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CAFA'S IMPACT ON FORUM SHOPPING AND THE MANIPULATION OF THE CIVIL JUSTICE SYSTEM

Congress enacted the Class Action Fairness Act of 2005 ("CAFA") in response to perceived problems with, and abuses of, the traditional class action system.¹ Proponents of CAFA accused class action lawyers of abusing the device to benefit their own interests, rather than the interests of individual class members.² This abuse also extended to state and local courts that kept cases of national importance out of federal court, displayed bias against out-of-state defendants, and made binding judgments that imposed on the rights of out-of-state residents.³ Recognizing that procedural safeguards were necessary to remedy this abuse and to ensure that class actions operate as a "valuable tool in our jurisprudential system," Congress implemented CAFA.⁴

¹ See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4-5 (codified in scattered sections of 28 U.S.C.) (declaring CAFA's purpose). Class actions were designed to be a "valuable tool in our jurisprudential system" by providing a means for similarly-harmed plaintiffs to seek redress from a common defendant when the harm to each individual plaintiff would not be substantial enough to justify the cost of litigation. See S. REP. NO. 109-14, at 3 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 5 (noting benefits of class actions). The Senate report cautions that the class action device is only a valuable jurisprudential tool so long as the interests of class members remain a priority. *Id.*; see also Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. LEGIS. 76, 97-98 (2009) (describing Congress's acknowledgement of class action litigation abuse). Congress enacted CAFA to respond to the perception that attorneys abused the class action device by forum shopping and manipulating the civil justice system. Ellis, *supra*, at 98.

² See Class Action Fairness Act § 2(a) (listing Congress's perception of class action abuse). Congress notes that class members often receive little benefit from the suit and may even be harmed in cases where counsel receive excessive fees, or where unjustified awards are given to certain class members at the expense of others. *Id.*; see also Ellis, *supra* note 1, at 98 (noting plaintiffs' attorneys often awarded substantial fee outweighing each class member's individual interest in litigation); Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1596-97 (2008) ("CAFA's proponents successfully portrayed class action lawyers as opportunistic aggregators who get rich on litigation of their own making . . .").

³ See Class Action Fairness Act § 2(a)(4) ("Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution . . ."); see also S. REP. NO. 109-14, at 22-23, *reprinted in* 2005 U.S.C.C.A.N. at 22-23 (admonishing state court judges for careless class certification and for approving excessive settlement judgments). The Senate Judiciary Committee argued that inadequate supervision of class certification and settlement negotiations in state courts enabled many plaintiffs' attorneys to "'game' the procedural rules and keep nationwide or multi-state class actions in state courts." S. REP. NO. 109-14, at 3, *reprinted in* 2005 U.S.C.C.A.N. at 5.

⁴ See S. REP. NO. 109-14, at 3, *reprinted in* 2005 U.S.C.C.A.N. at 6 ("[CAFA] is a modest,

CAFA's purpose is to assure prompt recovery for class members with legitimate claims by expanding the scope of federal diversity jurisdiction over interstate cases of national importance.⁵ CAFA expands original jurisdiction of the federal courts to class action suits where (1) the amount in controversy exceeds \$5 million; (2) the class is made up of over 100 members; and (3) any one plaintiff is diverse from any one defendant.⁶ Additionally, CAFA makes federal courts more accessible to a removing defendant by relaxing the traditional removal requirements.⁷

While these procedural changes have addressed many of the abuses Congress sought to correct, CAFA's provisions have created new interpretation issues for the courts and a new form of abuse by attorneys.⁸ For example, although there is evidence that CAFA has successfully shifted many class action disputes from state to federal courts, CAFA does not address the underlying problems that created abuse of the class action device in the first place: forum shopping and manipulation of the civil justice system.⁹ Exacerbating the issue, the circuit courts are split regarding what burden a removing party must meet to demonstrate that the

balanced step that would address some of the most egregious problems in class action practice.”). But see Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1725 (2008) (“Opponents of [CAFA] generally defended the status quo as supporting the rights of states to enforce their own laws.”). Many CAFA opponents worried that expanding federal jurisdiction over diversity class actions, which are almost always based on state law interpretation, would infringe on state sovereignty rights. *Id.* Additionally, opponents of CAFA “expressed alarm at the potential addition of thousands of cases to the federal courts’ dockets.” *Id.*

⁵ See Class Action Fairness Act § 2(b) (defining purpose of legislation); see also Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77, 81 (2007) (addressing nationwide ramifications resulting from class actions involving more people and money than other lawsuits).

⁶ See 28 U.S.C. § 1332(d)(2), (d)(5) (2006) (listing requirements for federal jurisdiction under CAFA).

⁷ See 28 U.S.C. § 1453(b) (2006) (allowing class action removal without regard to citizenship and consent of all defendants).

⁸ See Erichson, *supra* note 2, at 1606-07 (predicting stronger class action bar unintended consequence of CAFA’s procedural changes). In addition to creating statutory interpretation questions for the courts, CAFA has altered the litigation landscape by requiring plaintiffs’ attorneys to adapt their forum-selection and claim-selection strategies. *Id.* at 1614. Rather than seek the most favorable state courts, plaintiffs’ attorneys are increasingly filing originally in federal court so that they can select the most favorable federal forum. *Id.* While this accomplishes CAFA’s goal of shifting multi-state class action lawsuits from state to federal courts, it undermines CAFA’s goal of preventing forum shopping and abuse of the class action device. *Id.* at 1626.

⁹ See *infra* notes 47-58 and accompanying text (explaining results of Federal Judicial Center’s CAFA research).

amount in controversy exceeds \$5 million.¹⁰ This circuit split creates an incentive for attorneys seeking to avoid federal jurisdiction to further abuse the civil justice system.¹¹

This Note proposes that although CAFA may have successfully shifted many nationwide class actions to federal courts, it has not remedied the underlying abuses that first prompted class action reform.¹² Part I outlines CAFA's history and implementation.¹³ Part II discusses CAFA's docket shift from state to federal courts and the challenges each circuit has faced with interpreting the burden a removing defendant must meet to invoke CAFA jurisdiction.¹⁴ Finally, Part III analyzes the implications of CAFA's docket shift, as well as the circuit split, on forum shopping and the manipulation of the civil justice system.¹⁵

I. HISTORY AND IMPLEMENTATION OF THE CLASS ACTION FAIRNESS ACT OF 2005

A. Class Actions in Need of Reform

Class actions have been utilized for over 150 years to adjudicate disputes involving numerous parties.¹⁶ For plaintiffs, class actions provide

¹⁰ See *infra* note 64 and accompanying text (listing each circuit's removal burden requirement); see also Dwight J. Davis, Jonathan R. Chally & Zachary A. McEntyre, Frederico v. Home Depot: *The Third Circuit Clarifies the Removal Burden for CAFA Defendants, but Is the Burden Still Too High?*, 75 DEF. COUNS. J. 358, 359 (2008) (describing standards of proof utilized by courts of appeals).

¹¹ See *infra* Part III (analyzing circuit split's effect on class action attorneys).

¹² See *infra* Part III (analyzing CAFA's effects on forum shopping and manipulation of civil justice system).

¹³ See *infra* Part I (discussing factors leading to CAFA's implementation).

¹⁴ See *infra* Part II (detailing CAFA's aftermath).

¹⁵ See *infra* Part III (analyzing CAFA's effects).

¹⁶ See S. REP. NO. 109-14, at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 7 ("Although class actions have some roots in common law, the general concept was first codified in 1849, when several states adopted the Field Code."). The Field Code required litigants to demonstrate a common interest in law or fact before a dispute could be prosecuted as a class action. *Id.* In 1938, Congress adopted Federal Rule of Civil Procedure 23 to govern class action disputes. *Id.* Subsequently, the modern form of class actions took shape in 1966, when Congress substantially amended Rule 23 to expand the availability of the class action device. See *id.* (citing expansion of class action availability as factor motivating 1966 amendments); 1 JOSEPH M. McLAUGHLIN, McLAUGHLIN ON CLASS ACTIONS § 1:1 (7th ed. 2010) (outlining purpose of Rule 23 amendments). Specifically, the 1966 amendments ensured the preclusive effect of class action judgments by binding all those "whom the court finds to be members of the class, whether or not the judgment is favorable to the class." See McLAUGHLIN, *supra*, § 1:1 (quoting FED. R. CIV. P. 23 advisory committee note); see also *White v. Deltona Corp.*, 66 F.R.D. 560, 563 (S.D. Fla.

a mechanism for seeking redress against a common defendant when the interest of each individual plaintiff is not substantial enough to justify the cost of litigation.¹⁷ For defendants, class actions avoid inconsistent results and promote efficiency by allowing the adjudication or settlement of all potential claims at one time.¹⁸ For courts, class actions promote the economical administration of justice by avoiding multiple suits involving the same claims.¹⁹ Finally, for consumers, class actions promote corporate

1975) (“[T]he 1966 revision of Rule 23 was meant to . . . lessen problems relating to the res judicata effect of judgments.”). In its original form, Rule 23 did not provide guidance as to what set of circumstances would justify class-wide preclusion. See MCLAUGHLIN, *supra*, § 1:1. Additionally, preclusion under the original rule was complicated by “spurious class actions,” which bound only those members who participated directly in the litigation. *Id.* By eliminating “spurious class actions” and mandating that judgments bind all class members, the 1966 amendments promoted judicial efficiency. *Id.*; see also *The Class Action Fairness Act of 1999: Hearings on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. of the Judiciary*, 106th Cong. 55-94 (1999) [hereinafter *Hearings*] (statement of Sen. John P. Frank, S. Comm. on Civil Rules) (explaining historical context behind adoption of 1966 Amendment to Rule 23). As a member of the Advisory Committee on Civil Rules in 1966, John P. Frank noted, that “[i]f there was a single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights, and, explicitly, segregation.” *Hearings, supra*, at 60. At the time Rule 23 was amended, the Advisory Committee had not anticipated the dramatic increase in litigation that would occur in the following twenty to thirty years. See *id.* (describing state of litigation in 1966). Consequently, as the country became more litigious in the late 1980s, the utilization of Rule 23 expanded beyond civil rights class action disputes to include personal injury, products liability, and other mass tort actions. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1357-58 (1995) (outlining shift in circuits toward allowing class action certification for mass tort disputes). Plaintiffs’ attorneys successfully argued to judges that Rule 23 should be interpreted broadly to allow class certification of mass tort cases, so that individual tort cases would not overly burden the judicial system. *Id.* at 1358. See generally Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687, 694-96 (1997) (tracing history of class actions).

