The district court held that a plaintiff cannot simply plead around CAFA's \$5,000,000 aggregate amount in controversy.
- The court applied the framework used by the Third Circuit in *Morgan v. Gay*, 471 F.3d 469 (3d Cir. 2006), where a plaintiff similarly alleged an amount in controversy below the jurisdictional requirement:
  - “(1) The party wishing to establish subject matter jurisdiction [the removing defendant] has the burden to prove by a legal certainty that the amount in controversy exceeds the statutory minimum;
  - (2) A plaintiff, if permitted by state laws, may limit her monetary claims to avoid the amount in controversy threshold; and
  - (3) Even if a plaintiff states that her claims fall below the threshold, this Court must look to see if the plaintiff's actual monetary demands in the aggregate exceed the threshold, irrespective of whether the plaintiff states that the demands do not. Key to the present matter is the plaintiff's pleadings are not dispositive under the legal certainty test. This Court's task is to examine not just the dollar figure offered by the plaintiff but also her actual legal claims.”
- Based on *Gay*, the district court held that, despite the allegations of the complaint, Cashcall was able to establish, to legal certainty, that the \$5,000,000 threshold was satisfied. It did so by presenting declarations from its Associate General Counsel setting forth the number of loans at issue (3,618), the total principal amount of the loans (\$10,616,850) and stating that review of the loan records revealed that the amount of allegedly illegal interest and fees collected exceeded \$5,000,000.

**Contrast with:****Bell v. Hershey Co.**, 557 F.3d 953 (8<sup>th</sup> Cir. Feb. 26, 2009)

- Bell alleged \$4.99 million in damages in this antitrust suit, although state law prohibited alleging a specific amount of damages.
- The Eight Circuit found that the district court erred in remanding the action based on removing defendant's failure to establish CAFA's \$5,000,000 amount in controversy to a legal certainty.
- The court explained that where the **plaintiff** is the proponent of federal jurisdiction, the amount in controversy alleged in the complaint controls unless the defendant can establish, to a legal certainty, that the claim is for less than the jurisdictional amount.
- As the plaintiff is the master of the complaint, when, on the other hand, the **defendant** seeks to invoke federal jurisdiction through removal, the requisite amount in controversy need only be established by a preponderance of the evidence, regardless of whether or not the complaint alleges damages below the jurisdictional minimum.
- The primary purpose in enacting CAFA was to open the federal courts to corporate defendants out of concern that the national economy risked damage from a proliferation of meritless class action suits. To impose a more stringent burden of proof would thwart that purpose.
- The court concluded by pointing out that, as the applicable state law prohibited inclusion of a specific damages amount in the complaint, the preponderance standard should have been applied in any event. Where state law prohibits pleading a specific amount in the complaint, any attempt to do so is a legal nullity.
- Note: For a truly complex burden of proof analysis, see *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696 (9<sup>th</sup> Cir 2007). The Ninth Circuit decision, referenced in *Bell v. Hersey*, identified three different standards of proof to be applied depending on the nature of the pleadings in the case:

“First, when a state court complaint alleges an amount in controversy greater than the jurisdictional minimum, the jurisdictional threshold is satisfied unless it appears to a legal certainty that the plaintiff cannot recover the amount pled. Second, when the complaint does not specify an amount in controversy or it is ‘unclear or ambiguous’ from the face of the complaint whether the jurisdictional threshold is met, the removing defendant must establish the jurisdictional facts by a preponderance of the evidence. Finally, when a complaint alleges an amount in controversy below the jurisdictional threshold, the party seeking removal may be required to prove to a legal certainty that the jurisdictional amount is satisfied.” (from *Bell v. Hershey*).

### Minimal Diversity (28 U.S.C. § 1332(d)(2)(A))

Minimal diversity is satisfied where any member of a class of plaintiffs is a citizen of a state different from any defendant.

