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Standard of Proof to Establish Amount in Controversy when Defending Removal under the Class Action Fairness Act

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STANDARD OF PROOF TO ESTABLISH AMOUNT IN CONTROVERSY WHEN DEFENDING REMOVAL UNDER THE CLASS ACTION FAIRNESS ACT

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I. INTRODUCTION

In 2005, Congress passed the Class Action Fairness Act, which amended the procedures that apply to large interstate class actions. In doing so, Congress declared that it sought “to assure fairer outcomes for class members and defendants.”¹ In addition to changing class action results, CAFA significantly expanded federal jurisdiction over class actions and mass actions.² CAFA thus marked a watershed for the federal courts, which have limited jurisdiction, unlike most state courts that have general jurisdiction.

Before enacting CAFA, Congress determined that class action litigation requires federal attention and, if certain requirements are met, federal courts obtain jurisdiction.³ Congress relied on specific findings that 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.”⁴ But Congress also found “abuses of the class action device.”⁵ While some of the abuses related directly to the parties and attorneys involved in class actions, other abuses were specifically tied to a concern that federal principles had been compromised. For ex-

1. Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2 § 1(a), 119 Stat. 4, 4 (2005) (codified in scattered sections of 28 U.S.C.).

2. See *infra* Part II.A.1.

3. However, CAFA reserved for the states two types of large class actions that are local in nature: (1) Local controversies remain in state court where (a) more than two-thirds of the class members are from the forum state and *either* the primary defendant *or* a significant defendant is from that state, (b) the principal injuries were incurred in that state, and (c) no other class action on the issue has been filed in the preceding three years. 28 U.S.C. § 1332(d)(4) (2006). And (2) Defendant’s home state may dictate that the action remain in state court when between one-third and two-thirds of the class members are from the forum state, and the primary defendants are from that state. *Id.* § 1332(d)(3). The first exception is mandatory; the second is discretionary. *Id.* CAFA also reserved Delaware’s jurisdiction over most corporate cases already addressed by the Private Securities Litigation Reform Act of 1995. See *id.* § 1332(d)(9). CAFA leaves out many civil rights class actions based on a concern that sovereign immunity defenses should remain intact. See *id.* § 1332(d)(5).

4. CAFA § 2(a)(1).

5. *Id.* § 2(a)(2).

ample, Congress found that class action abuses had “undermine[d] 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.”⁶ Significantly, Congress determined that state and local courts had been “keeping cases of national importance out of Federal court,” occasionally have acted “in ways that demonstrate bias against out-of-State defendants,” and have entered judgments that “impose their view of the law on other States and bind the rights of the residents of those States.”⁷

CAFA addressed these problems by changing diversity requirements, prerequisites to removal, and removal procedures for class actions that include more than 100 members⁸ and involve total claims of more than \$5 million.⁹ Diversity jurisdiction is substantially different for these cases. CAFA softened citizenship requirements by eliminating the complete diversity rule; CAFA also increased the total-amount-in-controversy threshold but allowed aggregation of class members’ claims.¹⁰ Similarly, CAFA removal procedures are more generous. Any defendant may remove, regardless of consent by other defendants, and CAFA eliminated the outer time limit for removal from state to federal court.¹¹ Additionally, CAFA granted defendants the right to immediately appeal a district court’s decision to remand to state court after removal.¹²

Statistics verify that CAFA has been effective in the five years since it was adopted. The Federal Judicial Center examined the period July 1, 2001 through June 30, 2007, and found an overall increase of seventy-two percent in class action activity.¹³ Most importantly, the Federal Judicial Center compared pre- and post-CAFA periods and declared “a dramatic increase in the number of diversity class actions filed as original proceedings in the federal courts.”¹⁴ This means that more plaintiffs initially filed class actions in federal courts after CAFA

6. *Id.* § 2(a)(4).

7. *Id.* § 2(a)(4)(A)–(C).

8. 28 U.S.C. § 1332(d)(5)(B) (2006).

9. *Id.* § 1332(d)(2).

10. *Id.* § 1332(d)(6).

11. *Id.* § 1453(b).

12. *Id.* § 1453(c)(1).

13. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1 (2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/\\$file/cafa0408.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf) [hereinafter FED. JUDICIAL CTR. REPORT].

14. *Id.*

became effective. While defense removals to federal court based on diversity jurisdiction initially increased following CAFA, the report stated that these increases had been “trending downward.”¹⁵ Interestingly, while the increase in diversity class actions as original federal court proceedings has been widespread, defense removals “are more varied by district and circuit.”¹⁶ Some observers have speculated that this is in some part a reaction to developments in the CAFA case law, which has varied widely by district and circuit.¹⁷

While a direct answer to this speculation is beyond the scope of this article, there is no doubt that by creating a right to immediate appeal from remand decisions, CAFA has sponsored ample and assorted case law on diversity and removal requirements. Satisfaction of the amount in controversy requirement has garnered significant attention in the federal courts of appeals. Because CAFA permits aggregation of all class member claims and removal is often determined at the pleadings stage, litigation has focused on who bears the burden of proving the amount in controversy and how that burden is satisfied. CAFA is silent on both counts. Prior to CAFA, Supreme Court precedent placed the burden of proof to satisfy all jurisdictional requirements—including the amount in controversy—on the party seeking federal jurisdiction.¹⁸ In removal cases, that burden falls to the defendant.¹⁹ Prior to CAFA, Supreme Court precedent articulated the standard of proof for the amount in controversy in different circumstances as “to a legal certainty” and “by a preponderance of the evidence.”²⁰

Post-CAFA, the federal courts of appeals so far are unanimous in

15. *Id.* at 2. Lee and Willging note that “we cannot determine whether the declining number of removals [post-CAFA] indicates that there are fewer class actions in the state courts and thus fewer to remove, or determine whether the declining number of removals indicates that class action defendants in the state courts are choosing to remove fewer cases to federal court.” *Id.* at 7.

16. *Id.* at 10–11.

17. Terry Carter, *A Step Up in Class*, A.B.A.J., May 2008, at 22, 23–24.

18. *See* *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936).

19. *See, e.g.*, *Huffman v. Saul Holdings Ltd. P'ship*, 194 F.3d 1072, 1079 (10th Cir. 1999); 15 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 102.21[3][a] (3d ed. 2010).

20. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288–89 (1938) (sum claimed by plaintiff controls the amount in controversy if the claim is made in good faith; “[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal”); *McNutt*, 298 U.S. at 189 (“[T]he court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.”).

concluding that CAFA did not alter who bears the burden of proving the requisite amount in controversy upon removal—it remains on the party seeking federal jurisdiction.²¹ But post-CAFA, the federal courts of appeals have split on what is the correct standard of proof for determining whether the amount in controversy is satisfied. The Third Circuit has embraced the legal-certainty test;²² four circuits—the Fourth, Sixth, Eighth and Eleventh—have espoused the preponderance-of-the-evidence test;²³ the First, Second, and Seventh circuits have adopted the “reasonable probability” test;²⁴ and the Ninth Circuit has adopted a combination of the legal-certainty and preponderance-of-the-evidence tests depending on the circumstances.²⁵ Only the Fifth and Tenth circuits appear to have not yet reached the issue.²⁶

This article discusses the circuit split on the standard of proof for determining the amount in controversy in CAFA removal cases. Section II provides additional background including the history and purpose of CAFA and how CAFA relaxed federal removal requirements yet did not alter which party bears the burden of proving the amount in controversy.²⁷ Additionally, the first section discusses Supreme Court precedent on the standard of proof for determining the amount in controversy, particularly in removal cases.²⁸ Section III analyzes the standards of proof adopted by various courts of appeals when determining the amount in controversy following CAFA removal.²⁹ Section IV concludes that the proper standard of proof requires the removing defendant to prove the amount in controversy by a preponderance of the evidence in CAFA litigation.³⁰

21. See *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 297 (4th Cir. 2008); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006); *Morgan v. Gay*, 471 F.3d 469, 473 (3d Cir. 2006); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447 (7th Cir. 2005).

22. See *Frederico v. Home Depot*, 507 F.3d 188, 198 (3d Cir. 2007); *Morgan*, 471 F.3d at 473.

23. See *Bell v. Hershey Co.*, 557 F.3d 953, 959 (8th Cir. 2009); *Strawn*, 530 F.3d at 297–98; *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 404 (6th Cir. 2007); *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1208 (11th Cir. 2007); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1330 (11th Cir. 2006).

24. See *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 43 (1st Cir. 2009); *Brill*, 427 F.3d at 448–49.

25. See *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 999 (9th Cir. 2007); *Abrego*, 443 F.3d at 683, 683 n.8.

26. For a district court decision on the issue, see *Apodaca v. Allstate Ins. Co.*, No. 07-cv-00937-EWN-MEH, 2008 WL 113844, at *2 (D. Colo. Jan. 8, 2008).

27. See *infra* Part II.

28. See *infra* Part II.C.

29. See *infra* Part III.

30. See *infra* Part IV.

II. BACKGROUND

A. *History and Purpose of CAFA*

Congress noted that it was the fourth Congress to consider an overhaul of the class action statutes.³¹ In the public law passed by both houses and signed by President George W. Bush, Congress identified four specific findings that supported the new law. Two findings related to the general importance of class actions and concerns about whether class action practice was consistent with federalism principles in diversity cases. The Senate Report noted that class action lawsuits are “the only mechanism that has been successful in imposing liability on some industries.”³² A minority view was that class actions have allowed plaintiffs with small claims to join together and pursue legal action when individual litigation might not otherwise be warranted.³³

The Senate Report commented, however, that class action plaintiffs’ lawyers had eroded federalism by manipulating pleadings to ensure their cases remain at the state level, where judges have reputations for easy certification and settlement approval.³⁴ Pleadings affected federal jurisdiction in two ways—by adding parties to destroy diversity or by eliminating parties with claims of more than \$75,000.³⁵ Congress’s third and fourth findings focused on “abuses of the class action device” and included unfair or unjust litigation results.³⁶ For instance, Congress found some class members had received “little or no benefit” when counsel received large fees and class members received coupons and also Congress found some class members received “unjustified awards . . . at the expense of other class members.”³⁷

Not surprisingly then, Congress declared that CAFA’s purposes

31. S. REP. NO. 109-14, at 1–2, *reprinted in* 2005 U.S.C.C.A.N. 3–5 (act first considered by 105th Congress).

32. *Id.* at 54, *reprinted in* 2005 U.S.C.C.A.N. 50. This same section of the reports also stated that this result will be “destroy[ed]” by increasing removal of state class actions to federal court. *Id.*

33. *Id.* at 83, *reprinted in* 2005 U.S.C.C.A.N. 76 (minority view).

34. *Id.* at 4, 14, *reprinted in* 2005 U.S.C.C.A.N. 5, 14 (majority view).

