

CAFA'S NEW "MINIMAL DIVERSITY" STANDARD FOR  
INTERSTATE CLASS ACTIONS CREATES A  
PRESUMPTION THAT JURISDICTION EXISTS, WITH  
THE BURDEN OF PROOF ASSIGNED TO THE  
PARTY OPPOSING JURISDICTION<sup>1</sup>

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I. INTRODUCTION

The Class Action Fairness Act of 2005<sup>5</sup> (CAFA) has reshaped the class-action landscape so dramatically that it will take years for class-action practitioners and the courts to understand its wholesale changes in the law and broad ramifications. These new provisions constitute the most sweeping changes to class-action practice in a generation, rendering obsolete many preexisting standards and practices. This landmark tort reform legislation has two principal components. First, CAFA "federalizes" most interstate class actions now in the state courts. It accomplishes this transformation through its revolutionary "minimal-diversity" jurisdictional provisions that substantially expand federal jurisdiction over class actions,

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5. Pub. L. 109-2, 119 Stat. 4 (2005).

and through its drastically liberalized rules for removal of class actions. Second, CAFA enacts a “Consumers’ Class Action Bill of Rights” that provides new consumer-protection standards in the context of class-action settlement practices.<sup>6</sup>

This article analyzes the critical interplay between CAFA’s new, expansive minimal-diversity and removal standards for interstate class actions on the one hand, and the preexisting, restrictive “complete diversity” and related removal standards on the other. Among other things, CAFA amended 28 U.S.C. 1332, which prior to CAFA allowed for complete-diversity jurisdiction only. CAFA adds the new minimal-diversity jurisdictional grant under amended 28 U.S.C. 1332(d). Specifically, section 1332(d)(2) now vests original minimal-diversity jurisdiction in the federal courts over interstate class actions that, generally, are those class actions with 100 or more plaintiffs in which the amount in controversy exceeds \$5,000,000 and at least one plaintiff and one defendant are citizens of different states.<sup>7</sup>

Since enactment of CAFA’s jurisdictional centerpiece—28 U.S.C. § 1332(d)—a critically important disagreement has arisen in the courts between plaintiffs and defendants over which party bears the burden of establishing the existence or nonexistence of minimal-diversity jurisdiction under CAFA. The face of new 28 U.S.C. § 1332(d) is silent on this precise point. Generally speaking, many jurisdictional contests involve close facts or close legal issues, and the outcome in these instances is often decided against the party who bears the burden of proof. In a class-action context,

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6. For a more detailed discussion of the various changes in class-action practice brought about by CAFA, see Anthony Rollo & Gabriel A. Crowson, *Mapping the New Class Action Frontier—A Primer on the Class Action Fairness Act and Amended Federal Rule 23*, 59:1 & 2 Consumer Fin. L.Q. Rep. (2005); Anthony Rollo & Gabriel A. Crowson, *The Newly Enacted Class Action Fairness Act, Part 1*, 8:17 Consumer Fin. Servs. L. Rep. (2005); Anthony Rollo & Gabriel A. Crowson, *The Newly Enacted Class Action Fairness Act, Part 2*, 8:18 Consumer Fin. Servs. L. Rep. (2005); John T. Kolinski, *The Class Action Fairness Act of 2005*, 80 APR FLBJ 18 (2006); David F. Herr & Michael C. McCarthy, *The Class Action Fairness Act of 2005—Congress Again Wades into Complex Litigation Management*, 228 F.R.D. 673 (2005); Warren W. Harris & Erin Glenn Busby, *Highlights of the Class Action Fairness Act of 2005—The Future of Class Actions in America*, 72 DEF. COUNS. J. 228 (2005); Aashish Y. Desai, *The Class Action Fairness Act*, 47-JUL OCLAW 20 (2005); Linda Pissott Reig, Charles E. Erway III, & Brian P. Sharkey, *The Class Action Fairness Act of 2005: Overview, Historical Perspective, and Settlement Requirements*, 40 TTIPLJ 1087 (2005).

