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Class Action Litigation Report®

Pleading to the Promised Land: The Growing Circuit Split Over Whether Plaintiffs Must Provide Proof to Invoke CAFA's Local Controversy Exception

By Brian J. Murray and James M. Burnham

Congress passed the Class Action Fairness Act to ensure that major class actions of a national scope would play out on a level field.

As the Senate Judiciary Committee explained in its accompanying report, plaintiffs' lawyers had historically been able to "'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." S. Rep. No. 109-14 at 5. To solve this problem, Congress expanded federal jurisdiction to include all class actions with at least 100 class members, minimal diversity, and at least $5 million at stake. 28 U.S.C. § 1332(d)(2).

This jurisdictional grant is subject to several exceptions, however, for lawsuits that are truly local in scope and concern. The two most important are the "local controversy" and "home state" exceptions. For both exceptions, the party seeking a remand to state court has the burden of proving that the exception applies. But there is a growing circuit split over what that burden entails for parties who invoke the local controversy exception.

This short article evaluates both sides of the circuit split and offers what we believe is the correct interpretation.

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Pleadings Versus Proof: The Circuits Divided

The Local Controversy Exception Generally

The local controversy exception has five requirements, all of which must be met for it to apply. It requires that:

1. greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action was originally filed;

2. at least 1 defendant is a defendant—*(aa)* from whom significant relief is sought by members of the plaintiff class; *(bb)* whose alleged conduct forms a sig-

 ISSN 1529-0115

nificant basis for the claims asserted by the proposed plaintiff class; and *(cc)* who is a citizen of the State in which the action was originally filed; and

3. principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed.

28 U.S.C. § 1332(d)(4)(A)(i).[1]

Much of this provision has been uncontroversial. Every circuit agrees, for example, that the remand-seeking party (almost always the plaintiff) has the burden of proving that it applies.[2] Courts also generally agree that the remand-seeking party must either prove that greater than two-thirds of the class members are citizens of the forum state[3] or limit the class definition to citizens of the forum state.[4] Only one court of appeals has tackled the ''principal injuries'' provision, and it held that ''it is satisfied either 1) when principal injuries resulting from the alleged conduct of each defendant were incurred in the state in which the action was originally filed, or 2) when principal injuries resulting from any related conduct of each defendant were incurred in that state.'' *Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 158 (3d Cir. 2009).

Difficulty has arisen, however, with the middle provision—regarding the characteristics of the defendant—and how parties ''prove'' that provision's three elements. The Ninth, Tenth, and Third Circuits have held that these determinations should generally be based on the pleadings. The Eleventh Circuit, by contrast, requires the remand-seeking party to provide actual evidence showing that each prerequisite to the exception applies.

Third, Tenth, Ninth Circuits: Focus on Pleadings

Of the three opinions, only the Ninth Circuit addressed both subsection (aa) (''from whom significant relief is sought'') and subsection (bb) (''whose alleged conduct forms a significant basis.''). The Tenth Circuit analyzed the ''significant relief'' provision, while the Third Circuit addressed only the ''alleged conduct'' requirement.

The first opinion decided was the Third Circuit's in *Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144 (3d Cir. 2009). The bulk of *Kaufman*'s analysis focused on issues subsidiary to the facts-versus-pleading question. But the court was unambiguous that the ''District Court's focus here must be the alleged conduct.'' *Id.* at 157.

The next case, in the Tenth Circuit, focused more directly on the facts-versus-pleadings issue. There, plaintiffs were Oklahoma residents who sued a variety of defendants for polluting their property. *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240 (10th Cir. 2009). After the defendants invoked CAFA jurisdiction to remove to federal court, plaintiffs sought to remand using the local controversy exception. The district court granted plaintiffs' motion to remand and the defendants appealed, arguing that the plaintiffs did not seek ''significant relief'' from the allegedly-local defendant.

Defendants argued ''that the language 'from whom significant relief is sought' requires consideration of a defendant's ability to pay a judgment.'' *Id.* at 1244. The Tenth Circuit rejected this argument, explaining that the ''statutory language is unambiguous, and a 'defendant from whom significant relief is sought' does not mean a 'defendant from whom significant relief may be obtained.' '' *Id.* at 1245. The court further reasoned that ''nothing in the language of the statute [] indicates Congress intended district courts to wade into the factual swamp of assessing the financial viability of a defendant as part of this preliminary consideration, which is one of six issues for a court to consider when deciding whether the 'local controversy exception' is met.'' *Id.* at 1245. It thus held that the ''significant relief'' sought must be determined on the pleadings.

