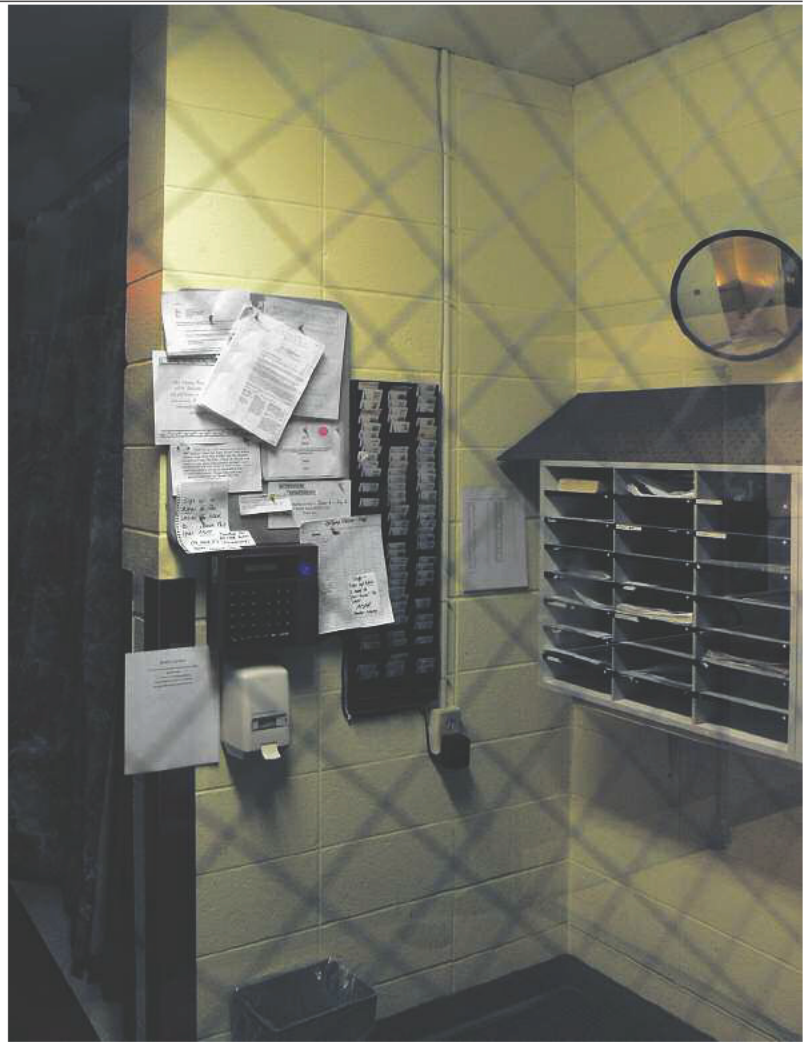


# Maintaining your wage-and-hour class action in state court



The enactment of the Class Action Fairness Act has made it easier for a defendant to remove a class action to federal court. The struggle over venue is often an important indicator of an employer's exposure and risk.



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In 2010, wage-and-hour litigation outpaced all other types of workplace class actions. In fact, there have been far more wage-and-hour class-action and collective-action decisions by federal and state court judges than in any other area of workplace litigation. Collective actions pursued in federal court under the Fair Labor Standards Act ("FLSA") (29 U.S.C. § 216(b)) outnumbered all other types of private class actions in employment-related cases. In

light of this steady rise in employment litigation, a pivotal area of contention between plaintiffs and defendants is venue selection, namely federal versus state court. Defendants and plaintiffs have various motivations as to their preferred choice of forum in the context of wage-and-hour class actions since the ultimate decision on venue can directly impact an employer's risk of exposure.

Generally speaking, plaintiffs often prefer to pursue their class action in state court. The decision to file a class action in state court is often motivated by several factors, including the inherent attributes found in federal courts under the Federal Rules of Civil Procedure. This article explores the benefits of selecting a state-court forum for class-certification

purposes in light of these attributes and provides some background on the advantages of selecting a state-court forum in the context of wage-and-hour litigation. The article then discusses the impact of the enactment of the Class Action Fairness Act ("CAFA"), which changed the landscape of the forum-selection issue by facilitating the removal of class actions from state to federal court and expanding federal diversity jurisdiction in class actions. Finally, the article explores several measures that class counsel can take to avoid removal of their wage-and-hour class actions to federal court or to maintain a strong position supporting remand to state court.