**Hertz Corp. v. Friend**, 130 S. Ct. 1181 (Feb. 23, 2010).

- Hertz sought removal under CAFA, contending that, because plaintiffs were California citizens and it was a citizen of New Jersey, CAFA's minimal diversity requirement was met.
- Under 28 U.S.C. § 1332(c)(1), a corporation is deemed a citizen of (1) any state by which it has been incorporated and (2) the state where it has its **principal place of business**.
- Plaintiffs argued in their motion to remand that Hertz's principal place of business was in California, applying Ninth Circuit precedent which asks whether the corporation's business activity is "significantly larger" or "substantially predominates" in one state.
- The district court remanded the case to state court and the 9<sup>th</sup> Circuit affirmed.
- The Supreme Court expressed concern over the divergent and increasingly complex tests used by courts to determine a corporation's "principal place of business," which often involved the extremely difficult and subject task of assessing the weight of operations in various states.
- In an effort to settle on a single uniform interpretation of the statutory phrase, the Court endorsed the **"nerve center" approach**:

"Principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. In practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the 'nerve center,' and not simply an office where the corporation holds its board meetings."
- The Supreme Court expressed a willingness to accept certain results that might not comport with the purpose behind diversity jurisdiction (preventing a corporation from being haled into court in a state where it might be subjected to undue local bias) for the sake of uniformity and administrative efficiency.
- The Ninth Circuit's decision was vacated and remanded for application of the "nerve center" test.

**The old regime:****Ferrell v. Express Check Advance of S.C., LLC**, 591 F.3d 698 (4th Cir. Jan. 8, 2010)

- After being sued by a class of South Carolina borrowers, the payday lender defendants sought to remove the action to federal court under CAFA, contending that minimal diversity existed because Express Check, a limited liability company, was not a citizen of South Carolina. Plaintiffs disagreed and moved to remand.
- The citizenship-related facts were as follows:

“Express Check is a limited liability company organized under the laws of Tennessee, and its sole member is QC Financial Services, Inc., a Missouri corporation with its principal place of business in Overland, Kansas. All the stock of QC Financial Services is in turn owned by QC Holdings, Inc., a Kansas corporation with its principal place of business in Overland, Kansas. Express Check engages in the business of making payday loans from stores located solely in South Carolina. While its top four officers who are also officers of QC Financial Services, are located in Kansas, all other Express Check employees are located in South Carolina.

Express Check’s operations in South Carolina are substantially controlled by QC Financial Services and QC Holdings. These two corporations make the major operational and policy decisions for Express Check, which then are implemented by Express Check’s employees in South Carolina. QC Financial Services and QC Holdings also provide a variety of general support services to Express Check, such as legal, marketing, accounting, auditing, information technology, and collection services.”

- The court began its analysis of CAFA’s diversity requirement with a discussion of the factors used to determine the citizenship of LLCs. Before the enactment of CAFA, unincorporated business associations like LLCs were considered citizens of the states in which their members were citizens.
- CAFA added § 1332(d)(10) to Title 28. Under that section, for purposes of CAFA, an unincorporated association, like a corporation, is now a citizen of the state under whose laws they it was organized and the state where it maintains its principal place of business.
- Pursuant to section 1332(d)(10), the district court and the Fourth Circuit found remand appropriate, concluding that Express Check’s principal place of business was in South Carolina. In reaching this conclusion, the Fourth Circuit dismissed the fact that Express Check’s operations were directed, controlled, and coordinated from Kansas and applied a “place of operations” test, finding it more appropriate under the circumstances than the alternative “nerve center” test.

- Note: Under *Hertz Corp. v. Friend*, decided the following month, this case may very well have remained in federal court.

### **Local Controversy Exception (28 U.S.C. § 1332(d)(4)(A))**

Jurisdiction must be declined if the controversy is uniquely local and does not reach into multiple states; in other words, if two thirds of the putative class and one significant defendant are citizens of the forum state. A significant local defendant is one from whom significant relief is sought and whose alleged conduct forms **a significant basis** for the claims asserted. Additionally, in order for the exception to apply, principal injuries resulting from the alleged or any related conduct of each defendant must have been incurred in the forum state and no other class action asserting the same or similar factual allegations against any of the defendants can have been filed within the past three years by the same or other persons.

### **Kaufman v. Allstate N.J. Ins. Co.**, 561 F.3d 144 (3d Cir. Mar. 26, 2009)

- The question presented on appeal (which the Third Circuit claimed had not yet been addressed by any other circuit) was: How local is local? Does every putative class member have to assert a claim against the local defendant to satisfy the “significant basis” provision of the local controversy exception?
- Plaintiff plead various state-law claims arising out of Defendants’ alleged failure to pay “diminished value” automobile losses.
- First, the Third Circuit found that the district court committed error by considering the six original defendants in applying the exception. According to the court, the exception requires consideration of the defendants in the action at the time the motion for remand is filed. Only three of the original six (one of them local) remained when the motion to remand was filed.
- Second, the Third Circuit confirmed that the district court correctly assigned plaintiffs the burden of establishing applicability of the exception.
- The court then proceeded to address the insurer defendants’ impressive textual argument that the “significant basis” provision of the local controversy exception requires that **every** putative class member have asserted a claim against the local defendant for remand to be appropriate. Specifically, the provision states that the local defendant’s alleged conduct must form “a significant basis for the claims asserted by the proposed **plaintiff class**.” “Class” is defined as “all of the class members in a class action.” 28 U.S.C. § 1332(d)(1)(A). Defendants argued that if only some portion of the class were required to assert claims against the local defendant then the term “members” would have been used, as it is used elsewhere in the Act. For example, the local controversy exception itself