35. *Id.* at 26–27, *reprinted in* 2005 U.S.C.C.A.N. 3, 26–27.

36. Class Action Fairness Act of 2005, Pub. L. No. 109-2 § 2(a)(2), 119 Stat. 4, 4 (2005).

37. *Id.* § 2(a)(3). Other abuses noted are that class actions have “harmed class members with legitimate claims and defendants that have acted responsibly” and “confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.” *Id.* § 2(a)(2)(A), (3)(C).

fall along two lines—improving recoveries to class members and stopping the attrition of federal court involvement in the litigation of large interstate class actions.³⁸ Specifically, Congress stated that CAFA would seek to “assure fair and prompt recoveries for class members with legitimate claims” and “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.”³⁹ While Congress fulfilled the first purpose by changing settlement requirements and addressing coupon provisions,⁴⁰ Congress addressed the second purpose by opening federal courts to more class action litigation by easing diversity and removal rules.

1. CAFA Expanded Federal Jurisdiction in Diversity Class Actions

Traditionally, all class representatives must be diverse from all defendants—the complete diversity rule.⁴¹ If one named plaintiff has more than \$75,000 in controversy, the district court may include all class members’ claims in its discretion under its supplemental jurisdiction.⁴²

Under CAFA, however, at a minimum, one class member must be diverse from one defendant, and the total amount in controversy must exceed \$5 million, excluding interest and costs.⁴³ It does not matter if one plaintiff’s claim exceeds \$75,000, since CAFA considers all claims in the aggregation.⁴⁴

Removal procedures are also relaxed under CAFA. Traditionally, only out-of-state defendants may remove cases to federal court based on diversity.⁴⁵ Under CAFA, any defendant may remove, even a resident of the forum state.⁴⁶ Traditionally, all defendants must consent to removal⁴⁷ and there is a thirty-day deadline for removal, triggered

38. *Id.* § 2(b)(1)–(2). Congress also identified a third purpose—to “benefit society by encouraging innovation and lowering consumer prices.” *Id.* § 2(b)(3).

39. *Id.* § 2(b)(1)–(2).

40. 28 U.S.C. §§ 1712–1715 (2006).

41. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267–68 (1806).

42. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005).

43. 28 U.S.C. § 1332(d)(2).

44. *Id.* § 1332(d)(6).

45. *Id.* § 1441(b).

46. *Id.* § 1453.

47. *Chicago, Rock Island, & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 248 (1900) (removal requires the consent of all defendants); *see, e.g., Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533–34 n.3 (6th Cir. 1999) (holding that the “defendant ha[d] 30 days from the date of service to remove a case to federal district court, with the consent of the remaining defendants.”).

by the date a “removable pleading” is received, but limited by cut-off for removal that ends one year from the commencement of the action.⁴⁸ Under CAFA, no consent is required and the statute erased the one-year limit.⁴⁹

2. *Interlocutory Appeal Procedures Generated Case Law Quickly*

CAFA altered the rules for appellate review of removal. Traditionally, no appellate review is permitted from a district court decision to remand a case to state court after removal.⁵⁰ Under CAFA, appellate review of a decision granting or denying a motion to remand is allowed under strict timelines. District court decisions may be appealed if review is sought “not more than 10 days after entry of the order.”⁵¹ Additionally, if the court of appeals accepts review, it must decide the appeal “not later than 60 days after the date on which such appeal was filed,”⁵² with the possibility of a ten-day extension.⁵³

B. *CAFA Relaxed Federal Removal Requirements, but Did Not Alter Which Party Bears Burden of Proof*

The federal courts are courts of limited jurisdiction and “possess only that power authorized by Constitution and statute.”⁵⁴ Congress has established the amount in controversy necessary to sustain federal jurisdiction in diversity cases and therefore Congress has the authority to modify these requirements.⁵⁵ In the past, Congress has revised the

48. 28 U.S.C. § 1446(b).

49. *Id.* § 1453(b).

50. *Id.* § 1447(d).

51. *Id.* § 1453(c)(1) (West 2009). The original language of this provision stated a petition was timely if filed “not less than 7 days after entry of the order.” *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 983 (7th Cir. 2008). Described as both a “gaffe” and “garble,” the language “attracted considerable attention.” *Id.* at 983–84 (citing authorities). Congress finally revised the language in 2009. *See* Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, 123 Stat. 1607 (2009).

52. 28 U.S.C. § 1453(c)(2).

53. *Id.* § 1453(c)(3). A ten day extension may be granted “for good cause shown and in the interests of justice.” *Id.* § 1453(c)(3)(B). An extension for a longer period may be granted if all parties agree. *Id.* § 1453(c)(3)(A).

54. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also* *Finley v. United States*, 490 U.S. 545, 548 (1989) (holding that jurisdiction is only what is expressly granted within the text of the Federal Torts Claims Act, which is limited to “civil actions on claims against the United States”).

55. *Finley*, 490 U.S. at 556 (“Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress.”). *See* *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373, n.13 (1978) (noting that “complete diversity is not a ‘constitutional requirement’” but has been adopted by court

amount in controversy, which is a statutory requirement, not a constitutional requirement.⁵⁶ As a statutory requirement, courts have applied the amount in controversy by examining the language of any amendment and construing it to give effect to Congress's intent.⁵⁷ The same analysis applies to determining which party bears the burden of proof on the amount in controversy. Congress has the authority to prescribe who bears the burden of proof on the amount in controversy. This has never been incorporated into a federal statute, but has been the subject of case law.⁵⁸

The federal courts of appeals that have considered the issue have held that, under CAFA, the party asserting federal jurisdiction—whether as a matter of original or removal jurisdiction—bears the burden of proving that issue.⁵⁹ Two primary rules of law have been cited in favor of this conclusion. First, federal courts have long recognized that they have limited jurisdiction and that “all doubts” must be resolved against jurisdiction.⁶⁰ Second, courts presume that Congress is aware of the existing rule and, if it had intended to change the rule, Congress would have done so expressly in CAFA as it did with other amendments that changed diversity requirements.⁶¹ Yet CAFA

decision; Congress has amended diversity jurisdiction statute but left complete diversity rule intact); *Healy v. Ratta*, 292 U.S. 263, 270 (1934) (“The policy of the statute calls for its strict construction.”).

56. For example, article III, section 2, clause 1 of the U.S. Constitution states, The judicial Power shall extend . . . to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In comparison, 28 U.S.C. § 1332 provides that the requisite amount in controversy for diversity jurisdiction is \$75,000.00.

57. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553–54 (2005) (noting complete diversity rule is neither constitutional or statutory but courts apply in light of purpose of rule); *id.* at 568 (“[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material.”); see also *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589 (1939) (holding every plaintiff must separately satisfy the amount-in-controversy requirement).

58. See *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 188–89 (1936). See also 28 U.S.C. § 1332 (lacking any express determination as to who bears the burden of proof).

59. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328–29 (11th Cir. 2006); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006); *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 678 (9th Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447 (7th Cir. 2005).

60. *Hahn v. PepsiCo, Inc.*, 350 F. Supp. 2d 758, 763 (N.D. Ill. 2004).

61. See discussion in *Abrego*, 443 F.3d at 683–85. See also *Goodyear Atomic Corp.*

is silent on the burden of proof.

The Senate Report persuaded some district courts that held that CAFA had altered the burden of proof and placed it on the plaintiffs' shoulders in all instances, including removal.⁶² The Report indicated that a majority of the judiciary committee intended that the burden of proof shift to the plaintiffs.⁶³ The courts of appeals that have considered the language in the Senate Report have rejected it, reasoning that CAFA is not ambiguous and, therefore, legislative history does not factor into the courts' analysis of the statute.⁶⁴ While some have commented that this conclusion rests on a "useful fiction," the general consensus is that "it may not be possible to truly determine congressional intent on this point, and therefore, the existing rule should remain in force."⁶⁵

C. Supreme Court Precedent on the Standard of Proof for Amount in Controversy

The Supreme Court has recognized that the amount in controversy requirement "is meant to ensure that a dispute is sufficiently important to warrant federal-court attention."⁶⁶ In 1938, the Supreme Court in *St. Paul Mercury Indemnity Company v. Red Cab Company* established a two-pronged test for determining whether the jurisdictional minimum has been met in a matter removed to federal court based on diversity of jurisdiction.⁶⁷ First, the complaint creates a rebuttable presumption that the amount of damages sought is a good faith

v. Miller, 486 U.S. 174, 184–85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

62. See, e.g., *Berry v. Am. Express Publ'g, Corp.*, 381 F. Supp. 2d 1118, 1122 (C.D. Cal. 2005), *abrogated by Abrego*, 443 F.3d at 685.

63. S. REP. NO. 109-14, at 42 (2005) *reprinted in* 2005 U.S.C.C.A.N. at 40:

The Committee intends this subsection [the amount in controversy] 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 [T]he court should err in favor of exercising jurisdiction over the case.

64. See, e.g., *Brill*, 427 F.3d at 448.

65. Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77, 98 (2007). See also *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (holding that, in a bankruptcy case construing U.S. bankruptcy code, the uncertainties surrounding documents and hearings with regard to determining legislative intent illustrated the importance of relying upon statutory text rather than on legislative intent).

66. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 562 (2005).

67. 303 U.S. 283, 288–89 (1938) [hereinafter *Red Cab*].

statement of the actual amount in controversy.⁶⁸ Second, “[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.”⁶⁹

In *Red Cab*, an Indiana corporation sued a Minnesota corporation in Indiana state court.⁷⁰ The plaintiff sought to enforce an insurance contract for workers’ compensation claims.⁷¹ The damages sought in the complaint were \$4000, which met the amount-in-controversy requirement at the time.⁷² The defendant removed to federal court and the plaintiff amended the complaint, still alleging \$4000 in damages, but attaching an exhibit that stated the actual total amount expended for the claims was \$1380.89.⁷³ The federal court entered judgment for the plaintiff and an appeal was taken.⁷⁴ The court of appeals refused to decide the merits, stating it lacked jurisdiction because the amount in controversy was not met.⁷⁵

The Supreme Court reversed the judgment of the court of appeals and remanded for proceedings on the merits of the appeal. Although the Court began by noting that Congress intended “drastically to restrict federal jurisdiction in controversies between citizens of different states,” it also held that “unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith.”⁷⁶ The Court continued: “It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.”⁷⁷ Federal jurisdiction is not defeated by subsequent events, such as actual recovery or a valid defense.⁷⁸ Instead, the legal-certainty test results in dismissal when it is applied to the “face of the pleadings, [if] it is apparent . . . that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount.”⁷⁹

The Court explained that, in a removed action, a presumption is

68. *Id.* at 288.

69. *Id.* at 289.

70. *Id.* at 284.

71. *Id.*

72. *Id.* at 285. The amount-in-controversy requirement at the time of the case was \$3000. *Id.* at 286.