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## The venue decision: federal versus state court

Plaintiffs and defendants typically have conflicting views on whether a case should proceed in state court or federal court, particularly in the class-action context. Indeed, there are wide discrepancies between state and federal courts, both procedurally and substantively. For example, federal courts typically have stricter pleading requirements than state courts, as well as an expedited discovery schedule under Rule 26 of the Federal Rules of Civil Procedure. In fact, federal judges have reporting requirements which tend to move their cases faster, on the average, than many state courts. Accordingly, federal courts are often understandably disinclined to grant continuances if the delay would unduly hamper the court in keeping to its strict trial schedule. (See e.g., *Real v. Hogan* (1st Cir. 1987) 828 F.2d 58, 63-64 [need for completion of long-anticipated physical exam lower priority than need to keep on trial schedule].)

This expedited pace in federal court can pose a challenge for plaintiffs seeking class certification as the court must make its certification decision “at an early practicable time” after the action is filed. (Fed. Rules Civ. Proc., rule 23(c)(1)(A).) In light of the fast-tracked discovery schedule, plaintiffs must assure that they have completed all necessary class-related discovery well in advance of their deadline to file their motion for class certification. Additionally, federal courts tend to have more stringent class-certification standards. In fact, the Ninth Circuit (and other federal appellate courts) have held that courts must conduct a “rigorous analysis” into determining whether all the prerequisites of Rule 23(a) and (b) have been met before certifying the suit as a class action or denying certification. (See e.g., *Zinser v. Accufix Research Inst., Inc.*, (9th Cir. 2001) 253 F.3d 1180, 1186 [court must conduct rigorous analysis before certifying]; *In re Hydrogen Peroxide Antitrust Litig.* (3d Cir. 2008) 552 F.3d 305, 309-310 [class certification is proper only after “rigorous analysis” of prerequisites; court must conduct thorough examination of factual and legal allega-

tions and find that each Fed. R. Civ. P. 23 requirement is met].) Indeed, in the 1990’s, a series of federal circuit courts repeatedly rejected class certification, facilitating the perception that federal courts are tougher forums for class certification. (See e.g., *Castano v. Am. Tobacco Co.* (5th Cir. 1996) 84 F.3d 734; *In re Am. Med. Sys.* (6th Cir. 1996) 75 F.3d 1069; *In re Rohne-Poulenc Rover, Inc.* (7th Cir. 1995) 51 F.3d 1293; *In re Gen. Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig.* (3rd Cir. 1995) 55 F.3d 768.)

## The advantages of pursuing a wage-and-hour class action in state court

In the wage-and-hour context, the procedures governing federal collective actions can also pose challenges for plaintiffs. For example, state law wage-and-hour class actions are usually “opt out,” meaning that when potential class members are sent notice about class actions they must opt out to be excluded from the class. Most putative class members do not exercise the option of opting out, so state wage-and-hour class actions tend to be larger than federal FLSA wage-and-hour collective actions, which are “opt in.” In addition to the opt-in requirement, claims brought under the FLSA are subject to more stringent damages formulas and a broader definition of employees who are exempt from overtime. It benefits plaintiffs to resist employers’ attempts to remove state claims to federal court on diversity grounds, as well, since attorneys’ fees are more limited and federal verdicts require a unanimous jury.

In California, state labor law has more restrictive definitions for the categories of workers that qualify as exempt from overtime pay requirements (see *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785 [85 Cal.Rptr.2d 844]). Additionally, California courts can impose the remedy of disgorgement of profits into a fluid recovery fund for Labor Code violations established in a class action. Moreover, the statute of limitations under the FLSA is two years and three years only if willful conduct is found. In contrast, overtime claims brought under California’s Labor Code

enjoy a three-year statute of limitations, and representative UCL actions have a four-year statute of limitations. Additionally, federal court interpretation of state labor laws may lead to varying outcomes depending on the federal courts’ familiarity with the statute in question. Thus, the determination of venue in wage-and-hour cases can have a powerful impact on the ultimate success of the action, the extent of liability and the scope of recovery.

## The Class Action Fairness Act

The playing field in the struggle over venue changed on February 18, 2005, when the Class Action Fairness Act (“CAFA”), 28 U.S.C § 1332, became effective. CAFA significantly expanded federal subject-matter jurisdiction over class-action lawsuits. For large class actions, CAFA is a new weapon for employers seeking to reduce the impact of class actions on businesses and employers. CAFA facilitates the removal of class actions from state to federal court and modified the procedures for settling class actions in federal court. Its enactment was motivated in part because the large procedural and substantive variations among state forums pre-CAFA created equally large disparities among judgments and settlements. CAFA passed because of the fairness-ensuring provisions governing settlement of class actions in federal court, and the inclusion of several exceptions to federal jurisdiction allowing truly local controversies to remain in state court.