¹⁷ See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(i), 119 Stat. 4, 4 (codified in scattered sections of 28 U.S.C.) (“[Class actions] permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.”); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1487 (2008) (stating class actions allow “economically irrational” individual claims against common adversary). But see Ellis, *supra* note 1, at 76 (criticizing class actions where interest of no single plaintiff is enough to justify litigation).

¹⁸ See MCLAUGHLIN, *supra* note 16, § 1:3 (“[D]efendants can . . . consensually resolve on a global basis all claims arising out of an event or transaction that otherwise could mire a company or an industry in decades of litigation with myriad adversaries.”). Additionally, class action settlements can “extinguish the claims of actual and potential claimants both in the settled lawsuit and, in appropriate circumstances, in other lawsuits in different jurisdictions.” *Id.*

¹⁹ See *id.* § 1:1 (stating class actions promote “efficiency and fairness in handling large numbers of similar claims” (quoting *W. Va. Rezulin Litig. v. Hutchison*, 585 S.E.2d 52, 62 (W. Va. 2003))). Specifically, class actions promote efficiency and fairness by consolidating the

accountability and fairness in the marketplace.²⁰

Despite these benefits, class actions have been heavily criticized.²¹ In the pre-CAFA context, critics cited lax class certification by state court judges as leading to abuse of the class action device.²² Specifically, critics were concerned that lax certification encouraged attorneys to abuse the civil justice system by “forum shopping” for pro-plaintiff state court jurisdictions, and by manipulating pleadings to avoid federal jurisdiction altogether.²³

1. Lax Certification and the Magnet Jurisdiction Problem

Under Rule 23, a class action may be brought so long as the following conditions are met:

- (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly

“time, effort and expense” that would be necessary to litigate each claim individually. *Id.* Furthermore, class actions promote fairness by ensuring “uniformity of decisions” in similar claims. *Id.*

²⁰ See Shapiro, *supra* note 5, at 78 (stating class action redress necessary to prevent corporations from wrongfully profiting from harming consumers). Class actions add value to society because they benefit consumers by keeping corporations and businesses accountable for actions affecting commerce. *Id.* at 79. Additionally, the class action device is necessary in the products liability and mass tort context because plaintiffs might not have any other practical option for redress if they could not band together when harmed by a business or corporation. *Id.*

²¹ See Erichson, *supra* note 2, at 1593-94 (describing class action lawyers as “self-interested, unscrupulous, unprincipled, and unaccountable” (footnote call numbers omitted)). CAFA proponents successfully depicted class action attorneys as “opportunistic aggregators who get rich on litigation of their own making.” *Id.* at 1596; see also Ellis, *supra* note 1, at 76 (addressing class action criticism). By allowing lawsuits to be brought where the interest of no single plaintiff would justify the costs of litigation, class actions contribute to the “skyrocketing number of lawsuits” filed each year. Ellis, *supra* note 1, at 76.

²² See Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 488 (2000) (describing litigation explosion following availability of mass tort class actions); Jeffrey L. Roether, Note, *Interpreting Congressional Silence: CAFA’s Jurisdictional Burden of Proof in Post-Removal Remand Proceedings*, 75 FORDHAM L. REV. 2745, 2751 (2007) (“[D]uring the period of 1988 to 1998, class action filings against Fortune 500 companies increased by more than 300% in federal courts and by more than 1000% in state courts.”).

²³ See Roether, *supra* note 22, at 2751 (describing class action device as “efficient tool of entrepreneurial” plaintiffs’ attorneys); see also S. REP. NO. 109-14, at 7-9 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 8-10 (summarizing then-current rules governing federal jurisdiction).

and adequately protect the interests of the class.²⁴

Congress imposed these requirements to promote efficient administration of justice and to safeguard the due process rights of absent class members and defendants.²⁵

However, during the litigation explosion of the 1990s, state court judges of certain jurisdictions, known as magnet jurisdictions, developed a reputation for being less careful than their federal counterparts about applying Rule 23's requirements to potential classes of plaintiffs.²⁶ Absent

²⁴ FED. R. CIV. P. 23(a); *see also* S. REP. NO. 109-14, at 6, *reprinted in* 2005 U.S.C.C.A.N. at 7 (describing Rule 23 requirements). In addition to meeting the requirements of Rule 23(a), a prospective class must meet certain requirements that depend on the type of class proposed. *See* FED. R. CIV. P. 23(b). For example, under Rule 23(b)(3), a damages class will only be certified if the proponent shows that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* at 23(b)(3).

²⁵ *See* S. REP. NO. 109-14, at 4-5, *reprinted in* 2005 U.S.C.C.A.N. at 7-8 (discussing purpose of Rule 23). The purpose of these requirements is to ensure that all class members are similarly situated in order to protect the rights of unnamed class members. *Id.* Furthermore, Rule 23 protects the due process rights of both the unnamed class members and defendants. *Id.* Rule 23's procedural requirements are necessary so that a court can ensure, "to the greatest extent possible," that it is fair to bind the interests of every member of the class. *See generally In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 783-86 (3d Cir. 1995) (discussing fundamental principles behind Rule 23's requirements). Rule 23's numerosity requirement is designed to prevent members of small classes from being unnecessarily deprived of their rights, without being heard in court, because all members of a class action are bound by the judgment. *See Rippey v. Denver U.S. Nat'l Bank*, 260 F. Supp. 704, 713 (D. Colo. 1966) (finding eight class members too few to satisfy Rule 23's numerosity requirement). The numerosity requirement is typically satisfied when the number of class members exceeds forty. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (stating "numerosity is presumed at a level of 40 members" (citing 1 NEWBERG ON CLASS ACTIONS 2d § 3.05 (1985 ed.))); *Krieger v. Gast*, 197 F.R.D. 310, 314 (W.D. Mich. 2000) (stating class of forty or more members is generally sufficient to meet numerosity requirement). Additionally, Rule 23 safeguards the rights of absent class members by requiring that there be questions of law or fact common to the class, without requiring that every question of law and fact be common to every member of the class. *See Katz v. Carte Blanche Corp.*, 52 F.R.D. 510, 514 (W.D. Pa. 1971) ("Nothing in F.R.C.P. 23 . . . mandates that the identity of the questions of fact or law be total."). The typicality requirement of Rule 23 ensures that no significant aspect of any class member's claim will go unrepresented by the named plaintiffs. *See Sommers v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 66 F.R.D. 581, 587 (E. D. Pa. 1975) (declaring similar claims required to ensure absent class members adequately represented). Named plaintiffs' claims are typical of the class if they arise "from the same event or practice or course of conduct that gives rise to the claims of other class members, and if [they] are based on the same legal theory." *Abby v. City of Detroit*, 218 F.R.D. 544, 547 (E.D. Mich. 2003) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996)). Finally, Rule 23 requires adequacy of representation because of the binding effect that a judgment in a class action has upon those who are defined to be a member of the class. *See Kramer v. Scientific Control Corp.*, 67 F.R.D. 98, 102 (E.D. Pa. 1975) (stating adequacy of representation should not be "lightly regarded").

²⁶ *See* S. REP. NO. 109-14, at 13-14, *reprinted in* 2005 U.S.C.C.A.N. at 14 (citing state

consistent class certification by state judges, attorneys had an incentive to file similar lawsuits in several jurisdictions in order to find a judge willing to certify the class.²⁷ Critics of the class action device opposed this practice as increasing judicial inefficiencies and contravening the Supreme Court's anti-forum shopping policy.²⁸

Additionally, critics cited magnet jurisdictions as leading to frivolous lawsuits that violated the due process rights of defendants.²⁹ For

court's failure to follow Rule 23's strict requirements or state's parallel governing rule). The Senate Judiciary Committee noted that federal courts pay closer attention to the procedural requirements of Rule 23 than their state court counterparts because state courts often lack the resources necessary to supervise class action disputes. *Id.* at 13, *reprinted in* 2005 U.S.C.C.A.N. at 14-15. In contrast, federal judges have the support of law clerks and can appoint special masters when they are faced with complex litigation. *Id.* Not surprisingly, abuses by class counsel were more likely to occur when state court judges were unable to give complex class action disputes the attention they required. *See id.* (criticizing lax certification as incentivizing attorneys to seek out magnet jurisdictions). For example, between 1998 and 2002, the Circuit Court of Madison County, Illinois, a small rural county, home to less than one percent of the United States population, attracted more class actions each year than some of the nation's most populous communities. *See* JOHN H. BEISNER & JESSICA DAVIDSON MILLER, CTR. FOR LEGAL POLICY, CLASS ACTION MAGNET COURTS: THE ALLURE INTENSIFIES 1 (2002), *available at* http://www.manhattan-institute.org/pdf/cjr_05.pdf (describing class action magnet jurisdictions). Between the years of 1998 and 2000, the number of class action filings in Madison County rose from two to thirty-nine, resulting in a 1850 percent increase in class action filings in that jurisdiction. *Id.* If class actions were filed nationwide at that rate, there would be nearly 43,000 class actions filed throughout the United States each year. *Id.* More troubling, nearly all of the Madison County Class actions involved non-Madison County defendants. *Id.* at 1-2. Finally, during the years 1998–2000, the Madison County class action docket was monopolized by a “small cadre of plaintiffs’ counsel.” *Id.* at 2. *But see* Lee & Willging, *supra* note 4, at 1725 (explaining CAFA has potential to overburden federal judiciary). Critics of CAFA worried that the mass docket shift to federal court would overburden the federal judiciary by consuming scarce judicial resources. *See id.*