73. *Id.* at 285.

74. *Id.*

75. *Id.*

76. *Id.* at 288.

77. *Id.* at 289.

78. *Id.*

79. *Id.*

appropriate when “a large amount” is sought in the complaint because collusion is unlikely and the opportunity for the defendant to remove is limited by a short deadline.⁸⁰ If a plaintiff were allowed to “reduce the amount of his demand to defeat federal jurisdiction [then] the defendant’s supposed statutory right of removal would be subject to the plaintiff’s caprice.”⁸¹ Although not presented on the facts before it, the Court observed that the plaintiff has an alternative: sue for less than the jurisdictional amount even though entitled to more.⁸² In that event, the defendant cannot remove.⁸³ Applying these rules to the case before it, the Supreme Court held the defendant was entitled to remove to federal court because the requisite amount in controversy appeared on the face of the complaint and “a reduction of the amount claimed after removal did not take away that privilege.”⁸⁴

The “legal-certainty” test has controlled the analysis of the amount in controversy requirement since *Red Cab*.⁸⁵ Under this test, the party asserting federal jurisdiction “must establish merely that it does *not* appear to a legal certainty that the claim is *below* the jurisdictional minimum. Thus, under this standard, courts must be very confident that a party cannot recover the jurisdictional amount before dismissing the case for want of jurisdiction.”⁸⁶

Before deciding *Red Cab*, the Supreme Court determined which party shouldered the burden of proving the amount in controversy and by what standard it must be proven where jurisdiction is disputed or unclear. In *McNutt v. General Motors Acceptance Corp.*, the district court granted an injunction to restrain the enforcement of a state law.⁸⁷ On a direct appeal, the Supreme Court questioned jurisdiction;⁸⁸ the action had been filed originally in federal court but the

80. *Id.* at 290–91.

81. *Id.* at 293.

82. *Id.*

83. *Id.*

84. *Id.* at 296.

85. MOORE, *supra* note 19, § 102.104[1], at 102-168 (3d ed. 1999). *See also id.* at n. 2 (citing authorities from each federal court of appeal); 14AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3702, at 17 (3d ed. 1998) (noting the legal-certainty test is “the universal test in the context of actions that originate in the federal courts”); *see also id.* at 28 (“it must appear to a legal certainty that the plaintiff’s claim is really for less than the jurisdictional amount to justify dismissal for lack of subject matter jurisdiction.”).

86. MOORE, *supra* note 19, §102.106[1], at 102-171 & n.5 (citing authorities).

87. 298 U.S. 178, 179 (1936).

88. *Id.*

amount in controversy could not be determined on the face of the complaint.⁸⁹ The complaint asserted federal question jurisdiction and raised constitutional issues, but failed to allege the amount in controversy.⁹⁰ The value of the business interests affected by the state statute was alleged, but the “value of the right” was not alleged.⁹¹ The Supreme Court held that the party asserting jurisdiction bears the burden of proof and, if challenged by the opponent, must support the amount “by competent proof” and “the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.”⁹² The Supreme Court reversed the matter and remanded to dismiss the complaint for lack of jurisdiction.⁹³

In deciding removed cases, courts of appeals have sought to blend the legal-certainty and preponderance-of-the-evidence standards by focusing on whether the complaint alleges damages in excess of the jurisdictional minimum.⁹⁴ If the complaint alleges damages exceeding the jurisdictional minimum, then the party challenging jurisdiction must show to a legal certainty that the amount cannot be recovered.⁹⁵ However, if the complaint alleges damages less than the jurisdictional amount, the circuit courts have split on what the defendant must do to successfully remove the case.⁹⁶ While mere conclusory allegations are insufficient, some courts presume the complaint is correct, but allow the defendant to establish jurisdiction by a preponderance of the evidence.⁹⁷ Any rebuttal by the plaintiff must be to a legal certainty in order to remand to state court.⁹⁸ Similarly, where the complaint alleges damages of an uncertain amount, a removing defendant must establish the amount in controversy by a preponder-

89. *Id.* at 178–81.

90. *Id.* at 180–81. The law applicable at the time required a federal question and \$3000 as the minimum amount in controversy. *Id.* at 181.

91. *Id.*

92. *Id.* at 189.

93. *Id.* at 190.

94. MOORE, *supra* note 19, at 102-193 (citing authorities).

95. *Id.* at 102-89 & n.12. *See also* Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992) (“The court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.”).

96. MOORE, *supra* note 19, at 102-189. *See also* WRIGHT, *supra* note 85, at 52 n.24 (citing authorities).

97. Gaus, 980 F.2d at 567 (holding that a conclusory allegation is insufficient to remove the case); *see also* MOORE, *supra* note 19, at 102-190 & n.17 (citing authorities); WRIGHT, *supra* note 85, at 52 n.24 (citing authorities).

98. De Aguilar v. Boeing Co., 47 F.3d 1404, 1412 (5th Cir. 1995). *See also* MOORE *supra* note 19, at 102-190 n.18 (citing authorities).

ance of the evidence.⁹⁹ The Third Circuit has differed, holding the removing defendant must prove to a legal certainty that the plaintiff *can* recover the jurisdictional amount.¹⁰⁰ This circuit split has continued to play out and perhaps become exacerbated under CAFA removal.

III. CIRCUIT ANALYSIS OF STANDARD OF PROOF UNDER CAFA

The standard of proof in CAFA-removal cases is different from circuit to circuit. Courts have formulated four tests: the (1) legal certainty, (2) preponderance of the evidence, (3) reasonable probability, and (4) combination tests. Despite differences, there is overlap in how these standards are articulated and applied. In many circuits, the factor determining which standard applies is the *ad damnum* clause in the plaintiff's complaint. Some courts, such as the Eighth Circuit, have rejected that factor as determinative.¹⁰¹

A. *Legal-Certainty Test*

The Third Circuit used the legal-certainty test to analyze a case where the plaintiff class alleged damages under \$5 million to avoid CAFA removal.¹⁰² In *Morgan v. Gay*, the consumer class brought deceptive-sales practices claims in New Jersey state court related to sale of skin cream.¹⁰³ The named plaintiff expressly limited the request for damages to less than \$5 million in the complaint.¹⁰⁴ After removal to federal court under CAFA, the district court ordered remand because the amount in controversy was lacking, given plaintiff's allegations of damages.¹⁰⁵ The Third Circuit affirmed.¹⁰⁶ Rather than relying on

99. *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1428 (2d Cir. 1996); *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996).

100. *Frederico v. Home Depot*, 507 F.3d 188, 194–99 (3d Cir. 2007); *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 398 (3d Cir. 2004).

101. *See, e.g., Bell v. Hershey*, 557 F.3d 953 (8th Cir. 2009).

102. *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006).

103. *Id.* at 471.

104. *Id.*

105. *Id.*

106. *Id.* at 477. The court's opinion adds this caution:

The plaintiffs in state court should not be permitted to ostensibly limit their damages to avoid federal court only to receive an award in excess of the federal amount in controversy requirement. The plaintiff has made her choice and the plaintiff in state court who choose not to opt out of the class must live with it.

Id. at 477–78.

cases directly addressing the legal-certainty test,¹⁰⁷ the Third Circuit relied on a Seventh Circuit decision to hold that the legal-certainty test applied, even though the Seventh Circuit decision actually considered a complaint where damages were unspecified and that court ultimately applied the reasonable-probability test.¹⁰⁸

More recently, the Third Circuit has confirmed that it will apply the legal-certainty test to analyze removal questions under CAFA's amount in controversy provisions.¹⁰⁹ In *Frederico v. Home Depot*, the plaintiff class sued Home Depot claiming that it had violated the New Jersey Consumer Fraud Act.¹¹⁰ The claims arose after the plaintiff rented a truck from a Home Depot store to use for seventy-five minutes.¹¹¹ According to the terms of the rental agreement, the plaintiff would pay \$19.00 for the first seventy-five minutes, and \$5.00 for each additional fifteen minutes the truck was overdue.¹¹² Plaintiff attempted to return the rental truck at 7:38 p.m., but was told that the rental department was closed—even though the store was open—and she would have to return the truck the next morning when the rental

107. *Morgan* was decided before *Lowdermilk v. U.S. Bank National Ass'n*, which addressed the same factual scenario: both plaintiff classes had limited their demand for recovery to under \$5 million. *Id.* at 471; *Lowdermilk v. U.S. Bank National Ass'n*, 479 F.3d 994, 996 (9th Cir. 2007). In *Morgan*, the Third Circuit acknowledged in a footnote that the Ninth Circuit had considered and reserved a similar issue in *Abrego*. *Morgan*, 471 F.3d at 474 n.5. In fact, *Morgan* is consistent with the Ninth Circuit's later decision in *Lowdermilk*, which in turn cites *Morgan* as consistent with the Ninth Circuit's decision to adopt the legal-certainty standard. *Lowdermilk*, 479 F.3d at 999.

108. The Third Circuit relied on *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447 (7th Cir. 2005), which is discussed in detail *infra* Part III.C. *Morgan's* reliance on *Brill* is misplaced for two reasons. First, in *Brill* the scenario was not the same as in *Morgan*. *Id.* The *Brill* plaintiffs did not specify or limit the damages sought in the complaint against Countrywide for the advertising faxes. *Id.* Conversely, the *Morgan* plaintiffs specified that they would not seek damages exceeding \$5 million. *Morgan*, 471 F.3d at 472. Second, the Third Circuit in *Morgan* pieced together quotes from *Brill* and claimed that *Brill* required the defendant to meet the legal-certainty standard. *Morgan*, 471 F.3d at 474. *Brill* actually adopted the reasonable-probability standard. *Brill*, 427 F.3d at 447. The Third Circuit's reliance on the Seventh Circuit is undercut even further by the Seventh Circuit's decision in *Meridian Security Insurance Co. v. Sadowski*, 441 F.3d 536, 539 (7th Cir. 2006), a non-CAFA case that explained that the "reasonable-probability" language had created a number of problems for the district courts in analyzing removal issues, and that the "legal-certainty" language had created even more confusion. Ultimately, the Seventh Circuit in *Meridian* adopted the preponderance-of-the-evidence standard, which it will likely apply in CAFA removal cases. *Id.* at 541–42.

109. *Frederico v. Home Depot*, 507 F.3d 188 (3d Cir. 2007).

110. *Id.* at 191–92.

111. *Id.* at 191.