Before CAFA, a non-federal-question class action was often non-removable because complete diversity was lacking, or the amount in controversy had not been satisfied. Plaintiffs’ counsel, seeking to avoid removal on diversity grounds, would carefully draft their complaints around the statute. For example, plaintiffs could deliberately plead damages below the jurisdictional threshold or assign all or part of the cause of action to a citizen of the same state as the defendant.

With the introduction of CAFA, federal jurisdiction over class actions has

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become increasingly accessible since CAFA only requires the existence of *minimal* diversity between plaintiffs and defendants, one-hundred or more proposed plaintiffs, and more than \$5 million in controversy. Thus, the enactment of CAFA has significantly expanded the ability of a defendant sued in state court to remove the action to federal court. Additionally, under CAFA there is no longer a one-year time limit for removing an action to federal court and the consent of only one defendant is needed in order to remove (pre-CAFA, the consent of all defendants was required). Accordingly, one way to view CAFA is to think of it as a class-action impediment act.

CAFA is comprised of nine sections. The first two sections provide for the table of contents and legislative intent and the last four address enactment and other organization matters. The meat of CAFA is in sections three, four, and five, which revised three different sets of statutory provisions. These revisions expanded diversity jurisdiction to class actions (28 U.S.C. § 1332(d)), made it significantly easier for a defendant to remove class actions to federal court (28 U.S.C. § 1453), and presented additional fairness procedures for the settlement of class actions (28 U.S.C. § 1711-1715). This article will focus on the revisions outlined in Section 1332(d) of CAFA.

Although primarily aimed at consumer class action “forum shopping” and other practices viewed as abusive to business interests by Congress, CAFA unquestionably impacts employment class actions, as well. In fact, during floor debate prior to its passage, some civil rights proponents argued that wage-and-hour and civil rights class actions should be excluded from CAFA, but an amendment specifically aimed at excluding them from the bill’s reach was not included within the final text. While CAFA has an impact on employment litigation, it likely has minimal impact on employment-discrimination class actions, as these discrimination class actions tend to be filed in federal court anyway. Thus, CAFA’s impact tends to be greater on FLSA wage-and-hour class actions and

other similar collective action claims due to their opt-in component. With respect to FLSA litigation, CAFA has an immediate impact on the practice of filing a “hybrid” employment class action – that is, a federal “opt-in” collective action under the FLSA together with an “opt-out” class action under state law. In most cases, CAFA will require both these suits to now be filed in state court.

Though the enactment of CAFA has made it easier for a defendant to remove a class action to federal court, the burden of establishing that federal jurisdiction is still on the removing defendant. (*Abrego Abrego v. The Dow Chem. Co.* (9th Cir. 2006) 443 F.3d 676, 685.) This notwithstanding, plaintiffs’ counsel can take several measures to avoid removal of their class action to federal court.

### Keeping your class action in state court in light of CAFA

While a plaintiff remains master of his or her complaint, removal allows a defendant to override a plaintiff’s choice of forum. As discussed above, a variety of reasons exists that may cause plaintiffs and defendants to have a preference for a state versus a federal forum to resolve conflicts in employment cases. Both prior to and after CAFA’s enactment, class counsel could take the following general measures to avoid removal to federal court or to maintain a strong position supporting remand to state court, if the defendant seeks removal:

- Avoid pleading claims that arise under federal law, including any citations to federal statutes, the U.S. Constitution, or to rules or orders from federal agencies.
- If possible, name only defendants from the same state as the plaintiff’s residence.
- Ensure that each cause of action pleaded in the complaint is adequately supported by state sources of law and that such sources are clearly cited or identified.
- Be aware that plaintiff is precluded from filing federal claims related to the same transaction or series of transactions after the state case has been decided.

Despite these precautionary measures, CAFA has expanded the procedure

for defendants to remove class actions to state court and, consequently, broadened federal jurisdiction over class actions. However, class counsel can still keep a state court action in the state court forum and avoid removal by (1) limiting the amount in controversy; (2) carefully defining the class; and (3) limiting the class size.

### Amount in controversy

Under section 1332(d)(2) of CAFA, a federal court may exercise diversity jurisdiction if there is diversity of citizenship between any plaintiff and any defendant *and* only after it aggregates plaintiffs’ claims and finds alleged damages in excess of \$5 million (exclusive of interest and costs). This proposition is relatively straightforward when plaintiffs seek a federal forum because their complaint will likely contain allegations that, if proven at trial, would establish the amount in controversy. However, when plaintiffs pursue a state court forum, the complaint may be silent or ambiguous on one or more of the elements needed to calculate the \$5 million amount in controversy, which then transfers to defendant the burden to prove this threshold amount.

