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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[1]

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I. Introduction

The Class Action Fairness Act of 2005[5] (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.[6]

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.[7]

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,

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.**"[8]

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.[9]

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—

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.[10]

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.[11]

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."[12] 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."[13]

When complete diversity is the basis for federal court jurisdiction,[14] 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.[15] 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.[16] The Court noted that this congressional intent to limit federal court access is found in the complete-diversity statute and in the

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.[17]

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.[18]

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,[19] CAFA profoundly changed the existing rules and principles governing jurisdiction over interstate class actions by introducing the new vehicle of minimal diversity,

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.[20]

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.[21]

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).

For example, as noted above, federal jurisdiction now exists as long as any single named plaintiff or putative class member is a citizen of a different state from any one defendant, and the numerosity and $5,000,000 jurisdictional amount-in-controversy requirements are satisfied. In other words, diversity of citizenship is no longer required to be "complete" for interstate class actions. CAFA further now permits the aggregation of class members' claims, statutorily overruling for interstate class actions existing jurisprudence in the complete-diversity context that had previously limited the prospect for federal court treatment of many class actions by requiring either that each plaintiff in a class action independently satisfy the $75,000 amount-in-controversy requirement, or that at least one named plaintiff satisfy this requirement.[22]

In addition to its changes eliminating the need for complete diversity of citizenship and allowing aggregation of class member claims, CAFA further expands federal jurisdiction through its new definition of "class action,"[23] and by inviting to federal courts for the first time "mass actions" with more than 100 plaintiffs, which is a new category coined under this law.[24] Similarly, CAFA now exempts interstate class actions from the one-year time limitation for removal that otherwise applies under the Complete Diversity Standard.[25] And, contrary to the preexisting rule under the Complete Diversity Standard, CAFA now provides that a class action "may be removed by any defendant without the consent of all defendants, and further, without regard to whether any defendant is a citizen of the state where the action is brought."[26]

In addition to this broad expansion of federal jurisdiction at the trial court level, CAFA creates sweeping new federal appellate jurisdiction over orders remanding class actions that were removed under the Act. Prior to CAFA, 28 U.S.C. 1447(d) barred appellate review of virtually all remand

22. In *Exxon-Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 2627–28 (2005), the Supreme Court acknowledged that CAFA "abrogates the rule against aggregating claims" first recognized in *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), and "reaffirmed" in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). *See also* Gregory P. Joseph, *Federal Class Action Jurisdiction After Cafa, Exxon Mobil and Grable*, 8 DEL. L. REV. 157 (2006).

23. 28 U.S.C. § 1332(d)(1), as amended by CAFA, which tracks the language of new 28 U.S.C. § 1711, provides:

> "In this subsection—
> (A) the term "class" means all of the class members in a class action;
> (B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;
> (C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and
> (D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action."

24. The term "mass action" means "any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." 28 U.S.C. § 1332(11)(B)(i).

25. 28 U.S.C. § 1453(c).

26. 28 U.S.C. § 1453(b).

orders in matters removed on complete-diversity jurisdiction grounds. New 28 U.S.C. 1453(c), however, now permits discretionary appeals of orders denying or granting motions to remand class actions. This new provision also requires that the courts of appeals expedite resolution of CAFA appeals, showing an unusually heightened concern by Congress over this special category of cases.

B. Congress's "Findings and Purposes" Behind CAFA Are Found in the Text of CAFA

Significantly, Congress wrote in the text of CAFA, in Section 2, a clear statement of its "Findings and Purposes" with respect to enacting CAFA. Surprisingly, Section 2 has been mentioned or referenced by only a few courts in connection with a ruling on the burden-of-proof question. Section 2, which now appears in the Historical and Statutory Notes section of new 28 U.S.C. 1711, reads as follows:

> SEC. 2. FINDINGS AND PURPOSES.
>
> (a) FINDINGS. Congress finds the following:
>
> (1) Class action lawsuits are an important and valuable part of the legal system when they 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.
>
> (2) Over the past decade, there have been abuses of the class action device that have
>
> (A) harmed class members with legitimate claims and defendants that have acted responsibly;
>
> (B) adversely affected interstate commerce; and
>
> (C) undermined public respect for our judicial system.
>
> (3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where
>
> (A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;
>
> (B) unjustified awards are made to certain plaintiffs at the expense of other class members; and
>
> (C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.
>
> (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, in that State and local courts are

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES. The purposes of this Act are to

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) 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; and

(3) benefit society by encouraging innovation and lowering consumer prices.

Thus, Section 2 of CAFA evidences Congress's plain desire to **change** and to **correct** the problems with the jurisdictional status quo when the restrictive Complete Diversity Standard kept interstate class actions from making their way to the federal courts where Congress felt they belonged.

C. Congress Expressly Allocated the Burden of Proof to the Party Opposing Jurisdiction in CAFA's Legislative History

CAFA's legislative history includes both a House Sponsors' Statement and a Senate Judiciary Committee Report, each of which shows that Congress expressly allocated the jurisdictional burden of proof in minimal-diversity contests on the party opposing jurisdiction.

On February 17, 2005, Representative F. James Sensenbrenner (R. Wis.) inserted a statement of the intent of the creators of CAFA into the House record.[27] The Senate Judiciary Committee published its separate report on CAFA on February 28, 2005.[28] Both state that the drafters of CAFA intended that a new standard apply for the jurisdictional burden of proof, one different from the existing rule for complete diversity that had previously blocked interstate class actions from access to federal court.

This legislative history reflects Congress's desire that there be a presumption in favor of a finding that jurisdiction exists. The extent to which this unambiguous legislative history should be considered by the courts in determining which party bears the jurisdictional burden of proof under

27. 151 Cong. Rec. H723-02, at H727–29 (daily ed. Feb. 17, 2005).

28. S. Rep. 109-14 (2005). Although the Senate Committee Report was "ordered to be printed on" February 28, it was submitted to Congress **before** CAFA became law. *See* 151 Cong. Rec. S978 (Feb. 3, 2005).

CAFA is now the subject of considerable controversy, and perhaps may not be resolved conclusively until decided by the Supreme Court.

The Senate Judiciary Committee Report, published on February 28, 2005,[29] states:

> Pursuant to new subsection 1332(d)(6), the claims of the individual class members in any class action shall be aggregated to determine whether the amount in controversy exceeds the sum or value of $5,000,000 (exclusive of interest and costs). **The Committee intends this subsection to be interpreted expansively. 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).** And if a federal court is uncertain about whether "all matters in controversy" in a purported class action "do not in the aggregate exceed the sum or value of $5,000,000," **the court should err in favor of exercising jurisdiction over the case.**
>
> * * *
>
> **Overall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.**
>
> As noted above, **it is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court** (e.g., the burden of demonstrating that more than two-thirds of the proposed class members are citizens of the forum state). **Allocating the burden in this manner is important to ensure that the named plaintiffs will not be able to evade federal jurisdiction with vague class definitions or other efforts to obscure the citizenship of class members.**
>
> * * *
>
> **It is the Committee's intention with regard to each of these exceptions that the party opposing federal jurisdiction shall**

29. S. Rep. 109-14 (2005). The Seventh Circuit, speaking through Judge Easterbrook, declined to consider the statements in the Senate Report in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005), in its observations that "[t]hirteen Senators signed this report and five voted not to send the proposal to the floor. Another 82 Senators did not express themselves on the question; likewise 435 Members of the House and one President kept their silence." However, the Seventh Circuit erred in its ruling by applying an incorrect canon of statutory construction, see discussion *infra* Section V.A., where the correct standard specifically **required** that court to look to and follow the congressional intent behind CAFA. In addition, the Seventh Circuit in *Brill* erred by not considering Congress's specific intent stated in Section 2 of the Act.

> **have the burden of demonstrating the applicability of an exemption.** Thus, if a plaintiff seeks to have a class action remanded under section 1332(d)(4)(A) on the ground that the primary defendants and two-thirds or more of the class members are citizens of the home state, **that plaintiff shall have the burden** of demonstrating that these criteria are met by the lawsuit. Similarly, if a plaintiff seeks to have a purported class action remanded for lack of federal diversity jurisdiction under subsection 1332(d)(5)(B) ("limited scope" class actions), **that plaintiff should have the burden of** demonstrating that "all matters in controversy" do not "in the aggregate exceed the sum or value of $5,000,000, exclusive of interest and costs" or that "the number of all proposed plaintiff classes in the aggregate is less than 100."[30]

The House Sponsors' Statement was inserted, rather than read, into the House record as a result of debate-related time constraints. Representative Sensenbrenner began the statement by explaining, "I have a lengthy additional statement explaining how this bill is to work. We do not have the time in general debate for me to give this statement on the floor, so I will insert the statement relative to the intent of the managers of the bill in the record at this point."[31] The House Sponsors' Statement begins its section-by-section analysis of CAFA with the new jurisdictional provisions to be added as new 28 U.S.C. 1332(d), found in Section 4 of CAFA:

> Section 4 gives Federal courts jurisdiction over class action lawsuits in which the aggregate amount in controversy exceeds $5 million, and at least one plaintiff and one defendant are diverse. **Overall, new section 1332(d) is intended to expand substantially Federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court** if removed by any defendant. **If a purported class action is removed under these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improper.** And if a Federal court is uncertain about whether the $5 million threshold is satisfied, **the court should err in favor of exercising jurisdiction over the case.**[32]

Both the House Sponsors' Statement and the Senate Committee Report unmistakably state congressional intent to assign the burden of proof squarely upon the shoulders of the party opposing the existence of federal

30. S. Rep. No. 109-14, at 42–44 (2005) (emphasis added).

31. 151 Cong. Rec. H723-02, at H727 (daily ed. Feb. 17, 2005).

32. *Id.* (emphasis added).

jurisdiction under CAFA's new minimal-diversity provisions. This uniform legislative history is entirely consistent with CAFA's statutory "Findings and Purposes," the other operative provisions of the Act, and Congress's objective of minimizing class-action abuses in the state courts by sweeping interstate class actions into federal court where those matters previously could not be maintained.

IV. The Courts are Now Split over Who Bears the Jurisdictional Burden of Proof Under CAFA

Some courts addressing the question of which party bears the burden of proof have concluded that the party opposing minimal-diversity jurisdiction under CAFA bears the burden of establishing that jurisdiction does not exist. Under this Minimal Diversity Standard, those courts suggest that CAFA creates a presumption of federal jurisdiction over interstate class actions, with all doubts to be resolved in favor of a finding of federal jurisdiction.

Other courts addressing this issue have concluded to the contrary, and applied the Complete Diversity Standard to interstate class actions asserting minimal-diversity jurisdiction. Those courts have found that the party asserting minimal-diversity jurisdiction under CAFA bears the burden of establishing that all jurisdictional requirements have been met, and have applied the Complete Diversity Standard's attendant presumption against federal jurisdiction, with all doubts to be resolved against a finding of jurisdiction. Many of these courts have mechanically applied the Complete Diversity Standard in a CAFA context, seemingly with no recognition or analysis that the test for this category of cases may now be different under CAFA.

To date, only a few of the many decisions that have actually analyzed the burden-of-proof question while considering whether CAFA changed the rules have referenced or discussed Section 2 of CAFA with its statement of congressional "Findings and Purposes." Many of these decisions fail to reference CAFA's legislative history.[33] In most decisions where the courts applied the Complete Diversity Standard, however, overlooking Section 2 likely was outcome-determinative, especially in those instances where the court based its ruling in part on its view that no words in CAFA's text reflected Congress's intent on the burden-of-proof issue.

A. Decisions Applying the Minimal Diversity Standard (While Discussing, and Following, CAFA's Legislative History)

1. *Berry v. American Express Publishing Corp.*[34]

Berry, the first case to decide the burden-of-proof question in keeping with the legislative history of CAFA by placing the burden on the party challenging federal jurisdiction, has been followed by a number of other

33. *See, e.g.*, the discussion of Miedema v. Maytag Corp., *infra* text accompanying notes 235–56.
34. Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118 (C.D. Cal. 2005).

courts as authoritative on the burden-of-proof issue. In *Berry*, United States District Judge Alicemarie H. Stotler examined a California class action premised on an alleged unlawful business practice in which credit card holders were charged for unsolicited magazine subscriptions unless the cardholders took contrary affirmative action to ensure exclusion.[35]

Judge Stotler stated, "[t]hese new additions to the diversity jurisdiction statute create various interpretative issues, such as whether the burden of proof has shifted post-CAFA in favor of federal jurisdiction . . ."[36] With no prior decisions on point to look to for guidance, Judge Stotler undertook the "difficult task of reconciling previously established, judicially-developed [sic] principles of diversity jurisdiction with the purpose and structure of the recent CAFA-amendments to the statute."[37] Judge Stotler expressed some hesitation with statutory interpretation, but noted that legislative history such as "Committee Reports are 'the authoritative source for finding the Legislature's intent,' and may be consulted as one important resource in the quest for faithful statutory interpretation."[38]

Contesting removal under CAFA, the *Berry* plaintiffs argued that an examination of the legislative history violated Article III,[39] to which Judge Stotler disagreed for two reasons:

> First, a statute cannot address all possible outcomes and situations, and language inevitably contains some imprecision . . . . Second, if legislative intent is clearly expressed in Committee Reports and other materials, judicial disregard for the explicit and uncontradicted statements contained therein may result in an interpretation that is wholly inconsistent with the statute that the legislature envisioned. . . . Where both plaintiffs' and defendants' interpretations of the burden of proof . . . are constitutionally permissible, the role of the Court is to faithfully implement the law as intended by the Legislature. In these circumstances, the legislative history is a proper tool of statutory interpretation.
>
> * * *
>
> Although the burden of proof is not addressed in either the text of the original or the text of the new statute, the CAFA was clearly enacted with the purpose of expanding federal jurisdiction over class actions. . . . [quoting from the Senate Committee Report:] ("The Framers were concerned that state courts might discriminate against interstate business

35. *Id.* at 1120.

36. *Id.* at 1121.

37. *Id.*

38. *Id.* (citing Garcia v. United States, 469 U.S. 70, 76 (1984); *accord* City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802, 805 (9th Cir. 1994)).

39. *Id.*

> and commercial activities . . . both of these concerns—judicial integrity and interstate commerce—are strongly implicated by class actions . . . [thus] class action legislation expanding federal jurisdiction over class actions would fulfill the intention of the Framers") . . . .
>
> To this end, the Committee Report expresses a clear intention to place the burden of removal on the party opposing removal to demonstrate that an interstate class action should be remanded to state court. The Committee Report states that "[i]t is the Committee's intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption." . . . "[T]he named plaintiffs should bear the burden of demonstrating that a case should be remanded to state court . . . ."[40]

The plaintiffs also argued that "the failure to incorporate this directive on the burden of proof into the statute evinces an explicit intent to maintain the status quo . . . ."[41] The court, however, disagreed, stating:

> [M]ore plausibly, the failure to address the burden of proof in the statute reflects the Legislature's expectation that the clear statements in the Senate Report would be sufficient to shift the burden of proof. The Court notes, with some irony, that the original diversity statute does not contain any reference to the burden of proof. Plaintiff fails to explain how the failure to incorporate the burden of proof in Section 1332(d) should be assigned more or less meaning than the failure to incorporate any burden of proof into the original text. In these circumstances, the Court finds that the failure to explicitly legislate changes on the burden of proof in interstate class action has little interpretive value.[42]

Following the conclusion that the burden of proving federal jurisdiction shifted for interstate class actions under CAFA to the plaintiff seeking remand, the court examined the amount in controversy, and remanded the action, noting that

> Although the Court is aware that the burden is on plaintiffs to demonstrate that the amount in controversy does not exceed $5,000,000, the claims in this dispute are so difficult to value that any monetary valuation could only be wholly speculative. Accordingly, the court finds that the amount in

40. *Id.* at 1122 (quoting Sen. Pub. 109-14, at 8, 43–44) (internal citations omitted).
41. *Id.*
42. *Id.* at 1123.

