



Defendants Bear a Heavy

Burden to Prove the Amount in Controversy under the Class Action Fairness Act of 2005

by Aashish Y. Desai

The standard of proof required to prove an argument is often dispositive. In the same vein, the standard of proof required to establish removal jurisdiction under the Class Action Fairness Act of 2005 (CAFA) is very important. As most practitioners know by now, a class action filed in state court may be removed to federal court under CAFA if the parties have “minimal diversity,” the class is numerous, and the amount in controversy exceeds \$5 million, exclusive of interest and costs. (28 U.S.C. § 1441(a).) The Ninth Circuit recently held that under CAFA the burden of establishing removal jurisdiction remains, as before, on the proponent of federal jurisdiction, *i.e.*, the

defendant. (*Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 685 (9th Cir. 2006).)

Oftentimes whether the amount in controversy is met is a difficult question in the class action context. Thus, the party that bears the burden of proof has an uphill battle. While the Ninth Circuit in *Abrego Abrego* held that a defendant bears the burden of proving the jurisdictional requirements under CAFA, it did not specify what level of proof the defendant must meet. In *Abrego Abrego*, the Ninth Circuit discussed three different scenarios.

First, when the plaintiff does not plead a specific amount of damages, the defendant seeking removal must prove by a "preponderance of the evidence" that the amount in controversy has been met. (*Abrego Abrego*, 443 F.3d at 683.) Second, the Ninth Circuit held that if a complaint alleges damages in excess of the federal amount in controversy requirement, then the amount in controversy requirement under CAFA is "presumptively satisfied" unless it appears that a claim is actually for less than the jurisdictional minimum. (*Id.* at 683 n.8.) Third, and possibly the most important scenario, if the claimant alleges damages less than the jurisdictional amount, the Ninth Circuit recognized that more difficult problems are presented. Moreover, there was no binding precedent which resolved this question — thus the Ninth Circuit did not reach a resolution, thereby saving the question for a later time. That time is now.

In *Lowermilk v. United States Bank National* (479 F.3d 994 (9th Cir. Mar. 2, 2007)), the court answered the question. As a matter of first impression, when a plaintiff pleads damages of less than the CAFA jurisdictional amount, a removing defendant must prove to a "legal certainty" that the CAFA amount in controversy has been met. The Ninth Circuit cited to two principles to support its decision.

First, the court noted that federal courts are courts of "limited jurisdiction" and, therefore, federal district courts should strictly construe subject matter jurisdiction. (*Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).) Second, the *Lowermilk* court held that it is a well-established axiom that the plaintiff is the "master of her complaint" and can plead to avoid federal jurisdiction. (*Lowermilk*, 479 F.3d at 998 – 999.) In fact, the court noted that

where the plaintiff has alleged facts and pled damages and there is no evidence of bad faith, the defendant must not only contradict the plaintiff's own assessment of damages but must overcome a heavy presumption against federal jurisdiction. The court noted that the Third Circuit had recently agreed with this analysis in *Morgan v. Gay*, 471 F.3d 469, 472-73 (3rd Cir. 2006).

In *Lowermilk*, the defendant, in support of removal jurisdiction, argued that the court should have applied the preponderance of the evidence burden of proof. The court observed

that the preponderance of the evidence standard is applicable where the plaintiff fails to allege a specific amount of damages. Rejecting the defendant's argument, the court held "that Plaintiff did plead a 'specific amount in damages,' and therefore, the preponderance of the evidence standard does not apply." (479 F.3d at 998). The Ninth Circuit said that the "legal certainty" burden of proof "guard[s] the presumption against federal jurisdiction and preserve[s] the plaintiff's prerogative, subject to the good faith requirement, to forgo a potentially larger recovery to remain in state court."

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Thus, where the complaint clearly alleges an amount in controversy below the jurisdictional amount, the burden of proof borne by the defendant is high.

