THOMSON REUTERS

Westlaw®

Why strict reliance on 'time of filing' rule in CAFA cases is risky business

By Sean A. Commons, Esq. and Sheri Porath Rockwell, Esq., *Sidley*

AUGUST 14, 2019

For more than a century, courts and practitioners have repeated as immutable doctrine that removal jurisdiction in diversity cases turns exclusively on the pleadings at the time of removal. They have continued to do so since passage of the Class Action Fairness Act.

But actual practice is far more complex. More and more, courts have recognized exceptions to the "time of filing" rule, allowing post-removal events to shape — and in some cases, dictate — the outcome of jurisdictional analyses in CAFA cases.

Careful attention to the exceptions can spell the difference between preserving or defeating federal jurisdiction.

QUICK OVERVIEW OF CAFA

Congress passed CAFA to make it easier for defendants to remove class and mass actions to federal court.[1] Before the law's enactment in 2005, state courts were keeping cases of national importance out of federal court and were "sometimes acting in ways that demonstrate[d] bias against out-of-state defendants.[2]

CAFA sought to curb these apparent abuses in class actions" by expanding federal diversity jurisdiction where the amount in controversy exceeds $5 million.

Because Congress enacted CAFA to facilitate adjudication of class actions in federal court, there is no presumption against CAFA removal jurisdiction.[3]

Like a complaint filed directly in federal court, a notice of removal under CAFA only has to set forth plausible, good-faith allegations to support CAFA jurisdiction. The removing party is not required to provide testimonial evidence or documents in the notice of removal.

A plaintiff can challenge jurisdiction by invoking one of several statutory exceptions to CAFA but bears the burden of proof when doing so.[4] If a district court challenges a removing party's assertion of CAFA jurisdiction in the notice of removal, it must afford each side "a fair opportunity to submit proof" and argument rather than remand sua sponte.[5]

As with traditional removal cases, disputes about CAFA removal jurisdiction traditionally focus on "examining the case 'as of the time it was filed in state court[.]"[6]

The Supreme Court has affirmed that this time-of-filing rule applies to CAFA cases, and the circuits likewise "have unanimously and repeatedly" invoked it in CAFA cases.[7] Indeed, the "time of filing" rule has been a hallmark of removal jurisdiction for more than a century, described by the Supreme Court as a "hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure."[8]

> Despite the pedigree of the time-of-filing rule, courts can and will look to post-removal events when adjudicating CAFA jurisdictional disputes, making uncritical reliance on the rule a risky proposition.

RELYING ON EVENTS AFTER A CAFA REMOVAL

Despite the pedigree of the time-of-filing rule, courts look to post-removal events when adjudicating CAFA jurisdictional disputes, making uncritical reliance on the rule a risky proposition.

First, even if CAFA jurisdiction does not exist at the time of removal due to a statutory exception, federal courts can exercise CAFA jurisdiction as long as no party timely raises the exception. Unlike in other settings, where jurisdictional defects can never be waived, the weight of authority is that all of CAFA's exceptions can be waived.[9]

Second, courts regularly consider post-removal filings to inform their understanding of whether CAFA jurisdiction existed at the time of removal. In fact, it can be an abuse of discretion for a district court to categorically disregard an amended complaint or other post-removal submission by a plaintiff when resolving CAFA jurisdiction questions.[10]

The analysis often turns not only on what the plaintiff has said after removal but also on whether there is any reason to suspect an effort to manipulate jurisdiction.

"If the rule were otherwise, plaintiffs would have ample opportunity for forum manipulation by filing vague complaints in state court that could be narrowed after removal to eliminate jurisdiction."[11]

On the one hand, if a plaintiff expressly or implicitly concedes jurisdiction post-removal in an amended complaint or alleges post-removal that the amount in controversy exceeds $5 million, a defendant can rely on the concession as "strong evidence" that CAFA jurisdiction existed at the time of removal.[12]

The reasoning is simple: A plaintiff who elected to file in state court presumably would not make such a statement to manufacture CAFA jurisdiction.

Careful attention to the exceptions to the time-of-filing rule can spell the difference between preserving or defeating federal jurisdiction.

On the other hand, some courts allow a plaintiff to "clarify" or "supplement" allegations in a state court pleading even when it is part of an admitted strategy to secure remand.[13] Courts have allowed plaintiffs to clarify that references to "residents" in a state court complaint were, in fact, references to "citizens" to be able to invoke CAFA exceptions to jurisdiction.[14]

Similarly, some courts have permitted plaintiffs to arguably narrow the size of the putative class and thus decrease the amount in controversy and potentially invoke CAFA exceptions.[15]

Despite the obvious risks of forum manipulation, these courts reason that a plaintiff should be permitted to clarify jurisdictional matters, at least when the plaintiff was under no obligation to provide such details in the state court complaint.