> controversy, from either the perspective of the class members or the defendants, is less than the requisite $5,000,000.[43]

2. *Yeroushalmi v. Blockbuster, Inc.*[44]

On March 4, 2005, Ronit Yeroushalmi filed a complaint in the Superior Court of Los Angeles County, seeking class certification of issues arising out of Blockbuster, Inc.'s "No More Late Fees" policy. On April 6, 2005, Blockbuster removed the California class action, claiming minimal-diversity jurisdiction under CAFA.[45] United States District Judge A. Howard Matz held that, under CAFA, the federal court had jurisdiction over the case.[46]

Judge Matz analyzed the burden-of-proof issue by first noting that "CAFA is silent as to whether the burdens of proving or disproving removal jurisdiction previously in place when an action is removed pursuant to § 1332 have changed."[47] "The courts previously placed the burden on the removing defendants to establish jurisdiction."[48] Now, "[i]t is clear that Congress intended CAFA to undo . . . these policies and rules."[49] Judge Matz also looked to CAFA's legislative history, observing that "[i]n light of the Senate Judiciary Committee Report, it is proper for the Court to "err" in favor of inclusion . . . ."[50] The court recognized the shift in the burden of proof to the plaintiff and that the plaintiff had failed to meet that burden: "plaintiff has not shown that the amount in controversy requirement has not been met or that it will be limited in any way. Therefore, under CAFA the Court has jurisdiction."[51]

3. *Waitt v. Merck & Co.*[52]

On July 27, 2005, United States District Judge Robert S. Lasnik, writing for the Western District of Washington, denied the plaintiff's motion to remand. The action was filed on April 6, 2005 in King County, Washington, alleging that Merck had failed to reimburse the plaintiff for the cost of his unused Vioxx, as promised.[53] Merck removed the action to federal court on minimal-diversity grounds under CAFA.[54]

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43. *Id.* at 1124–25.
44. Yeroushalmi v. Blockbuster, Inc., No. CV 05-225-AHM(RCX), 2005 WL 2083008 (C.D. Cal. July 11, 2005).
45. *Id.* at *1.
46. *Id.* at *6.
47. *Id.* at *2.
48. *Id.* at *3 (citing Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)).
49. *Id.*
50. *Id.* at *5.
51. *Id.*
52. Waitt v. Merck & Co., No. C05-0759L, 2005 WL 1799740 (W.D. Wash. July 27, 2005).
53. *Id.* at *1.
54. *Id.*

Waitt moved to remand for lack of subject matter jurisdiction, arguing that CAFA "does not modify the existing standard for remand because the statute itself is void of language providing for such modification."[55] Merck countered "that it was Congress' [sic] intent, as evidenced by CAFA's legislative history to place the burden of showing that removal was improper upon the party moving for remand."[56] The court noted that it could not find any federal case law on point, but conducted its own extensive analysis using canons of statutory construction.

> In cases of statutory construction, the Court's task is to "interpret the words of the statute in light of the purposes Congress sought to serve." CAFA, which is codified at various places in Title 28 of the United States Code, effects its relevant changes upon 28 U.S.C. § 1332, colloquially known as the diversity jurisdiction statute. Regarding these changes, the Senate Committee on the Judiciary stated: "[o]verall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." That is, CAFA is designed to permit federal courts to hear more interstate class actions and to relax the barriers facing defendants who seek to remove qualifying class actions to federal court.
>
> With specific regard to removal and remand, plaintiff correctly points out that CAFA itself lacks burden-shifting language. However, notwithstanding the absence of explicit statutory provisions, it is not difficult to divine Congressional intent from CAFA's legislative history:
>
> > Pursuant to new subsection 1332(d)(6), the claims of the individual class members in any class action shall be aggregated to determine whether the amount in controversy exceeds the sum or value of $5,000,000 . . . . The Committee intends this subsection to be interpreted expansively. 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). And if a federal court is uncertain about whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value of $5,000,000,' the

55. *Id.*
56. *Id.*

> court should err in favor of exercising jurisdiction over the case.
>
> The Senate Committee on the Judiciary also stated:
>
> > It is the Committee's intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption. Thus, if a plaintiff seeks to have a class action remanded under section 1332(d)(4)(A) on the ground that the primary defendants and two thirds or more of the class members are citizens of the home state, that plaintiff shall have the burden of demonstrating that these criteria are met by the lawsuit. Similarly, if a plaintiff seeks to have a purported class action remanded for lack of federal diversity jurisdiction under subsection 1332(d)(5)(B) . . . that plaintiff should have the burden of demonstrating that 'all matters in controversy' do not 'in the aggregate exceed the sum or value of $5,000,000, exclusive of interest and costs' or that 'the number of all proposed plaintiff classes in the aggregate is less than 100.' . . .
> >
> > [I]t is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court (e.g., the burden of demonstrating that more than two-thirds of the proposed class members are citizens of the forum state).
>
> Based on the foregoing legislative history, the Court holds that Merck's reading of CAFA is the correct one and that it is plaintiff's responsibility to demonstrate that removal from state court was improvident.[57]

Judge Lasnik then denied Waitt's motion to remand, finding that he, as the party challenging minimal-diversity jurisdiction, had not met his burden of proving that the court did not have jurisdiction over the case. Waitt also argued that his damages did not meet the $5,000,000 requirement, but Judge Lasnik noted that the "plaintiff's reply fails to include any of the economic damages suffered by the nationwide class he purportedly represents and similarly fails to mention that his complaint requests treble and/or punitive damages."[58]

57. *Id.* at *1–2 (internal citations omitted).
58. *Id.* at *2.

4. *In re Textainer Partnership*[59]

United States District Judge Maxine M. Chesney remanded a California class action from the Northern District of California on July 27, 2005, holding that CAFA did not apply because the action was covered by an exception in CAFA relating to corporate governance suits.[60] As part of Judge Chesney's *Order Granting Motion to Remand*, she discussed the burden-of-proof issue, explaining:

> While courts ordinarily are required to "strictly construe [a] removal statute against removal jurisdiction," rejecting jurisdiction "if there is any doubt as to the right of removal in the first instance," the legislative history of CAFA instructs that CAFA's jurisdictional provisions "should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if removed by any defendant." "[I]f a Federal court is uncertain . . . the court should err in favor of exercising jurisdiction over the case."
>
> Similarly, while the defendant ordinarily bears the burden of proving that removal was proper, CAFA's legislative history indicates that the plaintiff has the burden of proving that an action removed under CAFA should be remanded. "If a purported class action is removed pursuant to these jurisdictional provisions . . . it is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court."[61]

5. *Natale v. Pfizer*[62]

On July 28, 2005, United States District Court Chief Judge William G. Young, writing for the District Court of Massachusetts, analyzed a class action removed prior to enactment of CAFA and noted as part of his analysis:

> Under the Act, the burden of removal is on the party opposing removal to prove that remand is appropriate. [W]ith respect to the Act, "the Committee Report expresses a clear intention to place the burden of removal on the party *opposing* removal to demonstrate that an interstate class action should be remanded to state court." . . . "It is the

59. *In re* Textainer P'ship, No. C 05-0969 MMC, 2005 WL 1791559 (N.D. Cal. July 27, 2005).

60. Section 5 of CAFA, codified as 28 U.S.C. § 1453(d)(2), provides an exception to removal of CAFA-based class actions for "a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the state in which such corporation or business enterprise is incorporated or organized."

61. *Textainer*, 2005 WL 1791559, at *3 (internal citations omitted).

62. Natale v. Pfizer, Inc., 379 F. Supp. 2d 161 (D. Mass. 2005).

> Committee's intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption." . . ."The named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court."[63]

Chief Judge Young then continued by stating that "[t]he amendments and expansion of federal diversity jurisdiction, including the expansion of removal of state actions, are '[t]he most publicized changes associated with the . . . Act.'"[64] The *Natale* opinion also contains an in-depth analysis of CAFA and the cases to date interpreting the "date of commencement" issue for CAFA-removal purposes. The court held, in line with the developing case law,[65] that "a case is 'commenced' for purposes of the Class Action Fairness Act when it is filed with the state court."[66] However, the court chose not to remand the case, but rather to certify the question to the United States Court of Appeals for the First Circuit.[67]

6. *Lussier v. Dollar Tree Stores, Inc.*[68]

On September 8, 2005, United States District Judge Anna J. Brown remanded an Oregon class action removed from state court because the action was commenced on February 14, 2005, four days before CAFA's effective date. Judge Brown did, however, consider the burden-of-proof issue in her opinion:

> The court ordinarily is required to "strictly construe [a] removal statute against removal jurisdiction" and reject jurisdiction "if there is any doubt as to the right of removal in the first instance." The legislative history of CAFA, however, "instructs that CAFA's jurisdictional provisions 'should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if removed by any defendant.'"
>
> In addition, although the removing defendant ordinarily bears the burden of proving that removal was proper, "CAFA's legislative history indicates . . . the plaintiff has the burden of proving . . . an action removed under CAFA

63. *Id.* at 168 (quoting the Senate Committee Report) (internal citations omitted). The judge noted that the *Berry* opinion was not signed or dated by the court. *Id.* at 168 n.10.

64. *Id.* (internal citations omitted).

65. *See supra* note 19.

66. *Natale*, 379 F. Supp. 2d at 183.

67. *Id.* The First Circuit, in a per curiam opinion, affirmed the District Court of Massachusetts in its remand decision, but did not address the burden-of-proof analysis, as that issue was not included in the question of law certified to the First Circuit. *See* Natale v. Pfizer, Inc., 424 F.3d 43 (1st Cir. 2005).

68. Lussier v. Dollar Tree Stores, Inc., No. CV 05-768-BR, 2005 WL 2211094 (D. Or. Sept. 8, 2005).

> should be remanded." "If a purported class action is removed pursuant to these jurisdictional provisions, . . . it is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court." "It is plaintiff's responsibility to demonstrate that removal from state court was improvident."[69]

7. *Dinkel v. General Motors Corp.*[70]

On November 9, 2005, United States District Judge D. Brock Hornby denied a motion to remand a class action filed in a Kansas state court and consolidated in the District Court of Maine by the Judicial Panel on Multidistrict Litigation.[71] The court determined that, under the Kansas Rules of Civil Procedure, the action commenced as to the defendants that were not served within ninety days of filing of the complaint at the moment they were served.[72] The court stated, "Dinkel did not serve the Removing Defendants within the ninety days. As to them, the Kansas lawsuit was not 'commenced' until they were actually served . . . which was after the effective date of CAFA. For them 'a new window of removal' was opened."[73] Judge Hornby held that Dinkel could not "unring the bell" by dismissing the removed defendants to attempt to return the lawsuit to its status on February 17, 2005, before CAFA's enactment date.[74]

As to the burden-of-proof issue, Judge Hornby stated:

> My conclusion flows from CAFA's plain language and removal principles generally. But CAFA's legislative history also strongly supports it. As stated in the Senate Report on CAFA:
>
> > The law is clear that, once a federal court properly has jurisdiction over a case removed to federal court, subsequent events generally cannot "oust" the federal court of jurisdiction. While plaintiffs undoubtedly possess some power to seek to avoid federal jurisdiction by defining a proposed class in particular ways, they lose that power once a defendant has properly removed a class action to federal court.
>
> Moreover, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its

69. *Id.* at *1 (quoting from both House and Senate legislative histories) (internal citations omitted).

70. Dinkel v. Gen. Motors Corp., 400 F. Supp. 2d 289 (D. Me. 2005).

71. *Id.*

72. *Id.* at 292.

73. *Id.* at 293 (internal citations omitted) (quoting Knudsen v. Liberty Mut. Ins. Co., 411 F.3d 805, 807 (7th Cir. 2005)).

74. *Id.* at 294.

> provisions [according to the Senate Report] should be read broadly, with a strong preference that interstate class actions should be heard in federal court if properly removed by any defendant. [F]ederal courts should "err in favor of exercising jurisdiction." "[I]f a Federal court is uncertain . . . the court should err in favor of exercising jurisdiction over the case." According to the Report, "The Committee intends this subsection to be interpreted expansively. 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").[75]

B. Decisions Mechanically Applying the Complete Diversity Standard (Without Discussing CAFA's Legislative History)

1. *In re Expedia Hotel Taxes and Fees Litigation*[76]

On April 15, 2005, the Western District of Washington, in an Order by United States District Judge John C. Coughenour, held that this class action filed prior to February 18, 2005, but consolidated after that date, could not be removed under CAFA.[77] However, in looking at the burden-of-proof issue, Judge Coughenour simply referenced the Complete Diversity Standard: "The burden of establishing federal jurisdiction is on the party seeking removal, and the removal statute is strictly construed against removal jurisdiction."[78] The court did not consider in its ruling the differences between complete and minimal diversity and did not examine the language of Section 2 of CAFA or its legislative history, but instead mechanically applied the traditional burden of proof to the party invoking federal jurisdiction in a complete-diversity setting.

2. *Awaida v. Pfizer, Inc.*[79]

On June 7, 2005, Judge Lee R. West, United States District Judge for the Western District of Oklahoma, denied a plaintiff's motion to remand a class action filed on February 18, 2005.[80] The plaintiff filed on CAFA's effective date in the District Court of Canadian County, Oklahoma, and Pfizer timely removed to federal court, alleging federal subject matter jurisdiction under Title 28 Section 1332, asserting both complete- and minimal-diversity jurisdiction under CAFA.[81] In his motion to remand, Awaida

75. *Id.* at 294–95 (internal citations omitted).

76. *In re* Expedia Hotel Taxes and Fees Litig., 377 F. Supp. 2d 904 (W.D. Wash. 2005).

77. *Id.*

78. *Id.* at 905 (quoting Prize Frize, Inc. v. Matrix, Inc., 167 F.3d 1261, 1265 (9th Cir. 1999)).

79. Awaida v. Pfizer, Inc., No. Civ-05-425-W (W.D. Okla. June 7, 2005) (not available on Westlaw or LexisNexis).

80. *Id.*

81. *Id.* at 1.

