

## BURDENS OF JURISDICTIONAL PROOF

LONNY SHEINKOPF HOFFMAN<sup>†</sup>

### ABSTRACT

Having passed the most significant legislative reform of complex litigation in American history, advocates of the Class Action Fairness Act have now set their sights on more technical battles of statutory interpretation and application. Their ambitions span a broad range: from trying to stretch the boundaries of CAFA's reach, in the first instance, to divining new principles in the conflict of laws which bear, ultimately, on the propriety of class certification. One of the most important questions with which courts are wrestling with regard to the Class Action Fairness Act concerns the burden of jurisdictional proof. In the broadest sense, the issue is who bears the burden of proving the existence (or nonexistence) of the federal district court's subject matter jurisdiction under the new statute. Traditionally, the party who desires to maintain the suit in federal court always has had the obligation of demonstrating the court's authority to hear the case. Reallocating some of that obligation so that the other side has to prove that federal jurisdiction is lacking constitutes a sea-change of enormous proportions. Yet, as to one aspect of the burden of proof under CAFA, this is exactly what the vast majority of courts—and every court of appeals to consider the question—has found Congress intended. It is already possible to see the impact that this reallocation is having on class action litigation. The empirical evidence, which Professor Hoffman collects and reports in Appendix A to this article, shows that reallocation of this burden of jurisdictional proof dramatically influences forum selection outcomes. In this paper Professor Hoffman demonstrates that the arguments credited by courts that have adjudged Congress intended to shift some of the burden of proof onto the party opposing federal jurisdiction rest on a number of highly suspect doctrinal and empirical assumptions. Against the prevailing view, Professor Hoffman argues that there are sound reasons to conclude that CAFA does not shift any of the burden of jurisdictional proof from the party who desires to maintain the suit in federal court.

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## BURDENS OF JURISDICTIONAL PROOF

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### INTRODUCTION

This is a story only a lawyer could love. Having passed the most significant legislative reform of complex litigation in American history, advocates of the Class Action Fairness Act<sup>1</sup> have now set their sights on more technical battles of statutory interpretation and application. Their ambitions span a broad range: from trying to stretch the boundaries of CAFA's reach, in the first instance, to divining new principles in the conflict of laws which bear, ultimately, on the propriety of class certification.<sup>2</sup> Nuanced and dry, and lacking all of the fanfare that accompanied the highly-charged and politicized debate over the law's passage, these procedural questions of statutory meaning are being decided quietly, out of the headlines. Nevertheless, the stakes could not be higher. These interpretative contests are shaping CAFA's full breadth and scope. They are the law's bone and sinew.<sup>3</sup>

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

<sup>2</sup> See Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-wide Arbitration and CAFA*, 106 COLUM. L. REV. 1872, 1876 (2006) (observing of CAFA's proponents that "[b]y moving nationwide class actions involving state-law claims into federal court, the defense-side backers of CAFA were not engaged in a mere shell game. The point of moving such classes into federal court is to subject them to a distinctively federal body of class certification principles, and in so doing, to alter the outcomes of class certification decisions from what they otherwise would have been--at least in some courts within some state judicial systems.").

<sup>3</sup> Compare *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 555 (1935) ("This is clear from the provisions of section 7(a) of the act (15 U.S.C.A. §707(a), with its explicit disclosure of the statutory scheme. Wages and the hours of labor are essential features of the plan, its very bone and sinew."); *Legal Tender Cases*, 10 Wall. 457, 564 (1871) ("The heart of the nation must not be crushed out. The people must be aided to pay their debts and meet their obligations. The debtor interest of the country represent its bone and sinew, and must be encouraged to pursue its avocations.")

One of the most important questions with regard to CAFA concerns the burden of jurisdictional proof. In the broadest sense, the issue is who bears the burden of proving the existence (or nonexistence) of the federal district court's subject matter jurisdiction under the new statute. Traditionally, the party who desires to maintain the suit in federal court always has had the obligation of demonstrating the court's authority to hear the case.<sup>4</sup> Shifting some of the burden so that the other side (which, as a practical matter, means shifting the burden to the *plaintiff*, since a challenge to the federal court's authority occurs most often after the defendant has removed the case from state court and the plaintiff has asked that it be moved back) has to prove that federal jurisdiction is lacking constitutes a sea-change of enormous proportions. Yet, as to one aspect of the burden of jurisdictional proof, that is exactly what the vast majority of courts—and every court of appeals to consider the question—has found Congress intended.<sup>5</sup> This is the civil procedural equivalent of saying that criminal defendants are now guilty until proven innocent.

Congress, of course, cannot legislate all of the details that arise in the soft spots between the substantive provisions in the law. Indeed, it usually doesn't even try, leaving the courts to flesh these out as live controversies come before them. This ought not to deceive us into thinking there are few practical consequences that flow out of the procedural details that develop around the substantive law. It is already possible to see the impact that reallocation of some of the burden is having on class action litigation.

For the party who does not want to litigate in federal court, bearing the burden of jurisdictional proof has meant she has had a much harder time getting out of that forum. The proof is in the numbers. The Appendix to this paper contains two tables reporting win/loss rates in forum contests under CAFA.<sup>6</sup> Table 1 catalogues cases in the dataset where the court determined that CAFA shifts some of the burden of proof to the party opposing federal jurisdiction; Table 2 lists those where the court did not. When some of the jurisdictional burden of proof was shifted, the party desiring to litigate in federal court prevailed in 80% of the cases reviewed (16/20). Table 2 reports a corresponding rate in reverse. Among the (smaller) set of cases not shifting the burden of jurisdictional proof, the success rate of the party in the identical position—the one desiring to

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<sup>4</sup> *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

<sup>5</sup> See *infra* note \_\_\_\_.

