

CLASS ACTIONS

Circuits Split on Standard For Removal Under CAFA



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The Class Action Fairness Act of 2005 (CAFA) expands federal jurisdiction over class action suits and provides defendants another basis for removal to federal court. CAFA grants federal courts original jurisdiction over class actions involving at least 100 class members, with minimal or incomplete diversity of citizenship among the parties, and an amount in controversy exceeding \$5 million. Since CAFA's inception, the circuits have applied various standards to evaluate the amount in controversy under CAFA, creating a split among the federal Courts of Appeals.

Until Congress or the Supreme Court resolves the existing circuit split by declaring a uniform standard for evaluating the amount in controversy, defendants in state court class actions should remain aware of the evolving but conflicting views of the circuit courts as they evaluate whether removal can be accomplished in their jurisdictions. This article sets forth the framework under which courts evaluate the amount in controversy under CAFA, including a circuit by circuit overview of the application of the various standards.

Amount in Controversy

The amount in controversy is an estimate of the total amount at issue at the time of removal. Prior to CAFA it was well-settled that proponents of removal bore the burden of establishing federal jurisdiction, and the circuit courts have upheld that rule in the CAFA context. Significant uncertainty exists, however, as to what burden of proof should be applied in determining whether the \$5 million amount in controversy threshold is met. In an effort to permit plaintiffs to remain masters of their complaints while simultaneously upholding the purposes of CAFA, many circuits rely on subjective and amorphous standards, which require district courts to make judgment calls in evaluating the amount in controversy.

The circuits have articulated and applied a wide spectrum of standards, ranging from



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the more lenient “reasonable probability,” “preponderance of the evidence,” and “legal impossibility” standards to the more stringent “legal certainty” standard. Some circuits have even applied different tests depending on whether the complaint alleges damages below \$5 million. Furthermore, not all of the circuits have even formulated a standard for determining the amount in controversy under CAFA.¹ The unfortunate result for defendants in certain jurisdictions is that plaintiffs can attempt to construct complaints to limit the amount in controversy in order to remain in state court while leaving the door open for greater recovery at the settlement or judgment stages.

Recently, the U.S. Court of Appeals for the Seventh Circuit clarified the “legally impossible” standard in *Back Doctors Ltd. v. Metropolitan Property and Casualty Ins. Co.*, 637 F.3d 827 (7th Cir. 2011), providing parties with the closest thing to a bright-line test for evaluating the amount in controversy. The Seventh Circuit’s *Back Doctors* opinion closes a significant potential loophole for remanding plaintiffs by setting forth a bright-line standard that lessens the subjectivity of the amount in controversy determination. The Seventh Circuit’s removal-friendly and bright-line standard conflicts with the range of tests applied by its sister courts.

Range of Standards

As the circuit courts continue to disagree as to the proper test for evaluating the amount in controversy, it is important for defendants litigating class actions in various jurisdictions to

understand the following range of standards.

• **Reasonable Probability and Preponderance of the Evidence.** The First and Second circuits require defendants removing under CAFA to demonstrate to a “reasonable probability” that the amount in controversy exceeds \$5 million when the complaint does not specifically allege damages. The First Circuit applies the same reasonable probability standard if a complaint alleges less than \$5 million. Under the similar “preponderance of the evidence” standard, removing defendants must demonstrate that in all likelihood the amount in controversy exceeds \$5 million.

The Sixth and Eighth circuits have adopted the preponderance standard regardless of the damages alleged in the complaint, while the Ninth and Eleventh circuits employ this standard when the complaint does not include specific allegations of damages. Highlighting the uncertain nature of these standards, disagreement exists as to whether the preponderance and reasonable probability tests are identical or merely similar in nature. For example, the Ninth Circuit has opined that the reasonable probability test is more lenient than the preponderance test, while the First Circuit has held that the only difference between the two tests is more semantic in nature, as the “reasonable probability language better captures the preliminary nature” of the inquiry.² Set forth below is a short description of the key appellate court decisions.