"contended that because congressional legislation does not become law until the precise moment it is approved by the executive branch . . . the Act was not in effect at the time this lawsuit was filed."[82] Judge West held CAFA applicable because it states that it "shall apply to any civil action commenced on or after the date of [its] enactment."[83]

Judge West briefly considered the burden-of-proof issue and mechanically applied the Complete Diversity Standard, stating that "[o]nce the issue of jurisdiction has been raised, the party seeking to invoke this Court's subject matter jurisdiction 'bear[s] the burden of establishing that the requirements for the exercise of diversity jurisdiction are present.' In this case, the burden falls upon Pfizer."[84] The court did not, however, separately consider the burden-of-proof issue under CAFA, nor did it address Section 2 of CAFA or its legislative history. The court did, however, deny the motion to remand, finding that minimal-diversity and the amount-in-controversy requirements under CAFA had been established.[85]

3. *Sneddon v. Hotwire, Inc.*[86]

On June 29, 2005, United States District Judge Susan Illston issued an opinion examining CAFA's date of "commencement" issue. The judge remanded the class action against defendant Hotwire, Inc., filed in the Superior Court for the County of San Francisco, California, on January 10, 2005.[87] The opinion did not analyze the burden of proof under CAFA, but merely noted in passing that "[t]he court may remand sua sponte or on motion of a party, and the party who invoked the federal court's removal jurisdiction has the burden of establishing federal jurisdiction."[88]

C. *Decisions Applying the Complete Diversity Standard (While Discussing, but Rejecting, CAFA's Legislative History)*

1. *Schwartz v. Comcast Corp.*[89]

In this case, "[p]laintiff Adam Schwartz[ ] filed a class action complaint on April 18, 2005 in the Pennsylvania Court of Common Pleas for Philadelphia County alleging that defendant, Comcast Corporation, breached its contract with plaintiff, was unjustly enriched, and violated Pennsylvania's

82. *Id.* at 2.

83. *Id.* (quoting 119 Stat. 4, 114) (the Supreme Court has held that with such language "[f]ractions of the day are not recognized." (quoting Lapeyre v. United States, 84 U.S. 191, 198 (1872))).

84. *Id.* at 5 (quoting Martin v. Franklin Capital Corp., 251 F.3d 1284, 1290 (10th Cir. 2001)).

85. *Id.*

86. Sneddon v. Hotwire, Inc., No. C 05-0951 SI, C 05-0952 SI, C 05-0953-SI, 2005 WL 1593593 (N.D. Cal. June 29, 2005).

87. *Id.*

88. *Id.* at *1 (citing Emrich v. Touche Ross & Co., 846 F.2d 1190, 1195 (9th Cir. 1988) (citing Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921)); Salveson v. W. States Bankcard Ass'n, 525 F. Supp. 566, 571 (N.D. Cal. 1981), *aff'd in part, rev'd in part*, 731 F.2d 1423 (9th Cir. 1984); SCHWARZER, TASHIMA, & WAGSTAFFE, FEDERAL CIVIL PROCEDURE BEFORE TRIAL, 2:1093 (1992)).

89. Schwartz v. Comcast Corp., No. Civ.A. 05-2340, 2005 WL 1799414 (E.D. Pa. July 28, 2005).

Consumer Protection Law . . . ."[90] Schwartz alleged specifically that Comcast had violated the company's promise to provide "service that was always on, 24 hours a day, 7 days a week, 365 days a year."[91] Comcast, a Delaware corporation with its principal place of business in Pennsylvania, filed its notice of removal, asserting minimal diversity under CAFA. Schwartz moved to remand.[92]

Comcast argued that the class included citizens of other states that were "merely doing business in Pennsylvania or temporarily residing in Pennsylvania," and that therefore the minimal-diversity-of-citizenship requirements were met under CAFA.[93] Schwartz then filed an amended complaint, attempting to limit his original complaint to citizens of the state of Pennsylvania. Comcast asserted that "CAFA's legislative history demonstrates Congress's intent to alter this rule and place the burden of proof with respect to jurisdiction on a remanding plaintiff."[94] Comcast cited the Judiciary Committee's section-by-section analysis from the committee's report in which it states:

> Overall, new section 1332 is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.
>
> As noted above, it is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should bear the burden of demonstrating that a case should [sic] be remanded to state court (e.g., the burden of demonstrating that more than two-thirds of the proposed class members are citizens of the forum state). Allocating the burden in this manner is important to ensure that the named plaintiffs will not be able to evade federal jurisdiction with vague class definitions or other efforts to obscure the citizenship of class members. The law is clear that, once a federal court properly has jurisdiction over a case removed to federal court, subsequent events generally cannot "oust" the federal court of jurisdiction. While plaintiffs undoubtedly possess some power to seek to avoid federal jurisdiction by defining a proper class in particular ways, they lose that power once a defendant has properly removed a class action to federal court.
>
> * * *

90. *Id.* at *1.
91. *Id.* (internal quotations omitted).
92. *Id.*
93. *Id.* at *2 (internal quotations omitted).
94. *Id.* at *4.

> It is the Committee's intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption. Thus, if a plaintiff seeks to have a class action remanded under section 1332(d)(4)(A) on the ground that the primary defendants and two-thirds or more of the class members are citizens of the home state, that plaintiff shall have the burden of demonstrating that these criteria are met by the lawsuit.[95]

Comcast also cited *Berry v. American Express Publishing Corp.*[96] in support of its arguments that the jurisdictional burden of proof under CAFA is on the party opposing removal. Judge O'Neil conducted an extensive analysis of the *Berry* opinion, writing:

> In *Berry*, Judge Stotler interpreted CAFA's legislative history—specifically the Judiciary Committee Report—to hold that CAFA has shifted the burden of proof to the party seeking remand. Acknowledging that "determining legislative 'intent' is a process not without the potential for selective interpretation, where the statute does not squarely address the issue," Judge Stotler determined that "legislative history is an essential tool for statutory interpretation." Finding support in the Supreme Court's opinion in *Garcia v. United States* and an opinion from the Court of Appeals for the Ninth Circuit in *City of Edmonds v. Wash. State Bldg. Code Council*, Judge Stotler held that the [Judiciary Committee Report is] "'the authoritative source for finding the Legislature's intent,' and may be consulted as one important resource in the quest for faithful statutory interpretation." In support of this conclusion, Judge Stotler added:
>
> > First, a statute cannot address all possible outcomes and situations, and language inevitably contains some imprecision; where the text does not provide a clear answer, a faithful interpretation of the statute necessarily involves more than the text itself. Second, if legislative intent is clearly expressed in Committee Reports and other materials, judicial disregard for the explicit and uncontradicted statements contained therein may result in an interpretation

95. *Id.* at *4 (internal citations omitted) (quoting the Senate Judiciary Committee Report, S. Rep. No. 109-14, at 42–44 (2005)). These sentiments were echoed by Representative Sensenbrenner, 151 Cong. Rec. H727–730, and Representative Goodlatte, *id.* at H732, in the House of Representatives.

96. Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118 (C.D. Cal. 2005) (discussed *supra* text accompanying notes 34–43).

that is wholly inconsistent with the statute that the legislature envisioned. Where the source of legal authority is statutory and not constitutional, such as with the diversity statute, Congress retains the ability to create and direct the law, so long as it is consistent with constitutional principles, and it is particularly important for the Court to follow that directive. Where both plaintiffs' and defendants' interpretations of the burden of proof . . . are constitutionally permissible, the role of the Court is to faithfully implement the law as intended by the Legislature. In these circumstances the legislative history is a proper tool of statutory interpretation.

With this statutory interpretation framework in place, Judge Stotler found that "the Committee Report expresses a clear intention to place the burden of removal [sic] on the party opposing removal to demonstrate that an interstate class action should be remanded to state court." Rejecting plaintiffs' arguments "that the failure to incorporate this directive evinces an explicit intent to maintain the status quo," Judge Stotler held that "this contention cannot be squared with the uncontradicted statements contained in the Committee Report." Judge Stotler further opined:

Although the lack of any burden-shifting provisions may be an opaque means of preserving the status quo . . . it is equally possible that it was due to legislative oversight, the inability of the Legislature to foresee, or for statutes to address all circumstances. Alternatively, and more plausibly, the failure to address the burden of proof in the statute reflects the Legislature's expectation that the clear statements in the Senate Report would be sufficient to shift the burden of proof. The Court notes, with some irony, that the original diversity statute does not contain any reference to the burden of proof. Plaintiff fails to explain how the failure to incorporate the burden of proof in Section 1332(d) should be assigned more or less meaning than the failure to incorporate any burden of proof in the original text.

Judge Stotler thus concluded that "the failure to explicitly legislate changes on the burden of proof in interstate class actions has little interpretive value." Judge Stotler also observed "that her interpretation is consistent with the tradition of placing the burden on the moving party."[97]

97. *Schwartz*, 2005 WL 1799414, at *5–6 (internal citations omitted).

Judge O'Neil disagreed, however, with Judge Stotler's analysis in *Berry*, and pointed to "Justice Jackson's concurrence in *Schwegmann Bros.*: 'Resort to legislative history is only justified where the face of the Act is inescapably ambiguous.'"[98] He further noted that "[w]here the statutory language is plain and unambiguous, further inquiry is not required, except in the extraordinary case where a literal reading of the language produces an absurd result."[99] Judge O'Neil found neither ambiguity in section 1332(d) nor absurdity in its result, "because it is consistent with courts' long standing application of the burden of proof for establishing diversity jurisdiction."[100] However, in looking solely at new section 1332(d), Judge O'Neil overlooked the specific congressional intent expressed in the text of Section 2 of CAFA.

Judge O'Neil also considered a number of Supreme Court cases, noting that "Congress is presumed to be aware of existing law when it passes legislation."[101] In contrast to Judge Stotler, Judge O'Neil concluded that he could not "assume that, with the Judiciary Committee's understanding of the operation of diversity jurisdiction, Congress was unaware that courts have uniformly placed the burden of proof on a removing defendant."[102]

Judge O'Neil found that "a court may depart from the plain language of a statute only by an extraordinary showing of a contrary congressional intent in the legislative history."[103] Instead of following Judge Stotler, Judge O'Neil held that

> with a plain, nonabsurd construction of a statute in view, I need not construe this statute in a manner that would enlarge its meaning "so that what was omitted, presumably by inadvertence, may be included within its scope." I am, therefore, hesitant to read into the statute a Congressional intent to shift the longstanding burden of proof for establishing diversity jurisdiction, where Congress expressly enacted numerous other intended changes discussed by the Judiciary Committee in its Report to the exclusion of the change with respect to the burden of proof.[104]

98. *Id.* at *6 (citing Garcia v. United States, 469 U.S. 70, 77 (1984) (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395–96 (1951) (Jackson, J., concurring). *See also In re* First Merch. Acceptance Corp., 198 F.3d 394, 402 (3d Cir. 2000) ("Supreme Court cases declaring that clear [statutory] language cannot be overcome by contrary legislative history are legion.")).

99. *Id.* (quoting Idahoan Fresh v. Advantage Produce, Inc., 157 F.3d 197, 202 (1998)).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at *7 (quoting *Idahoan Fresh*, 157 F.3d at 202) (citing *Garcia*, 469 U.S. at 75)).

104. *Id.* (internal citation omitted).

By "failing to express a concomitant change in the burden of proof, Congress implicitly acknowledged and adopted the longstanding rule that a removing defendant bears the burden of proof for establishing diversity jurisdiction."[105]

Judge O'Neil concluded his analysis of statutory interpretation by holding:

> Had Congress intended to make a change in the law with respect to the burden of proof, it would have done so expressly in the statute. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result." I therefore hold that, notwithstanding its legislative history, CAFA does not shift the burden of proof from a removing defendant to a remanding plaintiff.[106]

2. *Moll v. Allstate Floridian Insurance Co.*[107]

In *Moll v. Allstate Floridian*, United States Senior District Judge Roger Vinson, writing for the Northern District of Florida, granted the plaintiffs' motion to remand.[108] The plaintiffs asserted claims of breach of contract and breach of the implied covenant of good faith, based on Allstate Floridian's alleged intentional underestimation of claims related to hurricanes in Florida during 2004.[109] The plaintiffs filed the action in Florida state court, and Allstate Floridian removed the action to the District Court of the Northern District of Florida on minimal-diversity jurisdiction grounds.[110]

On the plaintiffs' motion for remand, the court placed the burden of establishing federal jurisdiction squarely on Allstate Floridian (AFIC), stating that "AFIC, as the party removing this action to federal court, has the burden of establishing federal jurisdiction."[111] The court ultimately held that Allstate Floridian bore the burden of proving federal jurisdiction "[b]ecause the removal statutes are strictly construed against removal [and] all doubts about removal must be resolved in favor of remand."[112]

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105. *Id.*

106. *Id.* (internal citations omitted).

107. Moll v. Allstate Floridian Ins. Co., No. 3:05CV160RVMD, 2005 WL 2007104 (N.D. Fla. Aug. 16, 2005).

108. *Id.*

109. *Id.* at *1–2.

110. *Id.*

111. *Id.* at *2 (citing Sweet Pea Marine, Ltd. v. APJ Marine, Inc., 411 F.3d 1242 (11th Cir. 2005)) (citing McCormick v. Aderholt, 293 F.3d 1254, 1257 (11th Cir. 2002)).

112. *Id.* (citing *Sweet Pea Marine*, 411 F.3d 1242; *McCormick*, 293 F.3d 1254; Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994)).

The court explained that "the sole basis for federal subject matter jurisdiction in this case is premised upon diversity of citizenship as set forth in Title 28, United States Code, Section 1332, and as amended by the Class Action Fairness Act."[113] The court did acknowledge in a footnote, however, that "CAFA was undoubtedly intended to expand federal diversity jurisdiction over multi-state actions. However, the CAFA still incorporates the corporate citizenship requirements of Title 28, United States Code, Section 1332(c)(1), and it preserves state courts' jurisdiction over class actions that predominantly involve plaintiffs and defendants in the same state."[114]

The court determined that the defendants seeking removal satisfied CAFA's $5,000,000 amount-in-controversy requirement, but that they failed to prove that diversity jurisdiction existed, since Allstate Floridian's principal place of business was in Florida.[115]

3. *Judy v. Pfizer, Inc.*[116]

On September 14, 2005, U.S. District Judge Rodney W. Sipple of the Eastern District of Missouri held that CAFA does not apply to a petition amended post-CAFA to assert new claims for relief.[117] Pfizer had previously removed the litigation on other grounds prior to enactment of CAFA, but the case was remanded when Judge Sipple found no federal question or complete-diversity jurisdiction.[118] Thereafter, Elizabeth Judy, the plaintiff, filed her amended petition on July 22, 2005, several months after CAFA's enactment date, to refine the factual allegations and to assert additional common-law claims for relief surrounding the prescription drug Neurontin.[119] Pfizer again removed, this time on minimal-diversity grounds under CAFA based on the amended complaint, in an attempt to consolidate multi-district litigation involving Neurontin.[120] The court followed *Knudsen v. Liberty Mutual Insurance Co.*,[121] holding that the amendment of the state court action did not "commence" a new action in the state court, and remanded the case.[122]

Judge Sipple, in examining Pfizer's arguments that the burden of proof fell on plaintiffs, stated:

> Pfizer asserts that the CAFA places the burden of proof in support of remand upon Judy. Settled case law regarding removal, however, places the burden of proof on the party invoking federal jurisdiction, Pfizer in this matter. Pfizer's

113. *Id.* at *3–4.
114. *Id.* at *1 n.1.
115. *Id.* at *13–14.
116. Judy v. Pfizer, Inc., No. 4:05CV1208RWS, 2005 WL 2240088 (E.D. Mo. Sept. 14, 2005).
117. *Id.*
118. *Id.* at *1.
119. *Id.*
120. *Id.*
121. Knudsen v. Liberty Mut. Ins. Co., 411 F.3d 805, 806 (7th Cir. 2005).
122. *Judy*, 2005 WL 2240088, at *3.