<sup>6</sup> See *infra* Appendix.

litigate in federal court—declined to 30% (3/10). These dramatic findings, which are consistent with data Kevin Clermont and Ted Eisenberg have collected elsewhere regarding reported CAFA cases,<sup>7</sup> provide support for the conclusion that where one of CAFA’s jurisdiction limiting provisions—28 U.S.C. §§1332(d)(3), (d)(4), (d)(5) or (d)(9)—is at issue, allocation of the burden of proof is a key determinant in the forum contest’s outcome. In light of other, recent decisions (both specific to CAFA<sup>8</sup> and more broadly<sup>9</sup>) that have heightened the importance of the pleading stage and of gathering adequate pre-filing discovery, reallocation of some of the burden may soon become virtually dispositive in terms of forum selection outcomes. What this means is that so long as choice of forum matters<sup>10</sup>—a proposition that was, importantly, a foundational premise behind CAFA’s passage<sup>11</sup>—placement of the jurisdictional burden of proof will continue to be of enormous consequence to forum selection and, by extension, to case

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<sup>7</sup> Kevin Clermont and Theodore Eisenberg, *CAFA Judicata*, 156 U. PA. L. REV. \_\_\_ (forthcoming 2007) (copy of August 23, 2007 draft on file with author).

<sup>8</sup> *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11<sup>th</sup> Cir. 2007) (emphasizing claimant’s obligations under Fed. R. Civ. P. 8 and 11, as well as defendant’s pleading obligations in its notice of removal, and further determining that no jurisdictional discovery is permissible under CAFA).

<sup>9</sup> *Bell Atlantic Corp. v. Twombly*, \_\_\_ U.S. \_\_\_, 127 S.Ct 1955 (2007) (holding that to survive a motion to dismiss the plaintiff’s antitrust claim must allege facts that “plausibly” suggest existence of a conspiracy); see generally Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 121 (2007) (available at <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf>).

<sup>10</sup> See Kevin Clermont and Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L.J. 581 (1998) (providing empirical evidence that forum selection between state and federal court impacts case outcomes); see also Georgene M. Vairo, *Judge-Shopping*, NAT. L. J., Nov. 27, 2000 at A16 (“Any good plaintiff’s lawyer should consider what forum is best for resolving a client’s dispute, and a good defense attorney disserves a client if no attention is paid to removing or transferring or otherwise shifting the case to a different jurisdiction that would be a better forum for protecting the client’s interests.”); Thomas E. Willging and Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make*, 81 NOTRE DAME L. REV. 591, 591 (2006) (observing that “[l]awyers commonly perceive that choosing a forum in a class action is a critical element of litigating such a case.”).

<sup>11</sup> Lonny Sheinkopf Hoffman, *The Commencement Problem: Lessons From a Statute’s First Year*, 40 U.C. DAVIS L. REV. 469, 472 (2006) (“By its intended effect the statute [CAFA] authorizes the removal of state class action suits previously outside the jurisdictional reach of the federal courts.”); Nagareda, *supra* note \_\_\_, at 1876 (observing that the “primary thrust of CAFA is simply to amend the federal diversity jurisdiction statute in order to make it easier for defendants to remove class actions involving state-law claims—particularly nationwide class actions—from state court to federal court”).

outcomes, as well.<sup>12</sup> Yet, Congress said not one word in this detailed jurisdictional statute about who bears what burden before the court.

In this paper I describe, in Part I, how a statute that is entirely silent on the question of jurisdictional proof under CAFA has come to spawn two different burden of proof debates, producing, most remarkably, two opposing answers. In Part II, I then consider all of the arguments credited by courts that have adjudged Congress intended to shift a part of the burden of proof onto the party opposing federal jurisdiction. I will endeavor to show that these arguments rest on a number of highly suspect doctrinal and empirical assumptions. Against the prevailing view, I argue in Part III that there are sound reasons to conclude that CAFA does not shift any of the burden of jurisdictional proof from the party who desires to maintain the suit in federal court.

I have two ultimate ambitions for this paper. In looking carefully at this vital question of statutory interpretation, my immediate aim is to offer a perspective different from what has become the established wisdom with regard to CAFA and, thereby, to widen and improve upon existing thinking. More broadly, I also hope this study may offer some analytic clarity which can be drawn upon when future battles erupt over procedural questions of statutory meaning that lie, commonly and unavoidably, in the soft spots of the law where Congress rarely legislates.

## I. CAFA'S TWO BURDEN OF PROOF QUESTIONS

With CAFA's passage, Congress expanded the original jurisdiction of the federal courts to now encompass class action lawsuits that, prior to the statute's passage, were confined to state court. This legislative accomplishment was achieved through the introduction of two key statutory features: aggregation of the monetary value of claims and a minimal diversity of citizenship threshold. For any putative class action case, the claims of all class members are to be added together and, if the sum exceeds \$5,000,000 exclusive of interest and costs and at least one member of the plaintiff class is a citizen of a state different from at least one defendant, then the federal court "shall have jurisdiction" by virtue of 28 U.S.C. §1332(d)(2).<sup>13</sup> This means that a class action asserting state law claims for

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<sup>12</sup> For one discussion of how forum selection can influence case outcomes, see Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401 (1999) (cited in *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 35 n.1 (2003) (Stevens, J., concurring)).

