



## Class Action

### *Class Action Fairness Act Burden Shifting Question Nearly Settled*

Since the passage of the *Class Action Fairness Act of 2005*, Pub. L. 109-2, 119 Stat. 4 (“CAFA”) in February 2005, a significant body of case law has developed interpreting the new and complex changes to class action jurisdiction and procedure in federal courts as a result of the law. One previously unsettled question involves whether CAFA shifts the burden of proof on a motion to remand a case back to state court to the party opposing federal jurisdiction. CAFA says nothing about the jurisdictional burden of proof when an action is removed

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to federal court and the traditional rule is that the removing party bears the burden of establishing federal jurisdiction.

Initially, a number of courts, not relying on any provision in CAFA but its legislative history, took the position that the burden shifts to the

plaintiff moving for remand of a class action removed under CAFA to show that federal subject matter jurisdiction is lacking.

The rationale for this change was a senate judiciary report issued ten days after CAFA’s passage into law which states: “If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied).” S.Rep. No. 109-14, at 42 (Feb. 28, 2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 40.

At the same time, a split was developing in the case law with a number of courts holding that Congress’ silence meant that CAFA did not change the burden of proving federal jurisdiction when a motion to remand is filed.

The Seventh Circuit was the first appellate court to weigh in on the burden of proof issue, and the court held that CAFA did not alter the traditional burden on a motion to remand. “The rule that the proponent of federal jurisdiction bears the risk of non-persuasion has been around for a long time. To change such a rule, Congress must enact a statute with the President’s signature (or by a two-thirds majority to override a veto). A declaration by 13 Senators will not serve.” *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005).

Recently the Ninth Circuit followed the Seventh Circuit and also held that CAFA did not alter the burden on remand. “We join our sister circuit and hold that CAFA’s silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the long-standing rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction.” *Abrego v. Dow Chemical Co.*, — F.3d —, 2006 WL 864300, \*8 (9th Cir. April 4, 2006).

With two circuits now having decided the issue by following the traditional rule on the burden for federal jurisdiction, a defendant will have a more difficult time arguing that CAFA shifts the burden to the party opposing remand. A majority of the circuits have not weighed in on the burden issue and a circuit split is a possibility, although with the direction of the recent case law it is unlikely future decisions will shift the burden of proof on a motion to remand.

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