> argument turns this settled case law on its head. In support of shifting the burden of proof to Judy, Pfizer cites to four district court cases, three from California and one from Washington. These cases hold that, although the CAFA is silent about the burden of proof in cases removed under the Act, a [Senate] Committee Report contemplates the shifting of the burden to the plaintiff seeking remand.[123]

Judge Sipple began his analysis by noting that "[a]t the time of the enactment of the CAFA, Congress was presumed to be aware of the well settled case law regarding the burden of proof in removed actions."[124] Using that general concept as his cornerstone, Judge Sipple continued his statutory interpretation: "A court may resort to legislative history to interpret a statute when it contains an ambiguity. Absent some ambiguity in the statute, there is no occasion to look to legislative history."[125] Judge Sipple concluded:

> The omission of a burden of proof standard in the CAFA does not create an ambiguity inviting courts to scour its legislative history to decide the point. By failing to specifically address the burden of proof in the Act, especially in light of discussing the issue in a Committee Report, Congress is deemed to have not intended to change the settled case law on that issue. Had Congress wished to change which party bears the burden of proof in a removal action under the CAFA, it could have explicitly done so.
>
> As a District Court Judge, I am compelled to follow the precedent of the Eighth Circuit Court of Appeals which places the burden on the party seeking removal. Moreover, the burden of proof issue in this case is not a decisive issue because my determination of whether Judy's amendment of her petition commenced a new case for purposes of removal under the CAFA can be resolved by simply viewing her original and amended state court petitions.[126]

4. *Plummer v. Farmers Group, Inc.*[127]

On September 15, 2005, United States District Judge Ronald A. White, writing for the Eastern District of Oklahoma, denied plaintiff's motion to remand, holding that an amended complaint adding a request for

123. *Id.* at *1 (internal citations omitted).

124. *Id.* at *2 (citing Contract Freighters, Inc. v. Sec'y of U.S. Dep't of Transp., 260 F.3d 858, 861 (8th Cir. 2001) (Congress is presumed to know the legal background in which it is legislating)).

125. *Id.* (citing Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1032 (8th Cir. 2003)).

126. *Id.*

127. Plummer v. Farmers Group, Inc., 388 F. Supp. 2d 1310 (E.D. Okla. 2005).

class certification constituted "commencement" under CAFA.[128] The plaintiff originally filed the suit on August 15, 2003, as a single-plaintiff case concerning an automobile insurance policy and an insurance company computer program that allegedly undervalued her automobile.[129] Plummer amended her complaint on May 23, 2005, seeking class certification under Oklahoma law.[130] Farmer's Group then removed the case to federal court, claiming minimal-diversity jurisdiction under CAFA.[131] The court examined both the date of commencement issue and the amount in controversy. As to the date of commencement, the court agreed with the Seventh Circuit in *Knudsen v. Liberty Mutual Insurance Co.*[132] that the amended complaint did not relate back and was the equivalent of filing a new cause of action.[133]

As part of the court's consideration of the amount-in-controversy issue, it looked to the burden-of-proof question raised by the defendants. Judge White began by acknowledging the Complete Diversity Standard: "Typically, the party invoking federal jurisdiction bears the burden of demonstrating it exists."[134]

> Several courts have held that it is the intent of Congress that "if a purported class action is removed pursuant to [CAFA], the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident." This Court agrees this view better comports with the purpose of CAFA. This Court is not, however, sanguine about the reliance by these courts on CAFA's legislative history rather than the precise language of the statute itself.[135]

The plaintiff, on the other hand, cited *Schwartz v. Comcast Corp.*[136] for two propositions: first, that "Congress implicitly acknowledged and adopted the longstanding rule that a removing defendant bears the burden of proof for establishing diversity jurisdiction,"[137] and second, "[h]ad Congress intended to make a change in the law with respect to the burden of proof, it would have done so expressly in the statute . . . . It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result."[138]

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128. *Id.*

129. *Id.* at 1312.

130. *Id.* at 1313.

131. *Id.*

132. Knudsen v. Liberty Mut. Ins. Co., 411 F.3d 805, 808 (7th Cir. 2005).

133. *Plummer*, 388 F. Supp. 2d at 1316.

134. *Id.* at 1317 (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998)).

135. *Id.* (quoting Waitt v. Merck & Co., No. C05-0759L, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005); Harvey v. Blockbuster, Inc., 384 F. Supp. 2d 749, 752 (D.N.J. 2005); *In re* Textainer P'ship, No. C 05-0969 MMC, 2005 WL 1791559, at *3 (N.D. Cal. July 27, 2005).

136. Schwartz v. Comcast Corp., No. Civ.A. 05-2340, 2005 WL 1799414 (E.D. Pa. July 28, 2005).

137. *Plummer*, 388 F. Supp. 2d at 1316 (quoting *Schwartz*, 2005 WL 1799414, at *7).

138. *Id.*

Judge White, without acknowledging the existence of Section 2 of CAFA and its clear statement of congressional intent behind its passage of CAFA, held:

> While the Court does not necessarily agree that Congress's failure to "expressly" modify the law with respect to the burden of proof constitutes an implicit adoption of the traditional rule, the Court agrees that it is not the role of the judiciary to correct drafting errors. The Tenth Circuit has stated that the removing party, at a minimum, has the burden to prove by a preponderance of the evidence that the jurisdictional amount has been satisfied. This showing must be evident from the face of the petition or the notice of removal itself. While the purpose of CAFA may arguably militate in favor of reversing this burden, Congress did not expressly say so in the statute. This Court is loath to ignore the long-standing precedent of this Circuit on the ethereal basis of Congressional intent unstated in the actual language of the law. Therefore, the Court will not reverse the burden of proof on this issue.[139]

5. *Brill v. Countrywide Home Loans, Inc.*[140]

On October 20, 2005, the Seventh Circuit became the first circuit court to examine the burden-of-proof issue under CAFA.[141] Circuit Judges Posner, Easterbrook, and Rovner considered the decision of the Northern District of Illinois written by United States District Judge John W. Darrah.[142] The District Court remanded an Illinois class action removed on minimal-diversity grounds under CAFA, finding that the Telephone Consumer Protection Act provides exclusive state court jurisdiction over its private causes of action.[143] Judge Darrah's opinion included a statement regarding the burden of proof in a complete-diversity context: "The party seeking to preserve the removal, not the party moving to remand, bears the burden of establishing that the court has jurisdiction."[144]

Countrywide filed an appeal under CAFA, which provides for review of remand orders,[145] and the *Brill* court summarily reversed the District Court's decision, without full briefing or argument by the parties.[146] The

139. *Id.* at 1317–18 (internal citations omitted).

140. Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005).

141. *Id.*

142. Brill v. Countrywide Home Loans, Inc., No. 05 C 2713, 2005 WL 2230193 (N.D. Ill. Sept. 8, 2005).

143. *Id.* at *2.

144. *Id.* at *1 (citing Jones v. Gen. Tire and Rubber Co., 514 F.2d 660, 664 (7th Cir. 1976)).

145. 28 U.S.C. 1453(c)(1).

146. *Brill*, 427 F.3d at 447.

Brill court did not, however, reverse the District Court's observations regarding the burden of proof. Judge Easterbrook, writing for the court, explained:

> Countrywide maintains that the Class Action Fairness Act reassigns that burden to the proponent of remand. It does not rely on any of the Act's language, for none is even arguably relevant. Instead it points to this language in the report of the Senate Judiciary Committee: "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 provisions are not satisfied)." This passage does not concern any text in the bill that eventually became law. When a law sensibly could be read in multiple ways, legislative history may help a court understand which of these received the political branches' imprimatur. But when the legislative history stands by itself, as a naked expression of "intent" unconnected to any enacted text, it has no more force than an opinion poll of legislators—less, really, as it speaks for fewer. Thirteen Senators signed this report and five voted not to send the proposal to the floor. Another 82 Senators did not express themselves on the question; likewise 435 Members of the House and one President kept their silence.
>
> We recognize that a dozen or so district judges have treated this passage as equivalent to a statute and reassigned the risk of non-persuasion accordingly. But naked legislative history has no legal effect, as the Supreme Court held in *Pierce v. Underwood*, 487 U.S. 552, 566–68 . . . (1988). A Committee of Congress attempted to alter an established legal rule by a forceful declaration in a report; the Justices concluded, however, that because the declaration did not correspond to any new statutory language that would change the rule, it was ineffectual. Just so here. 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.[147]

Nowhere in its analysis of the burden-of-proof issue did the *Brill* court reference or otherwise indicate that it was aware of CAFA's "Findings and Purposes" in Section 2, which text reveals that CAFA's legislative history is

147. *Id.* at 448 (some internal citations omitted).

not a "naked expression of 'intent' unconnected to any enacted text." The *Brill* court further did not apply the correct canon of statutory construction.[148] The court, nevertheless, concluded that even under the Complete Diversity Standard, Countrywide had satisfied the minimum jurisdictional requirement of $5,000,000 in controversy, and remanded to the district court for a decision on the merits.[149]

6. *Ongstad v. Piper Jaffray & Co.*[150]

On January 4, 2006, United States District Judge Daniel L. Hovland, writing for the District Court of North Dakota, examined a class action filed on September 29, 2005 that was removed on minimal-diversity grounds pursuant to CAFA.[151] The action alleged that Piper Jaffray, a securities broker and investment banking firm, traded securities without authorization, resulting in a loss.[152] Judge Hovland examined the burden-of-proof arguments and the amount-in-controversy requirement. The court placed the jurisdictional burden of proof on Piper Jaffray as the removing party and held that it could not demonstrate the requisite amount in controversy as required by CAFA.[153]

In his examination of the burden-of-proof issue, Judge Hovland outlined the jurisprudence of the Complete Diversity Standard within the Eighth Circuit and the disagreement among the courts on this issue in the CAFA context, concluding, "[r]emoval statutes are strictly construed in favor of state court jurisdiction and federal district courts must resolve all doubts concerning removal in favor of remand. The removing party bears the burden of showing that removal was proper."[154] The court acknowledged that some courts have held that CAFA shifts the burden of proof to the party seeking remand, and pointed to the legislative history of CAFA in doing so.[155] The court also stated that other courts have determined that "CAFA does nothing to alter the traditional rule of law that the party opposing remand bears the burden of establishing federal jurisdiction."[156]

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148. See discussion of the correct approach *infra* Section V.A.

149. *Brill*, 427 F.3d at 452.

150. Ongstad v. Piper Jaffray & Co., 407 F. Supp. 2d 1085 (D.N.D. 2006).

151. *Id.* at 1085.

152. *Id.* at 1086.

153. *Id.* at 1092–93.

154. *Id.* at 1087–88 (citing *In re* Bus. Men's Assurance Co. of Am., 992 F.2d 181, 183 (8th Cir. 1993); *see also* Green v. Ameritrade, Inc., 279 F.3d 590, 595 (8th Cir. 2002) (citing *Bus. Men's Assurance*, 992 F.2d at 183) (the party opposing remand has the burden of establishing federal subject-matter jurisdiction)).

155. *Id.* at 1088 (citing Harvey v. Blockbuster, Inc., 384 F. Supp. 2d 749, 752 (D.N.J. 2005); *In re* Textainer P'ship, No. C 05-0969 MMC, 2005 WL 1791559, at *3 (N.D. Cal. July 27, 2005); Waitt v. Merck & Co., No. C05-0759L, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005); Yeroushalmi v. Blockbuster, Inc., No. CV 05-225-AHM(RCX), 2005 WL 2083008, at *3 (C.D. Cal. July 11, 2005); Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118, 1122–23 (C.D. Cal. 2005)).

156. *Ongstad*, 407 F. Supp. 2d at 1088 (citing Plummer v. Farmers Group, Inc., 388 F. Supp. 2d 1310, 1317–18 (E.D. Okla. 2005); Judy v. Pfizer, Inc., No. 4:05CV1208RWS, 2005 WL 2240088, at *2 (E.D. Mo. Sept. 14, 2005); Schwartz v. Comcast, Corp., No. Civ.A. 05-2340, 2005 WL 1799414, at *4 (E.D. Pa. July 28, 2005); *In re* Expedia Hotel Taxes and Fees Litig., 377 F. Supp. 2d 904, 905 (W.D. Wash. 2005); Sneddon v. Hotwire, Inc., No. C 05-0951 SI, C 05-0952 SI, C 05-0953 SI, 2005 WL 1593593,

Observing that "the United States Supreme Court and the Eighth Circuit Court of Appeals have not yet addressed this issue,"[157] Judge Hovland began a step-by-step approach with his reasoning, but like the *Brill* court, apparently overlooked Congress's "Findings and Purposes" in Section 2 of the Act: "At the time of the enactment of the CAFA, Congress was presumed to be aware of the well settled case law regarding the burden of proof in removed actions."[158] The court also acknowledged that legislative history may be considered to interpret a statute when the statute contains an ambiguity, but absent some ambiguity in the statute, there is no occasion to look to the legislative history.[159]

Following the road taken in *Brill*, Judge Hovland concluded that "[t]he omission of a burden of proof standard in the CAFA does not create an ambiguity inviting courts to scour its legislative history to decide the point. By failing to specifically address the burden of proof in the Act, especially in light of discussing the issue in a Committee Report, Congress is deemed to have not intended to change the settled case law on that issue. Had Congress wished to change which party bears the burden of proof in a removal action under the CAFA it could have explicitly done so."[160] Judge Hovland then cited *Brill* at length in discounting the authoritative value of CAFA's legislative history, and held that "[t]his Court is persuaded by the holdings in *Judy* and *Brill*. The Court will decline Piper Jaffray's invitation to break from the well-established rule of law that the removing party bears the burden of establishing federal subject-matter jurisdiction. There is simply nothing in CAFA that contemplates such a change."[161]

7. *Rogers v. Central Locating Service Ltd.*[162]

On February 1, 2006, United States District Judge John C. Coughenour of the Western District of Washington remanded a wage-and-hour action back to Washington state court that had been removed pursuant to CAFA.[163] Central Locating Service (CLS) asserted the existence of minimal-diversity jurisdiction "because there were more than 100 putative class members, at least one named plaintiff was diverse from CLS, and the aggregated amount in controversy exceeded $5,000,000."[164] In analyzing the

at *1 (N.D. Cal. June 29, 2005); Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005)).

157. *Id.*

158. *Id.* at 1089 (citing Contract Freighters, Inc. v. Sec'y of U.S. Dep't of Transp., 260 F.3d 858, 861 (8th Cir. 2001) (Congress is presumed to know the legal background in which it is legislating)).

159. *Id.* (citing Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1032 (8th Cir. 2003)).

160. *Id.* (citing Judy v. Pfizer, Inc., No. 4:05CV1208RWS, 2005 WL 2240088, at *1–2 (E.D. Mo. Sept. 14, 2005)).

161. *Id.* at 1090.