<sup>13</sup> 28 U.S.C. § 1332(d)(2) (West 2006). The section provides in full:

relief that satisfies these criteria now can be originally brought in federal and, if filed in state court, can be brought into the federal system thanks to Congress's passage of §1453, the corresponding removal provision.<sup>14</sup>

CAFA impacts most class suits that raise state law claims, but not all of them. Obviously, any suit involving less than the \$5,000,000 floor would be outside the statute's reach. Additionally, expansive as CAFA is, there are some provisions that limit the breadth of this expansion. We'll return to these in a moment. It is enough to say now that whether one characterizes the elements necessary to satisfy jurisdiction (such as the aggregate amount in controversy requirement or that of minimal diversity between the parties) differently than those elements that limit jurisdiction turns out to matter a great deal in the debate over who bears what burden of jurisdictional proof.

#### A. THE THRESHOLD OR *PRIMA FACIE* BURDEN

It is a venerable principle of federal jurisdictional law that the party seeking to maintain a suit in the federal forum (whether by virtue of instituting it himself or removing a case instituted by someone else in state court) bears the burden of proving the existence of the district court's subject matter jurisdiction over the case.<sup>15</sup> Nevertheless, a debate emerged in the early CAFA case law as to whether Congress in the statute shifted some or all of this initial burden.<sup>16</sup> While a few district courts initially

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(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which --

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

<sup>14</sup> 28 U.S.C. § 1453 (West 2006).

<sup>15</sup> See *supra* note \_\_; see also *Steele Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception'" (citations omitted). Because we regard federal courts as courts of limited jurisdiction, *Owens Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978), that means we must begin with a presumption against the existence of federal court jurisdiction. See *McNutt*, 298 U.S. at 189. This presumption is what produces the heavy burden that the party seeking to invoke federal jurisdiction bears. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *McNutt*, 298 U.S. at 189.

<sup>16</sup> See, e.g., *Dinkel v. Gen. Motors Corp.*, 400 F. Supp. 2d 289, 295 (D. Me. 2005); *Berry v. American Express Pub. Corp.*, 381 F.Supp. 2d 1118, 1122-23 (C.D. Ca. 2005). Several lawyers prominent in CAFA debates argued that these early courts got it right and that the

leaned in the other direction, the vast majority—and all of the circuit courts to consider the question—have held that the initial burden of demonstrating the existence of subject matter jurisdiction lies with the party that wants to be in federal court.<sup>17</sup> Adhering to this traditional placement of the jurisdictional burden of proof, the courts have described the principle as “near canonical”<sup>18</sup> and a “well-settled practice in removal actions.”<sup>19</sup>

In roundly rejecting the suggestion that Congress altered this traditional placement of the burden of proof on the party seeking the federal forum, most courts have considered it critical that the statute is silent on this point. Such silence, the courts say, is almost dispositive evidence of congressional intent. “[I]t would be thoroughly unsound for [the Court] to reject a longstanding rule absent an explicit directive from Congress,” one court intoned.<sup>20</sup> “We presume that Congress, when it enacted CAFA, knew where the burden of proof had traditionally been placed. By its silence, we conclude that Congress chose not to alter that rule.”<sup>21</sup>

Indeed, courts also typically reject reliance on the statute’s legislative history to support the argument that Congress intended to shift the burden of proof on the threshold showing of jurisdiction to the plaintiff. In *Brill v. Countrywide Home Loans*, for instance, the plaintiff argued that a

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threshold jurisdictional burden should shift to the party opposing jurisdiction. See H. Hunter Twiford III, Anthony Rollo & John T. Rouse, *CAFA’s New “Minimal Diversity” Standard for Interstate Class Actions Creates a Presumption that Jurisdiction Exists, with Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 MISS. CO. L. REV. 7 (2005). For a discussion of all of these early cases see generally Lonny Sheinkopf Hoffman, *In Retrospect, A first Year Review of the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 1135 (2006) (cataloguing and discussing cases); Linda S. Mullenix, *CAFA Cacophony*, NAT. L.J. Jan. 27 2007 at 13.

<sup>17</sup> *Morgan v. Gay*, 471 F.3d 469, 473 (3d Cir. 2006); *DiTolla v. Doral Dental IPA of New York, LLC*, 469 F.3d 271 (2d Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7<sup>th</sup> Cir. 2005); *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676, 683; *Miedema v. Maytag Corp.*, 450 F.3d 1332, 1328-1329 (11<sup>th</sup> Cir. 2006); *Evans v. Walters Indus. Inc.*, 449 F.3d 1159, 1164 (11<sup>th</sup> Cir. 2006); *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11<sup>th</sup> Cir. 2007); *Blockbuster v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006).

<sup>18</sup> *Abrego Abrego*, 443 F.3d at 684.

<sup>19</sup> *Morgan*, 471 F.3d at 473.

<sup>20</sup> *DiTolla*, 469 F.3d at 275 (brackets in original); see also *Miedema*, 450 F.3d at 1329. Relatedly, most courts interpreting the new statute have similarly found that, consistent with the interpretation of other removal provisions Congress has previously enacted, the removal portions in CAFA should be strictly construed against removal, and all doubts construed in favor of remand. See, e.g., *Abrego Abrego*, 443 F.3d at 685; Tiffany v. Hometown Buffet, 2006 WL 1749577 (N.D. Cal., June 22, 2007) at \*4.

<sup>21</sup> *DiTolla*, 469 F.3d at 275 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979)).