²⁷ *See* S. REP. NO. 109-14, at 23, *reprinted in* 2005 U.S.C.C.A.N. at 23 (describing tactics used by class action plaintiffs’ counsel). Exacerbating this problem, there is no way to consolidate overlapping class actions filed in different state court jurisdictions, which means that each action must be litigated separately in an “uncoordinated, redundant fashion.” *Id.* This results in an enormous waste of judicial resources because “multiple judges of different courts must spend considerable time adjudicating precisely the same claims asserted on behalf of precisely the same people.” *Id.* However, when overlapping cases are pending in different federal courts, “they can be consolidated under one single judge to promote judicial efficiency and ensure consistent treatment of the legal issues involved.” *Id.*

²⁸ *See generally* Justin D. Forlenza, Note, *CAFA and Erie: Unconstitutional Consequences?*, 75 *FORDHAM L. REV.* 1065, 1091-95 (2006) (analyzing CAFA’s implications on Supreme Court’s anti-forum shopping policy). Concerned with vertical forum shopping, the Supreme Court held in *Erie Railroad Co. v. Tompkins* that federal courts sitting in diversity must apply state substantive law. *See* 304 U.S. 64, 78 (1938) (announcing holding of court). CAFA critics worry that federal courts sitting in diversity will be forced to create federal substantive law with regard to class action suits. *See* Forlenza, *supra*, at 1094 (“[T]he same problem that prompted Congress to enact CAFA—horizontal forum shopping—could arise in the federal court system.”).

²⁹ *See* S. REP. NO. 109-14, at 20-21, *reprinted in* 2005 U.S.C.C.A.N. at 21 (criticizing

example, in the pre-CAFA context, attorneys were more likely to file weak lawsuits in magnet jurisdictions because once a lawsuit was certified as a class action, it was more likely to be settled.³⁰ Due to the expense and negative publicity associated with defending against a class action lawsuit, many defendants chose to settle class actions in the early stages of litigation.³¹ When these same lawsuits were based on frivolous claims, the due process rights of the defendant were violated.³²

2. Diversity Jurisdiction Manipulation

Critics also claimed that class action attorneys “gamed the system” by manipulating the requirements of diversity jurisdiction to avoid federal court.³³ Under 28 U.S.C. §1332, a dispute may be heard in federal court if the parties are diverse and the amount in controversy exceeds the statutorily-required threshold, which is currently set at \$75,000.³⁴

Before enactment of CAFA, the “complete diversity rule” mandated that all named class action plaintiffs be from different states of

frivolous lawsuits filed in state court as “judicial blackmail”). Prior to the enactment of CAFA, class attorneys often exercised “unbounded leverage” against corporate defendants in magnet jurisdictions. *Id.*

³⁰ See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO’S PRE-CAFA SAMPLE OF DIVERSITY CLASS ACTIONS 11 (2008), available at [ftp://ftp.resource.org/courts.gov/fjc/cafa1108.pdf](http://ftp.resource.org/courts.gov/fjc/cafa1108.pdf) (“Every case in which a motion to certify was granted, unconditionally or for settlement purposes, resulted in a class settlement.”).

³¹ See Shapiro, *supra* note 5, at 103 (outlining risks associated with defending class action disputes). Additionally, critics of the class action device admonish attorneys for using huge, unmanageable class actions to “blackmail” defendants “who could not risk the possible ruin of a jury verdict” into settling the dispute. *Id.* Too often, settlements benefit class counsel more than class members. *Id.*

³² See generally S. REP. NO. 109-14, at 16, reprinted in 2005 U.S.C.C.A.N. at 21 (“[Class action] leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits.”).

³³ See S. REP. NO. 109-14, at 10-11, reprinted in 2005 U.S.C.C.A.N. at 11-12 (explaining methods used by plaintiffs’ attorneys to “game the system” to evade federal jurisdiction).

³⁴ 28 U.S.C. § 1332 (2006). Section 1332(a) provides, in relevant part:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

§ 1332(a)(1)-(4).

all named defendants.³⁵ Additionally, 28 U.S.C. §1441(b) prohibited removal of a class action from state court if any defendant was a citizen of the state in which the action was filed.³⁶ Thus, by purposefully adding a non-diverse party, or by filing the action in the defendant's state of citizenship, class action attorneys manipulated diversity jurisdiction to evade federal court.³⁷

Attorneys also avoided federal jurisdiction by manipulating the amount in controversy requirements.³⁸ The Supreme Court has held that where one plaintiff meets the requisite amount in controversy, other plaintiffs with the same or substantially similar claims against a common defendant will not defeat diversity jurisdiction, even if those plaintiffs' claims are for less than \$75,000.³⁹ However, by claiming that no one plaintiff's damages meet the statutorily required amount, class action attorneys "misused" the jurisdictional threshold to avoid federal jurisdiction.⁴⁰

B. The Class Action Fairness Act of 2005

These criticisms led Congress to pass CAFA, a procedural statute intended to rectify past abuse by amending diversity jurisdiction and removal requirements for class actions.⁴¹ Specifically, CAFA amended the

³⁵ See *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 367 (1921) (holding only named parties are considered for federal diversity jurisdiction); *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806) (holding no diversity jurisdiction where any plaintiff is from same state as any defendant).

³⁶ 28 U.S.C. § 1441(b) (2006).

³⁷ See S. REP. NO. 109-14, at 7, reprinted in 2005 U.S.C.C.A.N. at 11 (summarizing federal forum evasion tactic). One witness at the Committee's 2002 hearing on class actions testified that her business was a named defendant in "hundreds of lawsuits" for the purpose of ensuring that the cases were heard "in a place known for its lawsuit-friendly environment." *Id.*

³⁸ See *id.* at 10, reprinted in 2005 U.S.C.C.A.N. at 11-12 ("[C]lass action lawyers typically misuse[d] the jurisdictional threshold to keep their cases out of federal court."). For example, class action lawyers often claimed that no class member sought the jurisdictional amount required for federal jurisdiction. *Id.* at 11, reprinted in 2005 U.S.C.C.A.N. at 12. However, after removal, attorneys would amend the complaint to seek more relief. *Id.*

³⁹ See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549 (2005) (holding § 1367 authorizes supplemental jurisdiction over plaintiff claims failing to meet the requisite amount in controversy).

⁴⁰ See S. REP. NO. 109-14, at 8, reprinted in 2005 U.S.C.C.A.N. at 12 ("For example, class action complaints often include a provision stating that no class member will seek more than \$75,000 in relief, even though they can simply amend their complaints after the removal to seek more relief and even though the class action seeks millions of dollars in the aggregate.").

⁴¹ See *id.* at 27, reprinted in 2005 U.S.C.C.A.N. at 27 (describing CAFA as "modest attempt" to address problems and abuses in class action system). By amending diversity jurisdiction and removal requirements, Congress sought to enable federal courts to hear more class actions. *Id.*

diversity jurisdiction requirements under 28 U.S.C. §1332 to give federal courts original jurisdiction over class actions where the aggregate amount in controversy involves at least \$5 million; where there are over 100 members of the class; and where any one plaintiff is diverse from any one defendant.⁴² By relaxing the diversity jurisdiction requirements, Congress intended for CAFA to ensure that federal judges decide class actions of nationwide importance by making it easier for class actions to be filed in, or removed to, federal court.⁴³

Additionally, CAFA amended the 28 U.S.C. §1453 requirements that a defendant must meet to remove a case to federal court in the class action context.⁴⁴ Under CAFA, a class action may be removed to federal court regardless of whether a defendant is a citizen of the state in which the action was filed.⁴⁵ Furthermore, defendants no longer need the consent of all co-defendants before seeking removal to a federal forum.⁴⁶

II. AFTERMATH OF CAFA: ITS IMPACT ON FORUM-SELECTION AND MANIPULATION OF PLEADINGS

In the years following CAFA's enactment, preliminary data from the Federal Judicial Center ("FJC") suggests that CAFA has successfully shifted many nationwide class action lawsuits from state to federal courts.⁴⁷

⁴² Class Action Fairness Act of 2005 § 4(a)(2), 28 U.S.C. § 1332(d)(2) (2006).

⁴³ See S. REP. NO. 109-14, at 5, *reprinted in* 2005 U.S.C.C.A.N. at 7 (declaring CAFA's purpose). The Senate Judiciary Committee determined that federal courts are the proper forums to decide most class action lawsuits having significant implications for interstate commerce, because the then-current diversity and removal standards facilitated a "parade of abuses" in the state courts. *Id.*

⁴⁴ Class Action Fairness Act § 5(a).

⁴⁵ See *id.* ("A class action may be removed . . . without regard to whether any defendant is a citizen of the State in which the action is brought . . ."). This provision sought to eliminate the common practice of manipulating the parties to defeat federal jurisdiction. See Erichson, *supra* note 2, at 1598 ("By replacing the complete diversity requirement with minimal diversity, by eliminating the in-state defendant exception and the unanimity requirement for removal, and by allowing aggregation of the amount in controversy, CAFA ensured that nearly all large-scale class actions could be filed in or removed to federal court.").

⁴⁶ See Class Action Fairness Act § 5(a), 28 U.S.C. § 1453 (2006) ("[S]uch action may be removed by any defendant without the consent of all defendants."). This provision furthered Congress's goal of making removal more readily available to class action defendants. See *supra* note 41 and accompanying text (stating purpose of enacting CAFA).