Finally, the Ninth Circuit relied on and extended *Freeport* and *Allstate* in *Coleman v. Estes Exp. Lines Inc.*, 631 F.3d 1010 (9th Cir. 2011). There, the plaintiff was a former driver for Estes Trucking who sought to bring a class action against his former employer. Estes invoked CAFA jurisdiction to remove to federal court, but the district court held that it couldn't look beyond plaintiffs' pleadings and remanded to state court. Estes appealed, arguing that 1) the local corporate entity (Estes West) had insufficient funds to satisfy a judgment so ''significant relief'' was not actually being ''sought'' from it, and 2) because Estes Express had almost complete control over the operations of Estes West, Estes West's ''alleged conduct'' did not ''form a significant ba-

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[1] Additionally, no class action on behalf of similar plaintiffs can have been filed asserting similar allegations against any of the defendants in the previous three years. 28 U.S.C. § 1332(d)(4)(A)(ii). This requirement has not (yet) sparked any disagreement.

[2] *See, e.g., Westerfeld v. Independent Processing LLC*, 621 F.3d 819 (8th Cir. 2010) (''Once Provident satisfied CAFA's basic jurisdictional requirements . . . the burden shifted to Westerfeld to establish that CAFA's local-controversy exception applied.''); *Kaufman v. Allstate New Jersey*, 561 F.3d 144, 154 (3d Cir. 2009) (joining its ''sister circuits in concluding that the party seeking remand has the burden of showing that the local controversy exception applies''); *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007) (''[O]nce federal jurisdiction has been established under [§ 1332(d)(2)], the objecting party bears the burden of proof as to the applicability of any express statutory exception under §§ 1332(d)(4)(A) and (B).''); *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 680 (7th Cir. 2006) (same); *Frazier v. Pioneer Ams. LLC*, 455 F.3d 542, 546 (5th Cir. 2006) (same); *Evans v. Walter Indust. Inc.*, 449 F.3d 1159, 1165 (11th Cir. 2006) (same).

[3] *See, e.g., In re Sprint Nextel Corp.*, 593 F.3d 669, 674 (7th Cir. 2010) (''[W]e agree with the majority of district courts that a court may not draw conclusions about the citizenship of class members based on things like their phone numbers and mailing addresses.''); *Preston v. Tenet Healthsystem Memorial Medical Center Inc.*, 485 F.3d 793, 801 (5th Cir. 2007) (quotation omitted) (requiring plaintiffs to show ''where [each class member] exercises civil and political rights, pays taxes, owns real and personal property, has driver's and other licenses, maintains bank accounts, belongs to clubs and churches, has places of business or employment, and maintains a home for his family.'').

[4] *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Lit.*, 564 F.3d 75, 79 (1st Cir. 2009) (''[A]t least one other circuit has recognized that defining the class to include only citizens of a particular state can defeat federal jurisdiction under CAFA.''); *Johnson v. Advance America*, 549 F.3d 932, 938 (4th Cir. 2008) (''[I]f the class is limited to citizens of South Carolina, it could hardly be claimed that two-thirds of the class members were not citizens of South Carolina.''); *c.f. Dennison v. Carolina Payday Loans Inc.*, 549 F.3d 941, 942-43 (4th Cir. 2008) (holding that plaintiffs can define the class as citizens of the forum state to eliminate the minimal diversity required for CAFA jurisdiction).

  CLASS ISSN 1529-0115

sis for the claims asserted by the proposed plaintiff class.'' *Id.* at 1013.

The Ninth Circuit agreed with the district court that the pleadings were controlling and rejected both of Estes's arguments. The court contrasted the language in requirements one (''relief is *sought*'') and two (''*alleged* conduct'') with the language in requirement three (''*is* a citizen''). The court explained that unlike the word ''is,'' which requires an actual fact to be established, the word '' 'sought' focuses attention on the plaintiff's claim for relief'' and the word '' 'alleged' makes clear that the second criterion is based on what is alleged in the complaint rather than on what may or may not be proved by evidence.'' *Id.* at 1015.