Senate Committee Report specifically stated that “the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident.”<sup>22</sup> The Seventh Circuit refused to accept this argument, observing that “[t]his passage does not concern any text in the bill that eventually became law. When a law sensibly could be read in multiple ways, legislative history may help a court understand which of these received the political branches’ imprimatur. But when the legislative history stands by itself, as a naked expression of “intent” unconnected to any enacted text, it has no more force than an opinion poll of legislators...”<sup>23</sup>

It bears emphasizing that this distinction between text and legislative history untethered to text that the courts have drawn with regard to the threshold jurisdictional showing is not unique to CAFA. In this regard, the CAFA cases rejecting efforts to shift the initial burden of jurisdictional proof are straightforward applications of well-established general principles of statutory interpretation.<sup>24</sup> If it has not been surprising, then, to see that most courts have refused to find that the new statute shifts the initial jurisdictional burden of proof, that makes stranger still the story of how a second burden of proof question, with regard to other provisions in CAFA that limit the scope of the statute’s reach, has come to be addressed and answered.

#### B. SHIFTING THE BURDEN OF PROOF AS TO CAFA’S “EXCEPTIONS”

While CAFA greatly expands federal jurisdiction, as we have seen, it also contains provisions that simultaneously limit the breadth of this expansion. The sentiment behind these parts of the statute ostensibly was to

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<sup>22</sup> *Brill*, 427 F.3d at 448 (citing S. Rep. 14, 109<sup>th</sup> Cong. 1<sup>st</sup> Sess. 42 (2005)).

<sup>23</sup> *Id.*; *see also id.* (commenting that “naked legislative history has no legal effect. . . . The rule that the proponent of federal jurisdiction bears the risk of non-persuasion has been around for a long time”); *Miedema* 450 F.3d at 1328-29 (“While a committee report may ordinarily be used to interpret unclear language contained in a statute, a committee report cannot serve as an independent statutory source having the force of law”) (*quoting* *United States v. Thigpen*, 4 F.3d 1573, 1577 (11th Cir.1993)).

<sup>24</sup> *See, e.g., Exxon Mobil v. Allapattah Services*, 545 U.S. 546, 568 (2005) (“Judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text”).



try to strike a balance between those cases that, in the Congress's judgment, warrant federal jurisdiction and those that have "a truly local focus."<sup>25</sup>

Oddly named, they are even harder to categorize. Section §1332(d)(4)(A) is regularly referred to as the "local controversy" exception, a phrase that does not appear in the statute, but is meant to get at the idea that if "more than two-thirds" of the putative class and at least one defendant is a forum citizen *and* alleged to bear "significant" responsibility for the plaintiffs' alleged injuries, then the case ought to be litigated in state court since it is truly a local matter.<sup>26</sup>

A similar purpose lies behind §1332(d)(4)(B), which also is aimed at not allowing the statute to sweep local controversies into federal court, but has been dubbed, instead and rather clumsily, the "home state" exception.<sup>27</sup> This rule filters out just slightly more cases, in the sense that it applies where "two-thirds or more" of the putative class members are from forum, a figure which apparently but inexplicably includes those cases where exactly 66.6% of the class members are forum citizens (as opposed to the "local controversy" provision which requires that the figure be at least .01% more).<sup>28</sup>

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<sup>25</sup> S. Rep. 14, 109<sup>th</sup> Cong. 1<sup>st</sup> Sess. 42 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 28; *see also* Hart, 457 F.3d 675, 682 (observing that the "local controversy" and "home state" exceptions are designed to draw a delicate balance between making a federal forum available to genuinely national litigation and allowing the state courts to retain cases when the controversy is strongly linked to that state").

<sup>26</sup> 28 U.S.C. §1332(d)(4)(A). This section provides that a "district court shall decline to exercise jurisdiction under paragraph (2)--

(A)(i) over a class action in which--

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant--

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that 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.

<sup>27</sup> 28 U.S.C. §1332(d)(4)(B). Under this section, a district court shall decline to exercise jurisdiction under paragraph (2) over a class action in which "(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed."

<sup>28</sup> *Id.*

At the same time, a second and more significant requirement of §1332(d)(4)(B), that “all” defendants must have been “primary” wrongdoers, seems intended to restrict the application of §1332(d)(4)(B) as compared with §1332(d)(4)(A). Whatever difference there is between a “primary” and “significant” wrongdoer (and several courts have concluded that Congress intended there to be a difference, though the practical distinction may be fairly small<sup>29</sup>), by requiring that *every* named defendant be a “primary” defendant, this statutory condition plainly is intended to more severely restrict the provision’s applicability.<sup>30</sup>

Still other parts of CAFA exclude from federal jurisdiction other kinds of cases, such as those where the defendant is a state, state official or other governmental entity,<sup>31</sup> those that involve certain securities claims,<sup>32</sup> and those cases raising state claims regarding the internal affairs or governance of a company or other business entity.<sup>33</sup>

In addition to and unlike all of these mandatory exclusions from jurisdiction, one other provision in CAFA gives district judges discretion to decide whether to keep a case over which CAFA has extended jurisdiction. The “interest of justice” exception, as it has been called by others, is found in §1332(d)(3), and covers cases where between one-third and two-thirds of the proposed class members and the primary defendants are forum citizens.<sup>34</sup>

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<sup>29</sup> See, e.g., *Caruso v. Allstate Ins. Co.*, 469 F. Supp. 2d 364, 369 (E.D. La. 2007).

<sup>30</sup> 28 U.S.C. §1332(d)(4)(B).

<sup>31</sup> Section §1332(d)(5) provides that “Paragraphs (2) through (4) shall not apply to any class action in which (A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.”

<sup>32</sup> 28 U.S.C. §1332(d)(9)(A) and (C). Section 1332(d)(9) provides, in full:

(9) Paragraph (2) shall not apply to any class action that solely involves a claim--

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder.

<sup>33</sup> 28 U.S.C. §1332(d)(9)(B).

<sup>34</sup> 28 U.S.C. §1332(d)(3).