Whether the plaintiff has made the requisite showing that the amount in controversy exceeds \$5 million can be somewhat of a challenge, and indeed, there is a jurisdictional split on this issue. However, the Ninth Circuit has firmly held that the standard to establish federal jurisdiction depends on the allegations of the amount of controversy contained in the complaint. (*Lowdermilk v. United States Bank National Association* (9th Cir. 2007) 479 F.3d 994, 998-100.) Where a complaint sets forth an amount in controversy less than CAFA’s \$5 million jurisdictional threshold, a removing defendant must show to “a legal certainty” that the amount in controversy is more than \$5 million. (*Ibid.*) The *Lowdermilk* court reasoned that “[b]y adopting ‘legal certainty’ as the standard of proof, we guard the presumption against federal jurisdiction and preserve the plaintiff’s prerogative, subject to the good faith measurement,

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to forego a potentially larger recovery to remain in state court.” (*Id.* at 999.)

However, where a complaint is *silent* as to the amount in controversy, the removing defendant has a lesser burden, but must still prove by a “preponderance of the evidence” that the amount in controversy exceeds \$5 million. (*Abrego Abrego, supra*, 443 F.3d at p. 685.) To discharge its burden, the defendant must “provide evidence establishing that it is more likely than not that the amount in controversy exceeds that amount.” (*Id.*, internal citations and quotations omitted.) Alternatively, where the complaint alleges damages in *excess* of the federal amount in controversy requirement, then the amount in controversy requirement is presumptively satisfied unless “it appears to a ‘legal certainty’ that the claim is actually for less than the jurisdictional amount.” (*Id.* at 683.)

To make a determination that the amount in controversy has been met by a preponderance of the evidence, which defendants often fail to do, courts should consider, in addition to the complaint itself, “facts in the removal petition and...summary-judgment-type evidence relevant to the amount of controversy at the time of removal.” (*Id.* at 690.) In fact, the Ninth Circuit has established that assertions, without proper corroboration, fail to prove by a preponderance of the evidence that the amount in controversy meets CAFA’s jurisdictional threshold. (*Lowdermilk, supra*, 479 F.3d at p. 1002.) Moreover, the evidence and testimony a removing defendant provides must be based on more than just information and belief, but instead must demonstrate actual facts supporting the amount in controversy. (*Valdez v. Allstate Ins. Co.* (9th Cir. 2004) 372 F.3d 1115, 1117; *Rao v. Tyson Foods, Inc.* (E.D. Cal. 2009) 2009 U.S. Dist. LEXIS 35187.) For instance, defendant cannot simply provide a declaration based on “information and belief” that the total amount in controversy exceeds \$5 million in wages due under the Labor Code – if it does not provide adequate evidence to support that figure. (See *Jayme v. Checksmart Financial, LLC* (E.D. Cal. 2010) 2010 WL 2900333,

\*1[“However, after [t]aking a close look at Defendant’s ... figures ... there is a conspicuous lack of evidentiary support for these numbers.”].)

Thus, a plaintiff can avoid removal by limiting the request for recovery in the complaint to less than \$5 million (i.e., “seeking damages not to exceed \$4,999,999”). If the defendant removes the class action to federal court based on the amount in controversy, a plaintiff seeking remand should clearly assert the burden which defendant must carry and carefully scrutinize the information submitted by defendant in support of removal and ensure that the evidence is the summary-judgment type evidence required to support removal of the action.

### The “home controversy” and “local controversy” exceptions

In addition to pleading damages less than the \$5 million threshold, CAFA has two exceptions to federal jurisdiction. The first exception, known as the “local controversy” exception (28 U.S.C. § 1332(d) (4) (A)), requires a federal court to decline jurisdiction over a class action in which: (1) more than two-thirds of the members of the proposed plaintiff class are citizens of the state in which the action was originally filed; (2) at least one “significant” defendant is a citizen of the state in which the action was originally filed; and (3) the principal injuries from the alleged conduct were incurred in the state in which the action was originally filed. The second exception, commonly known as the “home controversy” exception (28 U.S.C. § 1332(d) (4) (B)), requires two-thirds or more of the members of all proposed plaintiff classes (in the aggregate) and the primary defendants to be citizens of the same state where the action was originally filed.