In a nod to the time-of-filing rule, however, these courts generally do not permit a plaintiff to withdraw or contradict prior allegations in the state court complaint operative at the time of removal; instead they permit a plaintiff only to fill in gaps or omissions.[16]

Finally, a lack of CAFA jurisdiction at the time of removal can be deemed "cured" as long as federal jurisdiction exists at the time of judgment.[17]

A recent Ninth Circuit decision adopted a threefold test to resolve when to apply this exception to the time-of-filing rule. The test asks three questions: (1) did the party contesting jurisdiction preserve the objection to removal? (2) if a defect existed and was preserved, did jurisdiction exist at the time of judgment? and (3) do "considerations of finality, efficiency, and economy" make it so that dismissal based on the removal defect "would be inconsistent 'with the fair and unprotracted administration of justice'"?[18]

The answer to the first question generally turns on whether the plaintiff filed a timely motion to remand. If not, procedural defects in the removal are waived, and the only question becomes "'whether the district court would have had original jurisdiction of the case had it been filed' in federal court at the time of judgment."

But assuming a plaintiff preserved an objection to a defect in removal, the question at the second step becomes whether subsequent events cured the jurisdictional defect. For instance, an amended complaint or dispositive ruling that adds or drops a party before judgment can cure a prior lack of diversity.

Similarly, a plaintiff who voluntarily amends a complaint post-removal to add a federal claim cures any lack of federal jurisdiction that may have existed at the time of removal. By adding a federal claim, a plaintiff renders procedural or jurisdictional arguments raised in a motion to remand "moot."[19]

And as long as jurisdiction existed at the time of judgment, a court can exercise jurisdiction under the third step despite a lack of jurisdiction at the time of removal based on its assessment of considerations of "finality, efficiency, and economy."

In some circuits, a ruling on summary judgment, rather than at trial, can provide sufficient finality to support application of this exception.[20] Indeed, courts have found jurisdictional defects cured even when summary judgment was obtained at a relatively early stage of the litigation with limited discovery.[21]

Court and parties will continue to struggle over when it is appropriate to rely on post-removal amendments and filings by plaintiffs to support or oppose removal.

THE CONTOURS OF THE EXCEPTIONS ARE FIERCELY LITIGATED

Courts and parties will continue to struggle to determine when it is appropriate to rely on post-removal amendments and filings by plaintiffs to support or oppose removal. With respect to complex jurisdictional questions, it is often not easy to tell the difference between a representation that can fairly be deemed a clarification and one that is more properly characterized as an outright contradiction.

When battling over the line between clarification and contradiction defendants can continue to rely on the presumption in favor of CAFA jurisdiction. Much like the principle of construing a contract against its drafter, defendants can argue that ambiguities should be construed against the plaintiff as the drafter of the complaint and in favor of CAFA jurisdiction.[22]

Defendants also can argue that allowing plaintiffs to retroactively narrow or clarify allegations to defeat removal jurisdiction puts defendants in an untenable position. Defendants cannot be expected to take a wait-and-see approach to CAFA removals.[23]

Otherwise, plaintiffs inevitably will argue that a defendant should have removed earlier. At the same time, no defendant wants to face the prospect of lengthy and expensive briefing about removal, and a potential request for costs or sanctions, due to post-removal allegations or evidence not apparent from the face of the state court complaint.

Plaintiffs, in turn, will continue to argue that they should not be precluded from explaining allegations originally intended for a state court. In contrast to a number of federal courts, many state courts have more relaxed pleading rules with regard to setting out the elements of a class action in a complaint.[24]

In such settings, plaintiffs may argue that it is unfair to construe silence or ambiguities in a state court complaint against them. And federal courts anxious to control swollen dockets appear more than willing to entertain such arguments.

NOTES

1 *See, e.g., Dart Cherokee Basin Operating Co., LLC v. Owens*, –– U.S. ––, 135 S. Ct. 547, 554 (2014).

2 28 U.S.C. § 1711 (2006) (citing Pub. L. 109-2, § 2(a)(4), Feb. 18, 2005 at 119 Stat. 4)

3 *See, e.g., Dart Cherokee Basin Operating Co., LLC v. Owens*, –– U.S. ––, 135 S. Ct. 547, 554 (2014).

4 *See, e.g., Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007) ("the objecting party bears the burden of proof as to the applicability of any express statutory exception").