How are all of these provisions in CAFA to be characterized? We've seen already that they are described by most commentators and courts as "exceptions" to jurisdiction, as in the "local controversy exception," "home state exception," "state action exception," and so forth. Far and away, this is the predominant way the provisions have been understood, even though none of these terms appear in any of the provisions.<sup>35</sup> Nevertheless, they have come to be characterized by nearly all courts to consider them as "exceptions" to the expanded grant of jurisdiction in CAFA; specifically, that is, as exceptions to the expanded grant of jurisdiction in §1332(d)(2).

Calling them "exceptions," those who hold to this view are distinguishing between jurisdiction-granting and jurisdiction-limiting rules. The notion goes something like this: If the elements that confer jurisdiction are satisfied, then the court has jurisdiction. Jurisdiction can be taken away by other provisions but—and this seems to be the important point—adherents of this view are certain that, at least in some theoretical sense, jurisdiction once conferred did exist, even if only for a fleeting moment.<sup>36</sup> It can be undone, but its initial existence cannot be denied.

The notion that one can divine legislative intent by somehow distinguishing certain provisions as "exceptions" immediately raises a number of perplexing questions. For one thing, what textual proof is there that these provisions are "exceptions" to jurisdiction, in the sense that they are distinct from an *a priori* grant of jurisdiction elsewhere in the statute? Further, even if there were a plausible textual basis for distinguishing jurisdictional grants from exceptions in CAFA, why do the courts assume that all such exceptions to jurisdiction in CAFA necessarily have to be proven by the party who is arguing for their applicability? Outside of the specific CAFA context, the courts routinely require the party who desires to

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<sup>35</sup> The leading circuit court cases, to date, are: *Evans v. Walter Indus., Inc.*, 449 F.3d 1159 (11th Cir. 2006); *Frazier* 455 F.3d 542; *Hart v. Fedex Ground Package Sys., Inc.*, 457 F.3d 675 (7th Cir. 2006); *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018 (9th Cir. 2007); *Preston v. Tenet Healthsystem Memorial Medical Center, Inc.*, 485 F.3d 793, 795 (5th Cir. 2007). There have been very few dissenters. See *Lao v. Wickes Furniture Co., Inc.*, 455 F. Supp. 2d 1045 (C.D. Ca. 2006); *Serrano v. 180 Connect, Inc.*, 2006 WL 2348888, at \*1 (N.D. Ca., Aug. 11, 2006), *rev'd*, 478 F.3d 1018 (9th Cir. 2007); *Kearns v. Ford Motor Co.*, 2005 WL 3967998 (C.D. Ca., Nov. 21, 2005), *overruled by* 478 F.3d 1018 (9th Cir. 2007).

<sup>36</sup> See *Serrano*, 478 F.3d 1018, 1022 ("Implicit in both subsections (d)(3) and (d)(4) is that the court has jurisdiction, but the court either may or must decline to exercise such jurisdiction."); *Lao v. Wilkes*, 455 F. Supp. 2d at 1057 (*citing* Defs' Opp. Brief at 10 n. 7) ("Merely declining to exercise subject matter jurisdiction presumes that subject matter jurisdiction exists to begin with. How else could a court decline to do something unless there were in fact something—in this case jurisdiction—to decline?").

litigate in the federal forum to bear the burden of proof as to other, more familiar statutory provisions that limit removal rights.<sup>37</sup> Most of all, how can we explain the startling level of agreement among courts in interpreting a statute that, on the specific issue of the burden of jurisdictional proof, is conspicuously silent and, from a broader perspective, has been characterized as “clumsy,”<sup>38</sup> “bewildering”<sup>39</sup> and “a headache to construe.”<sup>40</sup>

Despite all of these uncertainties, almost all courts—and every circuit court to consider the question—have held that Congress did intend to shift the burden as to §§1332(d)(3) and (d)(4). Why? To get at the answers to these questions, it is necessary to take a much closer look at the leading cases and the arguments they have credited to justify this shift in the jurisdictional burden.

## II. BEHIND THE CASES

### A. THE ASSUMPTION THAT THE PLAINTIFF IS IN A BETTER POSITION TO ACCESS THE JURISDICTIONAL FACTS

One reason some courts have given to justify shifting the burden of proof in §§1332(d)(3) and (d)(4) is that the plaintiff is in the better position to access the facts supporting the existence or nonexistence of jurisdiction. Both the Eleventh Circuit in *Evans* and the Fifth Circuit in *Frazier* concluded that Congress intended to shift the burden of jurisdictional proof as to §§1332(d)(3) and (d)(4). Part of what led both courts to this judgment was their belief that plaintiffs generally have better access to facts relevant to the jurisdictional analysis called for by these statutory subsections. “[P]lacing the burden of proof on the plaintiff in this situation,” the *Evans* court intoned, “places the burden on the party most capable of bearing it.”<sup>41</sup> The Fifth Circuit followed in stride.<sup>42</sup>

Oddly, both circuit court opinions talk in terms of *plaintiffs*, rather than the party who has invoked these subsections to try to get out of federal court. What the courts presumably mean by this is that since questions regarding §§1332(d)(3) and (d)(4) arise most often in the context of motions

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<sup>37</sup> See *infra* text accompanying notes \_\_\_ - \_\_\_.

<sup>38</sup> *Abrego Abrego*, 443 F.3d at 681.

<sup>39</sup> *Id.* at 686.

<sup>40</sup> *Lao v. Wilkes* 455 F. Supp. 2d at 1048

<sup>41</sup> *Evans*, 449 F. 3d at 1164 n.3.