112. *Id.*

department reopened.¹¹³ Plaintiff returned the truck and paid \$287.14 for the rental the next day.¹¹⁴ After a class action was filed in state court, Home Depot filed a notice of removal and the plaintiff did not seek remand.¹¹⁵ Home Depot moved to dismiss the complaint for failure to state a claim, and the district court granted Home Depot's motion; plaintiff appealed.¹¹⁶ The court of appeals considered the question of federal jurisdiction *sua sponte*.¹¹⁷

The court of appeals exhaustively reviewed *Morgan* and non-CAFA case law from the Third Circuit and the United States Supreme Court¹¹⁸ to reach two precepts that the court said were "crystal clear": (1) where a complaint limits damages to less than \$5 million, then the "defendant seeking removal must prove to a legal certainty that plaintiff can recover the jurisdictional amount;" and (2) where a complaint does not limit damages to less than \$5 million, then "the case must be remanded if it appears to a legal certainty that the plaintiff cannot recover the jurisdictional amount."¹¹⁹

The court of appeals read the Supreme Court decision in *Red Cab*¹²⁰ as holding that "when a case is brought in federal court, 'the sum claimed by the plaintiff controls if the claim is apparently made in good faith.' [And] . . . if 'from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed'" then the case will be dismissed.¹²¹ The court of appeals then turned to the Supreme Court's decision in *McNutt*,¹²² limiting its holding to apply only when the jurisdictional dispute about amount in controversy "surrounded factual matters." In *McNutt*, the Third Circuit observed that the complaint included no allegations about the amount and no evidence or findings addressed the issue.¹²³ In that context, the court could require proof by a preponderance of

113. *Id.*

114. *Id.* at 192.

115. *Id.* at 191.

116. *Id.* at 192.

117. *Id.*

118. *Frederico* relied on *Samuel-Bassett*. *Id.* at 193. (citing *Samuel-Bassett v. Kia Motors Am., Inc.*, 357 F.3d 392, 396 (3d Cir. 2004)). Additionally, *Frederico* discussed *Red Cab* and *McNutt* at length, stating that these decisions created the "template" for federal jurisdiction challenges. *Id.* at 193–94.

119. *Id.* at 197.

120. 303 U.S. 283 (1938). See *infra* note 254 and accompanying text for additional discussion.

121. *Frederico*, 507 F.3d at 194 (quoting *Red Cab*, 303 U.S. at 288).

122. 298 U.S. 178 (1936). See *infra* note 277 and accompanying text for additional discussion.

123. *Frederico*, 507 F.3d at 194.

the evidence.¹²⁴ When relevant facts were not in dispute, then there was no need to resort to *McNutt*.¹²⁵

Frederico concluded that the standard of proof is the same regardless of the scenario presented by plaintiff's complaint: The party asserting federal jurisdiction must show to a legal certainty that the amount in controversy exceeds the jurisdictional amount.¹²⁶ The court of appeals reasoned the legal-certainty standard is correct because the plaintiff is the master of the complaint, entitled to choose the preferred forum, and the defendant must overcome these presumptions.¹²⁷ Regarding the complaint in *Frederico*, the court of appeals held that jurisdiction was proper and proceeded to the merits of the appeal.¹²⁸

B. *Preponderance-of-the-Evidence Test*

Four circuits, the Fourth,¹²⁹ Sixth,¹³⁰ Eighth, and Eleventh¹³¹ have

124. *Id.* (citing *McNutt*, 298 U.S. at 189).

125. *Id.* (citing *Samuel-Bassett*, 357 F.3d at 397).

126. *Id.* at 196.

127. *Id.* at 193–96.

128. *Id.* at 199.

129. *Strawn v. AT&T Mobility, LLC*, 530 F.3d 293, 288–99 (4th Cir. 2008) (reversing district court decision to remand under CAFA, relying on allegations in notice of removal); *see Strawn v. AT&T Mobility, LLC*, 513 F. Supp.2d 599 (D.W. Va. 2007) (applying preponderance-of-the-evidence standard).

130. *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 403–04 (6th Cir. 2007) (affirming district court's decision to remand under CAFA, holding defendant failed to establish adequate amount in controversy by a preponderance of the evidence; state class action complaint limited amount of claims to "less than" \$4.9 million).

131. In *Lowery v. Ala. Power Co.*, 483 F.3d 1184 (11th Cir. 2007), *aff'g on other grounds Lowery v. Honeywell Intern, Inc.*, 460 F. Supp. 2d 1288 (N.D. Ala. 2006), the court of appeals first explained that in non-CAFA cases where the complaint demands unspecified damages, the removing party must show that the damages exceed the amount in controversy "by a preponderance of the evidence." *Id.* at 1208. The court also cited *Abrego* from the Ninth Circuit, which involved a complaint with unspecified damages; however, the court did not address the other two tests that the Ninth Circuit has adopted. *Id.* For a discussion of Ninth Circuit case law, see discussion *infra* Part III.D.

In *Lowery*, the plaintiffs' class action complaint did not allege specific monetary damages. *Lowery*, 460 F. Supp. 2d at 1291. The court of appeals applied the preponderance-of-the-evidence standard to CAFA removal based on circuit precedent because the complaint did not specify damages. *Lowery*, 483 F.3d at 1184, 1208–10. However, the court expressed concern that, without any factual allegations and no evidence to determine whether the amount in controversy exceeded the jurisdictional minimum, it could not "meaningfully apply" the preponderance-of-the-evidence standard. *Id.* at 1210–11. Indeed, the court said to do so would be "unabashed guesswork." *Id.* at 1211. Based on the record before it, the court of appeals affirmed

adopted or approved the preponderance-of-the-evidence standard to determine the amount in controversy in CAFA cases. These courts have required the removing defendant, the proponent of federal jurisdiction, to show that the amount in controversy more likely than not exceeds \$5 million. In effect, this standard mirrors the rule adopted in some circuits for non-CAFA cases that the party seeking federal jurisdiction must show that the amount in controversy exceeds the jurisdictional minimum.¹³²

In *Bell v. Hershey*, the Eighth Circuit analyzed a complaint that the district court had determined was “clearly designed” to prevent the defendant from satisfying the \$5 million amount in controversy element in CAFA.¹³³ In *Bell*, the plaintiff class filed suit against The Hershey Company and four other chocolate manufacturers in Iowa state court claiming that these manufacturers had conspired to fix prices, forcing plaintiffs to pay higher prices for chocolate than they would have otherwise paid.¹³⁴

The plaintiffs attempted to avoid removal, contending in the complaint that “[CAFA] does not apply and no federal court jurisdiction is available as a basis for removal.”¹³⁵ The complaint “limited” damages sought to \$3.75 million in compensatory damages and “no more than” \$1.24 million in attorneys’ fees, for a total of less than \$5 million.¹³⁶ The plaintiffs also attempted to limit the amount in controversy by controlling the class composition and the underlying allegation of price fixing. First, the plaintiffs limited the class to chocolate purchasers in eight specific Iowa counties, rather than the entire state.¹³⁷ Second, the plaintiffs assumed that the price fixing overcharge was 5%, despite other allegations in the complaint that higher price increases were in effect.¹³⁸ Finally, the plaintiffs limited the duration of the class period to six years.¹³⁹

Defendants filed a notice of removal and contended that if the court conformed the damages sought to the facts alleged in the com-

the district court’s order to remand to state court. *Id.* at 1221.

132. See, e.g., *Advance Am. Servicing of Ark., Inc. v. McGinnis*, 526 F.3d 1170, 1173 (8th Cir. 2008) (“A complaint will be dismissed for lack of subject matter jurisdiction if it appears to a legal certainty that the value of the claim is less than the required amount of \$75,000.”).

133. 557 F.3d 953 (8th Cir. 2009).

134. *Id.* at 954.

135. *Id.* at 955.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

plaint, then the complaint demonstrated an amount in controversy in excess of \$5 million.¹⁴⁰ For example, defendants claimed in its notice of removal that by increasing the assumed price-fixing percentage to 5.1% or 5.2%, which were facts alleged in the plaintiffs' petition, the amount in controversy increased to \$5.04 million.¹⁴¹ Defendants also contended that adding one month to the seventy-two-month class period, which was consistent with the allegations in the complaint, also established that the amount in controversy was greater than \$5.04 million.¹⁴²

The plaintiff filed a motion for remand.¹⁴³ The district court applied the legal-certainty test and found that the defendants had "failed to prove to a legal certainty that the amount in controversy exceeded the jurisdictional minimum."¹⁴⁴ Defendants appealed, and the court of appeals vacated because the district court applied the wrong test.¹⁴⁵

On appeal, plaintiffs argued—citing cases from the Ninth and Third circuits—that defendants should be required to prove to a legal certainty that the amount in controversy exceeds \$5 million.¹⁴⁶ The Eighth Circuit rejected the plaintiff's argument for several reasons. First, plaintiff's position was a departure from pre-CAFA Eighth Circuit opinions that had already adopted and applied the preponderance-of-the-evidence standard in removal cases.¹⁴⁷ The court saw no "logical" reason to "demand more from a CAFA defendant."¹⁴⁸

Second, the Eighth Circuit read *Red Cab* as imposing the legal-certainty test on the party trying to defeat federal jurisdiction.¹⁴⁹ The

140. *Id.*

141. *Id.* at 955–56.

142. *Id.* at 956.

143. *Id.*

144. *Id.*

145. *Id.* at 959.

146. *Id.* at 957 (citing *Lowdermilk v. U.S. Bank Nat'l Assoc.*, 479 F.3d 994, 1000 (9th Cir. 2007); *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006)).

147. *See, e.g.*, *Advance Am. Servicing of Ark., Inc. v. McGinnis*, 526 F.3d 1170, 1173 (8th Cir. 2008) (identifying the preponderance-of-the-evidence test as the correct standard of proof to determine whether the amount in controversy exceeds the jurisdictional minimum); *James Neff Kramper Family Farm P'ship v. IBP, Inc.*, 393 F.3d 828, 831 (8th Cir. 2005) (concluding that if facts are disputed, the court may require proof that the jurisdictional amount exceeds the statutory minimum by a preponderance of the evidence); *In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 834 (8th Cir. 2003) (holding that where the complaint is silent, the proponent of federal jurisdiction must show that the amount in controversy exceeds the statutory minimum by a preponderance of the evidence).

148. *Bell*, 557 F.3d at 957.