The First Circuit applied the “reasonable probability” standard in the 2009 decision *Amoche v. Guarantee Trust Life Ins. Co.*, a suit involving the refunding of unearned portions of automobile

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insurance premium.³ In affirming the district court's decision to remand to state court, the First Circuit held that the reasonable probability test was appropriate because the complaint did not contain specific allegations of damages.

The *Amoche* court found it was a "draw" as to whether the amount in controversy exceeded \$5 million, but noted that the defendant would have further opportunity to remove at a later stage in the litigation when facts supporting removal were further developed.⁴ Notably, the court indicated that the reasonable probability standard should apply regardless of the damages alleged, as it found no reason for applying "a higher standard simply because the plaintiffs have pled an amount under \$5 million."⁵

The Second Circuit applied the reasonable probability standard to evaluate the amount in controversy in *Blockbuster Inc. v. Galeno*, 472 F.3d 53 (2d Cir. 2006). In *Galeno*, the complaint alleged deceptive business practices and unjust enrichment stemming from Blockbuster's "No Late Fee" program, but did not allege a specific amount of damages. The circuit court ruled that the district court had altogether failed to evaluate the amount in controversy, and remanded for the lower court to determine if it was reasonably probable that the amount in controversy exceeded \$5 million. The court did not indicate whether the same standard would apply where a complaint alleges damages less than \$5 million.

In *Bell v. Hershey Co.*, 557 F.3d 953 (8th Cir. 2009), an antitrust class action against five chocolate manufacturers, the district court remanded based on the defendants' failure to demonstrate to a "legal certainty" that the amount in controversy exceeded \$5 million where the complaint alleged \$4.99 million in damages. On appeal, the Eighth Circuit rejected the "legal certainty" standard in favor of the "preponderance of the evidence" standard, which it defined as testing not "whether the damages are greater than the requisite amount, but whether a fact finder might legally conclude that they are."⁶ The Eighth Circuit held that the preponderance standard should apply regardless of the amount alleged in the complaint, as to hold otherwise would be to defeat the "primary purpose" of CAFA of expanding federal jurisdiction over large class action suits.⁷

The Eighth Circuit noted in *Bell* that the plaintiff had violated state court rules expressly prohibiting the pleading of damages with specificity. If the removal standard depended on the amount alleged in the complaint, the court found, "defendants within the same circuit would be subject to varying burdens of proof upon removal based solely on differing state pleading requirements."⁸ The Eighth Circuit remanded to district court to evaluate the amount in controversy, holding that when a defendant satisfies its burden of proof by a preponderance of the evidence, the burden shifts to the plaintiff to show it is "legally impossible" to recover more than \$5 million.

In *Smith v. Nationwide Property & Casualty Ins. Co.*, 505 F.3d 401 (6th Cir. 2007), the Sixth Circuit similarly held that the preponderance standard should control—regardless of the amount of damages alleged in the complaint—but remanded after determining the defendants had not met that burden.

The Ninth and Eleventh circuits also adopted the preponderance of the evidence standard, at least in cases in which the complaint does not allege a specific amount. For example, in *Lewis v. Verizon Communications Inc.*, 627 F.3d 395 (9th Cir. 2010), the Ninth Circuit applied the preponderance standard where the complaint did not allege a specific amount of damages.

On the other hand, in *Lowdermilk v. U.S. Bank Nat'l Ass'n.*, 479 F.3d 994 (9th Cir. 2007), the Ninth Circuit required the removing defendants to show to a "legal certainty" that the amount in controversy exceeded \$5 million, where the complaint alleged damages of less than the jurisdictional requirement. In remanding to state court, the *Lowdermilk* court held that the plaintiff was "master of her complaint" and could formulate her pleadings to avoid federal jurisdiction by alleging less than \$5 million.⁹

Finally, in *Pretka v. Kolter City Plaza II*, 608 F.3d 744 (11th Cir. 2010), the Eleventh Circuit applied the preponderance of the evidence standard where the complaint did not allege a specific amount of damages. The *Pretka* court left open the question of the standard it would apply where a complaint alleged less than \$5 million, although there are indications from various district court cases and the circuit's pre-CAFA jurisprudence that it would apply the more stringent "legal certainty" in such circumstances.