⁴⁷ See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1 (2008) [hereinafter FJC STUDY], *available at* [http://www.uscourts.gov/uscourts/Rulesandpolicies/rules/fourth%20interim%20report%20class%](http://www.uscourts.gov/uscourts/Rulesandpolicies/rules/fourth%20interim%20report%20class%20)

However, the data indicates that although every circuit saw an increase in class actions originally filed in, and removed to, federal court, those increases varied dramatically.⁴⁸ Specifically, circuits considered relatively liberal on class certification, such as the Third, Ninth, and Eleventh Circuit Courts of Appeals, saw dramatic increases compared to the level of increases reported in more conservative circuits, such as the Fourth, Fifth, and Seventh Circuit Courts of Appeals.⁴⁹

As expected, the number of removals to federal court based on diversity jurisdiction increased after CAFA's enactment.⁵⁰ Specifically, the First, Second, Third, Seventh, Ninth, Eleventh, and D.C. Circuits saw increases, with diversity removals increasing by more than one hundred percent in the First, Ninth, and D.C. Circuits.⁵¹ Notably, the Seventh

20action.pdf (finding seventy two percent overall increase in class action activity in the eighty-eight district courts studied). After Congress passed CAFA, the Judicial Conference's Advisory Committee on Federal Rights requested that the FJC study CAFA's impact on federal court procedures and workloads. *Id.* The FJC studied class action filings and removals in the federal courts from July 1, 2001 through June 30, 2007. *Id.* Specifically, the FJC compared statistics from July through December 2001 (pre-CAFA) with January through June 2007 (post-CAFA) to draw conclusions about whether CAFA had successfully shifted class actions to federal courts. *Id.* In the pre-CAFA period, 1370 class actions were filed in, or removed to, federal court, compared with 2354 in the post-CAFA study period. *Id.* at 3. Notably, the federal courts observed the single largest number of filings and removals in March 2005, immediately following the enactment of CAFA. *See Lee & Willging, supra* note 4, at 1750 (interpreting FJC study's findings). The FJC concluded that its findings were "consistent with the hypothesis that CAFA has caused an increased number of class actions based on diversity of citizenship jurisdiction to be filed in the federal courts." *See FJC STUDY, supra*, at 1.

⁴⁸ *See FJC STUDY, supra* note 47, at 1-2 (summarizing FJC findings); *see also* Erichson, *supra* note 2, at 1613 (detailing FJC's findings).

⁴⁹ *See FJC STUDY, supra* note 47, at 22 (illustrating substantial increases in original filings and removals in Third, Ninth, and Eleventh Circuits); *see also* Erichson, *supra* note 2, at 1612 (citing John C. Coffee Jr. & Stefan Paulovic, *Class Certification: Developments over the Last Five Years 2002-2007*, 8 CLASS ACTION LITIG. REP. (BNA) S-819 (Oct. 26, 2007) (characterizing each circuit's class certification policy)). Although the law on class certification varies between each circuit, certain circuits have a reputation for being relatively liberal on class certification—namely, the Second, Third, and Ninth Circuits. *See* Erichson, *supra* note 2, at 1612. Conversely, the Fourth, Fifth, and Seventh Circuits are known as being relatively conservative about class certification. *Id.*

⁵⁰ *See FJC STUDY, supra* note 47, at 6 (reporting class action removal statistics). In the pre-CAFA period studied, diversity class action removals averaged 17.2% per month. *Id.* That figure increased to 33.3% per month from March 2005 through June 2006. *Id.*

⁵¹ *See id.* at 8, 22 (analyzing diversity class action removal by circuit). By analyzing each circuit's data separately, the FJC found that although removals decreased in a few circuits, most of the districts with substantial numbers of diversity class actions experienced increases in diversity removals. *Id.* at 8. The circuits experiencing decreases in removals were the Fourth, Fifth, Sixth, Eighth, and Tenth Circuits. *Id.* at 22. In the district courts of the Ninth Circuit, the number of cases removed to federal court on the basis of diversity jurisdiction substantially increased from sixty-two cases in 2002–2003, to 130 cases in the last two years of the study

Circuit, which contained one of the most notorious magnet jurisdictions in the pre-CAFA context, experienced more than a doubling of class action removals when comparing the twelve-month period before and after CAFA's effective date.⁵² However, overall diversity class action removals trended downward in the last two months of the study, leveling off near the pre-CAFA number of removals per month.⁵³ The FJC cautioned that without comparable data on class action activity in the state courts, it could not make any definitive conclusions regarding the reason for the decrease in class action removals.⁵⁴

Interestingly, original filings in federal court based on diversity jurisdiction also increased dramatically after the enactment of CAFA.⁵⁵ In

period. *Id.* at 8.

⁵² See Lee & Willging, *supra* note 4, at 1762 (announcing removal data as it relates to Seventh Circuit). The FJC researchers posited that defendants in the Seventh Circuit took advantage of CAFA's relaxed procedural requirements to remove their cases to federal court. *Id.* In the pre-CAFA context, the state courts of the Seventh Circuit were considered magnet jurisdictions. See *supra* note 26 and accompanying text (describing Circuit Court of Madison County, Illinois as magnet jurisdiction).

⁵³ See FJC STUDY, *supra* note 47, at 6. In the last twelve months of the study, July 2006 through June 2007, diversity class action removals decreased to an average of 18.1 per month, a figure comparable to the number of removals in the pre-CAFA period. *Id.* at 6.

⁵⁴ See *id.* at 7 (refusing to make definitive conclusion). However, the increase in diversity jurisdiction class actions being filed originally in federal court suggests that there may be fewer class actions in state court to remove. *Id.* at 8; see also Lee & Willging, *supra* note 4, at 1748 (noting no conclusive findings may be made without comparable state court data).

⁵⁵ See FJC STUDY, *supra* note 47, at 8 ("[T]he number of diversity class actions filed as original proceedings in the district courts basically tripled, increasing by slightly more than 200 percent."). The FJC found an overall increase in diversity class actions originally filed in federal district court in eleven of the twelve circuits. *Id.* at 9. The Third, Ninth, and Eleventh Circuits had the greatest increases in original filings. *Id.* The Fourth, Fifth, Sixth, Eighth, and Tenth Circuits saw major decreases in removals as compared to the increases each circuit saw in diversity class action suits originally filed in federal court. *Id.* Additionally, the FJC noted a dramatic increase in original diversity class action filings in certain district courts within each circuit. *Id.* at 10 (analyzing diversity class action removal by district within each circuit). For example, there was an eleven-fold increase in the Eastern District of Louisiana; more than a seven-fold increase in both the District of New Jersey and Southern District of Florida; more than a five-fold increase in the Central District of California; and more than a fourfold increase in the Northern District of Ohio. *Id.* This data suggests that while CAFA has enabled defendants to remove class actions to federal courts, it also has encouraged plaintiffs' attorneys to "file class actions in those federal courts perceived to be most amenable to class certification." See Erichson, *supra* note 2, at 1614; see also FJC STUDY, *supra* note 47, at 7 ("The findings with respect to increases in diversity class action filings strongly suggest that CAFA has altered class action plaintiffs' forum choices . . ."); McLAUGHLIN, *supra* note 16, § 12:10 ("[E]arly data thus suggests that many class action plaintiff lawyers have decided to avoid the expense and delay of removal and remand skirmishes precipitated by state court filings of suits removable under CAFA."). Since CAFA's enactment, many plaintiffs have chosen to file in the "available federal district perceived to be most advantageous to their interests." *Id.*

particular, diversity class actions originally filed in federal courts during July through December 2001 (pre-CAFA) averaged 11.9 per month, compared to an average of 34.5 filed per month during January through June 2007 (post-CAFA).⁵⁶ The Third and Ninth Circuits saw the greatest overall increases, with the Third Circuit registering a fivefold increase and the Ninth Circuit registering more than a fourfold increase.⁵⁷ FJC researchers cited this dramatic increase as the driving force behind the overall increase of class action suits being heard in federal court.⁵⁸

Although the FJC data suggests that CAFA has successfully effectuated its purpose of shifting class action disputes of nationwide importance to federal courts, statutory interpretational issues created by federal district court judges have created new problems in the class action context.⁵⁹

A. Interpretation Issues: Judges

Shortly after CAFA's enactment, the courts were faced with interpreting which party should bear the burden of establishing federal jurisdiction.⁶⁰ Every circuit that has considered this issue has held that the

⁵⁶ See FJC STUDY, *supra* note 47, at 7 n.6.

⁵⁷ See FJC STUDY, *supra* note 47, at 9, 22.

⁵⁸ See FJC STUDY, *supra* note 47, at 12-13 (concluding original filings, rather than removals, driving post-CAFA increase in federal diversity actions).

⁵⁹ See *supra* note 47 and accompanying text (concluding CAFA shifted most class actions having nationwide importance from state to federal courts); see also *infra* note 64 and accompanying text (explaining differences in federal interpretation of CAFA led to circuit split). See generally Michael D. Y. Sukenik & Adam J. Levitt, *CAFA and Federalized Ambiguity: The Case for Discretion in the Unpredictable Class Action*, 120 YALE L.J. ONLINE 233, 234 (2011) ("Millions of dollars in legal fees, along with a great deal of litigants' and judges' time, have been spent trying to unravel CAFA's statutory framework and its practical meaning.").