149. *Id.* at 957–58. On the one hand the Eighth Circuit elaborated that when

court therefore rejected the legal-certainty standard for a removed CAFA case because doing so would “invert[] the ‘legal certainty’ test of *St. Paul Mercury*, by placing such a burden on the party seeking to *assert* rather than *defeat* federal jurisdiction [and] places too high a barrier in the path of defendants.”¹⁵⁰ The court implied that this result conflicted with CAFA’s “primary purpose” of opening federal courts to corporate defendants.¹⁵¹

Third, the court of appeals recognized that using different standards of proof depending on how a complaint alleges damages may have “unintended consequences” by subjecting defendants in the same federal circuit to different standards of proof depending on the state court from which the case was removed.¹⁵² *Bell* presented a paradigm example of this “unintended consequence”: Iowa prohibits a plaintiff from making a specific demand for damages; Arkansas does not.¹⁵³ Thus, under the formulation described by the Ninth Circuit, cases removed from Iowa courts would be subject to the preponderance-of-the-evidence standard, while cases removed from Arkansas courts would be subject to either the legal-certainty or the preponderance-of-the-evidence standard, depending on what the plaintiff pleaded in the complaint.¹⁵⁴

With these concerns in mind, the Eighth Circuit articulated the standard of proof for defendants seeking removal to federal court in CAFA cases: “[A] party seeking to remove under CAFA must establish the amount in controversy by a preponderance of the evidence regardless of whether the complaint alleges an amount below the jurisdictional minimum.”¹⁵⁵ The Eighth Circuit also rejected the plaintiffs’ efforts to limit damages to an amount below the CAFA jurisdictional minimum. Because Iowa law forbids pleading a specific damages

plaintiff is the proponent of federal jurisdiction, the defendant must defeat by a legal certainty. *Id.* at 956. On the other hand, where the defendant removes, the defendant is the proponent of federal jurisdiction, and must establish amount in controversy by a preponderance of evidence, which plaintiff must defeat by a legal certainty. *Id.* 150. *Id.* at 957–58 (quoting *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 702 (9th Cir. 2007)) (emphasis in original).

151. *Id.* at 957.

152. *Id.* at 958.

153. *Id.*

154. *See id.*

155. *Id.* at 958. The Eighth Circuit discussed Ninth Circuit precedent in non-CAFA cases, specifically *Guglielmino*. *Id.* at 957–58 (citing *Guglielmino*, 506 F.3d at 696). The Eighth Circuit acknowledged that even if it adopted the Ninth Circuit’s three-pronged formulation, that the preponderance-of-the-evidence standard would apply anyway. *Id.* at 959.

amount in the complaint, “any attempt to do so is a legal nullity” and Bell’s petition is “construed” to be one “that does not plead a specific sum.”¹⁵⁶ The Eighth Circuit remanded the issue to the district court with instructions to apply the preponderance-of-the-evidence standard.¹⁵⁷

Other circuits, including the Sixth¹⁵⁸ and Eleventh, also use the preponderance-of-the-evidence standard to test the amount in controversy in cases removed under CAFA.¹⁵⁹ In *Miedema v. Maytag*,¹⁶⁰ the Eleventh Circuit applied the preponderance-of-the-evidence standard to a complaint that did not specify damages.¹⁶¹ The plaintiff consumer class sued Maytag in Florida state court alleging that the defendant’s oven contained a defective door latch that permitted heat to escape and damaged other parts of the oven.¹⁶² The complaint defined the class as “all purchasers of Maytag ranges/ovens, in the State of Florida.”¹⁶³ Maytag filed a notice of removal and an affidavit in support, which attested that 6729 ovens had been sold in Florida, the total value of those ovens was approximately \$5.9 million, the amount in controversy exceeded \$5 million, and, therefore, federal jurisdiction was proper under CAFA.¹⁶⁴ The plaintiffs sought remand, arguing that Maytag’s assessment of the number of ovens may have included ovens without the defective latch, and that the “total value”

156. *Id.* at 958. The court of appeals added that Bell could have presented a “binding stipulation” on damages but “it is too late to do so now.” *Id.* The court rejected the *ad damnum* clause as the equivalent, citing precedent. *Id.* at 958–59.

157. *Id.* at 959.

158. See *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 403 (6th Cir. 2007) (holding defendant that removed under CAFA failed to demonstrate the required amount in controversy by preponderance of evidence), discussed *infra* notes 172–180.

159. The Fourth Circuit also appears to have approved the preponderance-of-the-evidence standard. In *Strawn*, the court of appeals reversed the district court’s decision to remand a case back to state court after it determined that AT&T met the amount in controversy requirements. *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 299 (4th Cir. 2008). While the court of appeals did not specifically address the standard of proof under CAFA, the district court had applied the preponderance-of-the-evidence test. *Id.*; *Strawn v. AT&T Mobility LLC*, 513 F. Supp. 2d 599, 604 (S.D.W.Va. 2007). See also *Bartnikowski v. NVR, Inc.*, 307 Fed. App’x 730, 734 (4th Cir. 2009) (where damages were unspecified, “both parties agree that the defendant’s burden in these circumstances is to establish the jurisdictional amount by a preponderance of the evidence.”).

160. 450 F.3d 1322 (11th Cir. 2006).

161. *Id.* at 1325, 1330.

162. *Id.* at 1324.

163. *Id.* at 1325.

164. *Id.*

had no real meaning.¹⁶⁵ The district court granted plaintiffs' motion to remand after it found that Maytag failed to meet its burden that the amount in controversy exceeded \$5 million.¹⁶⁶

On appeal, the court of appeals affirmed the district court, determining that the district court had applied the following rule: "[w]here . . . the plaintiff has not pled a specific amount of damages, the removing defendant must prove by a *preponderance of the evidence* that the amount in controversy exceeds the jurisdictional requirement."¹⁶⁷ The court of appeals explained that determining whether the preponderance-of-the-evidence test is met requires the court to first consider the plaintiffs' complaint to determine whether, on its face, the amount in controversy exceeds the jurisdictional amount.¹⁶⁸ If the complaint does not establish the jurisdictional amount, then the court looks to the notice of removal.¹⁶⁹ Finally, the court "may require evidence relevant to the amount in controversy at the time the case was removed."¹⁷⁰ After the district court examined Maytag's evidence, the court correctly concluded that "great uncertainty" remained about the amount in controversy; therefore, Maytag failed to meet its burden on removal.¹⁷¹

The Sixth Circuit has also adopted the preponderance-of-the-evidence standard in CAFA cases, and applied this standard to a plaintiff's complaint that limited damages below the \$5 million threshold under CAFA.¹⁷² In *Smith v. Nationwide Property and Casualty Insurance Co.*,¹⁷³ the plaintiffs sued Nationwide in Tennessee state court, claiming that Nationwide did not restore plaintiffs' damaged vehicles to their "prior appearance, function and value" under the terms of a set-

165. *Id.*

166. *Id.* Maytag argued that the district court erroneously applied a "certainty" standard, but the Eleventh Circuit rejected this characterization of the district court's decision. *Id.* at 1330.

167. *Id.* at 1330 (quoting *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001) (a pre-CAFA case)).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 1332.

172. *See Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 403 (6th Cir. 2007). Note that in the Eighth Circuit, the court would apply the preponderance-of-the-evidence test in all cases, and in the Eleventh Circuit, the court would apply the preponderance-of-the-evidence test where the damages were unspecified. But the Eleventh Circuit has not yet held whether it will follow the Ninth Circuit, which applies the legal-certainty test to complaints with specific damage allegations.

173. *Id.*

tlement agreement.¹⁷⁴ Plaintiffs' complaint specifically limited damages to \$74,999 for each individual class member and \$4,999,999 for the class as a whole; plaintiffs specifically disclaimed punitive damages.¹⁷⁵ Nationwide filed a notice of removal contending that compensatory damages would be at least \$3.25 million, and that even a modest punitive damage award pushed the amount in controversy over \$5 million.¹⁷⁶ The plaintiffs moved for remand, and the district court granted the plaintiffs' motion.¹⁷⁷

The Sixth Circuit affirmed the district court's decision, focusing on two issues. First, the court of appeals held that a disclaimer that limited damages in a complaint "does not preclude a defendant from removing the matter to federal court upon a demonstration that damages are 'more likely than not' to 'meet the amount in controversy requirement.'" ¹⁷⁸ Thus, the plaintiffs' attempt to limit damages would not affect the burden on the defendant to show that removal was proper. Second, the court held that because plaintiffs' claims were limited to breach of contract, Nationwide could not argue that punitive damages were at issue and should be included in the amount in controversy.¹⁷⁹ Punitive damages were not pled in the complaint and normally were unavailable with contract claims.¹⁸⁰

C. Reasonable-Probability Test

The First,¹⁸¹ Second,¹⁸² and Seventh Circuits have applied the "reasonable-probability" standard to determine whether a removing defendant has shown that the \$5 million amount in controversy re-

174. *Id.*

175. *Id.*

176. *Id.* at 404.

177. *Id.*

178. *Id.* at 407.

179. *Id.* at 408.

180. *Id.*

181. *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 48 (1st Cir. 2009) (holding "reasonable probability" is a standard defendant must meet when removing under CAFA; affirming decision to remove to state court); *see also DiTolla v. Doral Dental IPA of New York*, 469 F.3d 271, 277 (2nd Cir. 2006) (affirming remand to state court after CAFA removal; no amount in controversy alleged in complaint, held, defendant failed to demonstrate required amount in controversy).

182. Without explanation, the Second Circuit held that the proponent of federal jurisdiction under CAFA must show that the amount in controversy exceeds \$5 million to a "reasonable probability." *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2nd Cir. 2006). *Blockbuster* relied on *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 216 F.3d 291, 296 (2nd Cir. 2000), a pre-CAFA putative class action case that applied the "reasonable probability" test.

quirement is met under CAFA. The reasonable-probability test requires the removing litigant to show what is at stake in the litigation, considering both “what the stakes of the litigation *could be*” and what the stakes of the litigation “*are* given the plaintiff’s actual demands.”¹⁸³ In other words, the removing defendant must “sufficiently demonstrate” that the amount in controversy is greater than CAFA’s jurisdictional minimum.¹⁸⁴ The Seventh Circuit was the first to adopt this standard, eight months after Congress enacted CAFA.¹⁸⁵

In *Brill v. Countrywide Home Loans*,¹⁸⁶ the plaintiff class filed suit against Countrywide in Illinois state court alleging that Countrywide had violated the Telephone Consumer Protection Act (TCPA), which prohibits sending “junk” advertising faxes.¹⁸⁷ The complaint did not allege an amount of damages sought, nor did it limit damages.¹⁸⁸ Countrywide filed a notice of removal under CAFA, contending that the amount in controversy exceeded \$5 million because Countrywide had sent “at least 3,800 advertising faxes.”¹⁸⁹ Under the TCPA, Countrywide argued it could be liable for \$500 per fax, which could be trebled if Countrywide acted willfully or knowingly, for a total of \$5.7 million in controversy.¹⁹⁰ The district court remanded the case to state court however, after determining that Countrywide had not shown the amount in controversy exceeded \$5 million (because the plaintiff class might not be able to prove willfulness).¹⁹¹

Relying on circuit precedent, the Seventh Circuit addressed the standard of proof to demonstrate the amount in controversy in CAFA cases and held that the removing defendant must show by a reasonable probability that the amount in controversy exceeds \$5 million.¹⁹² The problem, according to the Seventh Circuit, is that the “defendant can’t make the plaintiff’s claim for him;” thus, the defendant need only show by a reasonable probability that the amount in controversy

183. *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005).