7. Once minimal-diversity subject matter jurisdiction is established at the threshold, CAFA procedurally allows a federal district court to “decline to exercise” its minimal-diversity jurisdiction on a discretionary or mandatory basis, under certain conditions. Section 1332(d)(3) provides that the district court **may** decline to exercise jurisdiction over a class action in which more than one-third, but less than two-thirds, of the proposed class members in the aggregate and the primary defendants are citizens of the forum state, subject to certain judicial considerations. Section 1332(d)(4) provides that the district court **shall** decline to exercise jurisdiction over a class action (1) when more than two-thirds of the members of the class in the aggregate are citizens of the forum state and at least one defendant from whom significant relief is sought or whose alleged conduct forms a significant basis for the claims asserted is also a member of the forum state, and the principal injuries resulting from the alleged conduct or any related conduct were incurred in the forum state; or (2) when two-thirds or more proposed class members and the primary defendants are citizens of the forum state. This analysis involves abstention principles that assume that subject matter jurisdiction exists at the threshold. See Anthony Rollo, H. Hunter Twiford, III & Gabriel A. Crowson, *Practitioners Review “Abstention Procedure” under Sections 1332(d)(3) and (4)*, 9:2 Consumer Fin. Servs. L. Rep. (2005).

where the stakes are very high, the outcome of motion practice to determine whether the case proceeds in federal or state court can have enormous implications for both parties.

Historically, under well-settled jurisprudence in the complete-diversity context, the party asserting federal jurisdiction bears the burden of establishing that all jurisdictional requirements have been met, with all doubts resolved against a finding that jurisdiction exists. For purposes of this article, this test with its presumption against jurisdiction is referred to as the “**Complete Diversity Standard.**”

The Complete Diversity Standard—which applies both to class actions and non-class actions alike brought in federal court on complete-diversity grounds—flows from Congress’s intent to limit access to the federal courts on federalism grounds under its statutory grant of complete-diversity jurisdiction. In practice, the Complete Diversity Standard favors a plaintiff who files a class action in state court and then seeks remand following the defendants’ removal to federal court on complete-diversity grounds, where the defendants bear the jurisdictional burden of proof.

Under CAFA, however, Congress sought to sweepingly expand access to the federal courts for the narrow category of interstate class actions by creating minimal-diversity jurisdiction. Among other things, in Section 2 of the Act, “Findings and Purposes,” Congress stated that prior abuses in class actions undermined “the concept of diversity jurisdiction as intended by the Framers of the United States Constitution,” in that state and local courts kept cases of national importance out of federal court and sometimes demonstrated bias against out-of-state defendants. Also in Section 2 of CAFA, Congress stated that one purpose of the Act is to “restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.”

Congress’s “Findings and Purposes” expressly reflect a goal of **changing** the jurisdictional status quo for class actions. Section 2 and the other operative provisions of CAFA, along with CAFA’s legislative history, clearly show that Congress intended to extend federal jurisdiction over interstate class actions which, prior to CAFA’s enactment, could not be maintained in or removed to federal court under the existing—and restrictive—Complete Diversity Standard.

Today, defendants who remove class actions under CAFA contend that, in light of this congressional intent to give special treatment to interstate class actions by sweeping them into federal court, the Complete Diversity Standard does not apply in any jurisdictional contest. Instead, they argue that the jurisdictional burden of proof falls on the party opposing federal jurisdiction to establish that the requirements for minimal diversity have **not** been met, with all doubts to be decided in favor of a finding that

jurisdiction exists. For purposes of this article, this new standard, applicable only to interstate class actions under CAFA, with a presumption in favor of jurisdiction, is called the “**Minimal Diversity Standard.**”<sup>8</sup>

Plaintiffs, on the other hand, contend that the Complete Diversity Standard should still be applied when evaluating jurisdiction under CAFA. As a result, a split in the courts has developed over whether to apply the Complete Diversity Standard or the Minimal Diversity Standard to interstate class actions under CAFA. The answer to this question, as a practical matter, often determines the jurisdictional outcome of the case.

This article reviews the separate statutory bases for complete- and minimal-diversity jurisdiction, discusses the congressional intent behind the enabling statutes for both, and analyzes all the cases to date that have addressed the burden-of-proof question under CAFA.

The authors conclude that the courts should apply the Minimal Diversity Standard in interstate class actions under CAFA. That is, correctly interpreted, CAFA’s statutory text, purpose, and legislative history create a presumption in favor of finding that minimal-diversity jurisdiction exists, with all doubts resolved in favor of jurisdiction, and with the burden of proof on the party opposing jurisdiction. Any other result would defeat Congress’s clear intent in crafting this special-purpose statute.<sup>9</sup>

## II. WELL-SETTLED PRINCIPLES OF COMPLETE DIVERSITY

The concept of diversity jurisdiction has its genesis in Article III of the United States Constitution, which gives the federal courts authority to hear cases between citizens of different states. Prior to February 18, 2005, 28 U.S.C. 1332 (and its predecessor statutory provisions) limited original federal diversity jurisdiction solely to those cases in which there was “complete diversity” of citizenship among the litigants and the amount in controversy exceeded \$75,000, exclusive of interest and costs.