requires that “greater than two-thirds of the **members of all proposed plaintiff classes**” be members of the forum state, and that the class action include at least one local defendant “from whom significant relief is sought by **members of the plaintiff class.**”

- Though agreeing with its premise, the court rejected the argument. That the local defendant’s alleged conduct must form a significant basis for the universe of claims asserted in the action does not mean that the alleged conduct must form a basis for each and every claim. However, the court acknowledged that determining the number of claims for which the alleged conduct formed a basis might be useful to the “significant basis” analysis.
- While the Third Circuit acknowledged that the district court correctly rejected defendants’ argument, it found the market share analysis employed to determine whether the local defendant’s conduct formed a significant basis for the claims asserted in the action to be flawed. Market share cannot be used as a proxy for the actual conduct alleged. Thus, the Third Circuit remanded for discovery and “substantive analysis comparing the local defendant’s [actual] alleged conduct to the [actual] alleged conduct of all defendants.”

### **Corporate/Securities Carve-Out (28 U.S.C. § 1332(d)(9))**

Claims (1) concerning covered securities (as defined in section 16(f)(3) of the ‘33 Act), 28 U.S.C. § 1332(d)(9)(A); (2) relating to the internal affairs or governance of corporations that arise under state law, 28 U.S.C. § 1332(d)(9)(B); and (3) relating to the rights, duties (including fiduciary duties), and obligations relating to any security (as defined in section 2(a)(1) of the ‘33 Act), 28 U.S.C. § 1332(d)(9)(C), are excepted from federal jurisdiction under CAFA.

**Lincoln Nat’l Life Ins. Co. v. Bezych**, 610 F.3d 448 (7th Cir. June 25, 2010).

- Lincoln National sought removal of a variable life insurance class action alleging that its cost of insurance charges were not calculated based on expected mortality, as promised in the policy.
- The district court remanded under CAFA’s securities carve-out, 8 U.S.C. § 1332(d)(9)(C), to federal jurisdiction for an action “that solely involves a claim . . . that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 . . .).”
- On appeal, Lincoln National argued that, as cost of insurance charges are traditional insurance features of variable life policies, not security features, claims relating to them do not fall with the CAFA securities carve-out.

- Despite Seventh Circuit, Second Circuit, and Supreme Court precedent highlighting the dual and separable insurance and securities components of variable policies, the court agreed with the district court’s conclusion that the securities carve-out applied. Both the broad language of the CAFA exception, requiring only that the claims asserted **relate** to a right, duty, or obligation **relating** to a security, and the broad definition of “security” in the ’33 Act, which includes any interest in something that gives the holder a right to purchase a security, required that the carve-out be applied.

### **Right to Appeal Remand Order (28 U.S.C. § 1453(c)(1))**

“[N]otwithstanding section 1447(d), a court of appeals **may** accept an appeal from an order of a district court granting or denying a motion to remand a class action [including a mass action] to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.”

### **BP Am., Inc. v. Oklahoma**, 613 F.3d 1029 (10th Cir. 2010)

- The Oklahoma Attorney General brought this *parens patriae* action, alleging that BP violated the state’s Consumer Protection Act by manipulating gas prices.
- CAFA affords federal jurisdiction to “mass actions” that involve, among other things, claims for monetary relief by 100 or more persons that are proposed to be tried jointly on the ground that the claims involve common questions of law or fact. 28 U.S.C. § 1332(d)(11)(B)(i). BP asserted that the suit fit the definition of “mass action,” because the Attorney General sought, among other things, restitution and injunctive relief on behalf of Oklahoma consumers. Accordingly, BP removed the action to federal court. The Attorney General responded with a motion to remand, which the district court granted. BP sought leave to appeal.
- Generally, decisions to remand may not be appealed. 28 U.S.C. § 1447(d). However, CAFA creates an exception to that general prohibition for class **and mass actions**.
- To guide it in its analysis of whether BP should be granted leave to appeal, the Tenth Circuit highlighted the factors espoused by the First Circuit in *College of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33 (1st Cir. 2009):