<sup>42</sup> *Frazier*, 455 F.3d at 546.

to remand, the plaintiff will normally be the party who bears the burden of jurisdictional proof.<sup>43</sup> One charitably assumes that if a case were initiated in federal court and it was the defendant who was seeking dismissal, the Eleventh and Fifth Circuits would consistently leave the burden on the party who seeks to invoke §§1332(d)(3) and (d)(4).<sup>44</sup>

In any event, what about the empirical assertion made by these courts that the plaintiff is in a better position to gather these facts? It is possible, of course, that the plaintiff sometimes will be in a better position to know particular jurisdictional facts, relative to the defendants, like the citizenship of members of the proposed class or the amount of each of the claims being sought. But it also seems pretty hard to believe that the plaintiff will always have better access to the relevant facts. Surely there

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<sup>43</sup> Appendix A illustrates this point. Of the thirty cases considered where a statutory “exception” to CAFA was asserted to be applicable, the argument was made by a plaintiff seeking remand of a case originally filed in state court and removed to federal court by the defendant under CAFA. Only one case in the dataset was originally begun in federal court. See Appendix A. The one case—*Mattera v. Clear Channel Communications, Inc.*, 239 F.R.D. 70 (S.D.N.Y. 2006)—is discussed in the following note.

<sup>44</sup> In *Mattera v. Clear Channel Communications, Inc.*, 239 F.R.D. 70 (S.D.N.Y. 2006), the court rejected the suggestion that the plaintiff should carry the jurisdictional burden of proof as to one of the carve-out sections where the plaintiff had filed suit initially in federal court and the defendant argued for dismissal. The court observed:

I am not convinced that a plaintiff who files an action in federal court asserting CAFA jurisdiction must not only make a prima facie showing of jurisdiction under the statute, but should also negate the applicability of the statutory exceptions. It seems contrary to CAFA's stated purpose of expanding federal court jurisdiction over class actions to allocate to the plaintiff the burden of proving that a CAFA exception does not apply, where the plaintiff, having demonstrated minimal diversity and the requisite class size and amount in controversy under CAFA, has already established a basis for federal jurisdiction. . . .

Congress, through enactment of CAFA, sought to encourage federal jurisdiction over interstate class actions. I conclude that placing the burden of establishing the applicability of a CAFA exception on the party challenging federal jurisdiction, rather than on the party invoking federal jurisdiction at the outset, better protects against the risk of state courts adjudicating class actions with national ramifications. This is precisely the harm that Congress sought to alleviate in enacting the statute. Accordingly, the Court holds that the party seeking to avail itself of an exception to CAFA jurisdiction over a case originally filed in federal court bears the burden of proving the exception applies. Here, Defendants shoulder the burden.

*Mattera*, 239 F.R.D. 70, 79.

will occasions—there were many in my own practice experience, primarily as a defense lawyer—when the defendant has a better vantage point. Indeed, it is hardly uncommon for the facts relevant to a claim to be more or exclusively in the defendant’s knowledge;<sup>45</sup> it is not obvious why this would be different for jurisdictional facts. Notably, even some courts that have ultimately shifted the burden of proof onto the party seeking to dismiss or remand the case from federal court have refused to go along with the Eleventh and Fifth Circuit’s reasoning here, rejecting the notion that one party necessarily and always has better access to jurisdictional facts.<sup>46</sup>

A greater difficulty with using the assumption that the plaintiff is in the better position to know the jurisdictional facts as a basis for shifting the burden of proof is that the assumption proves too much. If true, then in non-class litigation the plaintiff would again presumably be in a better position to know the relevant jurisdictional facts. Yet, we do not shift the burden of proof to the plaintiff when a defendant removes a civil action under the general removal statute, 28 U.S.C. §1441. That’s a policy judgment that, whether good or bad, doesn’t come into play when the court is applying the directive in the general removal statute, where Congress said nothing about occasions when the burden of proof should be redistributed. Indeed, this inconsistency is even present in judicial treatment of CAFA removals. Even those that would shift the burden of proof as to §§1332(d)(3) and (d)(4) onto the plaintiff do not do so as to the initial *prima facie* burden, even when the same superior knowledge may bear relevance in both places. That powerfully suggests a fatal flaw in the logic of using this policy rationale as a substitute for express statutory authority to shift the burden.

## B. OF LEGISLATIVE HISTORY AND LEGISLATIVE SPIRIT

A second justification some have offered for shifting the burden is that the legislative history says that this was Congress’s intent.<sup>47</sup> Relatedly,

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<sup>45</sup> See generally Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 UNIV. MICH. J. L. REF. 217, 220-21 (2007) (discussing asymmetries of information in civil litigation).

<sup>46</sup> *Hart*, 457 F.3d at 680; *Serrano*, 478 F.3d 1018, 1024 n.8.

<sup>47</sup> See, e.g., *Hart*, 457 F.3d at 681 (finding support for its textual reading of statute in legislative history, observing that “it is also worth noting that this outcome is consistent with the legislative history of CAFA. The Senate Judiciary Committee unambiguously signaled where it believed the burden should lie”) (quoting from Senate Committee Report); see also *Frazier*, 455 F.3d at 545 n.5; *Evans*, 449 F.3d at 1163; see also Twiford, Rollo and Rouse, *supra* note \_\_ at \_\_ (arguing that “Congress’s ‘Findings and Purposes’ expressly reflect a goal of changing the jurisdictional status quo for class actions” even as to the threshold jurisdictional burden under subsection (d)(2) of the Act).

some courts and prominent commentators have made reference to CAFA's initial "Findings and Purposes" as further evidence Congress intended to shift the burden of proof.<sup>48</sup> The latter regards the opening "Findings and Purposes" in the statute, which detail a litany of perceived class action abuses and absurdities, as reflective of the spirit in which Congress passed this reform legislation.<sup>49</sup> According to this view, any interpretative questions regarding the statute should be read to favor the most expansive reading because Congress must have wanted to sweep into the net as many abusive class action cases as possible.<sup>50</sup>