162. Rogers v. Cent. Locating Serv. Ltd., No. C05-1911C (W.D. Wash. Feb. 1, 2006).

163. *Id.*

164. *Id.* at 3.

motion to remand, Judge Coughenour examined whether the Complete Diversity Standard applied to interstate class actions removed under CAFA.[165]

The court began its analysis by pointing out that prior to CAFA, the "well established rule in all cases was that district courts were to approach remand motions with a "'strong presumption' against removal jurisdiction and assign to the removing defendant 'the burden of proving the existence of jurisdictional facts.'"[166] The court cited *Brill* for the proposition that "[p]rinciples of fairness and judicial efficiency also support this presumption, particularly when jurisdiction rests on the defendant's own calculations of potential exposure under the plaintiffs' claims."[167] The jurisdictional dispute in *Rogers* centered around the cost of CLS's compliance with an injunction.[168]

CLS argued that CAFA reversed the presumption against removal by shifting the burden to the opponents of federal court jurisdiction.[169] CLS argued that the shift is evident from the statute. However, the court stated that "CLS has not identified, nor can the Court locate, anything in the text of § 1332(d) creating a new presumption in favor of removal jurisdiction or relieving the defendant of its burden of persuasion."[170] The court thus framed the question: "Should the Court interpret Congress's silence as enacting an implicit change to the well-established presumption against removal jurisdiction? In the usual course, attempting 'to divine congressional intent from congressional silence' is 'an enterprise of limited utility that offers a fragile foundation for statutory interpretation.'"[171]

Judge Coughenour stated, "because § 1332 has *always* been silent on the applicable presumptions and burdens, both before and after CAFA, the presumption against removal jurisdiction must be considered a judicial gloss on the original (silent) statutory language."[172] He noted that the court in *Berry* held that due to the silence in the original statute, Congress did not have to explicitly address the burden of proof to effect a change.[173] This assumption, the judge wrote, ignores the "uniform body of precedent

165. *Id.* at 5.

166. *Id.* (quoting Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118, 1120 (C.D. Cal. 2005) (quoting Gaus v. Miles, Inc., 980 F.2d 564, 556 (9th Cir. 1992))).

167. *Id.* (quoting Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 447–48 (7th Cir. 2005) ("When the defendant has 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.")).

168. *Id.* at 6.

169. *Id.*

170. *Id.*

171. *Id.* at 6–7 (citing Polar Bear Prods., Inc. v. Timex Corp., 384 F.3d 700, 717 (9th Cir. 2004)).

172. *Id.* at 7 (citing 14B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721 at 324 (3d ed. 2005) (citing "ample support" "at all levels of the federal courts—the Supreme Court, the courts of appeals, and the district courts—for the proposition that removal statutes will be strictly construed.")).

173. *Id.* (citing Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118, 1122–23 (C.D. Cal. 2005).

applying a clear presumption against removal . . . ."[174] The court concluded that "[w]hen a consistent statutory interpretation has been so long settled, the courts are justifiedly reluctant to read a repeal of that interpretation into a statutory amendment that is completely silent on the subject."[175]

The court then examined the interpretive value of CAFA's legislative history. CLS argued that "the text of § 1332(d) is so ambiguous that the Court must turn to CAFA's legislative history for guidance" and cited *Waitt v. Merck & Co.*[176] for the proposition that "it is not difficult to divine Congressional intent from CAFA's legislative history."[177] The court noted CLS's citation of *Waitt* and other district court rulings that reversed the presumption against removal and the burden of establishing jurisdiction, but found no ambiguity "requiring resort to CAFA's legislative history."[178] The court concluded that there was "no basis to conclude that CAFA imposed new presumptions and burdens by silent implications or through bare legislative history."[179]

Once again, this court in its analysis apparently overlooked the guidance of Congress as to its intent expressly stated in the "Findings and Purposes" in Section 2 of CAFA.

8. *Werner v. KPMG, LLP*[180]

On February 7, 2006, United States District Judge Lee H. Rosenthal, writing for the Southern District of Texas, examined the burden-of-proof issue as an initial consideration in her review of the "commencement" of a Texas state court action for purposes of determining CAFA jurisdiction.[181] The court held that CAFA did not apply "because this action 'commenced' as to the removing defendants before CAFA's enactment and the plaintiffs' amended pleading filed after CAFA did not 'commence' a new action."[182]

As to the burden-of-proof issue, Judge Rosenthal summarized recent decisions, beginning by noting the Complete Diversity Standard: "The established rule is that because the party seeking to invoke federal jurisdiction has the burden of proof, the removing party has the burden of showing the propriety of removal."[183] Additionally, the court wrote that "[t]he text of CAFA says nothing about the burden of proof on removal. Several

174. *Id.*

175. *Id.* at 8 (*cf.* Globe & Rutgers Fire Ins. Co. v. Draper, 66 F.2d 985, 991 (9th Cir. 1933) (noting that "repeals by implication are not favored"); Pierce v. Underwood, 487 U.S. 552, 567 (1988) (reenactment of statute that had been given "consistent judicial interpretation" is deemed to incorporate "the settled judicial interpretation.")).

176. Waitt v. Merck & Co., No. C05-0759L, 2005 WL 1799740 (W.D. Wash. July 27, 2005) (discussed *supra* text accompanying notes 52–58).

177. *Rogers*, No. C05-1911C, at 8 (quoting *Waitt*, 2005 WL 1799740, at *1).

178. *Id.* at 8–9 (citing *Berry*, 381 F. Supp. 2d at 1122–23; Natale v. Pfizer, Inc., 379 F. Supp. 2d 161, 168 (D. Mass. 2005)).

179. *Id.* at 10.

180. Werner v. KPMG, LLP, 415 F. Supp. 2d 688 (S.D. Tex. 2006).

181. *Id.*

182. *Id.* at 710.

183. *Id.* at 694 (citing Delgado v. Shell Oil Co., 231 F.3d 165, 178 n.25 (5th Cir. 2000); Frank v. Bear Stearns & Co., 128 F.3d 919, 921–22 (5th Cir. 1997)); *see also* Coury v. Prot, 85 F.3d 244, 248 (5th

courts have held that CAFA nonetheless shifted the burden to the plaintiff to demonstrate that federal jurisdiction does not exist."[184] The court then observed that the courts that have placed the burden of proof on the party opposing federal jurisdiction have relied on portions of the CAFA's legislative history—specifically, the Senate Committee Report and the separate statements of Representative Sensenbrenner and Representative Goodlatte.[185] The court did not reference Section 2 of CAFA, however.

Judge Rosenthal pointed out that

> [a] number of courts have held that Congress's silence means that CAFA did not change the burden of proving federal jurisdiction when a motion to remand is filed. The Seventh Circuit forcefully summarized the reason for rejecting reliance on legislative history to change the burden of proof when the statute does not address the issue: 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.[186]

The court concluded that "[t]he textual silence on the burden of proof, which contrasts with Congress's express provisions changing a number of aspects of removal practice for cases that fall under CAFA, leads this court to join those holding that the party opposing remand continues to bear the burden of proving federal jurisdiction."[187]

9. *Abrego Abrego v. Dow Chemical Co.*[188]

On March 7, 2006, the Ninth Circuit, in a per curiam opinion, discussed the burden-of-proof issue: "CAFA did not shift to the plaintiff the burden of establishing that there is no removal jurisdiction in federal court and that Dow did not meet its burden."[189] The case was originally filed by

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Cir. 1996) ("[T]here is a presumption against subject matter jurisdiction that must be rebutted by the party bringing an action to federal court.").

184. *Id.* (citing Harvey v. Blockbuster, Inc., 384 F. Supp. 2d 749, 752 (D.N.J. 2005); Judy v. Pfizer, Inc., No. 4:05-CV-1208-RWS, 2005 WL 2240088, at *1–2 (E.D. Mo. Sept. 14, 2005); *In re* Textainer P'ship Sec. Litig, No. C 05-0969 MMC, 2005 WL 1799740, at *3 (N.D. Cal. Jul. 27, 2005); Waitt v. Merck & Co., No. C05-0759L, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005); Yeroushalmi v. Blockbuster, Inc., No. CV 05-225-AHM(RCX), 2005 WL 2083008, at *3 (C.D. Cal. July 11, 2005); Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118, 1122–23 (C.D. Cal. 2005); Natale v. Pfizer, Inc., 379 F. Supp. 2d 161 (D. Mass. 2005), *aff'd on other grounds*, 424 F.3d 43 (1st Cir. 2005)).

185. *Id.* at 695 (citing Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 42–44 (2005); 151 Cong. Rec. H727–730 (statement of Rep. Sensenbrenner); *id.* at H732 (statement of Rep. Goodlatte)).

186. *Id.* (quoting Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (citations omitted)).

187. *Id.*

188. Abrego Abrego v. Dow Chemical Co., 443 F.3d 676 (9th Cir. 2006).

189. *Id.* at 678.

Panamanian banana workers in California state court, claiming injuries from exposure to a chemical pesticide banned in the U.S. in 1979 but still in use in Panama.[190] Three weeks later, on May 13, 2005, Dow Chemical removed the case to federal court under the mass-action provisions of CAFA.[191] The district court ordered Dow Chemical to show cause as to whether the amount-in-controversy requirement was met, to which Dow responded by arguing that CAFA shifted the jurisdictional burden of proof to the plaintiffs seeking remand.[192] The district court disagreed and remanded the case, holding that Dow had failed to meet its burden to prove that the action was a mass action under CAFA.[193] So Dow appealed the order to the Ninth Circuit.

The court began its opinion by discussing the complete-diversity requirements of Section 1332(a) and the minimal-diversity requirements of Section 1332(d).[194] It then undertook an analysis of Dow's arguments, and disagreed with Dow's contention that "CAFA shifted the burdens normally applicable in the removal context," explaining its reasoning:[195]

> In cases removed from state court, the removing defendant has "always" borne the burden of establishing federal jurisdiction, including any applicable amount in controversy requirement. . . . Dow maintains, as it did before the district court, that CAFA reverses long-standing law by requiring the plaintiffs, as the parties seeking remand, to refute the existence of jurisdiction.[196]

The Ninth Circuit cited *Brill*, noting that the Seventh Circuit had previously rejected the position Dow set forth because "there simply is no such language in the statute regarding the burden as to remand."[197]

Dow's reliance on CAFA's Senate Committee Report did not persuade the Ninth Circuit, "[because i]n this instance, the statute is not ambiguous. Instead, it is entirely silent as to the burden of proof on removal. Faced with statutory silence on the burden issue, we presume that Congress is aware of the legal context in which it is legislating."[198]

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190. *Id.*

191. *Id.* Regarding CAFA's mass-action provisions and jurisdictional requirements, see 28 U.S.C. § 1332(11)(B)(i).

192. *Abrego*, 443 F.3d at 678.

193. *Id.* at 679.

194. *Id.* at 679–82.

195. *Id.* at 682.

196. *Id.* at 682–83 (internal citations omitted) (quoting Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)).

197. *Id.* at 683 (citing Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (noting that none of CAFA's language "is even arguably relevant" to this burden-shifting argument)).

198. *Id.* at 683–84 (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 696–97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . ."); United States v. LeCoe, 936 F.2d 398, 403 (9th Cir. 1991) ("Congress is, of course, presumed to know existing law pertinent to any new legislation it enacts.")).

> As we have noted, CAFA contains a series of modifications of existing principles of federal subject matter jurisdiction, both statutory and judge-created. CAFA thus evidences detailed appreciation of the background legal context. Given the care taken in CAFA to reverse *certain* established principles but not others, the usual presumption that Congress legislates against an understanding of pertinent legal principles has particular force.[199]

While the *Abrego* court examined the history and the purposes behind Congress's objective in **limiting** access to the federal courts under the Complete Diversity Standard, it failed to discuss in its burden-of-proof analysis the congressional objective expressly stated in Section 2 of CAFA to **expand** access to the federal courts for the narrow category of interstate class actions.

The *Abrego* court further stated:

> The traditional rule of burden allocation in determining removal jurisdiction was meant to comport with what the Supreme Court has termed "[t]he dominant note in the successive enactments of Congress relating to diversity jurisdiction," that is, "jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business." This rule of restriction extends to removal jurisdiction, especially insofar as it is based on the diversity jurisdiction of the federal courts.[200]

The court concluded by holding that "CAFA's silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction."[201]

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199. *Id.* at 684 (emphasis in original).

200. *Id.* at 685 (internal citations omitted). The court found support for its view in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) ("[n]ot only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation"); *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 ("The right of removal is entirely a creature of statute and 'a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress.' These statutory procedures for removal are to be strictly construed." (internal citation omitted)); *Gaus*, 980 F.2d 564, 566 (9th Cir. 1992) ("The 'strong presumption' against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper."); and *Gould v. Mutual Life Insurance Co. of New York*, 790 F.2d 769, 773 (9th Cir. 1986) ("Removal jurisdiction is statutory and strictly construed.").

201. *Id.* at 686.

Like the *Brill* court, the *Abrego* court erred in its burden-of-proof analysis by similarly overlooking Congress's "Findings and Purposes" regarding CAFA and its intent to pull interstate class actions into federal court to correct class-action abuses in the state court systems. Like *Brill*, *Abrego* misapplied canons of statutory construction in reaching a result that is the opposite of what Congress in the legislative history said it wanted to achieve. In deciding to disregard CAFA's legislative history, the *Abrego* court ignored the contrary approach taken by the Ninth Circuit in *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*[202] In *Amalgamated*, the Ninth Circuit specifically looked to CAFA's legislative history to divine congressional intent when interpreting CAFA's new appeal provision.[203]

10. *Evans v. Walter Industries, Inc.*[204]

On April 8, 2005, the plaintiffs filed a class action in the Circuit Court of Calhoun County, Alabama, alleging personal injuries and damage to their Anniston, Alabama, property caused by waste produced over a period of eighty-five years by the defendants' manufacturing facilities.[205] Walter Industries removed the litigation to federal court under the "minimal diversity" jurisdictional provisions of the Class Action Fairness Act.[206] The plaintiffs did not dispute that minimal diversity existed at the threshold under 28 U.S.C. §1332(d)(2), but instead sought remand under CAFA's "local-controversy" exception.[207] The plaintiffs, citing §1332(d)(4)(A), argued that the court must decline to exercise its undisputed minimal-diversity jurisdiction under the exception since more than two-thirds of the class were Alabama citizens, and U.S. Pipe was a "significant" defendant under CAFA.[208] The district court agreed, applying the local-controversy exception, and remanded the case to the Alabama state court. Subsequently, Walter Industries perfected its appeal to the Eleventh Circuit Court of Appeals.[209]

Judge R. Lanier Anderson, writing for the three-judge panel of the Eleventh Circuit, began his opinion by examining the expedited appeal process provided by 28 U.S.C. § 1453 as amended by CAFA. This provision provides for a sixty-day period of review of remand decisions under CAFA. Noting that § 1453(c)(1) contains the word "may," the circuit judge held that review by the court of appeals of remand decisions under CAFA is "clearly discretionary."[210] Following the reasoning of *Patterson*

202. Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Trans. Servs., Inc., 435 F.3d 1140 (9th Cir. 2006).
203. 28 U.S.C. 453(c)(1).
204. Evans v. Walter Industries, Inc., 449 F.3d 1159 (11th Cir. 2006).
205. *Id.* at 1161.
206. *Id.*
207. *Id.*
208. *Id.*
209. *See id.*
210. *Id.* at 1162.

v. Dean Morris, LLP,[211] *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*,[212] and *Pritchett v. Office Depot, Inc.*,[213] the Eleventh Circuit held that the sixty-day period begins to run from the date the court of appeals grants the application to appeal and allows the appeal to be filed, as opposed to when the appellant applies for the appeal.[214]

Judge Anderson next examined the language of the local-controversy exception,[215] recognizing that CAFA's language favors federal jurisdiction for class actions and that CAFA's legislative history suggests that Congress intended the local-controversy exception to be narrow.[216] Referencing the statute's legislative history, the court quoted from CAFA's Senate Report for the tenet that all doubts be resolved "in favor of exercising jurisdiction over the case."[217] It is important to note that Judge Anderson also quoted Section 2 of CAFA for the proposition that Congress expanded federal court jurisdiction "providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction" with only narrow exceptions, and stated specifically, "these notions are fully confirmed in the legislative history."[218] The *Evans* court was the first court at any level to reference Section 2 of CAFA in connection with a burden-of-proof analysis.