These exceptions are dependent on factual issues because they require discovering each party’s citizenship. One of the first questions to be litigated in the federal appellate courts concerning the two exceptions has been allocation of the burden of establishing the exception. Following the Supreme Court’s decision

in *Breuer v. Jim’s Concrete Brevard Inc.* (2004) 538 U.S. 691, which stated that a party opposing removal is tasked with the burden of establishing exceptions, the Ninth Circuit has concluded that the burden falls upon the party seeking to invoke the exception. (*Serrano v. 180 Connect Inc.*, (9th Cir. 2007) 478 F.3d 1018, 1021-22.)

Beyond burden allocation, the Circuit courts have also begun to address the standard-of-proof governing the exceptions. For example, the Fifth Circuit has held that, in establishing whether the statutory exceptions have been met, proof by preponderance of the evidence is the appropriate evidentiary standard. (See e.g., *Preston v. Tenet Healthsystems Memorial Medical Center Inc.*, (5th Cir. 2007) 485 F.3d 804, 813.) The Fifth Circuit has also suggested that limited jurisdictional discovery could be available to ascertain citizenship for purposes of these exceptions. (*Ibid.*)

Plaintiffs can avoid removal by defining the putative class in a manner that falls under one of these exceptions. For example, class counsel can include forum state citizenship as a prerequisite to class membership. (See *Summerhill v. Terminix, Inc.* (D. Ark. 2008) 2008 U.S. Dist. LEXIS 91939; *Sorrentino v. ASN Roosevelt Ctr., LLC* (E.D.N.Y. 2008) 588 F.Supp.2d 350.) In other words, class counsel who wish to ensure that a class action will remain in state court will need to limit their class definition to essentially just the forum state and sue only forum defendants. It is also important to pay close attention to the language of these exceptions. For example, the “local controversy” exception requires that during the three-year period preceding the filing of the class action, no other class action has been filed asserting the same or similar *factual* allegations against any of the defendants on behalf of the same or other persons. (28 U.S.C. § 1332(d) (4) (A) (ii).) Thus, the inquiry is whether similar *factual* allegations have been made against the defendant in multiple class actions, regardless of whether the same causes of action were asserted or whether the

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purported plaintiff classes were the same (or even overlapped in significant respects). (See *Jadeja v. Redflex Traffic Systems, Inc.* (N.D.Cal., 2010) 2010 WL 4916413, \*3.)

### **Class size and other preclusions to federal jurisdiction under CAFA**

There are other exceptions to CAFA's expanded diversity jurisdiction in class actions. For instance, CAFA does not apply if the primary defendants are states, state officials, or certain other governmental entities. (28 U.S.C. § 1332(d)(5).) Additionally, CAFA does not apply if there are fewer than 100 proposed plaintiffs in the class. (*Ibid.*) This is particularly relevant for class counsel seeking to certify a class action on a much smaller scale.

Some courts have held that the burden to show that there are 100 or more class members rests on defendant. Particularly, a dispute exists whether the removing party has the burden to establish jurisdictional requirements and whether the party seeking remand has the burden to prove exceptions. (*Hart v. FedEx Ground Package System Inc.*, (7th Cir. 2006) 457 F.3d 675, 679.) The court in *Hart* implied that proving a class has an

aggregate of more than 100 members is part of CAFA's jurisdictional requirements and not one of CAFA's exceptions, like the home-state or local-controversy provisions. Other appellate courts disagree. (*Compare Serrano v. 180 Connect, Inc.*, *supra*, 478 F.3d at p. 1020 fn. 3 ["[S]atisfaction of § 1332(d)(5) serves as a prerequisite, rather than as an exception, to jurisdiction under § 1332(d)(2)"] with *Frazier v. Pioneer Americas LLC* (5th Cir. 2006) 455 F.3d 542, 546 [treating the 100 or more member requirement as an exception]; see also, *Cunningham Charter Corp. v. Learjet, Inc.* (S.D.Ill. Aug. 13, 2008) 2008 WL 3823710, at \*3 [(stating without much discussion that the removing party has the burden to show 100 or more potential class members].) Thus, it appears that the burden of providing that there are 100 or more class members under 28 U.S.C. § 1332(d)(5)(B) is a jurisdictional element that the defendant (or the party asserting federal jurisdiction) must establish.

### **Conclusion**

Since its enactment, CAFA has achieved its primary goal of expanding federal subject matter jurisdiction over

employment class actions, thereby making it easier for defendants to remove class actions to federal court. In light of this steady increase in wage-and-hour litigation, the plaintiffs' bar and defense bar will continue to confront novel CAFA issues in wage-and-hour cases, since the struggle over venue is often a key indicator of an employer's exposure and may ultimately determine whether the class action is certified.

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