The court went on to distinguish the relief sought and the alleged conduct from other jurisdiction-determining factors, like amount-in-controversy, which generally require the court to make an evidentiary determination. The court first analogized to other pleadings-based jurisdictional prerequisites, like the rule ''under long-established law'' that ''the district court looks to the 'well-pleaded complaint,' rather than to any subsequent pleading or evidence, in determining whether there is federal question subject matter jurisdiction.'' *Id.* at 1016. Second, the court explained, ''factual determinations under subsections (aa) and (bb) are likely to be more expensive and time-consuming than factual determinations of citizenship and amount-in-controversy.'' *Id.* This time-consuming enterprise would, the court surmised, conflict with Congress's intent that CAFA determinations ''be made quickly.'' *Id.*

The court also cited CAFA's Senate Committee Report in support of its holding. For example, the court cited the Report's statement that ''[t]he Committee understands that in assessing the various criteria established in all these new jurisdictional provisions, a federal court may have to engage in some fact-finding, not unlike what is necessitated by the existing jurisdictional statutes.'' *Id.* at 1017 (quoting S. Rep. No. 109-14, at 44 (2005)). The Report's acknowledgement that CAFA will require fact-finding is consistent with focusing on the pleadings, the court reasoned, because of the phrase ''not unlike what is necessitated by the *existing* jurisdictional statutes.'' *Id.* (emphasis added). In existing jurisdictional statutes, the only fact-finding that is ''necessitated'' is on ''questions of citizenship and amount-in-controversy.'' *Id.* Thus, the court concluded, the report must have been endorsing only similarly-limited factual inquiries.

The Eleventh Circuit: Show Me the Facts

The Eleventh Circuit's opinion in *Evans v. Walter Indus. Inc.*, 449 F.3d 1159 (11th Cir. 2006), is the only appellate opinion to come out the other way. In *Evans*, the plaintiffs sued a group of defendants for alleged injuries caused by the defendants' operation of manufacturing facilities in Alabama. In its opinion, which was written several years prior to the pro-pleadings opinions discussed above, the Eleventh Circuit rejected the plaintiffs' proffered evidence as insufficient to establish that the local defendant was significant. As the court explained, ''[w]ith respect to whether the conduct of U.S. Pipe 'forms a significant basis' for the plaintiffs' claims, plaintiffs' evidence offers no insight into whether U.S. Pipe played a significant role in the alleged contamination, as opposed to a lesser role, or even a minimal role.'' *Id.* at 1167. The court went on to conclude that, regardless of what the plaintiffs alleged in their pleadings, ''[t]he evidence does not indicate that a significant number or percentage of putative class members may have claims against U.S. Pipe, or indeed that any plaintiff has such a claim.'' *Id.*

Pleadings Versus Proof: A Third Way

As these decisions demonstrate, the pro-pleadings courts—the Ninth Circuit in particular—generally consider subsections (aa) (''from whom significant relief is sought'') and subsection (bb) (''whose alleged conduct forms a significant basis'') to permit resort only to the complaint for resolution, while maintaining that subsection (cc) (''a citizen of the State in which the action was originally filed'') allows for a more searching evidentiary inquiry. But the text, purpose, and legislative history of CAFA all suggest that this is the wrong grouping. Rather, the best interpretation of the local controversy exception is that the pleadings determine whether the local defendant's ''alleged conduct forms a significant basis'' of the class's claims. But just as the party seeking remand must provide evidence showing that the local defendant is ''a citizen of the State in which the action was originally filed,'' that party must provide evidence showing that ''significant relief is sought'' from the local defendant.

The Ninth Circuit's opinion in *Estes* is unquestionably right about subsection (bb). As *Estes* explains, ''the word 'alleged' makes clear that the second criterion is based on what is alleged in the complaint rather than on what may or may not be proved by evidence.'' 631 F.3d at 1015. CAFA is clear that this prong turns on complaint allegations, and it is neatly analogous to the long-established ''well-pleaded complaint'' rule from *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152-53 (1908), under which ''the district court looks to the 'well-pleaded complaint,' rather than to any subsequent pleading or evidence, in determining whether there is federal question subject matter jurisdiction under 28 U.S.C. § 1331.'' *Estes*, 631 F.3d at 1016.

But this reasoning doesn't apply to whether ''significant relief is sought'' under subsection (aa). The word ''sought'' is the past tense of seek, which means ''to try to acquire or gain.'' Webster's *Third New International Dictionary* at 2005 (Unabridged, Merriam-Webster 1981). Plaintiffs try to acquire or gain relief from only those defendants who—as a factual matter—can actually afford to pay or actually face significant liability. Further, as the Ninth Circuit explained in *Estes*, ''the word 'is,' used in subsection (cc), indicates that an actual fact must be established.'' 631 F.3d at 1015. So too in subsection (aa). Plaintiffs must show that significant relief ''*is* sought'' from the local defendant. It is foundational that ''identical words and phrases within the same statute should normally be given the same meaning.'' *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1185 (2011) (quotation omitted). Therefore, just like in subsection (cc), the word ''is'' in subsection (aa) ''indicates that an actual fact must be established.'' *Estes*, 631 F.3d at 1015. *Estes* never addressed this similarity, instead focusing on ''the distinction between 'sought' in subsection (aa) and 'is' in subsection (cc).'' *Id.*