Judge Anderson then cited *Brill v. Countrywide Home Loans, Inc.*[219] for the proposition that CAFA does not alter the traditional rule that a party seeking to remove a case to federal court bears the burden of establishing federal jurisdiction. He did not mention CAFA's legislative history and the changes discussed therein.[220] The court also cited *Abrego Abrego v. Dow Chemical Co.*,[221] which followed *Brill*, for the same proposition, and without any further analysis, relied on those rulings in concluding CAFA does not change the well-established rule that the removing party bears the burden of proof.[222] Judge Anderson did, however, hold that the plaintiffs bore the burden of proving the local-controversy exception by pointing to two non-CAFA cases, *Castleberry v. Goldome Credit Corp.*[223] and *Lazuka v. Federal Deposit Insurance Corp.*,[224] both of which discuss

211. Patterson v. Dean Morris, LLP, 444 F.3d 365 (5th Cir. 2006).

212. Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Servs., Inc., 435 F.3d 1140, 1145 (9th Cir. 2006).

213. Pritchett v. Office Depot, Inc., 420 F.3d 1090, 1093 (10th Cir. 2005).

214. *Evans*, 449 F.3d at 1162.

215. 28 U.S.C. § 1332(d)(4)(A).

216. *Evans*, 449 F.3d at 1163.

217. *Id.*

218. *Id.* at 1164.

219. Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005) (discussed *supra* text accompanying notes 140–49).

220. *Evans*, 449 F.3d at 1164.

221. Abrego Abrego v. Dow Chemical Co., 443 F.3d 676 (9th Cir. 2006) (discussed *supra* text accompanying notes 188–203).

222. *Evans*, 449 F.3d at 1164.

223. Castleberry v. Goldome Credit Corp., 408 F.3d 773 (11th Cir. 2005).

224. Lazuka v. FDIC, 931 F.2d 1530 (11th Cir. 1991).

the removal of actions involving the FDIC, eschewing any mention of the portion of CAFA's legislative history mentioned earlier in the opinion.[225]

Judge Anderson then proceeded to apply the local-controversy exception to the facts of the case. First, on the issue of whether more than two-thirds of the class members were Alabama citizens, the court held that the evidence brought forward by the plaintiffs (an affidavit by the plaintiffs' attorneys outlining their determination of percentages of Alabama citizens) failed to present a credible estimate of the percentage of class members who were citizens of Alabama.[226] Second, the court addressed whether U.S. Pipe was a defendant from whom "significant relief" was sought and whose conduct formed a "significant basis" for the claims asserted by the plaintiffs. Judge Anderson cited *Robinson v. Cheetah Transportation*[227] and *Kearns v. Ford Motor Co.*,[228] which held that a class seeks "significant relief" against a defendant when the relief sought against that defendant is a significant portion of the entire relief sought by the class.[229] Applying this test, the Eleventh Circuit disagreed with the district court that U.S. Pipe was a "significant defendant."[230] Following *Robinson*, Judge Anderson stated, "whether a putative class seeks significant relief from an in-state defendant includes not only an assessment of how many members of the class were harmed by the defendant's actions, but also a comparison of the relief sought between all defendants and each defendant's ability to pay a potential judgment."[231] He continued, pointing out that neither the plaintiffs' complaint nor their affidavit addressed the relief sought from U.S. Pipe or any of the other seventeen named defendants as to liability.[232] Moreover, the plaintiffs failed to prove that the conduct of U.S. Pipe formed a significant basis for their claims.[233] The court accordingly held that the plaintiffs failed to meet their burden of proof as to the local-controversy exception.[234]

11. *Miedema v. Maytag Corp.*[235]

In October 2005 Leslie Miedema filed a class action against Maytag in Florida state court alleging that some of Maytag's ovens had a defective door latch that allowed heat to escape and damage the components of the oven.[236] Maytag removed the action to federal court pursuant to CAFA. Maytag asserted that the models identified in Miedema's description of the

225. *Evans*, 449 F.3d 1164–65.
226. *Id.* at 1166.
227. Robinson v. Cheetah Transp., No. Civ.A. 06-0005, 2006 WL 468820 (W.D. La. Feb. 27, 2006).
228. Kearns v. Ford Motor Co., No. CV 05-5644 GAF(JTLX), 2005 WL 3967998 (C.D. Cal. Nov. 21, 2005).
229. *Evans*, 449 F.3d at 1167.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* at 1168.
235. Miedema v. Maytag Corp., 450 F.3d 1322 (11th Cir. 2006).
236. *Id.* at 1324.

putative class contained a total of 6729 ovens alleged to have been sold in Florida, which totaled $5,931,971.[237]

Miedema moved to remand for lack of jurisdiction. She argued that Maytag had the burden of establishing subject matter jurisdiction at the threshold and had failed to carry that burden as to the amount in controversy.[238] The district court noted the disagreement among the courts as to which party bears the burden of proof for minimal diversity under CAFA and requested additional briefing.[239] After discovery, the court remanded the case to Florida state court, holding that the removing defendant bears the burden of establishing the existence of minimal diversity and Maytag did not meet that burden.[240]

Maytag appealed the ruling to the Eleventh Circuit Court of Appeals before Circuit Judges Carnes, Wilson, and Pryor. Judge Wilson rendered the opinion. It began with a discussion of the seven-day appeal application rule. Citing the Seventh Circuit's opinion in *Pritchett v. Office Depot*,[241] the court held that CAFA's literal "not less than 7 days" rule was a typographical error in the statute and that Maytag had filed its permission to appeal within seven days.[242]

Next, the opinion quickly turned to the sixty-day review limit, holding that the sixty-day period begins to run from the date when the court of appeals grants the appellant's application to appeal and files the appeal.[243]

The bulk of the opinion then focused on the threshold burden-of-proof issue under CAFA. Maytag argued that the district court incorrectly applied the traditional rule in non-CAFA cases that the removing defendant bears the burden of establishing federal subject matter jurisdiction.[244] Maytag stated that the text of CAFA is silent as to the burden of proof, but pointed to the legislative history and the clear intent to change the burden of proof under CAFA.[245] Maytag specifically noted the Senate Report and its language placing the burden on the named plaintiff to show that the removal was improvident.[246]

The Eleventh Circuit, however, followed the Seventh Circuit opinion in *Brill* and the Ninth Circuit opinion in *Abrego* for the proposition that "CAFA's silence, coupled with a sentence in the legislative committee report untethered to any statutory language, does not alter the longstanding rule . . . ."[247]

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237. *Id.* at 1325.
238. *Id.*
239. *Id.*
240. *Id.*
241. Pritchett v. Office Depot, Inc., 420 F.3d 1090 (10th Cir. 2005).
242. *Miedema*, 450 F.3d at 1326.
243. *Id.* at 1326–27.
244. *Id.* at 1327.
245. *Id.*
246. *Id.* at 1327–28.
247. *Id.* at 1328.

Also, the court cited authority for the proposition that "courts have no authority to enforce principles gleaned solely from legislative history that has no statutory reference point."[248] In footnote five the Eleventh Circuit disregarded Maytag's citation of *Corning Glass Works v. Brennan*.[249] The Eleventh Circuit stated that *Corning Glass Works* "does not actually stand for the proposition Maytag urges—that legislative history, coupled with statutory silence, is sufficient to override an already existing, well-established rule allocating the burden of proof to a removing defendant."[250]

The court held in line with the Seventh and Ninth Circuits that the rule of construing removal statutes strictly and resolving doubts in favor of remand is well-established and the statements in CAFA's legislative history "are an insufficient basis for departing from this well-established rule."[251]

Maytag, in support of its position, pointed the court to Section 2 of CAFA and its express findings and purposes.[252] The court seemed to contradict itself that there is no language connected to the legislative history when it stated: "While the text of CAFA plainly expands federal jurisdiction over class actions and facilitates their removal, 'we presume that Congress legislates against the backdrop of established principles of state and federal common law, and that when it wishes to deviate from deeply rooted principles, it will say so.'"[253] The Eleventh Circuit concluded, "thus, Maytag's generalized appeals to CAFA's 'overriding purpose' are unavailing in the face of CAFA's silence on the traditional, well-established rules that govern the placement of the burden of proof and the resolution of doubts in favor of remand."[254]

Finally, the court examined the standard of proof as to the amount-in-controversy element for establishing minimal diversity. Again, following traditional rules, the court found the amount needed to be proven must be shown under a preponderance of the evidence standard.[255] The Eleventh Circuit agreed with the district court that Maytag had not established that the amount in controversy exceeded $5,000,000 and affirmed the remand to Florida state court.[256]

V. THE AUTHORS' CONCLUSION: CORRECTLY INTERPRETED, CAFA'S TEXT, PURPOSE, AND LEGISLATIVE HISTORY CREATE A PRESUMPTION IN FAVOR OF FINDING THAT MINIMAL DIVERSITY JURISDICTION EXISTS, WITH THE BURDEN OF PROOF ON THE PARTY OPPOSING JURISDICTION

Most jurisdictional contests involve close facts or legal issues. Due to the enormous stakes involved in class-action litigation, whether the case

248. *Id.*
249. Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (discussed *infra* Section V.A.).
250. *Miedema*, 450 F.3d at 1328 n.5.
251. *Id.* at 1329.
252. *Id.*
253. *Id.*
254. *Id.* at 1329–30.
255. *Id.* at 1330.
256. *Id.* at 1332.

proceeds in state court or in federal court has significant implications, both in terms of strategy and in exposure analysis, for the parties.

Under well-settled jurisprudence applying the Complete Diversity Standard, the party seeking federal jurisdiction clearly bears the burden of establishing that all requirements have been met, with all doubts resolved in favor of the party opposing federal jurisdiction. This result flows from the federalism and other concerns behind congressional intent to limit access to federal courts under the complete-diversity statute.

Few will dispute that Congress, by adopting CAFA, sought to increase access to the federal courts for interstate class actions; the conflict in the cases involves the narrower question focused on who bears the jurisdictional burden of proof. Proponents of the expansive Minimal Diversity Standard assert that a fair reading of the operative provisions in CAFA's text reflects that Congress intended to shift the burden of proof to persons opposing federal jurisdiction over interstate class actions by dramatically easing restrictions under the Complete Diversity Standard.[257] Further supporting this conclusion is CAFA Section 2, "Findings and Purposes," which expressly explains the strong congressional policy seeking to limit class-action abuses in the state courts by allowing more interstate class actions to be maintained in the federal courts.

Moreover, no one disputes that Congress in the legislative history explicitly stated that the burden of proof is on the party opposing federal court jurisdiction under CAFA, and that all doubts are to be resolved in favor of determining federal jurisdiction. However, as noted above, some courts have declined to consider that legislative history as authoritative, and in turn have reached a result that is the opposite of what Congress stated it intended in that history. Thus, the outcome-determinative question in cases looking at who bears the jurisdictional burden of proof under CAFA involves less a dispute over what words are in the legislative history, but rather, whether the court may properly reach those words of Congress under doctrines of statutory interpretation, and then apply those words.

All the courts thus far rejecting the use of CAFA's legislative history or application of the Minimal Diversity Standard have instead applied the

257. In *Wallace v. Louisiana Citizens Property Insurance Corp.*, 444 F.3d 697 (5th Cir. 2006), the Fifth Circuit reversed a remand order after examining the legislative history of the Multiparty, Multiforum Trial Jurisdiction Act (MMTJA), another recently enacted statute granting "minimal diversity" jurisdiction to expand federal jurisdiction for a special category of disputes. The MMTJA's minimal-diversity provisions are very similar to those in CAFA in many respects. Decisions on these analogous MMTJA provisions may provide persuasive authority under CAFA. The court noted that the House Sponsor's Report "makes clear [that] the MMTJA was designed to ameliorate the restrictions on the exercise of federal jurisdiction that ultimately forced parties in multiple suits arising from the same disaster to litigate in several fora. To hamstring the removal statute by misapplying the abstention provisions would undercut the MMTJA's ultimate goal of consolidation." *Id.* at 702. *Wallace* shows another instance where Congress carved out a narrow category of cases—mass tort suits filed in multiple courts—with the objective of granting them a new path to federal court where the existing restrictive Complete Diversity Standard had previously blocked that path. The MMTJA also appears to create a presumption in favor of a finding of jurisdiction, with the burden of proof on the party opposing jurisdiction.

Complete Diversity Standard to interstate class actions to find a presumption against jurisdiction. Each of these courts appears to have applied incorrect doctrinal principles of statutory construction. Moreover, there are few if any references in these courts' analyses of the burden-of-proof issue to Congress's "Findings and Purposes" under CAFA Section 2. These analyses of the clear words in the text of CAFA have apparently been overlooked by those courts. Accordingly, it is the view of the authors that those cases are incorrectly decided.

A. Proper Statutory Construction Principles Require Consideration of CAFA's Legislative History in Deciding the Burden-of-Proof Question

Neither *Brill*, *Abrego*, nor any other decisions applying the Complete Diversity Standard to CAFA's burden-of-proof question have followed the United States Supreme Court's well-established test to determine which party bears the burden of proof in adjudicating statutorily dictated standards. The Supreme Court has crafted a three-pronged inquiry to construe a statutorily created standard when it is necessary to interpret the statute to determine which party bears the burden of proving that the standard has been met:

> 1. The court should first determine whether the statutory text states which party bears the burden of proof.
>
> 2. If the statutory language is silent, the court should next determine if the legislative history indicates which party bears the burden of proof.
>
> 3. If both the statutory language and legislative history are silent, only then should the court apply other recognized rules of statutory construction to allocate the burden of proof.

For example, the Supreme Court applied this test in *Corning Glass Works v. Brennan*[258] to determine the burden of proof under a provision of the Equal Pay Act that prohibited an employer from paying unequal wages for equal work on the basis of gender. That provision, however, failed to address the burden of proof. The Secretary of Labor sued Corning under the statute. The Court held that "[a]lthough the Act is silent on this point, its legislative history makes plain that the Secretary has the burden of proof on this issue."[259] *Corning Glass Works*, therefore, sets forth the proposition that when deciding which party bears the burden of proof under a statutory standard, a court must first look at the statute's text for the answer, and if the text is silent, the court should then look to the legislative history to see if it resolves that issue. If the legislative history contains the

258. Corning Glass Works v. Brennan, 417 U.S. 188 (1974).
259. *Id.* at 195.

answer to the burden-of-proof question, then no further analysis or use of other canons of construction is necessary.