In practice, this nod to spirit means that even if the statute doesn't seem to directly speak to the particular question at issue—How do we precisely determine when a case has been "commenced" for statutory applicability purposes?<sup>51</sup> Is a federal court still bound by *Klaxon Co. v. Stentor Electric Manufacturing Co.*<sup>52</sup> to follow state choice of law rules or does the statute free its hand? Who bears what burden of jurisdictional proof?—the answer invariably lies in an awareness of the spirit of the statute. Congress, we are assured, would have wanted us to read the statute in such a way as to best ensure that it is applied as expansively as possible. After all, Congress expanded federal jurisdiction precisely to remedy these

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<sup>48</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4) (codified at 28 U.S.C. 1711 Historical and Statutory Notes)); *see, e.g.*, Hart, 457 F.3d at 682 ("Our holding that the plaintiff has the burden of persuasion on the question whether the home-state or local controversy exceptions apply is also consistent with the stated purposes of the statute. . . . These exceptions are designed to draw a delicate balance between making a federal forum available to genuinely national litigation and allowing the state courts to retain cases when the controversy is strongly linked to that state" (quotation from Findings and Purposes omitted)).

<sup>49</sup> *See, e.g.*, Hart, 457 F.3d at 681-82 ("Our holding that the plaintiff has the burden of persuasion on the question whether the home-state or local controversy exceptions apply is also consistent with the stated purposes of the statute. Congress made the following findings when it enacted CAFA. . .").

<sup>50</sup> Compare *McMorris v. TJX Companies, Inc.*, --- F Supp.2d ---, 2007 WL 1885137 (D.Mass. 2007) ("Whatever the actual social benefits of class action litigation, however, CAFA is generally regarded as reflecting skepticism about the work of plaintiffs' class action attorneys.").

<sup>51</sup> *See generally* Lonny Sheinkopf Hoffman, *The "Commencement" Problem: Lessons From A Statute's First Year*, 40 U.C. DAVIS. L. REV. 469 (2006).

<sup>52</sup> 313 U.S. 487 (1941). For a discussion of the *Klaxon* question that admirably treats CAFA's "Findings and Purposes" in a more sophisticated manner, see Patrick Woolley, *Erie and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1747-57 (2006) (considering the choice of law effect of the congressional finding in CAFA that in certifying nationwide classes state courts had been "making judgments that impose their view of the law on other States and bind the rights of the residents of those States") (quoting Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4) (codified at 28 U.S.C. 1711 Historical and Statutory Notes)).

perceived abuses. What further or better proof of legislative intent is needed? Of course, this is the kind of argument that is as unplagued by doubt as it is unbounded in scope. Outside of the class action context, the Supreme Court has recently and powerfully denounced the view that whatever advances a statute's purposes must influence judicial interpretation of ambiguous statutory terms.<sup>53</sup> I will not spend any more time on it, other than to make reference to two excellent commentaries, by Steve Burbank and Douglas Floyd, that expose as absurd the notion of looking to CAFA's "Findings and Purposes" as a reliable tool of statutory construction.<sup>54</sup>

As for the statute's legislative history, it is notable that in wrestling with the problem of jurisdictional proof under §§1332(d)(3) and (d)(4) most courts have not been deterred by inconsistency. Where legislative history has been regarded as "entitled to exceptionally little weight" on other CAFA interpretative questions,<sup>55</sup> as we saw earlier, not so with the burden shifting arguments advanced as to §§1332(d)(3) and (d)(4). Most astonishingly, courts that have refused to look to the statute's legislative history as proof Congress intended to shift the initial *prima facie* burden of jurisdictional proof, have been willing to do so as to the "exceptions." We previously saw the Seventh Circuit in *Brill* refused to look to the same Senate Committee Report in deciding the question of Congress's intent with regard to *prima facie* jurisdictional burden, calling it "a naked expression of 'intent' unconnected to any enacted text." The complete quote, even more damning, makes it all the more startling that another panel of the Seventh Circuit was willing to give any credence to this same legislative history in assessing congressional intent as to the discretionary and mandatory carve-out sections in §§1332(d)(3) and (d)(4).

When the legislative history stands by itself, as a naked expression of "intent" unconnected to any enacted text, it has no more force than an opinion poll of legislators—less, really, as it speaks for fewer. Thirteen Senators signed this

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<sup>53</sup> *Norfolk Southern v. Sorrell*, \_\_\_ U.S. \_\_\_, \_\_\_ 127 S.Ct. 799, 808 (2007) (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (*per curiam*) and its observation that "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law") (italics in original).

<sup>54</sup> Steve Burbank, *Aggregation on the Couch*, 106 COLUM. L. REV. 1924 (2006); Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487, 507-20 (2006).