184. *Amoche*, 556 F.3d at 50 (citing *Blockbuster*, 472 F.3d at 58; *Brill*, 427 F.3d at 449).

185. *See id.*

186. 427 F.3d 446 (7th Cir. 2005).

187. *Id.* at 447.

188. *Id.* at 447, 449.

189. *Id.* at 447.

190. *Id.*

191. *Id.* The court of appeals also considered whether the TCPA provided for exclusive jurisdiction in the state courts and decided that it did not. *Id.*

192. *Id.* at 449 (citing *Smith v. Am. Gen. Life & Acc. Ins. Co.*, 337 F.3d 888, 892 (7th Cir. 2003)).

exceeds \$5 million.¹⁹³ The court of appeals reversed the district court's decision, reasoning that Countrywide was not required to show what Brill *would* recover, only what was "in controversy."¹⁹⁴ Because Countrywide had essentially admitted that 3800 faxes were sent, and because Brill's complaint requested treble damages for willfulness, the recovery of more than \$5 million was not "legally impossible," according to the court of appeals, leading to reversal of the district court's decision.¹⁹⁵

The First Circuit joined the Second and Seventh circuits in adopting the reasonable-probability test.¹⁹⁶ In *Amoche v. Guarantee Trust Life Insurance Co.*, the plaintiff class sued, in New Hampshire State Court, an insurance company for a refund of the unearned portion of premiums paid for life insurance policies obtained as part of a vehicle financing.¹⁹⁷ The amended complaint also sought damages of "over a million dollars in unearned premiums."¹⁹⁸ The plaintiffs won their motion for partial summary judgment on liability, and attempted to amend their complaint to expand the class of plaintiffs to include from ten to twenty states.¹⁹⁹ While the plaintiffs' motion was under consideration, Guarantee Trust filed its notice of removal under CAFA, contending that, since "hundreds of thousands" of policies were at issue and the class would likely exceed 25,000 members, the amount in controversy would exceed \$5 million.²⁰⁰ The plaintiffs filed a motion for remand,²⁰¹ which the district court granted, based on its critical review of the defendants' allegations of the amount in controversy.²⁰²

193. *Id.*

194. *Id.* at 448.

195. *Id.*

196. *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 48–49 (1st Cir. 2009) (citing *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006); *Brill*, 427 F.3d at 449).

197. 556 F.3d at 43.

198. *Id.* at 45.

199. *Id.* at 44.

200. *Id.* at 45.

201. *Id.* After the briefing on the remand motion was complete, plaintiffs attempted to reduce the class to thirteen states. *Id.* at 46. The defendants argued that the district court could not consider post-removal events. *Id.*

202. *Id.* at 47. The district court found that Guarantee Trust's calculations were not apparent from the face of the complaint, i.e., a simple estimation of the number of plaintiffs and multiplication by the "expected" damages of \$200.00 was insufficient. *Id.* Additionally, Guarantee Trust's estimate of refunds paid in New Hampshire included refunds paid by other lenders, not just Guarantee Trust, and this estimate was unreliable for determining class-wide damages. *Id.*

On appeal, Guarantee Trust contended that the court of appeals should not adopt the reasonable-probability standard because the analysis is “too rigorous.”²⁰³ Rather, Guarantee Trust argued that it should be required to show merely that “it is not a legal certainty that the amount in controversy is less than the jurisdictional minimum,” which “mirrors the burden” plaintiffs would have if they had initially filed in federal court.²⁰⁴ The court of appeals rejected Guarantee Trust’s argument and affirmed the district court.²⁰⁵ Nothing in CAFA showed that Congress intended to put plaintiffs and defendants in the same position when seeking federal jurisdiction.²⁰⁶ And Guarantee Trust’s argument conflicted with the principle that plaintiffs are given deference in their choice of forum.²⁰⁷

Instead, the First Circuit adopted the reasonable-probability standard.²⁰⁸ The reasonable-probability standard does not require burden-shifting and avoids mini-trials on the amount in controversy; preliminary issues should not result in “extensive and time consuming litigation over the question of the amount in controversy in CAFA removal cases.”²⁰⁹ In addition, the reasonable-probability standard does not permit plaintiffs to simply discredit the defense allegations, but permits the court to consider facts or evidence provided by both parties and evaluate both parties’ showings.²¹⁰ Analysis of what both parties have shown is critical because defendants have more knowledge of their conduct but plaintiffs have more knowledge of their injuries.²¹¹ Finally, the amount in controversy should be judged at the time of removal, and events subsequent to removal that reduce ultimate recovery to less than the jurisdictional minimum would not divest the federal court of jurisdiction.²¹² The ultimate question in removal cases is what amount is “in controversy,” not what the plaintiff is likely to recover.²¹³ After reviewing the record, the First Circuit affirmed the

203. *Id.* at 49.

204. *Id.*

205. *Id.* at 53.

206. *Id.*

207. *Id.* at 49.

208. *Id.* at 50 (citing *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005)).

209. *Id.* at 50 (citing *Spielman v. Genzyme Corp.*, 251 F.3d 1, 4 (1st Cir. 2001)).

210. *Id.* at 51.

211. *Id.* (citing *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 n.3 (11th Cir. 2006)).

212. *Id.* (citing *Coventry Sewage Assocs. v. Dworkin Realty Co.*, 71 F.3d 1, 6 (1st Cir. 1995)).

213. *Id.*

decision to remand to state court.²¹⁴

Interestingly, both the First and Seventh Circuits have suggested that the reasonable-probability test is similar if not identical to the preponderance-of-the-evidence test. In *Meridian Security Insurance Co. v. Sadowski*, the Seventh Circuit decided a non-CAFA removal case and reevaluated the reasonable-probability standard of proof that it had announced in *Brill* and other cases.²¹⁵ *Meridian* traced the Seventh Circuit's adoption of the "reasonable-probability" test to the United States Supreme Court decision in *Shaw v. Dow Brands, Inc.*²¹⁶ and then reviewed the Seventh Circuit's removal case law.²¹⁷ *Meridian* commented on the confusion in circuit court decisions created by the "legal-certainty" language from *Red Cab*.²¹⁸ Ultimately, *Meridian* held that the "proponent of federal jurisdiction must, if material factual allegations are contested, prove those jurisdictional facts by a preponderance of the evidence."²¹⁹ *Meridian* contended that the reasonable-probability test overlaps substantially, if not fully, with the preponderance-of-the-evidence test.²²⁰ But also *Meridian* "banished" reasonable probability "from our lexicon" because it has "no provenance and no following outside this circuit."²²¹

The First Circuit in *Amoche* also stated that the reasonable-probability standard was "for all practical purposes identical" to the preponderance-of-the-evidence test already adopted by several circuits.²²² *Amoche* explained that it preferred the "reasonable probability" language because of the stage at which removal occurs.²²³ A notice of removal is usually filed in the early stages of the litigation where little evidence of damages is available.²²⁴ The preponderance-of-the-evidence standard is generally reserved for resolving ultimate evidentiary disputes, not preliminary jurisdictional questions.²²⁵

214. *Id.* at 53.

215. 441 F.3d 536, 541 (7th Cir. 2006).

216. 994 F.2d 364 (7th Cir. 1993).

217. *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 541–42 (7th Cir. 2006).

218. *Id.* at 542–43 (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288–89 (1938)).

219. *Id.* at 543.

220. *Id.* at 542.

221. *Id.* at 543.

222. *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 50 (1st Cir. 2009) (citing *Meridian*, 441 F.3d at 543).

223. *Id.*

224. *Id.*

225. *Id.*

D. *Combination of the Various Standards*

The Ninth Circuit uses a combination of the legal-certainty and preponderance-of-the-evidence-tests; which test applies turns on plaintiff's allegations in the complaint. The legal-certainty test applies when the plaintiff alleges damages greater than the jurisdictional minimum or specifically limits damages to less than \$5 million.²²⁶ The preponderance-of-the-evidence test applies when the plaintiff does not identify an amount in controversy or make a specific demand for damages.²²⁷

In *Lowdermilk v. U.S. Bank*, the plaintiff employee class sued in Oregon state court, claiming that the bank's practice of rounding hours worked to the nearest tenth of an hour caused plaintiffs to be under-paid.²²⁸ The class sought unpaid wages, damages for failure to timely pay wages, penalty wages, and costs.²²⁹ The complaint did not attempt to limit the amount of damages sought through specific class definitions. Rather, in the jurisdiction section, the complaint alleged that "[t]he aggregate total of the claims pled herein [does] not exceed five million dollars," and, in the demand for relief, plaintiffs alleged that the sum was "in total, less than five million dollars."²³⁰ After defendant removed under CAFA, the district court remanded, reasoning it was bound by the complaint as to the amount in controversy and defendant had not shown bad faith.²³¹

Relying on two principles, the Ninth Circuit affirmed the district court after applying the "legal-certainty" test because the plaintiffs had specifically limited damages to less than \$5 million in the complaint.²³² First, the court emphasized that federal courts only have li-

226. *Lowdermilk v. U.S. Bank Nat'l Ass'n* 479 F.3d 994, 998 (9th Cir. 2007).

227. *Id.* at 999.

228. *Id.* at 996.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 999. The dissent in *Lowdermilk* read the complaint as stating an unspecified amount of damages. *Id.* at 1004 (Kleinfeld, J., dissenting). While the prayer for relief stated that compensatory damages were limited to less than \$5 million, *Lowdermilk* also asked for attorneys' fees, which were available by statute for her unpaid wage claims. *Id.* The dissent noted that, when attorneys' fees are available by statute, the amount in controversy calculation must include the attorneys' fees in the analysis. *Id.* In this case, it meant that *Lowdermilk's* complaint should be read as containing an unspecified amount of damages and that, for example, she could recover \$4,999,999.00 in compensatory damages, and an unknown amount in attorneys' fees, pushing her complaint over the jurisdictional amount. *Id.* The dissent would have remanded the case for consideration under the less stringent preponderance-of-the-evidence-standard. *Id.* at 1005.

mitted jurisdiction, which is “strictly construed.”²³³ Second, the legal-certainty test protected the plaintiffs’ choice of forum as the master of the complaint by making it more difficult for defendants to remove cases; this protection was warranted because plaintiffs had specifically opted for a state-court forum by suing for less than the law allowed, provided plaintiffs act in good faith.²³⁴ Consequently, where plaintiffs have in good faith alleged damages below the jurisdictional amount, a defendant who seeks removal under CAFA must (1) “overcome the presumption against federal jurisdiction” and (2) “contradict the plaintiff’s own assessment of damages.”²³⁵ These principles, the court of appeals concluded, were advanced by the legal-certainty test.²³⁶

In contrast, the court of appeals noted that the preponderance-of-the-evidence test applied where plaintiff failed to plead a specific amount of damages and defendant removed.²³⁷ However, where the complaint filed in state court alleged an amount in excess of the federal jurisdiction requirement, then removal is allowed unless it appears to a legal certainty that the amount is less.²³⁸ Thus, the Ninth Circuit embraces both the preponderance-of-the-evidence and the legal-certainty tests, depending on allegations in the plaintiff’s complaint. The court of appeals acknowledged however, that the potential exists for “manipulation of the jurisdiction rules by plaintiffs.”²³⁹ Because CAFA eliminated the one-year limit on removal, the court concluded the legal-certainty test strikes a balance, “leaving plaintiff as master of her case, but giving defendants an option of a federal forum.”²⁴⁰

233. *Id.* at 998 (majority opinion).