This grant of complete-diversity jurisdiction is found in section 1332(c), which reads in part as follows:

- (a) 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—

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8. The U.S. Supreme Court permits the creation of jurisdictional “presumptions,” which can be “rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility.” These presumptions may be in favor of or against the exercise of federal jurisdiction. See *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (presumption of concurrent state and federal jurisdiction); *Michigan v. Long*, 463 U.S. 1032, 1044 (presumption of federal jurisdiction “in the absence of a plain statement [from a state court] that the decision below rested on an adequate and independent state ground”); *Hans v. Louisiana*, 134 U.S. 1, 18 (1890) (common-law doctrine of sovereign immunity creates presumption against jurisdiction).

9. The authors rely in large part on Section 2 of CAFA in concluding that the decisions stating to the contrary are incorrectly decided. Section 2’s clear statement of Congressional “Findings and Purposes,” which is part of the text of the Act itself, has been overlooked by most of the courts that have considered the burden-of-proof issue to date.

- (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.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States" as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.<sup>10</sup>

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10. 28 U.S.C. § 1332 (1988).

Complete-diversity jurisdiction under section 1332(c) historically has provided limited access to the federal courts for that small group of class actions whose litigants met those jurisdictional requirements. Complete diversity remains a separate and independent ground for federal jurisdiction over class actions following CAFA's enactment. But complete-diversity jurisdiction is a doorway to federal court that, for many class actions, never opens due to its strict limitations. The courts in this context consistently apply the Complete Diversity Standard, holding that the party invoking complete-diversity jurisdiction in a class action has the burden to demonstrate that the court possesses subject matter jurisdiction, with all doubts to be resolved against a finding that federal jurisdiction exists.<sup>11</sup>

Significantly, the requirements for complete diversity are **statutory** limitations—not constitutional—and the burden of proof under the Complete Diversity Standard as articulated by the courts flows from the congressional intent underpinning the complete-diversity statute. The United States Constitution does not mandate complete diversity for a case to proceed in federal court; all the Constitution requires is “minimal diversity.”<sup>12</sup> While the Supreme Court has recognized that Congress may enact laws that require complete diversity, it has also noted that Congress may promulgate laws requiring only minimal diversity—such as in CAFA—thus permitting suits to proceed in federal court as long as “any two adverse parties are not co-citizens.”<sup>13</sup>

When complete diversity is the basis for federal court jurisdiction,<sup>14</sup> the courts have been forced to grapple with the dichotomy between allowing the plaintiff to choose the forum in which to litigate, and the defendant's right to remove the case to federal court and to have the “equal benefit” of federal court jurisdiction.<sup>15</sup> In addressing this issue, courts over time have had to determine the congressional intent behind the statute creating complete-diversity jurisdiction. The Supreme Court has held that the requirements of the complete-diversity statute were intended by Congress to “drastically restrict” access to a federal forum, in part based on federalism concerns.<sup>16</sup> The Court noted that this congressional intent to limit federal court access is found in the complete-diversity statute and in the

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11. See *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182–83 (1936); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); and *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998).

12. U.S. CONST. art. III, § 2, cl. 1 applies to controversies “between Citizens of different States.”

13. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967).

14. For a historical view of federal court diversity jurisdiction, consult Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1923).

15. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 348 (1816). See also *Ry. Co. v. Whitton*, 80 U.S. 270, 287 (1871) (protection against local prejudice is secured by giving plaintiff an election of courts before suit is brought, and “where the suit was commenced in a State court[,] a like election to the defendant afterwards”); *Ins. Co. v. Dunn*, 86 U.S. 214, 224 (1873) (“The [removal] statute is remedial, and must be construed liberally.”).

16. *Healy v. Ratta*, 292 U.S. 263, 270 (1934) (“The policy of the [complete diversity] statute calls for its strict construction.”); see also *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938).

successive amendments to that statute that raised the minimum amount in controversy in complete-diversity cases.<sup>17</sup>

To ensure adherence to Congress's intent to limit access under diversity jurisdiction to only those cases in which there is complete diversity, the courts over time have imposed a burden-of-proof requirement on the party seeking to invoke federal jurisdiction to establish complete diversity. Thus, the burden of proof in complete-diversity cases flows directly from the courts' understanding that the congressional intent under the enabling statute was to limit access to federal courts and to favor state forums whenever possible.<sup>18</sup>

Significantly, just like the minimal-diversity provisions under CAFA found at 28 U.S.C. 1332(d), the complete-diversity provisions of 28 U.S.C. 1332(c) are silent as to which party bears the burden of proving whether jurisdiction exists.