In *Lowermilk*, a former employee brought a state class action against his former employer alleging violation of wage and hour laws. There was no dispute as to minimal diversity or that the number of class members (100) met the jurisdictional minimum under CAFA. The parties only disputed whether the claims established the \$5 million amount in controversy. Defendants removed the case to federal court and provided a declaration from a human resources employee asserting, by extrapolation, that, if proven, plaintiff's claims were worth more than \$9 million, thereby establishing original CAFA jurisdiction. The Ninth Circuit, however, held that, under the "legal certainty" standard, this was simply not enough. First, the Ninth Circuit noted that the defendant's computation "assumes that all class members would be entitled" to damages, but it provided no evidence to support this assertion. (*Lowermilk*, 479 F.3d at 1001.) Moreover, the court held that the deposition transcripts included in support of the defen-

dant's removal were of no help with respect to class-wide damages and whether the members would qualify for the penalty wages. (*Id.* at 102.)

Thus, the Ninth Circuit has raised the bar on removal such that the defendant will practically have to prove the plaintiff's case, as to liability and damages, to overcome an allegation rejecting the CAFA amount in controversy minimum. (*Singer*, 116 F.3d at 322 (summary judgment-type evidence is required).)

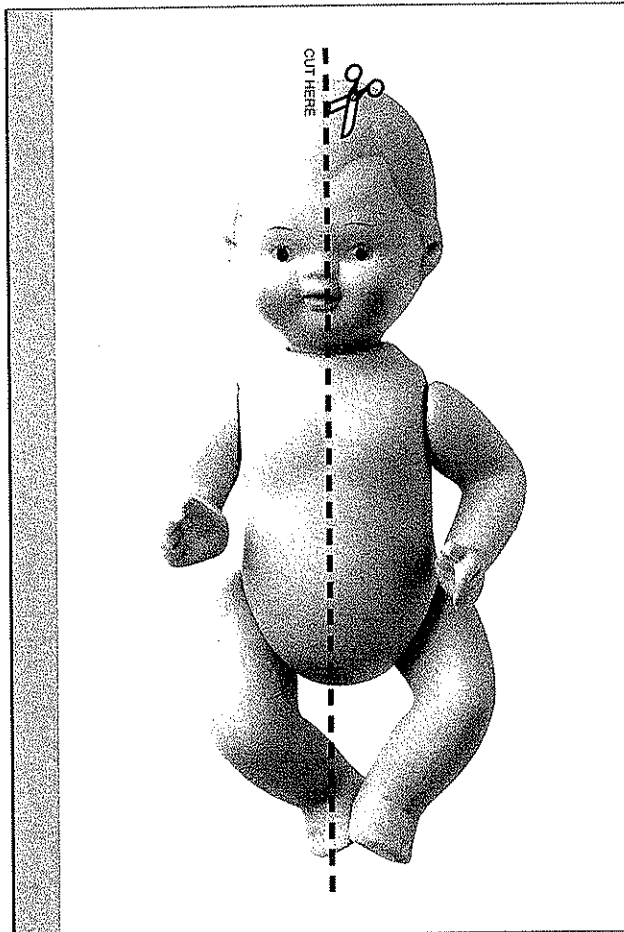
Indeed, the Ninth Circuit noted that the plaintiffs often cannot anticipate from the outset the value of their case, and they are not obligated to overstate their damages simply to satisfy the defendant's interest in a federal forum. (*Id.* at 1003.)

Ironically, the parties' arguments on the motion to remand are the reverse of what one would normally expect in litigation. The plaintiff is diminishing or disparaging the amount they are seeking, while the defendant seeks to aggrandize or augment that amount. In essence, the defendant, who seeks to remove under CAFA jurisdiction when the plaintiff pleads an amount in controversy under CAFA's \$5 million jurisdictional

amount in controversy requirement, must prove, to a legal certainty, that plaintiffs' damages will exceed \$5 million. That may be a frightening proposition which defense counsel should think twice about, particularly now that the Ninth Circuit has set the burden of proof to a "legal certainty" to prove the amount in controversy under CAFA. Even if successful, plaintiffs will surely use this evidence against the removing defendant at a later, perhaps more critical, time. That is yet another unintended result of CAFA and aptly falls under the "be careful what you wish for" category.



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