The Supreme Court followed the same three-step process in *Grogan v. Garner*[260] to address the burden of proof under an exception to discharge found at § 523(a) of the Bankruptcy Code. The Court explained that "we begin our inquiry into the appropriate burden of proof under § 523 by examining the language of the statute and its legislative history."[261] It first noted that "[t]he language of § 523 does not prescribe the standard of proof for the discharge exceptions."[262] The Court then found that "[t]he legislative history of § 523 . . . is also silent."[263] Only after having exhausted the first two steps of the test did the Court hold that Congress should be presumed to have intended the preponderance standard otherwise generally applicable in civil actions.[264]

While the *Brill* court did not apply this test, the test had been followed by the Seventh Circuit earlier in *Dadian v. Village of Wilmette*.[265] In *Dadian*, the burden of proof was at issue under a section of the Fair Housing Amendments Act of 1988 (FHAA) that established a safety standard for denying housing, but which was silent about which party bore the burden of proof regarding that standard. The provision at issue simply said that "nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals."[266] The Seventh Circuit held that "the text and legislative history of the FHAA support imposing the burden of proof on the public entity that asserts safety as a defense to a disability discrimination action."[267] Moreover, contrary to the *Brill* panel's opposition to considering CAFA's legislative history, the Seventh Circuit in *Dadian* quoted statements from a House Report in holding that "[t]he legislative history shows that this section was intended to incorporate the standard articulated" in a specific prior case, and that "[b]ased on these statements, we conclude that a public entity that asserts the reason it failed to accommodate a disabled individual was because she posed a direct threat to safety bears the burden of proof on that defense at trial."[268] If *Brill* and its progeny had followed the Supreme Court's three-part *Corning*

260. Grogan v. Garner, 498 U.S. 279 (1991).

261. *Id.* at 286.

262. *Id.*

263. *Id.*

264. *Id. See also* Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 21–22 & 22 n.2 (2000) (applying the burden-of-proof rule developed in analogous cases only after examining both the provisions in the text and the legislative history and finding that "there is no sign that Congress meant to alter the burdens of production and persuasion"); Concrete Pipe and Prods. of Calif., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 627–28 (1993) (in burden-of-proof case where statutory language was ambiguous, looking first for "the legislative purpose as revealed by the history of the statute" and, only after that was unfruitful, taking the third step of applying "a different rule of construction").

265. Dadian v. Village of Wilmette, 269 F.3d 831 (7th Cir. 2001).

266. *Id.* at 840 (quoting 42 U.S.C. § 3604(f)(9)).

267. *Id.*

268. *Id.* at 840–41.

Glass Works test, as did the *Dadian* court, the outcome in *Brill* and its progeny would have been different.

The *Corning Glass Works* three-pronged test makes clear that allocating the burden of proof under a federal statute is simply part and parcel of, and consistent with, the usual methods for interpreting that statute. Those methods involve looking first at the plain language of the statute as a whole, then at its legislative history, and, only if those indicia do not settle the question, then to general canons of construction.[269] The general canons of construction are "designed to help judges determine the Legislature's intent as embodied in particular statutory language."[270]

Specifically, the canon of construction under which a court examines existing legal principles at the time of enactment—for example, the collective jurisprudence and statutory provisions underpinning the Complete Diversity Standard when CAFA was enacted—is only one way to ascertain congressional intent, because, **without better evidence**, Congress is presumed to know existing law and intend that same meaning.[271] Significantly, however, those other techniques and canons "to help judges determine the Legislature's intent" are irrelevant and should **not** be considered where Congress has expressly stated its intended meaning of the statutory text, either in the words of the law itself or in its legislative history, such as it has with CAFA.[272] Thus, in deciding whether a federal statute such as CAFA is expansive enough to preempt existing judge-made law such as the Complete Diversity Standard, courts are **required** to examine the statute's text; its purpose and scope; and its legislative history.[273]

These same principles of statutory construction apply equally when the statute in question is jurisdictional in nature, like CAFA, because the scope of federal jurisdiction is for Congress to determine, subject only to the limits of Article III.[274] Thus, "[w]hatever [a court] say[s] regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress."[275] Further, "[n]o sound canon of interpretation requires Congress to speak with extraordinary clarity in order to modify the rules of

269. See, *e.g.*, Scheidler v. NOW, Inc., 126 S. Ct. 1264 (2006).

270. Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001).

271. *See, e.g.*, Beck v. Prupis, 529 U.S. 494, 500–01 (2000).

272. *See, e.g., Chickasaw Nation*, 534 U.S. at 94 (adopting interpretation supported by legislative history and explaining that "other circumstances evidencing congressional intent can overcome [the canons'] force"); Am. Soc'y of Cataract & Refractive Surgery v. Thompson, 279 F.3d 447, 452 (7th Cir. 2002) ("we also recognize that 'all presumptions used in interpreting statutes may be overcome by, inter alia, specific language or specific legislative history that is a reliable indicator of congressional intent'") (citation omitted). *Cf.* Miller v. French, 530 U.S. 327, 336, 341 (2000) (because "where Congress has made its intent clear, 'we must give effect to that intent,'" court cannot resort to canon of construction producing interpretation contrary to that expressed intent) (citation omitted).

273. City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 316–26 (1981); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991).

274. Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1992) (Every inferior court "derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction, at its discretion, provided it not be extended beyond the boundaries fixed by the Constitution.")

275. Finley v. United States, 490 U.S. 545, 556 (1989) (*overruled by* 28 U.S.C. § 1367 (1990)).

federal jurisdiction within appropriate constitutional bounds."[276] Courts have recognized under other jurisdictional statutes, in light of these principles, that Congress is free to place the burden of proof on the party opposing federal jurisdiction if it chooses to do so. For example, the Supreme Court recently held that, since the amendment of 28 U.S.C. § 1441 in 1948, "there has been no question that whenever the subject matter of an action qualifies it for removal, the **burden is on a plaintiff** to find an express exception."[277]

Accordingly, *Brill*, *Abrego*, and similar decisions declining to consider as authoritative CAFA's legislative history explicitly answering the burden-of-proof question are incorrectly decided. Those same courts also failed to take into account in their analyses the "Findings and Purposes" in CAFA Section 2, which are supported by this legislative history. Those courts erred by, among other things, applying the wrong methodology for statutory construction of CAFA. It is also important to note that *Miedema v. Maytag Corp.* quickly dismissed this exact method of statutory interpretation in a footnote, without any analysis.[278]

B. CAFA's Plain Text Reflects Congress's Intent to Expand Substantially Federal Jurisdiction Over Interstate Class Actions by Abolishing Existing Limitations Under the Complete Diversity Standard

While maintaining the requirements of complete diversity for other types of cases, CAFA changed the jurisdictional standard applicable to interstate class actions. CAFA did this by requiring only minimal diversity, and by lowering the procedural hurdles that previously helped trap interstate class actions in the state courts due to restrictions under the existing Complete Diversity Standard. The text of the Act contains findings of congressional intent that accentuate the reversal in approach for interstate class actions from that used under the Complete Diversity Standard and that suggest minimal-diversity jurisdiction should be presumed.

When interpreting a statute such as CAFA, courts begin by looking at "the plain language of the statute itself."[279] Once again, the "plain language" of Section 2 of CAFA as enacted (and now found in the historical and statutory notes to new 28 U.S.C. 1711) states in part as follows:

> SEC. 2. FINDINGS AND PURPOSES.
>
> (a) FINDINGS. Congress finds the following:

276. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 125 S. Ct. 2611, 2620 (2005).

277. Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 698 (2003) (emphasis added). *See also* Lazuka v. FDIC, 931 F.2d 1530, 1535 (11th Cir. 1991) (*overruled in part by* 12 U.S.C. 1819(b)(2)(B) (1994)) (interpreting 12 U.S.C. § 1819 as "creating a rebuttable presumption of federal jurisdiction" in light of Congress's intent "to afford the FDIC every possibility of having a federal forum within the limits of Article III"); Reding v. FDIC, 942 F.2d 1254, 1258 (8th Cir. 1991) (same); Sissoko v. Rocha, 440 F.3d 1145, 1160–63 (9th Cir. 2006) (the government bears the burden of proving absence of federal court jurisdiction under 8 U.S.C. § 1252(a)(2)(A)).

278. Miedema v. Maytag Corp., 450 F.3d 1322, 1328 n.5 (11th Cir. 2006).

279. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

* * *

(2) Over the past decade, there have been abuses of the class action device that have

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

* * *

(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, in that State and local courts are

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES. The purposes of this Act are to

* * *

(2) 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 . . . .[280]

CAFA's "Findings and Purposes" demonstrate Congress's concern that abuses in interstate class actions undermined the constitutional intent behind diversity jurisdiction for this type of case. Following its conclusion that abuses in class actions undermined the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers, Congress stated in Section 2(b) of CAFA that one purpose of the law 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."[281] Congress noted that without this new expansive federal jurisdiction, class-action cases of national importance were being kept out of federal court and resulting in state court bias against out-of-state defendants.[282]

Congress's desire to eliminate the restrictions imposed by the Complete Diversity Standard for class-action litigation under CAFA is apparent

280. 28 U.S.C. § 1711.

281. *Id.*

282. *Id.*

not merely from its "Findings and Purposes," but from a cursory review of the actual operative provisions of the Act as well. Under those provisions, Congress expanded the scope of jurisdiction by use of minimal diversity. It also abolished for interstate class actions most of the existing hurdles to removal that had limited a defendant's ability to seek a federal forum under the Complete Diversity Standard. For example, federal jurisdiction now exists as long as any one named plaintiff or putative class member is a citizen of a different state than any one defendant, and the $5,000,000 jurisdictional amount is satisfied. Diversity must no longer be "complete" for interstate class actions. CAFA also allows aggregation of class member claims, statutorily overruling jurisprudence that had required either that each plaintiff in a class action must independently satisfy the $75,000 amount-in-controversy requirement under the Complete Diversity Standard, or, alternatively, that at least one named plaintiff satisfy this requirement.[283] In addition to eliminating the need for complete diversity and allowing aggregation of class member claims, CAFA further expands federal jurisdiction by its new definition of "class action"[284] and by the creation of the new "mass actions" category.[285] Similarly, CAFA exempts interstate class actions from the one-year limitation on removal that otherwise applies in complete-diversity cases.[286] And unlike the rule under the Complete Diversity Standard, CAFA provides that a class action may be removed by any defendant without the consent of the other defendants and without regard to whether any defendant is a citizen of the state where the action is brought.[287]

CAFA also creates for the first time federal appellate jurisdiction over remand orders in class actions removed under the statute. Prior to CAFA, 28 U.S.C. 1447(d) barred appellate review of virtually all remand orders in matters removed under complete-diversity jurisdiction. New 28 U.S.C. 1453(c), however, permits discretionary appeals of orders on motions to

283. In *Exxon-Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 2627–28 (2005), the Supreme Court acknowledged that CAFA "abrogates the rule against aggregating claims" first recognized in *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), and "reaffirmed" in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

284. 28 U.S.C. § 1332(d)(1), as amended by CAFA, which tracks the language of new 28 U.S.C. § 1711, provides,

> In this subsection—
> (A) the term "class" means all of the class members in a class action;
> (B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;
> (C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and
> (D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

285. "As used in subparagraph (A), the term 'mass action' means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." 28 U.S.C. § 1332(11)(B)(i).

286. 28 U.S.C. § 1453(c).

287. 28 U.S.C. § 1453(b).

remand class actions removed on minimal-diversity grounds. This provision also requires the courts of appeals to expedite consideration of CAFA appeals.

These fundamental changes greatly liberalize and invite, rather than discourage, federal court jurisdiction over class actions within the scope of CAFA. These different provisions suggest that Congress intended to carve out for the narrow category of interstate class actions a presumption in favor of federal jurisdiction. Unlike the Complete Diversity Standard, CAFA restores federal jurisdiction to its full constitutional limits of minimal diversity, and rejects the limited-access-to-federal-court approach that resulted under the Complete Diversity Standard and its concomitant burden of proof on the party asserting federal jurisdiction.

C. *CAFA's Legislative History Expressly Assigns the Burden of Proof to the Party Opposing Minimal Diversity Jurisdiction*

Not only does the plain text of CAFA show congressional intent to change the status quo for interstate class actions, thus necessitating a different burden-of-proof rule, but its legislative history expressly says that that is what Congress intended.

CAFA's legislative history includes the House Sponsors' Statement and the Senate Judiciary Committee Report. The Senate Judiciary Committee Report is the "authoritative" evidence of congressional intent,[288] and the House Sponsor's Statement is properly accorded substantial weight in interpreting the Act.[289]

Application of the Complete Diversity Standard, placing the burden of proof on the party proposing federal jurisdiction, is diametrically contrary to the express provisions of CAFA's legislative history and the will of Congress. So is application of a standard that establishes a presumption against federal jurisdiction.

As previously noted, the Senate Judiciary Committee Report expressly states that the burden of proof is on the plaintiffs to show that the requirements for removal are not satisfied, and that in calculating the amount in dispute, the court should err in favor exercising jurisdiction:

> The Committee intends this subsection to be interpreted expansively. If a purported class action is removed pursuant

288. The Senate Judiciary Committee published its report on CAFA on February 28, 2005. S. Rep. 109-14 (2005). "Committee Reports are 'the authoritative source for finding the Legislature's intent,' and may be consulted as one important resource in the quest for faithful statutory interpretation." Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118, 1121 (C.D. Cal. 2005) (citing Garcia v. United States, 469 U.S. 70, 76 (1984); *accord* City of Edmonds v. Wash. State Bldg. Code Council, 18 F.3d 802, 805 (9th Cir. 1994)).

289. Representative F. James Sensenbrenner (R. Wis.) placed into the House record a statement of the intent of the creators of CAFA. 151 Cong. Rec. H723-02, at H727–29 (daily ed. Feb. 17, 2005). Because this Sponsor's Statement relates to the intent of the drafters of CAFA, it deserves to be accorded substantial weight in interpreting the statute. *See* Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976); Nat'l Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 640 (1967); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394–95 (1951).