### III. MINIMAL DIVERSITY: CAFA SUBSTANTIALLY EXPANDS FEDERAL JURISDICTION OVER INTERSTATE CLASS ACTIONS

Just as the courts were required to determine congressional intent under the complete-diversity statute before they could conclude that the jurisdictional burden of proof should be allocated to the proponent of federal jurisdiction, the courts must now separately examine the burden-of-proof question under CAFA's new minimal-diversity statutory provisions.

From its effective date of February 18, 2005,<sup>19</sup> CAFA profoundly changed the existing rules and principles governing jurisdiction over interstate class actions by introducing the new vehicle of minimal diversity,

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17. *Healy*, 292 U.S. at 270. To further that end, the Supreme Court has instructed the federal courts to narrowly construe the amount-in-controversy provision so as not to frustrate congressional purpose. See *id.* at 269-70; *Snyder v. Harris*, 394 U.S. 332, 339-40 (1969).

18. Congress's historical intent to "drastically" restrict federal jurisdiction in controversies between citizens of different states by its adherence to the complete-diversity principles has always been "rigorously enforced by the courts." See *St. Paul Mercury*, 303 U.S. at 288; *Snyder*, 394 U.S. at 340-41; *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941) ("The policy of the [complete diversity] statute calls for its strict construction, and in defining the boundaries of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy.").

19. Section 9 of CAFA, Pub. L. No. 109-2, 119 Stat. 14, states that the amendments made by the Act shall apply to any civil action commenced on or after the date of enactment. CAFA became effective on February 18, 2005, the date of its signature by the President. If a lawsuit was "commenced" prior to February 18, 2005, the federal district court does not have subject matter jurisdiction under the minimal-diversity provisions of CAFA and there is no basis for removal to federal court. If the case was "commenced" on or after February 18, 2005, the minimal-diversity provisions of CAFA clearly apply, and the case is subject to removal. The courts have uniformly upheld the fact that CAFA's effective date was February 18, 2005. See, e.g., *Natale v. Pfizer, Inc.*, 424 F.3d 43 (1st Cir. 2005); *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805 (7th Cir. 2005) (in some circumstances the suit may be considered "commenced" anew after February 18, 2005, even though initially filed earlier, in order to be removable under CAFA); *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, (9th Cir. 2005); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090 (10th Cir. 2005); *Awaida v. Pfizer, Inc.*, No. Civ. 05-425 (not available on Westlaw or LexisNexis) (W.D. Okla. June 7, 2005); *Isaacs v. Pfizer, Inc.*, No. Civ. 05-0426 (not available on Westlaw or LexisNexis) (W.D. Okla. June 21, 2005). A more thorough discussion of the "date of commencement" issue is beyond the scope of this article, but individual case summaries along with the full text of each case may be found at <http://www.cafalawblog.com>.

which effectively “federalizes” interstate class actions. Numerous class actions that could not be brought in or removed to federal court based on complete-diversity jurisdiction can now be brought in or removed to federal court on the basis of minimal diversity.<sup>20</sup>

A. *New 28 U.S.C. 1332(d)(2)*

CAFA amended the jurisdictional provisions of section 1332 to add new section 1332(d). The provisions of this section specifically apply to interstate class actions filed under Federal Rule of Civil Procedure 23 or similar state statutes, and to mass actions involving 100 or more plaintiffs. Section 1332(d)(2), which enables minimal-diversity jurisdiction, now reads as follows:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—

- (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
- (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
- (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.<sup>21</sup>

Congress drastically liberalized the inherent constraints under the Complete Diversity Standard that previously prevented interstate class actions from being filed in, or removed to, federal court. That this was Congress’s intent is shown by the dramatic and sweeping changes it made throughout the operative language of the statute. These significant departures from pre-CAFA law as it existed under the Complete Diversity Standard are aimed, in part, at preventing or minimizing what Congress viewed, in Section 2 of the Act, as abuses involving class actions implicating interstate commerce that belonged in federal court but were trapped in state courts.

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20. It is now possible for a federal court to exercise complete-diversity jurisdiction over a class action where minimal-diversity jurisdiction is lacking, to exercise minimal-diversity jurisdiction over a class action where complete-diversity jurisdiction is lacking, and/or to exercise jurisdiction over a class action alternatively on both complete- and minimal-diversity grounds.

21. CAFA’s minimal-diversity grant, however, does not apply to all interstate class actions. Specifically, minimal diversity is inapplicable to (1) cases where the primary defendants are state or government entities; (2) cases where the aggregate number of class members is less than 100; (3) cases involving certain covered securities under the federal securities laws; and (4) cases relating to the internal affairs or governance of a corporation arising under the law of the state in which the corporation is incorporated. 28 U.S.C. 1332(d)(5) and (9).