⁶⁰ See *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447-48 (7th Cir. 2005) (addressing burden issue). In *Brill*, the Seventh Circuit held that the party seeking federal jurisdiction has the burden of proving that it is proper under CAFA. *Id.* at 447. In *Brill*, the plaintiff filed a class action in state court alleging that Countrywide Home Loans violated the Telephone Consumer Protection Act by sending advertisements by facsimile. *Id.* In its notice of removal, pursuant to CAFA, Countrywide alleged that the class was comprised of more than 100 plaintiffs, minimal diversity of citizenship was present, and the amount in controversy exceeded \$5 million. *Id.* Additionally, Countrywide conceded that it sent at least 3800 advertising faxes. *Id.* Under the Telephone Consumer Protection Act, a court may award \$500 per fax, which may be trebled if the defendant willfully or knowingly violated the Act. *Id.* Thus, the amount in controversy could reach \$5.7 million. *Id.* Despite this, the district court remanded the case, ruling that Countrywide did not meet its burden to establish federal jurisdiction. *Id.* Countrywide appealed, and the Seventh Circuit reversed, rejecting Countrywide's argument that CAFA had shifted the burden of proof to the party opposing removal. *Id.* at 447-48. The court reasoned that placing the burden on the removing party was consistent with the Seventh Circuit's well-

party seeking federal jurisdiction has the burden of proving that it is proper under CAFA.⁶¹ While this broader issue appears settled, there is currently a split among the circuit courts regarding what burden the removing party must meet to prove that CAFA jurisdiction is proper.⁶²

The majority of courts have held that when the plaintiff alleges damages in excess of \$5 million, the defendant may remove so long as he shows by a preponderance of the evidence—or shows a reasonable probability—that the amount in controversy exceeds the jurisdictional minimum.⁶³ However, the circuits are split regarding what burden a defendant must prove when the plaintiff disclaims the amount in controversy.⁶⁴ The majority of the circuits have adopted the

established precedent under the general removal statute, and that it made practical sense in the class-action context because the removing party is generally better able to calculate the maximum amount in controversy. *Id.* at 447 (citing *Smith v. Am. Gen. Life & Accident Ins. Co.*, 337 F.3d 888, 892 (7th Cir. 2003); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997)). Additionally, the court noted that when the defendant has access to vital knowledge that the plaintiff may lack, “a burden that induces the removing party to come forward with the information—so that the choice between state and federal court may be made accurately—is much to be desired.” *Id.* at 447-48.

⁶¹ See, e.g., *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 48 (1st Cir. 2009) (holding removing defendant has burden of proving federal jurisdiction under CAFA); *Strawn v. AT & T Mobility LLC*, 530 F.3d 293, 298 (4th Cir. 2008) (“[I]n removing a class action based on diversity jurisdiction . . . the party seeking to invoke federal jurisdiction must . . . demonstrate the basis for federal jurisdiction.”); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 404-05 (6th Cir. 2007) (stating same); *Morgan v. Gay*, 471 F.3d 469, 473 (3d Cir. 2006) (stating same); *DiTolla v. Doral Dental IPA of N.Y., LLC*, 469 F.3d 271, 275 (2d Cir. 2006) (stating same); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1329-30 (11th Cir. 2006) (stating same); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 686 (9th Cir. 2006) (holding CAFA did not shift burden of establishing there is no removal jurisdiction); *Brill*, 427 F.3d at 447-48 (stating same).

⁶² See cases cited *infra* note 64 (listing removal burden adopted by each circuit).

⁶³ See Diane B. Bratvold & Daniel J. Supalla, *Standard of Proof to Establish Amount in Controversy when Defending Removal Under the Class Action Fairness Act*, 36 WM. MITCHELL L. REV. 1397, 1413-25 (2010) (explaining majority of circuits have adopted “preponderance of the evidence test” or functional equivalent). Specifically, the First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits have adopted a form of the “preponderance of the evidence” test to determine whether a removing defendant has proved that the amount in controversy exceeds \$5 million when the plaintiff claims that the damages are over \$5 million. *Id.* But see *infra* note 77 and accompanying text (stating Third and Ninth Circuits use “legal certainty” test when plaintiff disclaims amount in controversy).

⁶⁴ See *Bell v. Hershey Co.*, 557 F.3d 953, 957 (8th Cir. 2009) (declining to follow legal certainty test); *Smith*, 505 F.3d at 407 (“A disclaimer in a complaint regarding the amount of recoverable damages does not preclude a defendant from removing the matter to federal court upon a demonstration that damages are ‘more likely than not’ to ‘meet the amount in controversy requirement’”); *Miedema*, 450 F.3d at 1330 (“[T]he removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional requirement.”). Likewise, although the standard has yet to be adopted by the Fourth Circuit Court of Appeals, the district courts of that circuit have continued to find that the removing party must show that the amount in controversy exceeds \$5 million by a “preponderance of the evidence.”

“preponderance of the evidence” test, with only the Third and Ninth Circuits utilizing the “legal certainty” test.⁶⁵

1. “Preponderance of the Evidence” Test—Majority

Under the “preponderance of the evidence” test, the party asserting federal jurisdiction has the burden of showing that the amount in controversy “more likely than not” exceeds the jurisdictional threshold.⁶⁶ The majority of the circuits have adopted this standard, in one form or another.⁶⁷ In *Bell v. Hershey Co.*,⁶⁸ the Eighth Circuit established a bright-

See, e.g., *Wheeling Hosp., Inc. v. Ohio Valley Health Servs. & Educ. Corp.*, No. 5:10CV67, 2010 WL 4977987, at *3 (N.D.W. Va. Dec. 2, 2010) (“This Court has consistently applied the ‘preponderance of evidence’ standard to determine whether a removing defendant has met its burden of proving the amount in controversy.”); *Martin v. State Farm Mut. Auto. Ins. Co.*, No. 3:10-0144, 2010 WL 3259418, at *3 (S.D.W. Va. Aug. 18, 2010) (“Where the complaint does not specify the amount in controversy, the removing party must prove the jurisdictional amount by a preponderance of the evidence.”); *McMahon v. Advance Stores Co.*, No. 5:07CV123, 2008 WL 183715, at *8 (N.D.W. Va. Jan. 18, 2008) (finding defendant’s estimates as to amount in controversy insufficient to meet preponderance of evidence burden). Similarly, the First, Second, and Seventh Circuits have held that a defendant must show a “reasonable probability” that the amount in controversy exceeds \$5 million. *See Amоче*, 556 F.3d at 48 (adopting “reasonable probability” standard); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) (holding moving party must show “reasonable probability” that jurisdictional threshold met); *Brill*, 427 F.3d at 449 (acknowledging appropriateness of “reasonable probability” standard). The First Circuit stated that “for all practical purposes,” the “reasonable probability” test is “identical” to the “preponderance of the evidence” test. *See Amоче*, 556 F.3d at 50 (stating identical purpose of “reasonable probability” and “preponderance of evidence” tests). Finally, the Third and Ninth Circuits utilize both the “legal certainty” test and the “preponderance of the evidence” test depending on whether the plaintiff specifies an amount in controversy in the complaint. *See Frederico v. Home Depot*, 507 F.3d 188, 198 (3d Cir. 2007) (holding “preponderance of evidence” standard applies when plaintiff has not expressly limited damages); *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 999 (9th Cir. 2007) (adopting “legal certainty” standard where plaintiff does not specify amount in controversy); *Morgan*, 471 F.3d at 474 (holding “legal certainty” standard applies when plaintiff expressly disclaims amount in controversy); *Abrego Abrego*, 443 F.3d at 686 (holding “preponderance of evidence” applicable where amount in controversy not disclaimed).

⁶⁵ See cases cited *supra* note 64 (describing tests each circuit utilizes).

⁶⁶ See *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (establishing “preponderance of evidence” standard); see also *Bratvold & Supalla*, *supra* note 63, at 1414 (explaining removing defendant must prove amount in controversy “more likely than not” exceeds jurisdictional minimum).

⁶⁷ See cases cited *supra* note 64 (describing majority and minority views on removal burden). In *Miedema v. Maytag Corp.*, the Eleventh Circuit was the first court of appeals to hold that the “preponderance of the evidence” test was the appropriate standard for removal under CAFA. See 450 F.3d at 1332. In *Miedema*, the plaintiff filed suit in Florida state court on behalf of herself and all consumers of ovens manufactured by Maytag that contained a defective motorized door latch. *Id.* at 1324. The complaint, however, did not specify an amount in controversy. *Id.* at 1325. Maytag sought removal to federal court under CAFA, claiming that the amount in

line rule by holding that the “preponderance of the evidence” test is applicable regardless of whether the plaintiffs expressly allege an amount in controversy in the complaint.⁶⁹

The Eighth Circuit based its decision on the burden a removing party must meet in the non-CAFA context: “[t]he party seeking to remove . . . ‘has the burden to prove the requisite amount by a preponderance of the evidence’” regardless of whether the complaint pleads a specific amount in controversy.⁷⁰ The court reasoned that utilizing the “preponderance of the evidence” standard, rather than the “legal certainty” standard, was necessary to create consistency between CAFA and non-CAFA cases.⁷¹

Additionally, the court reasoned that requiring a defendant to meet the high burden of “legal certainty” would conflict with CAFA’s primary purpose of opening “the federal courts to corporate defendants out of concern that the national economy risked damage from a proliferation of meritless class action suits.”⁷² Finally, the Eighth Circuit noted that if the

controversy exceeded \$5 million because Maytag had sold 6729 ovens in Florida with a total value of \$5,931,971. *Id.* The Eleventh Circuit affirmed the district court’s decision to remand the case to state court after finding that Maytag failed to demonstrate the amount in controversy by a “preponderance of the evidence.” *Id.* at 1331. The court announced a two-part “preponderance of the evidence” test. *Id.* at 1330. First, the court must determine whether it is “facially apparent from the complaint that the amount in controversy exceeds the jurisdictional requirement.” *Id.* If so, that amount controls. *Id.* However, if the jurisdictional amount is not “facially apparent” from the complaint, the court must then look to the defendant’s notice of removal to determine whether the jurisdictional amount is met by a “preponderance of the evidence.” *Id.* In *Miedema*, Maytag failed to meet its burden because it “offered no explanation as to how [it] arrived at the conclusion that the 6,729 range/oven units had a ‘total value’ of \$5,931,971.” *Id.* at 1331.

⁶⁸ 557 F.3d 953 (8th Cir. 2009).