234. *Id.* at 998–99 (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288–89 (1938)).

235. *Id.* at 999.

236. *Id.*

237. *Id.* at 998. *Lowdermilk* relies on a discussion in another CAFA case, *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 683 (9th Cir. 2006) (per curiam), as well as a non-CAFA case, *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The *Abrego* discussion is helpful, but the decision focused on other aspects of CAFA jurisdiction and did not resolve the standard of proof for the amount in controversy. 443 F.3d at 683 n.8 (“As we are not presented with the question of the appropriate standard in such a case, we reach no resolution here.”).

238. *Lowdermilk*, 479 F.3d at 998.

239. *Id.* at 1002.

240. *Id.*

IV. THE PROPER STANDARD SHOULD BUILD ON SUPREME COURT PRECEDENT BUT HOLD THAT REMOVING DEFENDANT MUST PROVE THE AMOUNT IN CONTROVERSY MEETS JURISDICTIONAL REQUIREMENTS BY PREPONDERANCE OF THE EVIDENCE

Courts must strike a careful balance in construing federal jurisdiction statutes, like CAFA, to ensure that a neutral forum is available for parties of diverse citizenship but prevent federal courts from being flooded with unimportant cases.²⁴¹ Traditionally, removal statutes are strictly construed.²⁴² The rules of statutory construction require that courts adhere to the text of CAFA in light of Congress's intent; in other words, courts should strictly construe the statute yet stop the erosion of federal jurisdiction over class actions consistent with the provisions in CAFA.²⁴³

A textual or strict construction of CAFA still leaves some open questions, which courts have struggled to address. Looking at Congress's intent is therefore important to answer these outstanding questions. Congress intended that CAFA would expand federal jurisdiction over some class actions by making removal easier for

241. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005) (holding Congress granted diversity jurisdiction “[i]n order to provide a neutral forum” and adopted amount in controversy requirements “[t]o ensure that diversity jurisdiction does not flood the federal courts with minor disputes”). For legal authorities discussing the need for courts to strike a balance, see, e.g., *Smithers v. Smith*, 204 U.S. 632, 645 (1907) (federal court authority to dismiss action is “obviously not unlimited” given jurisdiction is summarily decided without trial); *Deutsch v. Hewes St. Realty Corp.*, 359 F.2d 96, 98–99 (2d Cir. 1966) (noting difficulties arise in developing “clear and just” rules to determine amount in controversy because “major considerations tug in precisely opposite directions.”); WRIGHT, *supra* note 85, at 16–17.

242. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (“[T]he policy of successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [reversal statutes].”). See also *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328–29 (11th Cir. 2006) (citing caselaw supporting the proposition that [t]he rule of construing removal statutes strictly and resolving doubts in favor of remand . . . is well-established.”).

243. The rules of statutory construction are thoroughly discussed in *Allapattah*, 545 U.S. at 558:

We must not give jurisdictional statutes a more expansive interpretation than their text warrants, but it is just as important not to adopt an artificial construction that is narrower than the text provides. . . . [W]e must examine the statute's text in light of context, structure, and related statutory provisions.

(citation omitted)). Congress's concern about the erosion of federal jurisdiction over class actions is evident in CAFA. See discussion *supra* notes 6–9 and accompanying text.

defendants,²⁴⁴ yet it modified only some of the rules and remained silent on others.²⁴⁵ CAFA expressly abrogated the complete diversity rule, allowed any defendant to remove without the consent of other defendants, eliminated the one-year deadline for removal, and made interlocutory review readily available.²⁴⁶ Yet of the amount in controversy, CAFA said both something and nothing. To qualify for CAFA removal, the amount in controversy must exceed \$5 million when all plaintiffs' claims are aggregated.²⁴⁷ By what standard of proof the amount must be proven was left to federal case law.²⁴⁸

Whether CAFA altered the standard to prove the amount in controversy is a good question. Congress has the authority to change and expand federal jurisdiction, and Congress has previously regulated federal jurisdiction by authorizing and controlling the amount in controversy.²⁴⁹ By enacting CAFA, Congress was similarly expanding federal jurisdiction to class action cases by relaxing the standards to obtain removal from state court. Attention has naturally focused on the

244. *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 47–48 (1st Cir. 2009) (“CAFA also made a federal forum more accessible to removing defendants by imposing only a minimal diversity requirement, eliminating the statutory one-year time limit for removal, and providing for interlocutory appeal of a federal district court’s remand order.”); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 56 (2d Cir. 2006) (“Congress enacted CAFA with the purpose of, inter alia, expanding the availability of diversity jurisdiction for class action lawsuits.”).

245. *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 297 (4th Cir. 2008) (“While CAFA expressly altered certain requirements for asserting diversity jurisdiction and removing class actions, it did not reverse the established principles for alleging and demonstrating jurisdiction on removal.”).

246. See discussion *supra* notes 43–53 and accompanying text.

247. See discussion *supra* note 43 and accompanying text.

248. Federal case law developed more rapidly than is probably usual because CAFA liberalized interlocutory appeal procedures. See discussion *supra* notes 50–53 and accompanying text. See also *Strawn*, 530 F.3d at 297 (noting that Congress passed CAFA with knowledge of interpretation courts have given federal jurisdiction).

249. As the Supreme Court stated again recently, “In *Finley* we emphasized that ‘[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress.’” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 557 (2005) (quoting *Finley v. United States*, 490 U.S. 545, 556 (1989)). In the same decision, the Court noted that Congress has altered the amount in controversy as it has seen fit in part because that is not a constitutional element of federal jurisdiction. *Id.* at 554. See also *id.* at 562 (noting amount in controversy is a statutory prerequisite which the courts construe claim by claim also observing it has “no inherent logical connection” to diversity). Congress has chosen to require and then not require an amount in controversy as well as changed the amount required. See generally *id.* at 562 (discussing that federal-question jurisdiction formerly had an amount-in-controversy requirement and holding that § 1367(a) unambiguously overruled the Court’s prior analysis about amount in controversy for supplemental federal jurisdiction).

amount in controversy—a key component of the removal analysis. Five years after CAFA was enacted, federal case law provides a variety of answers to the question posed above: did the standard to prove the amount in controversy change under CAFA?²⁵⁰

Choosing the correct answer is largely dictated by Supreme Court precedent and federal court of appeals decisions that were handed down pre-CAFA and which addressed the standard of proof for the amount in controversy. Federal case law on a related CAFA question informs this analysis. Every court of appeals to consider which party bears the burden of proving the amount in controversy under CAFA has logically concluded that the burden must be on the party asserting federal jurisdiction.²⁵¹ That has always been the rule; Congress is deemed to have known the existing rule of law, and CAFA did not expressly change the rule.²⁵² Yet this parallel only goes so far. The standard of proof does not benefit from the same clear pre-existing rule; in fact, there has always been some controversy about how to apply *Red Cab* and *McNutt* in different removal scenarios even before CAFA,²⁵³ which has only intensified the search for consistency in CAFA cases.²⁵⁴

250. See cases discussed *supra* Part III.

251. See cases cited *supra* notes 21 & 59.

252. See cases cited *supra* notes 61–65 and accompanying text. Also see the analysis of CAFA's legislative history in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447–49 (7th Cir. 2005):

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. . . . To change [the burden of proof for the amount in controversy], Congress must enact a statute with the President's signature (or by a two-thirds majority to override a veto).

See also *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) ("In the absence of a clear textual directive to alter such a long established principle of federal jurisdiction, we decline to do so."); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1329 (11th Cir. 2006) (holding CAFA's silence suggests burden of proof remains unchanged).

253. See discussion *supra* notes 94–100 and accompanying text. See, e.g., *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 539–41 (7th Cir. 2006) (discussing *McNutt* and *Red Cab* in non-CAFA class action, applying preponderance-of-the-evidence as correct test).

254. For example, the Third Circuit's discussion of *Red Cab* and *McNutt* is nothing less than intense. See *Frederico v. Home Depot*, 507 F.3d 188, 193–95 (3rd Cir. 2007). Much, if not most, of the CAFA case law that has considered the correct standard of proof for the amount in controversy has cited *Red Cab* and *McNutt*. See, e.g., *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009) (citing *Red Cab*); *Brill*, 427 F.3d at 448 (citing *Red Cab*); *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 50 (1st Cir.

The lack of a uniform rule among the federal courts of appeal on the standard of proof is problematic, especially under CAFA.²⁵⁵ Non-uniformity allows plaintiffs to manipulate federal jurisdiction by choosing a forum with favorable analysis.²⁵⁶ To some extent, the Federal Judicial Center statistics on the filing of class actions since CAFA suggest this may be happening.²⁵⁷ Significantly more plaintiffs are actually choosing to file class actions in federal court and fewer removals are happening now than when CAFA was first enacted.²⁵⁸ This manipulation is exactly what Congress intended to prevent by enacting CAFA.

Because the legal-certainty test from *Red Cab* is “the universal test” to ascertain whether the amount in controversy has been established,²⁵⁹ it obviously plays a role under CAFA. The legal-certainty test will apply where plaintiffs file an original class action in federal court and assert an amount in controversy over \$5 million.²⁶⁰ If the defendant seeks remand to state court, it must prove to a legal certainty that plaintiffs’ claim does not exceed \$5 million.²⁶¹ Similarly, where plaintiffs file a similar class action complaint alleging damages exceeding \$5 million in state court and the defendant removes it, the notice of removal may rely on the damages alleged in the complaint.²⁶² The plaintiffs could in turn seek remand to state court and the legal-

2009) (citing *McNutt*); *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 999 (9th Cir. 2007) (citing *Red Cab*); *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1209–10 (11th Cir. 2007) (citing *McNutt*).

255. *Miedema*, 450 F.3d at 1330 n.8 (observing that federal courts should not be left with “lingering doubts” about subject matter jurisdiction, particularly under CAFA which favors a “swift resolution” of jurisdictional disputes).