> 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). And if a federal court is uncertain about whether "all matters in controversy" in a purported class action "do not in the aggregate exceed the sum or value of $5,000,000," the court should err in favor of exercising jurisdiction over the case.[290]

The Senate Judiciary Committee Report likewise expressly states that the burden of proof with respect to other jurisdictional issues arising under CAFA is on the party disputing federal court jurisdiction.[291] Indeed, the Report makes clear that CAFA creates a strong bias in favor of finding that federal jurisdiction exists:

> Overall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.[292]

Similarly, the House Sponsors' Statement explicitly states that "new section 1332(d) is intended to expand substantially Federal court jurisdiction over class actions," that "[i]ts provisions should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if removed by any defendant," and that once a case is removed, "the named plaintiff(s) should bear the burden of demonstrating that the removal was improper."[293]

D. Congress Intended a Different Jurisdictional Burden-of-Proof Standard for Minimal Diversity than It Did for Complete Diversity, Because the Purposes Behind the Two Enabling Statutes Are Not Only Different, But Opposite

Some courts have applied the Complete Diversity Standard, which places the burden of proof on the proponent of jurisdiction, to disputes over minimal-diversity jurisdiction under CAFA.[294] That result defeats CAFA's intended purpose. It is misguided because there is no compelling reason to attach a burden-of-proof test developed to limit entry into federal court of actions grounded in complete-diversity jurisdiction, when minimal diversity for interstate class actions was created specifically to overcome those very limitations and pull more of these cases into federal

290. S. Rep. 109-14 (2005), at 42 (emphasis added).
291. *Id.* at 34, 42–44.
292. *Id.* at 43 (emphasis added).
293. 151 Cong. Rec. at H727.
294. *See, e.g.*, Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005).

court for the first time. It is incorrect to apply the general canon of statutory construction to this CAFA burden-of-proof question—that Congress is presumed to enact laws against the backdrop of existing precedent—because this canon is inoperative where congressional intention and purpose are evident or is inconsistent with the axiom.[295] This outcome is wholly consistent with the general rule of interpretation that a statute may not be interpreted through canons of construction in a way that frustrates its purpose or effect.[296]

A careful review of the context and history of the complete-diversity statute and the cases leading to the Complete Diversity Standard demonstrate that it should not be applied in CAFA cases. The rule that the burden of proof as to jurisdiction in a complete-diversity case rests on the party seeking the federal forum was created primarily because, the courts concluded, Congress intended that complete-diversity enabling statute be construed narrowly. This was the precise holding in *Thomson v. Gaskill*,[297] where the Supreme Court explained:

> The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction. Accordingly, if a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof.[298]

The historical basis for this strict-construction rule for complete-diversity cases confirms that it should not be blindly applied to CAFA cases. The Constitution permits Congress to allow for federal court jurisdiction over any suit that involves "Citizens of the Several states" and thus empowers Congress to authorize federal court jurisdiction over cases involving minimal diversity.[299] But the Judiciary Act of 1789 was much more limited, authorizing diversity jurisdiction only as to disputes where all plaintiffs were diverse in citizenship from all defendants.[300]

When Congress imposed complete diversity as a prerequisite for engaging federal court's jurisdiction, courts struggled with the dichotomy between the plaintiff's right to choose the forum in which to litigate, and the

295. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

296. *E.g.*, Pasquantino v. United States, 544 U.S. 349 (2005); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952); Jamison v. Encarnacion, 281 U.S. 635, 640 (1940).

297. Thomson v. Gaskill, 315 U.S. 673, 675 (1942) (Frankfurter, J.).

298. *Id.* at 675 (citations omitted); *see also* McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936).

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

300. Strawbridge v. Curtiss, 3 U.S. (3 Cranch) 267 (1806). The diversity statute, now found at 28 U.S.C. § 1332, required complete diversity until the recent enactment of minimal-diversity statutes, such as CAFA. For a historical view of federal court diversity jurisdiction, see Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1923).

defendant's right to remove the case to federal court and to have the "equal benefit" of federal court jurisdiction.[301]

Based on the restrictive nature of the jurisdictional grant of complete diversity, the Supreme Court concluded that the various limitations on complete-diversity jurisdiction were warranted in order to effectuate Congress's intent to "drastically restrict" access to the federal forum out of respect for state courts and to avoid creating additional federal court litigation.[302] Likewise, the Supreme Court has generally instructed federal courts to narrowly construe the complete-diversity statute, so as not to frustrate that congressional purpose.[303]

However, the conclusion that complete-diversity jurisdiction should be strictly construed (and the burden of proof allocated based on that conclusion) does not logically carry over to minimal-diversity jurisdiction under CAFA. In enacting CAFA, Congress went in the **opposite** direction. Through CAFA, Congress manifestly intended to wrest from the state courts control over interstate class actions and to add them to the federal courts' workload to avoid abuses in the state courts. As one of three stated purposes, CAFA was intended to "restore the intent of the framers . . . by providing for Federal court consideration of cases of national importance."[304] Congress specifically found in Section 2 of CAFA that the traditional allocation of national judicial resources under the restrictive Complete Diversity Standard had led to "State and local courts . . . keeping cases of national importance out of Federal court," "sometimes . . . demonstrat[ing] bias against out-of-State defendants" and "impos[ing] their view of the law on other States and bind[ing] the rights of the residents of those other States."[305] Thus, the text of CAFA rejects the primary policy reasons why complete-diversity jurisdiction has been strictly construed,[306] and removes numerous existing restrictions on complete-diversity jurisdiction and removal.

With these stated intentions and supporting changes under CAFA, the traditional allocation of the burden of proof used in the complete-diversity setting cannot be reconciled with CAFA. Because the congressional intentions underlying the two different jurisdictional enabling statutes pull in opposite directions, their resulting burden-of-proof rules must likewise point in opposite directions.

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301. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 348 (1816); Ry. Co. v. Whilton's Adm'r, 80 U.S. (13 Wall.) 270, 289 (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.").

302. Healy v. Ratta, 292 U.S. 263, 270 (1934); City of Indianapolis v. Chase Nat'l Bank of City of N.Y., 314 U.S. 63, 76 (1941); St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941).

303. *See, e.g.*, Thomson v. Gaskill, 315 U.S. 442, 446; *Indianapolis*, 314 U.S. at 76; Snyder v. Harris, 394 U.S. 332, 339–40 (1969); *Healy*, 292 U.S. at 269–70.

304. Pub. L. 109-2, § 2(b), 119 Stat. at 5.

305. *Id.* at § 2(a).

306. *See, e.g.*, *Healy*, 292 U.S. at 270; *Indianapolis*, 314 U.S. at 76.

E. Brill, Abrego, *and Similar Decisions Are Incorrect*

The *Abrego*[307] and *Brill*[308] decisions erroneously imported the Complete Diversity Standard and applied it to interstate class actions where the Minimal Diversity Standard should have been applied. Those opinions and their hostility to the use of contrary legislative history force the square peg of the Complete Diversity Standard burden of proof into the round hole of minimal-diversity jurisdiction, and do not withstand scrutiny. A primary mistake in these decisions was that they completely ignored the congressional intent found in CAFA's "Findings and Purposes."

Abrego, which mechanically followed *Brill,* held that "CAFA's silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction."[309] The foundation for this holding is in the court's conclusion:

> The traditional rule of burden allocation in determining removal jurisdiction was meant to comport with what the Supreme Court has termed "[t]he dominant note in the successive enactments of Congress relating to diversity jurisdiction," that is, "jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business."[310]

However, even though the *Abrego* court looked at the purposes behind the Complete Diversity Standard, it ignored the opposite purposes stated by Congress for passing CAFA: to expand federal court jurisdiction for interstate class actions, which the face of the statue itself describes as cases of national importance.[311]

Brill opined that the burden-of-proof language from the Senate Committee Report is "unconnected to any enacted text."[312] In fact, however, CAFA's legislative history is directly connected to the "enacted text" of CAFA in two respects: first, as described above, the enacted text of CAFA establishes a new statutory standard for federal court jurisdiction and removal and, just as in *Corning Glass Works*, the legislative history explicates

307. Abrego Abrego v. Dow Chemical Co., 443 F.3d 676 (9th Cir. 2006) (discussed *supra* text accompanying notes 188–203).

308. Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005) (discussed *supra* text accompanying notes 140–49).

309. *Abrego*, 443 F.3d at 686.

310. *Id.* 685 (citations omitted); *see also supra* note 202.

311. *See* 28 U.S.C. § 1711, Pub. L. 109-2, § 2(a)(4)(A).

312. *Brill*, 427 F.3d at 448.

that text. Second, CAFA's legislative history stating that Congress intended to impose the burden of proof on the party opposing federal jurisdiction to minimize existing abuses improperly keeping interstate class actions out of federal court directly relates to and informs the "Findings and Purposes" set forth in Section 2 of the Act.

Giving short shrift to both the operative text and the legislative history, and overlooking the Act's "Findings and Purposes," the *Brill* court held that the burden-of-proof rule under the Complete Diversity Standard should be presumed to have been intended under CAFA by Congress, despite the very different minimal-diversity standard actually created by CAFA (and by the drafters' statements to the contrary).[313] As the Supreme Court has repeatedly held, however, the canon of construction applied in *Brill, Abrego*, and similar rulings cannot be invoked to negate congressional intent that may otherwise be discerned from an act's text or legislative history.[314]

In addition, the *Brill* court's belief that its rule "makes practical sense" is unpersuasive. First, it is up to Congress to decide whether practical sense is better served by placing the burden on the party seeking or opposing federal jurisdiction. As both Section 2 of the Act and CAFA's legislative history make clear, Congress concluded that the practical need to change the status quo to prevent class-action abuses in state courts and to get these cases into the more neutral federal courts required allocating the burden to the party contesting jurisdiction. Moreover, that conclusion logically makes sense as well, because, as noted by the drafters, unless the burden is on the plaintiffs, who draft the complaint and supporting documents and who can easily minimize or even conceal what is genuinely at stake in the case, the purposes of the Act cannot be fulfilled.

Brill—the first and "leading" decision on this issue—reached an incorrect conclusion by, among other things, applying an erroneous standard for statutory interpretation, and by completely overlooking Section 2 of CAFA's "Findings and Purposes." *Abrego* and *Evans* are unpersuasive because they simply followed *Brill*, without any independent analysis. *Miedema* does acknowledge the existence of CAFA's "Findings and Purposes" under Section 2, noting the critical point that one CAFA purpose stated in its text is to "restore" the intent of the framers of the Constitution "by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction" for class-action cases previously

313. *Id.*

314. *See, e.g.*, Scheidler v. NOW, Inc., 126 S. Ct. 1264, 1273 (2006) (the canons of construction "are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent."). The Seventh Circuit also mistakenly relied on *Pierce v. Underwood*, 487 U.S. 552, 566–68 (1988). That case involved the reenactment of a law that already had been interpreted by the courts. Here, CAFA enacted a wholly new statutory provision that, as shown above, instituted a welcoming approach that was diametrically opposed to the approach under previously enacted statutes.

blocked from the federal courts.[315] The word "restore" in CAFA's text connotes that changes were made in the status quo for removal and jurisdictional rules standards which includes the burden of proof. That and other textual language in Section 2 showing Congress's intent to liberalize federal jurisdiction over class actions, when contrasted with the traditional removal standard that is strictly interpreted against federal jurisdiction, at least creates ambiguity sufficient to open the door to consideration of CAFA's legislative history. Similarly, a fair analysis of all of CAFA's new removal and jurisdictional provisions, when read together in an integrated fashion, creates further ambiguity in the text that calls appropriately for the courts to study the legislative history regarding the burden-of-proof issue.

Miedema, however, using artificial distinctions, rejected consideration of the congressional intent on point, and, tracking *Brill*, concluded that if Congress really intended to change the threshold removal burden-of-proof standard, it would have specifically said so in the statute. *Miedema* did not acknowledge the existence of any ambiguities created by Section 2. It therefore ignored the contrary pronouncements in the Senate Judiciary Committee Report and House Sponsors' Statement expressly stating that under CAFA the threshold burden of proof falls on the party opposing removal.

Finally, the hostility shown by the *Brill* and *Abrego* courts to using CAFA's legislative history—the avoidance of which is the essential lynchpin of those rulings—has not been shared by other circuit courts in interpreting CAFA. In fact, other circuits, including a sister panel to *Abrego*, have looked to and relied on the legislative history when CAFA's explicit text was unambiguous to reach a result that is directly contrary to the text of CAFA.[316] In those cases, the courts relied extensively on CAFA's legislative history to come to each of their conclusions. In *Amalgamated Transit Union*, the Ninth Circuit declared that a portion of the literal language of CAFA is at odds with congressional intent and held that parties must pursue appellate review of a remand not more than seven court days after the district court's order, despite the contrary text of CAFA.[317] Additionally, the Tenth Circuit examined the Senate Report of CAFA in *Pritchett* in coming to the same conclusion.[318] The Tenth Circuit described the issue as "one of the rare cases in which a 'literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters.'"[319] Along the same lines, the Fifth Circuit has handed

315. Miedema v. Maytag Corp., 450 F.3d 1322, 1329 n.6 (11th Cir. 2006) (quoting Section 2 of CAFA).

316. Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Servs., Inc., 435 F.3d 1140 (9th Cir. 2006); Pritchett v. Office Depot, Inc., 420 F.3d 1090, 1095 (10th Cir. 2005) (relying on CAFA's legislative history to determine Congress's intent on the "date of commencement issue").

317. *Amalgamated Transit Union*, 435 F.3d 1140.

318. *Pritchett*, 420 F.3d at 1093 n.2.

319. *Id.* (quoting United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989)).

down three separate decisions relying on CAFA's legislative history extensively to interpret its provisions.[320] When viewed in light of these decisions and their free use of CAFA's legislative history, it appears that *Brill* and its progeny are applying an incorrect and overly restrictive standard.

VI. CONCLUSION

CAFA was created by Congress in part to remedy abuses involving interstate class actions that historically have been trapped in the state court system due to restrictions inherent under complete-diversity jurisdiction. Congress sought 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." To this end, Congress substantially expanded federal court jurisdiction over interstate class actions through the vehicles of minimal diversity, liberalized removal rules, and new powers allowing appellate review of remand orders. In answer to the question of who bears the burden of proving CAFA's minimal-diversity jurisdiction, some courts have not carefully considered the pole-star shift underpinning the congressional purpose in adopting CAFA and have incorrectly applied the preexisting Complete Diversity Standard, which placed the jurisdictional burden of proof on the proponent of federal jurisdiction. Correctly interpreted, however, CAFA's text, purposes, and legislative history create a presumption in favor of finding that minimal-diversity jurisdiction exists, with the burden of proof assigned to the party opposing jurisdiction. The statute that enables complete-diversity jurisdiction and CAFA, which enables minimal-diversity jurisdiction, are not just different in purpose; congressional intent behind each goes in opposite directions. For complete-diversity jurisdiction, Congress intended to **restrict** access to the federal courts, leading the courts to assign the burden of proof to the party asserting jurisdiction. For minimal-diversity jurisdiction under CAFA, on the other hand, Congress intended to **substantially expand** access to the federal courts for those interstate class actions that previously were blocked from federal court due to existing rules for complete diversity. The Act's legislative history expressly states Congress's intent to change that status quo and to place the burden of proof on the party opposing jurisdiction. The decisions to date reaching a contrary conclusion are decided incorrectly. Adherence to the traditional burden-of-proof rule under complete diversity for interstate class actions would defeat the obvious purpose of CAFA and improperly restrict its scope as intended by Congress.

320. Braud v. Trans. Serv. Co. of Ill., 445 F.3d 801 (5th Cir. 2006) (reviewing CAFA's legislative history with respect to new 28 U.S.C. 1453(b)); Wallace v. La. Citizens Prop. Ins. Corp., 444 F.3d 697 (5th Cir. 2006) (relying on CAFA's legislative history with respect to new 28 U.S.C. 1453(c)(1)); Patterson v. Dean Morris, L.L.P., 444 F.3d 365 (5th Cir. 2006) (relying on CAFA's legislative history in construing new 28 U.S.C. § 1433(c)(1) and (c)(2)).