In an effort to permit plaintiffs to remain masters of their complaints while simultaneously upholding the purposes of CAFA, many circuits rely on subjective and amorphous standards, which require district courts to make judgment calls in evaluating the amount in controversy.

• **Legal Certainty-Preponderance of the Evidence Standard.** The Third Circuit uses a "legal certainty" standard depending on the complaint's allegations of damages. Where a complaint specifically alleges less than \$5 million in damages, removing defendants must show to a "legal certainty" that the amount in controversy exceeds CAFA's jurisdictional requirement. Where a factual dispute over the amount in damages exists, on the other hand, removing defendants must meet the preponderance of the evidence test.

The Third Circuit faced a third alternative in *Frederico v. Home Depot*, 507 F.3d 188 (3d Cir. 2007), when the plaintiff did not allege a specific amount of damages, and no factual dispute existed with respect to the Notice of Removal's assertion that the amount of controversy exceeded \$5 million. In *Frederico*, the Third Circuit upheld removal and held that "the case must be remanded if it appears to a legal certainty that the plaintiff cannot recover the jurisdictional amount" and the plaintiff failed to satisfy that burden.¹⁰

• **Legally Impossible Standard.** While sparking confusion among its district courts, the Seventh Circuit's decisions on this issue

are typically more favorable for removing defendants. The Seventh Circuit's *Back Doctors* decision attempts to clarify the "legally impossible" standard. The district court in *Back Doctors* remanded the suit, holding that the defendant had not shown to a "reasonable probability" that the amount in controversy exceeded \$5 million.

The Seventh Circuit reversed the lower court's decision, keeping *Back Doctors* in federal court and clarifying the jurisdiction's removal standard. The circuit court held that when a plaintiff does not "tie its own hands" by expressly limiting itself—prior to removal—to less than \$5 million in recoverable damages, it is up to the plaintiff to demonstrate that it would be "legally impossible" for the amount in controversy to exceed \$5 million.¹¹

The defendant in *Back Doctors* relied heavily on the potential for punitive damages to satisfy CAFA's amount in controversy requirement. The Seventh Circuit found such reliance appropriate, stating that "the question here is not whether the class is more likely than not to recover punitive damages, but whether Illinois law disallows such recovery."¹² While the *Back Doctors* decision was intended to clarify the standard for the district courts, the Seventh Circuit has already reversed one remand order where a district court failed to properly apply the more bright-line legally impossible standard and provided little support for its conclusion that the amount in controversy requirement was not met.¹³

The above cases demonstrate a circuit split and show that district courts often evaluate the amount in controversy using subjective and amorphous standards, thereby permitting plaintiffs to potentially avoid federal jurisdiction without limiting the value of their cases. Without further clarification from Congress or the Supreme Court, it is incumbent upon defendants and counsel to remain aware of the standards used in the jurisdictions in which they are defending class actions to determine the likelihood of successful removal to federal court under CAFA.

1. The Tenth Circuit has not issued any decisions on the issue, while the Fourth Circuit has two unreported opinions from which little insight into that court's position can be gained. *Lanier v. Norfolk Southern Corp.*, No. 06-1986, 2007 WL 4270847 (4th Cir. Dec. 5, 2007) (upholding removal to federal court where the complaint did not allege specific damages, the plaintiff did not challenge the amount in controversy set forth in the notice of removal, and the plaintiff could not show to a legal certainty that the judgment would not exceed the \$5 million threshold); *Bartnikowski v. NVR Inc.*, No. 09-1063, 2009 WL 106378 (4th Cir. Jan. 16, 2009) (remanding to state court where parties agreed that the preponderance standard was proper).

2. *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 50 (1st Cir. 2009).

3. 556 F.3d 41, 50.

4. 556 F.3d 41, 53.

5. 556 F.3d 41, 49 n.2.

6. 557 F.3d 953, 959.

7. 557 F.3d 953, 956-57.

8. 557 F.3d 953, 958.

9. 479 F.3d 994, 998-99.

10. 507 F.3d 188, 197.

11. 637 F.3d 827, 829.

12. 637 F.3d 827, 829.

13. *ABM Sec. Services Inc. v. Davis*, No. 11-8001, 2011 WL 2417104 (7th Cir. June 16, 2011).