256. This is essentially the point made in the Senate Report issued in support of CAFA’s adoption. S. REP. NO. 109-14, at 1–2, *reprinted in* 2005 U.S.C.C.A.N. 3–5 (act first considered by 105th Congress). Prior to CAFA, plaintiffs manipulated federal jurisdiction by adding parties to destroy diversity or by eliminating parties with claims under the jurisdictional amount. *See supra* note 36 and accompanying text. Post-CAFA, plaintiffs may manipulate federal jurisdiction by tailoring the complaint’s allegations to reduce the chances of removal depending on what standard of proof has been adopted by the forum in which they file.

257. *See* FED. JUDICIAL CTR. REPORT, *supra* note 13, at app. B, fig. 4. Two of the three federal circuits that have experienced an increase in original CAFA filings are the Third and Ninth Circuit Courts of Appeal. *Id.* Both of these circuits apply the legal-certainty test to determine the amount in controversy in a manner that is arguably more favorable to plaintiffs who seek to ensure federal jurisdiction. *See* discussion *supra* Part III.A.

258. *See* discussion *supra* notes 13–17 and accompanying text.

259. *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 291 (1938).

260. *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009).

261. *Id.*

262. *Id.*

certainty test would apply to that challenge.²⁶³

This application of *Red Cab* is true to the Supreme Court's analysis because in that case the complaint filed in state court alleged an amount in controversy sufficient for federal jurisdiction, but after the defendant removed, the plaintiff sought to lower the amount in controversy by attaching evidence of the actual damages to the amended complaint.²⁶⁴ The Supreme Court applied the legal-certainty test and upheld the removal to federal court because the plaintiff is master of the complaint—which alleged the requisite amount in controversy.²⁶⁵ But the Court rejected amendments to the complaint and held that actual damages did not affect the amount in controversy because federal jurisdiction does not depend upon the actual amount recovered.²⁶⁶

Red Cab has its limits when applied to CAFA cases. The federal rules now allow for the liberal amendment of the complaint, especially before an answer is filed, which is often the time for CAFA removal.²⁶⁷ The federal rules had not been adopted when the complaint in *Red Cab* was filed and amendment was not previously granted liberally.²⁶⁸ Also, *Red Cab* gave great deference to the plaintiff's allegations about the amount in controversy based on the Court's conclusion that collusion was unlikely between plaintiff and defendant to achieve federal jurisdiction.²⁶⁹ Collusion may remain unlikely today, but Con-

263. *Lowdermilk v. U.S. Bank Nat'l Assoc.*, 479 F.3d 994, 999 (9th Cir. 2007) (noting legal-certainty standard when applied to party challenging federal jurisdiction "maintains symmetry"); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005) (holding that the legal-certainty standard from *Red Cab* "applies to removed cases no less than to those filed initially in federal court").

264. *Red Cab*, 303 U.S. at 285.

265. *Id.* at 290 (reasoning that plaintiff chooses his forum but is subject to challenge by defense removal); see also *id.* at 294 (explaining in *dicta* that plaintiff may "resort to the expedient of suing for less than the jurisdictional amount" and less than he is entitled, in which case, "the defendant cannot remove").

266. *Id.* at 292–93 (holding that where plaintiff after removal "by stipulation, by affidavit, or by amendment of his pleadings" reduces the claim to less than the jurisdictional amount, the district court does not lose jurisdiction because these are events subsequent to removal which do not "oust" jurisdiction "once it has attached"). See also *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 51 (1st Cir. 2009) (holding the same).

267. FED. R. CIV. P. 15(a) (allowing amendments before trial once "as a matter of course" before being served with responsive pleading or within twenty days after serving pleading if no responsive pleading is allowed; with other amendments, "court should freely give leave when justice so requires").

268. See FED. R. CIV. P. 15 advisory committee's note to 1937 adoption, subdiv. b ("Compare [former] Equity Rule 19 (Amendments Generally) and code provisions which allow an amendment "at any time in furtherance of justice . . .").

269. *Red Cab*, 303 U.S. at 290–91 (holding that "[t]here is a strong presumption

gress has found significant manipulation of federal jurisdiction by various pleading devices.²⁷⁰

Where the plaintiff files in state court and alleges less than \$5 million, it makes little sense to apply the legal-certainty test, as the Third Circuit does.²⁷¹ Requiring a removing defendant to prove the amount in controversy by a legal certainty is an inversion of *Red Cab*, as the Eighth Circuit's decision noted.²⁷² The legal-certainty test is applied to defeat federal jurisdiction, not establish it.²⁷³ Also, any limitations on damages that the plaintiff inserts in the *ad damnum* clause are alone insufficient to defeat jurisdiction; these limitations do not bind plaintiffs in many jurisdictions and are prohibited in others, leading to non-uniform results within the same federal circuit depending on the state court of origin.²⁷⁴ In any event, these limitations are generally motivated by manipulation of federal jurisdiction, which CAFA seeks to curtail.

Where the plaintiff files in state court and alleges less than \$5 million in controversy, the three-pronged approach adopted by the Ninth Circuit for CAFA removal poses problems. First, which prong applies turns on what the plaintiff has alleged and, therefore, necessarily is susceptible to manipulation.²⁷⁵ This is unfair to defendants who are always somewhat at a disadvantage in establishing the amount in controversy for removal (the amount of damages is plaintiff's claim to make in the first instance).²⁷⁶ By linking the standard of proof re-

that the plaintiff has not claimed a large amount in order to confer federal jurisdiction" in a case originally filed in state court because "[i]t is highly unlikely that the parties would pursue this roundabout and troublesome method").

270. See *supra* note 36 and accompanying text.

271. See *supra* Part III.A.

272. *Bell v. Hershey Co.*, 557 F.3d 953, 957–58 (8th Cir. 2009).

273. *Id.*

274. *Id.* at 958; *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 407 (6th Cir. 2007) (holding that a disclaimer in a complaint does not preclude a defendant from removing to federal court upon proof that damages are likely to meet the jurisdictional amount but is sufficient absent proof offered by defendant). See FED. R. CIV. P. 54(c) (providing that "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings"); see also WRIGHT, *supra* note 85, at 51.

275. *Bell*, 557 F.3d at 958. The Ninth Circuit commented that "the potential for manipulation" exists and "gamesmanship is possible under our rules," but would be in bad faith. *Lowdermilk v. U.S. Bank Nat'l Assoc.*, 479 F.3d 994, 1002 (9th Cir. 2007). The court added, however, that when plaintiffs are uncertain about damages, they are not "obligated to overstate their damages to satisfy the defendant's interest in a federal forum, but may plead conservatively to secure a state forum." *Id.* at 1003.

276. *Lowdermilk*, 479 F.3d at 999 n.5 (noting the "irony" of a plaintiff diminishing damages and a defendant augmenting damages); *Brill v. Countrywide Home Loans*,

quired to establish the amount in controversy for removal, the three-pronged approach heightens the disadvantage to the defense. Ultimately, the application of the legal-certainty test in some cases, and the preponderance-of-the-evidence test in other cases, may encourage forum shopping. At least some plaintiffs would avoid those states that preclude any allegation of the amount of money damages, preferring those states that allow these allegations, because the allegations trigger the legal-certainty test.

Where the plaintiff files in state court and alleges less than \$5 million in controversy or is silent, the defendant who removes has the burden of proving the amount in controversy; therefore, the notice of removal must address it, and a court may require competent proof under *McNutt*.²⁷⁷ The applicable standard of proof for the party asserting jurisdiction where the complaint does not allege the requisite amount in controversy is preponderance of the evidence.²⁷⁸ If the removing defendant meets this standard, then the plaintiff must defeat federal jurisdiction by proving the amount in controversy is less than the CAFA requirement by a legal certainty.²⁷⁹

Although *McNutt* was originally filed in federal court and not removed, the Supreme Court decided that a federal court could require competent proof where the amount in controversy was in dispute and that, to successfully maintain federal jurisdiction, the party asserting it must prove the required amount by a preponderance of the evidence.²⁸⁰ This test has survived for decades and works in the CAFA context.²⁸¹

The preponderance-of-the-evidence test does no damage to plaintiff as master of the complaint. Where the complaint is silent on the amount of damages, the plaintiff has failed to assert mastery of the complaint. Where the complaint has alleged an amount of damages, the courts will presume the alleged sum is a good faith statement of

Inc., 427 F.3d 446, 449 (7th Cir. 2005) (“The complication is that a removing defendant can’t make the plaintiff’s claim for him . . .”).

277. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936).

278. See *supra* Part III.B. See also *Amoche v. Guar. Trust Life Ins. Co.*, 556 F.3d 41, 50 (1st Cir. 2009) (“[T]he reasonable probability standard is, to our minds, for all practical purposes identical to the preponderance standard adopted by several circuits.”); *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 542 (7th Cir. 2006) (holding that preponderance of the evidence and reasonable probability have the same meaning but banishing reasonable probability because it has created confusion over application of *Red Cab*).

279. See *supra* note 149 and accompanying text.

280. *McNutt*, 298 U.S. at 179, 189.

281. See *supra* note 92 and accompanying text.

the amount in controversy.²⁸² Further, plaintiff may maintain greater control over the amount in controversy by carefully tailoring the class definition (*e.g.*, number of states, years, products included) or entering into a binding stipulation to limit damages (although that may pose ethical issues, particularly in a class action).²⁸³

V. CONCLUSION

A circuit split exists on what is the correct standard of proof for determining the amount in controversy when a defendant removes to federal court under CAFA. This circuit disagreement started, in part, with a pre-existing controversy about how to apply Supreme Court precedent on the same question for removal generally. The crucial precedent is the Court's decisions in *Red Cab* in 1938 and *McNutt* in 1936, which do not refer to each other and have not been discussed in any detail by the Supreme Court since the decisions were issued. Because CAFA is silent on the standard of proof, yet in many other ways opened the federal courts to expanded removal of class actions, appellate courts have disagreed and understandably struggled with CAFA's impact on the *Red Cab-McNutt* analysis. The Eighth Circuit's analysis of the standard of proof is most consistent with Supreme Court precedent because it focuses on whether a party is seeking to establish or defeat jurisdiction and also gives plaintiffs their due as master of the complaint. The legal-certainty test applies to defeat federal jurisdiction, but not to establish it. Where proof of the amount in controversy is required, the party asserting federal jurisdiction must support the requisite amount by a preponderance of the evidence. Finally, the preponderance-of-the-evidence test is consistent with CAFA's provisions that make it easier to remove class actions to federal courts as well as Congress's stated goal of stemming the erosion of federal jurisdiction at plaintiffs' caprice.

282. *Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 290 (1938) (plaintiff "knows or should know whether his claim is within the statutory requirement as to amount. His good faith in choosing the federal forum is open to challenge . . .").

283. *Bell v. Hershey Co.*, 557 F.3d 953, 958 (8th Cir. 2009). *See also* *Lowdermilk v. U.S. Bank Nat'l Assoc.*, 479 F.3d 994, 999 n.5 (9th Cir. 2007) (noting that plaintiff may stipulate to damages to avoid federal court).