⁶⁹ See *id.* at 958 (announcing holding of case). In *Bell*, plaintiffs brought a class action in Iowa state court alleging that five chocolate manufacturers violated state antitrust laws. *Id.* at 954. In the petition, the plaintiffs sought compensatory damages and attorneys’ fees that were expressly limited to less than \$5 million. *Id.* at 955. Nevertheless, the defendants filed for removal, offering calculations based on facts alleged elsewhere in the petition that the amount in controversy exceeded \$5 million. *Id.* at 954-56. By revising the assumed price fixing overcharge that served as the basis for the plaintiffs’ calculations, the defendant estimated that the amount in controversy would be \$5.04 million. *Id.* at 955. However, the district court granted the plaintiffs’ motion to remand after finding that the defendants failed to prove with “legal certainty” that the amount in controversy exceeded \$5 million. *Id.* at 956. On interlocutory appeal, the Eighth Circuit vacated the district court’s remand order. *Id.* at 959.

⁷⁰ See *id.* at 956 (quoting *Advance Am. Servicing of Ark., Inc. v. McGinnis*, 526 F.3d 1170, 1173 (8th Cir. 2008)) (describing removal in non-CAFA context). After the defendant satisfies the “preponderance of the evidence” standard, the case will be heard in federal court unless the plaintiff can prove to a “legal certainty” that the claim is for less than the jurisdictional amount. See *id.* (explaining burden shift once federal jurisdiction established).

⁷¹ See *id.* at 957 (rejecting distinction between CAFA and non-CAFA cases).

⁷² See *id.* at 957 (acknowledging CAFA’s purpose). The court further noted that the “legal certainty” burden has primarily been placed on the party seeking to assert federal jurisdiction, not

court adopted different standards depending on the amount claimed, defendants in the same circuit would be subject to different standards of proof, depending on the state court from which the case was removed.⁷³

2. “Legal Certainty”—Third and Ninth Circuits

The “legal certainty” test requires a significantly higher showing than the “preponderance of the evidence” test.⁷⁴ Under the “legal certainty” test, the amount claimed by the plaintiff controls so long as it is claimed in good faith.⁷⁵ However, if it is apparent to a “legal certainty” that the plaintiff cannot recover the amount claimed, or that the plaintiff was never entitled to that amount, the case may not be heard in federal court.⁷⁶ Currently, only the Third and Ninth Circuits require a removing defendant to prove damages to a “legal certainty” when the plaintiff disclaims that the amount in controversy exceeds \$5 million.⁷⁷

the party seeking to defeat federal jurisdiction. *Id.* at 957-58.

⁷³ See *Bell*, 557 F.3d at 958 (cautioning “unintended consequences” if courts do not adopt uniform standard). The Eighth Circuit noted that different states have different pleading requirements. *Id.* For example, Iowa prohibits plaintiffs from alleging specific damages in pleadings, whereas Arkansas lacks such a prohibition. *Id.* Thus, unless a uniform “preponderance of the evidence” test is adopted, defendants within the same circuit “would be subject to varying burdens of proof upon removal based solely on differing state pleading requirements.” *Id.* See generally Bratvold & Supalla, *supra* note 63, at 1416 (describing effect different burdens of proof would have on defendants).

⁷⁴ See *St. Paul Mercury Indem. Co. v. Red Cab*, 303 U.S. 283, 288-89 (1938) (announcing “legal certainty” test). The *Red Cab* “legal certainty” test seeks to “rigorously” enforce the intent of Congress to drastically restrict federal jurisdiction in controversies between citizens of different states. *Id.* at 288; see also F. Elliotte Quinn IV, Note, *A Real Class Act: The Class Action Fairness Act of 2005’s Amount in Controversy Requirement, Removal, and the Preponderance of the Evidence Standard*, 78 DEF. COUNS. J. 85, 92-95 (2011) (analyzing the additional burden imposed by “legal certainty standard”). The “legal certainty” standard imposes a higher burden than the “preponderance of the evidence” standard because it requires the defendant to prove that the plaintiff cannot possibly legally recover the amount he or she has alleged. See Quinn, *supra*, at 92. Critics claim the burden imposed by the “legal certainty” test is too high because it essentially forces the defendant to “establish[] [the] plaintiff’s claim for him” at the outset of litigation. *Id.* at 93.

⁷⁵ See *Red Cab*, 303 U.S. at 288-89 (articulating legal certainty test).

⁷⁶ *Id.* at 289 (describing non-CAFA burden required to defeat defendant’s removal to federal court).

⁷⁷ See *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 999 (9th Cir. 2007) (adopting legal certainty standard); *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006) (adopting legal certainty standard). In *Morgan*, purchasers of the defendant’s skin care cream brought a class action suit for false advertising under the New Jersey Consumer Fraud Act, seeking compensatory and punitive damages. 471 F.3d at 471. In the complaint, the plaintiffs’ expressly stated that the damages “shall not exceed \$5 million in sum or value.” *Id.* After the defendants removed the case under CAFA, the plaintiffs filed a motion to remand asserting that federal

In adopting the “legal certainty” standard, the Third Circuit relied on the proposition that plaintiffs are the masters of their own claims and, as such, may limit their recovery to avoid federal jurisdiction.⁷⁸ The Third Circuit held that the amount in controversy asserted by the plaintiff is subject to a “broad good faith requirement,” which can only be overcome by a defendant who shows to a “legal certainty” that the amount in controversy exceeds \$5 million.⁷⁹

Similarly, in *Lowdermilk v. United States Bank National Ass’n*,⁸⁰

jurisdiction was improper because the amount in controversy was less than \$5 million. *Id.* Affirming the district court’s decision to remand the case, the Third Circuit held that the defendant failed to prove to a “legal certainty” that the amount in controversy exceeded \$5 million. *Id.* at 476. In *Lowdermilk*, the plaintiff sought relief on behalf of a class of employees who had been denied full compensation by the defendant for the hours that they worked. 479 F.3d at 996. Specifically, the plaintiffs alleged that because the defendant had a policy of rounding hours worked down to the nearest tenth of an hour, each employee was denied compensation for one to five minutes of the time worked each day. *Id.* The pleadings expressly stated that the aggregate total of the claims pled did not exceed five million dollars. *Id.* The defendant argued that because the plaintiffs did not seek a specific amount of damages, the “preponderance of the evidence” standard should apply and, thus, removal should be allowed. *Id.* at 998. However, the court determined that the “preponderance of the evidence” standard should be reserved for scenarios where the court has to look beyond the four corners of the complaint to determine whether the suit meets jurisdictional requirements. *Id.* Here, the plaintiff expressly claimed that the amount in controversy did not reach the threshold for jurisdiction; thus, the court found the “preponderance of the evidence” standard inapplicable. *Id.* The dissent noted, however, that “the ‘legal certainty,’ or ‘good faith,’ test . . . is applicable where the complaint at issue specifies an amount in controversy lower than the jurisdictional minimum, not where the complaint fails to specify what the amount in controversy is.” *Lowdermilk*, 479 F.3d at 1005 (Kleinfeld, J., dissenting).

⁷⁸ See *Morgan*, 471 F.3d at 474. Historically, courts have given deference to the plaintiff’s choice of forum. See *Red Cab*, 303 U.S. at 294. If the plaintiff wished to limit damages in order to avoid federal court, the court would allow him to do so because historically, a plaintiff could only recover the amount pled in the complaint. *Id.* at 292. But see *Quinn*, *supra* note 74, at 102 (suggesting changes in relevant law eliminate need to impose “legal certainty” requirement). The law in federal court and in a majority of state courts no longer binds plaintiffs by the amount claimed in the pleadings. *Id.* at 103 (citing *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1410 (5th Cir. 1995)). Rather than limit damage awards to the amount specified in the ad damnum clause of state pleadings, most states follow the example of Federal Rule of Civil Procedure 54(c), which states that “final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” FED. R. CIV. P. 54(c); see *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 705 n.6 (9th Cir. 2007) (O’Scannlain, J., specially concurring) (“In most jurisdictions . . . the common law rule no longer prevails and the ad damnum clause does not set forth an upper limit on recovery.”); *De Aguilar*, 47 F.3d at 1410 (noting majority of states do not limit damages to state pleading ad damnum amount).

⁷⁹ See *Morgan*, 471 F.3d at 474 (addressing requirements of “legal certainty”). In *Morgan*, the court held that by failing to disclose the price, sales, or profits of the skin cream, the defendant did not provide enough information to prove to a “legal certainty” that the amount in controversy exceeded the statutory minimum. *Id.* at 475-76.

⁸⁰ 479 F.3d 994 (9th Cir. 2007).

the Ninth Circuit held that the “legal certainty” test is proper where a plaintiff disclaims an amount in controversy in excess of the jurisdictional minimum.⁸¹ The Ninth Circuit reasoned that the presumption against federal jurisdiction necessitated the adoption of the stricter “legal certainty” test.⁸² Specifically, the court stated that “[b]y adopting ‘legal certainty’ as the standard of proof, we guard the presumption against federal jurisdiction and preserve the plaintiff’s prerogative, subject to the good faith requirement, to forgo a potentially larger recovery to remain in state court.”⁸³

When damages are not expressly limited in the pleadings, both circuits have held that the defendant must prove that the amount in controversy exceeds \$5 million by a “preponderance of the evidence.”⁸⁴ Consequently, in the Third and the Ninth Circuits, the defendant’s burden depends on, first, whether the plaintiff asserts an amount in controversy in the pleadings, and second, on the amount asserted.⁸⁵ Where the plaintiff

⁸¹ See *id.* at 999 (adopting “legal certainty” test).