5 *See, e.g., Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1197-1200 (9th Cir. 2015); *see also, e.g., Schneider v. Ford Motor Co.*, 756 F. App'x. 699, 700-701 (9th Cir. 2018) (holding it was "improper" for the same "district court [judge to] question[] Ford's estimate [of the amount in controversy], but [to] not give Ford the opportunity to introduce additional evidence").

6 *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013) (quoting *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 390 (1998)).

7 *See, e.g., Broadway Grill, Inc. v. Visa Inc.*, 856 F.3d 1274, 1277 (9th Cir. 2017).

8 *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570-573 (2004).

9 *See, e.g., Visendi v. Bank of Am.*, NA, 733 F.3d 863, 869-70 (9th Cir. 2013).

10 *See, e.g., Benko v. Quality Loan Serv. Corp.*, 789 F.3d 1111, 1117 (9th Cir. 2015); *but see, e.g., Padro v. Lowe's Homes Ctrs.*, LLC, No. SA:16-CV-709-DAE, 2016 U.S. Dist. Lexis 189891, *2-4 (W.D. Tex. Sept. 1, 2016) ("amended complaints filed after removal are not considered").

11 *See, e.g., Sanchez v. The Ritz Carlton*, CV 15-3484 PSG (PJWx), 2015 WL 4919972, at *2 (C.D. Cal. Aug. 17, 2015).

12 *See, e.g., Chavez v. JPMorgan Chase & Co.*, 888 F.3d 413, 416 (9th Cir. 2018).

13 *See, e.g., Benko*, 789 F.3d at 1117.

14 *See, e.g., Benko*, 789 F.3d at 1117.

15 *See, e.g., Laddi v. Soraya Motor Co.*, No. C17-0287-JCC, 2017 WL 7053651, at *1-2 (W.D. Wash. May 5, 2017) (acknowledging complaint was "not entirely consistent" as to whether it alleged both a statewide and nationwide class, but accepting plaintiffs' position that he intended only a statewide class).

16 *See, e.g., Lopez v. Aerotek, Inc.*, SACV 14-00803-CJC (JCGx), 2017 WL 253948, at *2 (C.D. Cal. Jan. 1, 2017).

17 *See, e.g., Caterpillar Inc. v. Lewis*, 519 U.S. 61, 64 (1996).

18 *See Singh v. American Honda Finance Corp.*, ___ F.3d ___, 2019 WL 2293436, at *6 (9th Cir. May 30, 2019) (*quoting Caterpillar Inc.*, 519 U.S. at 73, 75, 77).

19 *See, e.g., Retail Prop. Trust v. United Brotherhood of Carpenters & Joiners of Am.*, 768 F.3d 938, 949, 962 & n.6 (9th Cir. 2014); *see also, e.g., Pegram v. Herdrich*, 530 U.S. 211, 215 n.2 (2000) (noting plaintiff's "amended complaint alleged ERISA violations, over which the federal courts have jurisdiction, and we therefore have jurisdiction regardless of the correctness of the removal").

20 *Compare Singh*, 2019 WL 2293436, at *11-12 (upholding jurisdiction in light of summary judgment) *with Thermostat Corp. v. Bldg Materials Corp. of Am.*, 849 F.3d 1313, 1321 (11th Cir. 2017) (declining to uphold jurisdiction based on summary judgment).

21 *See Singh*, 2019 WL 2293436, at *4 (limited document discovery).

22 *See, e.g., Municipal Water Authority of Westmoreland County v. CNX Gas Company, LLC*, No. 16-422, 2016 WL 5025752, at *10-13 (W.D. Pa. Sept. 20, 2016) (holding courts must construe ambiguities in complaints "in favor of defendants" at least where plaintiff bears the burden to prove a CAFA exception).

23 *See, e.g., Standard Fire*, 133 S. Ct. 1345.

24 *See, e.g.*, Cal. Central District Local Rule 23-3 (requiring plaintiffs to plead the size (or approximate size) of the proposed class, the adequacy of the proposed representatives, and other information relevant to Rule 23 of the Federal Rules of Civil Procedure).

This article first appeared on the Practitioner Insights Commentaries web page on AUGUST 14, 2019.

ABOUT THE AUTHORS

Sean A. Commons (L) is a partner in **Sidley**'s Los Angeles office and is a member of the firm's consumer class actions practice. He has a wealth of experience litigating complex matters including class actions and qui tam claims. **Sheri Porath Rockwell** (R) is an associate in the firm's Los Angeles office and is a member of its commercial litigation and disputes and privacy and cybersecurity practices. This commentary has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and the receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers. The content herein does not reflect the views of the firm.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.