This straightforward textual interpretation would not, as the Tenth Circuit feared, send courts into the ''factual swamp'' of ''assessing the financial viability'' of each defendant. *Coffey*, 581 F.3d at 1245. It would

merely require limited discovery to figure out which defendants are the ''real'' target of the litigation. Often that determination will just require the defendants to submit basic financial information, which the court could then compare to the size of the plaintiffs' claim—a process that would be no more difficult or cumbersome than the limited discovery routinely required to establish personal jurisdiction.[5] *See, e.g.*, *Pohlman v. Bil-Jax Inc.*, 176 F.3d 1110, 1113 (8th Cir. 1999) (''Most corporate defendants raise serious personal jurisdiction issues in an early motion to dismiss. Typically, in response to such a motion, the court will grant plaintiff reasonable discovery on the personal jurisdiction issue.''). Other times it would require the court to make a basic factual determination of whether the class has a viable, significant claim against the local defendant—an assessment similar to the one that courts regularly make in the context of fraudulent joinder. *See, e.g.*, *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (''[T]here are cases . . . in which a plaintiff has stated a claim, but has misstated or omitted discrete facts that would determine the propriety of joinder. In such cases, the district court may, in its discretion, pierce the pleadings and conduct a summary inquiry.''). Either way, the so-called ''swamp'' is, in truth, a familiar and easily navigable place.

Finally, any other interpretation of subsection (cc) would enable plaintiffs to plead their way out of CAFA jurisdiction by simply alleging that they seek significant relief from a local defendant when that defendant is, in fact, totally nominal. Such a construction flies in the face of Congress's desire for only ''legitimately local disputes'' to be ''in state court,'' while ''large, interstate class actions like those typically brought in Madison and St. Clair counties and other magnet courts can be heard in federal court.'' S. Rep. No. 109-14 at 52. As the Senate Report explained, the local controversy exception was intended to ensure that only ''truly local single event[s] with no substantial interstate effects'' are exempted from CAFA jurisdiction. S. Rep. No. 109-14 at 47. It further instructs courts to focus on the ''real target in th[e] action (both in terms of relief and alleged conduct).'' S. Rep. No. 109-14 at 40. The Report even explains that ''the presence of conspiracy allegations should not alter this inquiry.'' *Id.* at 40 n. 126. Thus, even if a local agent were theoretically liable to the entire class, that ''would not change the fact that the agent is not the real target of the litigation, which is the inquiry contemplated by this criterion.'' *Id.*

Conclusion

Like many statutes enacted at the end of a legislative session, CAFA is not a model of clarity. That said, the parallel structure between subsections (aa) and (cc) of the local controversy exception makes it clear that they should be interpreted alike. Just as whether the defendant ''*is* a citizen'' of the forum state must be established factually, so must the issue of whether ''significant relief *is* sought'' from the local defendant. 28 U.S.C. §§ 1332(d)(4)(A)(i)(aa), (cc) (emphasis added). Interpreting the statute otherwise opens a gaping loophole for lawyers to '' 'game' the procedural rules and keep nationwide or multi-state class actions in state courts'' in direct contravention to its text and purpose. S. Rep. No. 109-14 at 5. In short, CAFA jurisdiction ultimately turns on what the meaning of ''is'' is. In this context, that meaning is clear. It requires actual proof—not just clever pleadings.

[5] Indeed, in both *Estes* and *Coffey*, the local defendant was a wholly-owned subsidiary while the out-of-state defendant was the parent company that would plainly have to bankroll the litigation and pay any resulting judgment. See *Coffey*, 581 F.3d at 1244 (''Freeport Defendants asserted that BZC has no assets to satisfy any potential judgment and that therefore BZC could not be considered a defendant from whom significant relief is sought.''); *Estes*, 631 F.3d at 1014 (quoting from a declaration filed by defendants explaining that ''Estes West does not have the funds to satisfy a potential judgment in the lawsuit brought by Bradford Coleman; only Estes Express would possess such funds''). In both of those cases, very limited discovery made it clear that the out-of-state parent corporation was the entity ''from whom significant relief [was] sought.''

   ISSN 1529-0115