⁸² See *id.* at 998 (reasoning limited jurisdiction of federal courts requires them to strictly construe jurisdiction). See generally Quinn, *supra* note 74, at 95-97 (analyzing presumption against federal jurisdiction in CAFA context). Federal courts must strictly construe their jurisdiction in order to avoid infringing upon state sovereignty. *Id.* at 96; see Bratvold & Supalla, *supra* note 63, at 1426 (“[C]ourts should strictly construe [CAFA] yet stop the erosion of federal jurisdiction over class actions consistent with the provisions in CAFA.”). The rules of statutory construction require that jurisdictional statutes not be given more expansive interpretation than their text warrants, while also ensuring that they are not given a narrower interpretation than the text provides. See *id.* (citing *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005)).

⁸³ See *Lowdermilk*, 479 F.3d at 999 (holding “legal certainty” standard required to protect presumption against federal jurisdiction); see also *supra* note 78 and accompanying text (explaining historical rationale for giving deference to plaintiff’s forum choice). The court also noted that applying the “legal certainty” standard to this situation maintains symmetry in the civil justice system because the standard is also applicable when a defendant seeks to remand a case that has originally been filed in federal court. *Lowdermilk*, 479 F.3d at 999.

⁸⁴ See *Frederico v. Home Depot*, 507 F.3d 188, 198 (3d Cir. 2007) (holding “preponderance of the evidence” applies where plaintiff has not expressly limited damages); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 683 n.8, 686 (9th Cir. 2006) (noting “preponderance of the evidence” standard applicable where amount in controversy is not disclaimed).

⁸⁵ See cases cited *supra* notes 77, 84 (explaining different burdens required depending on what damages are alleged); see also *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 699 (9th Cir. 2007) (describing three removal standards utilized in Ninth Circuit). First, where the state court complaint alleges an amount in controversy greater than \$5 million, the jurisdictional threshold is satisfied unless the party seeking to prevent removal can prove to a “legal certainty” that the plaintiff cannot recover that amount. See *Guglielmino*, 506 F.3d at 699. Second, if the complaint does not specify an amount in controversy, the removing defendant must establish the jurisdictional threshold by a “preponderance of the evidence.” *Id.* Finally, when the plaintiff disclaims the amount in controversy, the party seeking removal must prove to a “legal certainty” that the damages exceed \$5 million. *Id.*

expressly limits the amount in controversy to less than \$5 million, the “legal certainty” test is used; however, where the pleadings are silent regarding the amount in controversy, the “preponderance of the evidence” test is utilized.⁸⁶

III. ANALYSIS

Congress enacted CAFA in response to perceived abuse of the traditional class action device.⁸⁷ As a procedural statute, CAFA expands federal jurisdiction over complex class actions that have implications nationwide.⁸⁸ Although preliminary studies indicate that CAFA has successfully shifted many class actions from state to federal court, CAFA’s docket-shift has not eliminated the behaviors that prompted passage of the statute.⁸⁹

Pre-CAFA, critics cited lax certification of class actions by state court judges as leading to the creation of “magnet jurisdictions” that ultimately encouraged forum shopping and jurisdictional manipulation.⁹⁰ Congress determined that shifting major class actions to federal dockets would eliminate the problems created by the unbridled discretion of state court judges.⁹¹ However, by failing to provide a uniform removal standard for invoking CAFA, Congress provided federal judges with the same discretion it sought to remove from state court judges.⁹² Additionally,

⁸⁶ See cases cited *supra* notes 77, 84 (describing circumstances where “legal certainty” or “preponderance of the evidence” standard is used).

⁸⁷ See *supra* note 1 and accompanying text (describing reason Congress enacted CAFA).

⁸⁸ See 28 U.S.C. § 1332(d)(2), (d)(5) (2006) (listing requirements of federal jurisdiction under CAFA); 28 U.S.C. § 1453(b) (2006) (listing requirements for class action removal). Realizing that the judges of federal courts had better resources to handle complex nationwide class actions, Congress sought to make removal to federal court easier by relaxing the jurisdictional requirements of federal diversity jurisdiction. See *supra* note 26 and accompanying text (describing resources of federal judiciary).

⁸⁹ See *supra* notes 47-58 and accompanying text (outlining findings of FJC class action study). Preliminary data indicates that class actions were increasingly filed in, and removed to, federal court after CAFA’s enactment. See *supra* notes 50-55 and accompanying text. However, although every circuit saw an increase in class action activity, the data varied widely amongst each circuit court. See FJC STUDY, *supra* note 47, at 1-2 (summarizing FJC findings).

⁹⁰ See *supra* note 26 (citing lax certification as leading to abuse of class action device).

⁹¹ See *supra* note 26 and accompanying text (describing abuse resulting from lax class certification by state court judges).

⁹² See *supra* note 3 and accompanying text (admonishing state court judges for discretionary abuse regarding class certification). In promoting CAFA, Congress criticized state court judges for being lax about enforcing Rule 23’s requirements before certifying class action lawsuits. See *supra* note 26 and accompanying text (citing state court judges’ lax certification as leading to magnet jurisdictions). Congress repeatedly stated that nationwide class actions belong in federal

although the FJC data suggests that CAFA has successfully shifted many nationwide class actions to federal court, a closer analysis of the data reveals that the “magnet jurisdiction” problem that existed pre-CAFA has not been eliminated.⁹³

As expected, the number of class actions filed in, or removed to, federal district courts increased dramatically in the years following CAFA’s enactment.⁹⁴ However, the FJC study indicated that, although every circuit saw an increase in class activity, the results varied widely by circuit.⁹⁵ Specifically, reputed “class-friendly” circuits saw greater increases in original filings and removals than more conservative circuits.⁹⁶ This data suggests that class action plaintiffs are continuing to file actions in the state and federal courts most perceived to be pro-class plaintiff.⁹⁷

Interestingly, the number of class action removals trended downward toward the end of the FJC study.⁹⁸ This downward trend suggests that more class action plaintiffs are choosing to file suit originally

court where judges have the resources to ensure proper certification and oversight of class action suits. *See supra* note 26 and accompanying text (arguing federal judges better equipped to handle class actions). However, by remaining silent as to what burden a removing party must meet to invoke CAFA jurisdiction, Congress has left discretion to federal judges to parse out the appropriate removal burden on their own. *See supra* note 60 (addressing CAFA’s silence). Each circuit’s interpretation of CAFA’s removal burden has led to a split among the federal circuit courts. *See supra* note 64 and accompanying text (describing each circuit’s removal jurisprudence).

⁹³ *See supra* notes 47-58 and accompanying text (describing results of FJC study). As expected, the number of class action removals based on diversity jurisdiction increased dramatically after CAFA went into effect. *See supra* notes 50-52 (announcing increase in removals based on diversity jurisdiction). Taking into consideration that class action removals more than doubled in the Seventh Circuit, where magnet jurisdictions originally gained notoriety, the data suggests that CAFA has had a major impact on removing cases from state court dockets. *See supra* note 52 and accompanying text (stating Seventh Circuit removals based on diversity jurisdiction more than doubled post-CAFA). However, the data describing original federal filings based on diversity jurisdiction indicates that plaintiffs are selecting certain federal forums known to be pro-class action. *See supra* note 55 (describing which circuits are known to be pro-class certification).

⁹⁴ *See* FJC STUDY, *supra* note 47, at 3 (reporting 1370 pre-CAFA federal court cases compared with 2354 post-CAFA federal court cases).

⁹⁵ *See supra* note 47 and accompanying text (explaining FJC findings).

⁹⁶ *See supra* note 49 and accompanying text. The Third, Ninth, and Eleventh Circuits saw dramatic increases as compared to the level of increase in the Fourth, Fifth, and Seventh Circuits. *See* FJC STUDY, *supra* note 47, at 22 (reporting dramatic increases in Third, Ninth, and Eleventh Circuits).

⁹⁷ *See supra* note 55 (noting CAFA encouraged plaintiffs to seek out federal districts most amenable to class certification).

⁹⁸ *See supra* notes 47-58 and accompanying text (describing results of FJC study). Toward the end of the FJC study, CAFA removals leveled off to approximately the pre-CAFA number of removals. *See supra* note 53 and accompanying text (discussing downward trend).

in federal court so that they can exercise control over forum selection.⁹⁹ In fact, the FJC researchers noted that the number of diversity class actions filed as original proceedings increased more than two hundred percent at the same time that removals trended downward.¹⁰⁰

However, the increase in original class action filings was not evenly distributed throughout the federal district courts.¹⁰¹ Diversity class actions originally filed in the Third and Ninth Circuits greatly exceeded the number of original class action suits filed in other jurisdictions.¹⁰² Not surprisingly, the Third and Ninth Circuits are perceived as being more amenable to class certification compared to other jurisdictions.¹⁰³ This data strongly suggests that plaintiffs' attorneys are forum shopping for pro-class jurisdictions within the federal district courts.¹⁰⁴

Exacerbating this forum shopping issue, CAFA's silence concerning the removal burden provides federal judges with the same discretion that Congress sought to remove from state court judges.¹⁰⁵ Allowing the federal courts to parse out the appropriate removal standard has resulted in a circuit split between utilizing the "preponderance of the evidence" standard and the more strict "legal certainty" standard.¹⁰⁶

This split creates an incentive for plaintiffs who wish to remain in state court to forum-shop for the Third and Ninth Circuits.¹⁰⁷ By adopting

⁹⁹ See FJC STUDY, *supra* note 47, at 7 (admitting downward trend could be result of fewer class actions in state courts). The FJC refused to make any definitive conclusions regarding why there were fewer removals based on diversity jurisdiction toward the end of the study. *Id.* However, the researchers suggested that a likely cause of the decrease in removals was that there were fewer class actions being filed in state court. *Id.* Instead, plaintiffs were choosing to file in federal court so that they could choose the federal forum most amenable to their claim. *Id.*

¹⁰⁰ See *supra* note 55 and accompanying text (reporting original class action diversity filings nearly tripled in federal district courts post-CAFA).