“[T]he First Circuit outlined a number of factors it would consider in deciding whether to grant leave to appeal under CAFA. That list includes (1) ‘the presence of an important CAFA-related question’; (2) whether the question is ‘unsettled’; (3) ‘whether the question, at first glance, appears to be either incorrectly decided or at least fairly debatable’; (4) ‘whether the question is consequential to the resolution of the particular case’; (5) ‘whether the question is likely to evade

effective review if left for consideration only after final judgment’; (6) whether the question is likely to recur; (7) ‘whether the application arises from a decision or order that is sufficiently final to position the case for intelligent review’; and (8) whether ‘the probably harm to the applicant should an immediate appeal be refused [outweighs] the probable harm to the other parties should an immediate appeal be entertained.’”

- Applying the First Circuit’s factors, though emphasizing they constituted only considerations or guides to help inform the analysis, the court granted BP leave to appeal.

### Maintaining CAFA Jurisdiction

#### **Cunningham Charter Corp. v. Learjet, Inc.**, 592 F.3d 805 (Jan. 22, 2010)

- Cunningham brought a class action against Learjet in state court alleging claims for breach of warranty and products liability.
- Learjet removed under CAFA. Following removal, Cunningham’s motion to certify two class actions under Rule 23 was denied. Following the denial the district court remanded the case to state court for lack of subject matter jurisdiction.
- The Seventh Circuit reversed the remand order, holding that CAFA jurisdiction is evaluated at the time of the petition for removal and cannot subsequently be lost due to a denial of class certification.
- The court took justification for its decision from the precedents of other circuits and the language of the Act. Specifically, CAFA defines a class action 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,” without reference to certification. 28 U.S.C. § 1332(d)(1)(B). A later section states that the Act applies “to any class action [within the Act’s scope] **before or after the entry of class certification order.**” 28 U.S.C. § 1332(d)(8).
- The Seventh Circuit’s opinion “vindicates the general principle that jurisdiction once properly invoked is not lost by developments after a suit is filed, such as a change in the state of which a party is a citizen that destroys diversity.”
- Of course, the principle has exceptions, notably where a case becomes moot in the course of litigation, where a plaintiff amends away jurisdiction in a subsequent pleading, or where it is discovered that there was no subject matter jurisdiction at the outset.
- The Seventh Circuit remanded to the district court for further proceedings.

### Additional Payday Loan Decision

**Magee v. Advance Am. Servicing of Ark., Inc.**, No. 6:08-cv-6105, 2009 WL 890991 (W.D. Ark. Apr. 1, 2009)

- Plaintiffs alleged violations of the Arkansas Deceptive Trade Practices Act and usury provisions contained in Arkansas' Constitution.
- Advance America removed under CAFA and plaintiffs moved to remand.
- Having explained that a removing defendant has the burden of establishing CAFA jurisdiction by a preponderance of the evidence, while a plaintiff bears the burden of establishing any applicable exceptions, the district court addressed the amount in controversy requirement. Once a removing defendant has established the requisite \$5,000,000 amount in controversy by a preponderance of the evidence, remand is only appropriate if the plaintiff can establish, to a legal certainty, that the claim is for less than the requisite amount.
- The court found the amount in controversy requirement satisfied by aggregating the amount of alleged excess interest and fees paid (including punitive doubling of that amount), the value to plaintiffs of their equitable claim for loan forgiveness, and statutory attorneys' fees, despite plaintiffs' contention that the last two components of the calculation should not be considered.
- Next, the court rejected plaintiffs' contention that the local controversy exception applied, finding that *McGinnis v. Advance America*, an action filed by counsel for plaintiffs, against the same defendants, within the last three years, alleging substantially identical facts and claims, made the exception inapplicable. Identical language used by plaintiffs' counsel in the complaints filed in the two actions and previous acknowledgments by counsel in *Magee* of the similarity between the two actions did not help plaintiffs cause.
- The court also rejected plaintiffs' attempts to apply the home state and discretionary jurisdiction exceptions, both of which require that the primary defendants be citizens of the forum state. Plaintiffs could only allege that one of the two defendants was a citizen of Arkansas.
- Accordingly, the court concluded that CAFA jurisdiction was established. It then proceeded to compel arbitration, rejecting plaintiffs' contention that the arbitration provision, which contained a class waiver, was unconscionable.