¹⁰¹ See *id.* at 9 (stating some circuits saw greater increase in original filings than others). Class actions were more frequently filed in the Third, Ninth, and Eleventh Circuits than the Fourth, Fifth, Sixth, Eighth, and Tenth Circuits. *Id.*

¹⁰² See *id.* (describing results of study). The Third Circuit saw a fivefold increase and the Ninth Circuit saw a four-fold increase in original class action filings based on diversity jurisdiction. *Id.*

¹⁰³ See *supra* note 49 and accompanying text (characterizing Third and Ninth Circuits' class certification reputation).

¹⁰⁴ See *supra* note 55 (suggesting increase in original filings a result of plaintiff's altered forum choices).

¹⁰⁵ See *supra* note 26 (explaining state court judicial discretion led to magnet jurisdictions).

¹⁰⁶ See cases cited *supra* note 64 (outlining circuit split).

¹⁰⁷ See *supra* note 64 and accompanying text (explaining burden requirements for each circuit). The "legal certainty" standard is significantly higher than the preponderance of the evidence standard. See *supra* note 74 and accompanying text (stating "legal certainty" standard "rigorously" enforces Congress's intent to safeguard federal jurisdiction). Other circuits only

the “legal certainty” test as the appropriate removal burden when the plaintiff disclaims an amount in controversy, the Third and Ninth Circuits place a significant obstacle in the path of a removing defendant.¹⁰⁸ The Third and Ninth Circuits cite the presumption against federal jurisdiction and the proposition that the plaintiff is the master of his own claim as justifications for imposing the strict “legal certainty” standard on the removing defendant.¹⁰⁹ However, these justifications are misguided in the class action context because they fail to take into account the due process rights of defendants and congressional intent.¹¹⁰

Although it is well established that the plaintiff is the master of his complaint and may limit damages to avoid federal jurisdiction, the plaintiff’s interest in forum selection does not justify imposing the “legal certainty” burden on the removing defendant in the class action context.¹¹¹ Due to changes in legal precedent in federal courts and the majority of state courts, judges and juries are no longer bound by the plaintiff’s claimed damages when awarding a remedy; thus, the historical rationale for giving the plaintiff’s forum choice substantial deference does not justify imposing the strict “legal certainty” test upon the removing defendant.¹¹²

Furthermore, requiring a removing defendant to prove that the amount in controversy exceeds \$5 million to a “legal certainty” forces the

require the removing defendant to prove the amount in controversy exceeds \$5 million by a “preponderance of the evidence.” See cases cited *supra* note 64 (listing circuits utilizing “preponderance of evidence” standard when plaintiff disclaims amount in controversy).

¹⁰⁸ See *supra* note 74 (describing significantly higher burden of “legal certainty” test). Under the “legal certainty” standard, the amount in controversy claimed by the plaintiff controls as long as it is claimed in good faith. See *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938) (describing requirements of “legal certainty” test). A removing defendant must prove to a “legal certainty” that the amount in controversy exceeds the jurisdictional minimum for removal to be allowed. *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 999 (9th Cir. 2007).

¹⁰⁹ See *supra* notes 78-83 and accompanying text (outlining Third and Ninth Circuits’ reasoning for adopting “legal certainty” test).

¹¹⁰ See *infra* notes 113-17 and accompanying text (explaining plaintiff master of claim justification fails to consider defendant’s due process rights); *infra* notes 116-21 and accompanying text (explaining presumption against federal jurisdiction ignores congressional intent).

¹¹¹ See *supra* note 78 and accompanying text (describing historical rationale for proposition that plaintiff is master of own claim). Historically, the “legal certainty” standard was necessary to safeguard the plaintiff’s interest in forum selection because the plaintiff’s recovery was bound by the stated amount in controversy. *Red Cab*, 303 U.S. at 294.

¹¹² See *supra* note 78 and accompanying text (explaining federal law changes eliminating justification for “legal certainty” burden). A plaintiff’s recovery is no longer limited to what is pled in the complaint because most states adhere to Rule 54(c) of the Federal Rules of Civil Procedure. See *Bell v. Hershey Co.*, 557 F.3d 953, 959 (8th Cir. 2009) (stating most jurisdictions abandoned common law rule).

defendant to establish “the plaintiff’s claim for him.”¹¹³ Unlike the “preponderance of the evidence” standard where the removing defendant need only prove that the amount in controversy “more likely than not” exceeds \$5 million, the “legal certainty” standard requires the defendant to prove that the plaintiff cannot legally recover less than the jurisdictional minimum.¹¹⁴ By requiring the removing defendant to produce facts and information to prove that the plaintiff’s claim is actually worth more than the plaintiff has alleged at the outset of litigation, the defendant’s legal position is undermined as litigation progresses.¹¹⁵

Likewise, the Ninth Circuit’s reliance on the presumption against federal jurisdiction to justify imposing the “legal certainty” burden ignores congressional intent.¹¹⁶ Historically, in the diversity jurisdiction context, statutes have been narrowly construed to protect state sovereignty.¹¹⁷ However, removal statutes should not be so narrowly construed that they ignore congressional intent.¹¹⁸ Requiring removing parties to meet the strict “legal certainty” burden unnecessarily narrows the scope of CAFA and is directly at odds with Congress’s stated purpose in enacting CAFA: to provide “for Federal court consideration of interstate cases of national importance under diversity jurisdiction.”¹¹⁹

Additionally, the lack of uniform removal standards encourages

¹¹³ See *Bell*, 557 F.3d at 956-57 (criticizing “legal certainty” standard as too high a burden on removing defendant).

¹¹⁴ See *Quinn*, *supra* note 74, at 92-95 (comparing “preponderance of the evidence” and “legal certainty” requirements). The “legal certainty” test places a significantly higher burden on the defendant than the “preponderance of the evidence” test. See *supra* note 74 and accompanying text.

¹¹⁵ See *Quinn*, *supra* note 74, at 92-95 (admonishing “legal certainty” test as requiring removing defendant to prove plaintiff’s claim for him). When seeking removal, the defendant is at a “severe informational disadvantage” because he lacks discovery and information beyond the plaintiff’s complaint that would allow him to establish the amount in controversy with legal certainty. *Id.* at 93.

¹¹⁶ See *supra* notes 82-83 and accompanying text (announcing Ninth Circuit’s reliance on presumption against federal jurisdiction).

¹¹⁷ See *supra* note 82 (explaining historical rationale for guarding presumption against federal jurisdiction).

¹¹⁸ See *Bratvold & Supalla*, *supra* note 63, at 1426 (advising necessity of balancing congressional intent with textual interpretation of removal statutes). But see *Sukenik & Levitt*, *supra* note 59, at 241 (“Congress was ‘emphatic’ in insisting that it was ‘not impinging in any way on the independence of the Federal judiciary [or] their discretionary judgments’ in passing CAFA.” (quoting 151 CONG. REC. S1225 (daily ed. Feb. 10, 2005) (statement of Sen. Arlen Specter))). Critics cite CAFA’s expansion of federal jurisdiction as resulting in precisely the type of interference Congress guaranteed it would avoid when it passed CAFA. *Id.*

¹¹⁹ See *Quinn*, *supra* note 74, at 88 (cautioning statutory interpretation should not narrow scope of statute’s text).

plaintiffs' attorneys to manipulate their pleadings within the Third and Ninth Circuits to avoid federal jurisdiction.¹²⁰ As the Eighth Circuit recognized in *Bell*, subjecting the removing party to a different standard of proof depending on the plaintiff's allegation of damages could subject defendants in the same federal jurisdiction to different standards of proof, depending on from which state court the case was removed.¹²¹ For example, some states prohibit a plaintiff from pleading specific damages, whereas other states within the same circuit do not restrict pleadings.¹²² If the removal burden depends on the damages alleged in the complaint, the case removed from the state prohibiting specific damages may be subject to a different burden than the case removed from the state that has no such prohibition.¹²³ Plaintiffs wishing to defeat a defendant's right to removal under CAFA are incentivized to seek out forums that require the removing defendant to prove the amount in controversy to a "legal certainty."¹²⁴ Consequently, a lack of uniform interpretation among the federal circuits encourages and rewards the exact behaviors that Congress enacted CAFA to rectify: forum shopping and manipulation of jurisdictional requirements.

IV. CONCLUSION

Rather than remedy abuse through class action regulation in the state courts, Congress sought to transfer class actions from state court dockets to federal dockets, where it believed abuse would be less prevalent. However, it is clear that this docket-shift did not eliminate the problems and abuses that existed in the pre-CAFA context. The Third and Ninth Circuits have shown that pro-plaintiff class action jurisdictions—"magnet jurisdictions"—are not a problem exclusive to state courts. Additionally,

¹²⁰ See *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 699-700 (9th Cir. 2007) (describing different burdens of proof utilized depending on how plaintiff alleges damages).

¹²¹ See *Bell v. Hershey Co.*, 557 F.3d 953, 958 (8th Cir. 2009) (describing "unintended consequences" of non-uniform removal standards); *supra* note 73 and accompanying text (cautioning removal standards based on pleadings subject defendants to different standards within same circuit).

¹²² See *Bell*, 557 F.3d at 958 (describing contrasting state pleading laws in Iowa and Arkansas despite same federal circuit). In Iowa, the law prohibits any mention of specific damage in the pleadings. *Id.* However, Arkansas law does not contain the same prohibition. *Id.* Thus, if the Eighth Circuit had adopted a removal standard that depended on what was pled in the complaint, "defendants within the same circuit would [have been] subject to varying burdens of proof upon removal based solely on differing state pleading requirements." *Id.*

¹²³ See *id.*

¹²⁴ See *supra* note 107 and accompanying text (explaining differences in pleading requirements create different obstacles for removing defendant).

absent a uniform removal standard, plaintiffs' attorneys are encouraged to file suits in state courts sitting in the Third and Ninth Circuits to ensure that their cases are kept out of federal court. In the years following CAFA's enactment, it is clear that more than a docket-shift is necessary to remedy forum shopping and manipulation of the civil justice system.

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