<sup>55</sup> *Brill*, 427 F.3d at 428; see also Frazier, at n.5 (citing to legislative history and observing that "[t]he relevant statements show an intent to burden plaintiffs both as to *prima facie* jurisdiction, and as to the exceptions") (citations omitted).



report and five voted not to send the proposal to the floor. Another 82 Senators did not express themselves on the question; likewise 435 Members of the House and one President kept their silence. Naked legislative history has no legal effect. The rule that the proponent of federal jurisdiction bears the risk of non-persuasion has been around for a long time. To change such a rule, Congress must enact a statute with the President's signature (or by a two-thirds majority to override a veto). A declaration by 13 Senators will not serve.<sup>56</sup>

In short, courts are not supposed to look to legislative history to provide the justification for reading into a statute that which the legislators did not write into it.<sup>57</sup>

And we can't square the difference by pointing to some judgment that the language in §§1332(d)(3) and (d)(4) is more ambiguous than in §1332(d)(2). The courts aren't saying that. Reliance on legislative history is so dubious in this context that even some of those who would shift the burden of proof decline to do so on the basis of looking to the statute's legislative history.<sup>58</sup>

Another weakness in looking to legislative history to justify a burden shifting conclusion is that the evidence does not point in one direction. Other parts of the legislative history can be read to show that §§1332(d)(3) and (d)(4) were meant to be part of the jurisdictional *prima facie* case, as the district court in *Lao v. Wickes Furniture Co., Inc.* discovered:

The bill grants the federal courts original jurisdiction to hear interstate class action cases. . . The bill, however, includes several provisions ensuring that where appropriate, state

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<sup>56</sup> *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir.2005).

<sup>57</sup> See *supra* note 23; see also *United States v. American College of Physicians*, 475 U.S. 834, (1986) (observing that while the legislative history seemed to endorse a *per se* rule, "we are hesitant to rely on that inconclusive legislative history either to supply a provision *not* enacted by Congress ..., or to define a statutory term enacted by a prior Congress").

<sup>58</sup> See, e.g., *Serrano*, 478 F.3d at 1024 (finding that the text suggested a congressional intent to shift the burden of jurisdictional proof but commenting that "[a]s we observed in *Abrego*, we do not think that Congressional silence on the burden of proof results in ambiguity in the statute, and thus we do not rely on the legislative history as the basis for our holding") (citation omitted).

courts can adjudicate certain class actions that have a truly local focus. The first is the “Home State” exception. Under this provision, if two-thirds or more of the class members are from the defendant’s home state, the case *would not be subject to federal jurisdiction*. . . . In addition, S. 5 contains a “Local Controversy Exception” ...[and] [i]f all of [its] four criteria are satisfied, the case *will not be subject to federal jurisdiction under the bill*.<sup>59</sup>

Even if we were to ignore these conflicting signals in the committee report, use of this particular legislative history is especially “problematic” because the senate committee report was not finalized and published until two weeks after CAFA was enacted. In the past, the Court has given little weight to such post-hoc reports.<sup>60</sup>

Legislative history can be like a siren song that can easily steer us into trouble. In *Lowery v. Alabama Power Co.*, in dealing with a different but related interpretative question under CAFA, the Eleventh Circuit was apparently completely enthralled by these sweet sounds:

Though we are mindful that it is error to cloud the plain meaning of a statutory provision here with contrary legislative history, where, as here, the legislative history comports with the interpretation that has been adopted, and where there is a potential that others may find ambiguity where we have found plain meaning, caution and completeness counsel that we discuss the statute’s legislative history.<sup>61</sup>

In other words, look to legislative history when it supports the conclusion to which you are already leaning but ignore it if it seems contradictory? Tautological, this argument also ignores the Court’s decision in *Allapattah*, where the majority read the statute to unambiguously evidence a congressional intent that was one hundred and eighty degrees different than

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<sup>59</sup> 455 F. Supp. 2d 1045, 1058-59 (C.D. Ca. 2006) (*quoting* S. Rep. No. 109-14 at 28 (emphasis added by court)).

<sup>60</sup> *See Lao* (*citing* Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 168, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989)) (“the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute”); *Sullivan v. Finkelstein*, 496 U.S. 617, 631– 32, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990) (Scalia, J., concurring).

<sup>61</sup> *Lowery v. Alabama Power Co.*, 483 F.ed 1184, 1205 (11<sup>th</sup> Cir. 2007).

what much of the legislative history suggested.<sup>62</sup> So much for legislative history as dispositive proof of congressional intent to shift the jurisdictional burden of proof.

C. THE RESUSCITATION OF *BREUER V. JIM'S CONCRETE OF BREVARD, INC.*

While there has been limited support for basing a shift in the burden of proof either on the policy rationale of the plaintiff's position or on the statute's legislative history and/or its spirit, all the courts that have shifted the burden of proof as to §§1332(d)(3) and (d)(4) have felt bound to do so by the Supreme Court's decision in *Breuer v. Jim's Concrete of Brevard, Inc.*<sup>63</sup> Typical is the Eleventh Circuit's assessment:

[W]hen a party seeks to avail itself of an express statutory exception to federal jurisdiction granted under CAFA, as in this case, we hold that the party seeking remand bears the burden of proof with regard to that exception. *Cf. Breuer v. Jim's Concrete of Brevard, Inc.*, (holding that when a defendant removes a case under 28 U.S.C. 1441(a), the burden is on a plaintiff to find an express exception to removal)).<sup>64</sup>

Indeed, whether to characterize these jurisdiction-limiting provisions as "exceptions" turns out to have mattered even to the few courts that have ultimately concluded that Congress did not intend to shift any jurisdictional burden of proof. This is because all courts seem to regard *Breuer* as directly on point. Thus, in *Lao v. Wickes Furniture Co., Inc.*, the court observed:

Defendants argue that this statutory language and structure makes clear that (d)(4)'s provisions are more akin to statutory exceptions to removal than part of (d)(2)'s jurisdictional criteria. This characterization is important because, at the time of CAFA's passage, the Supreme Court in *Breuer v. Jim's Concrete of Brevard, Inc.* had recognized

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<sup>62</sup> *Allapattah*, 545 U.S. at 567 (noting, *inter alia*, that "[t]he proponents of the alternative view §1367 insist that the statute is at least ambiguous and that we should look to other interpretive tools, including the legislative history of §1367, which supposedly demonstrate Congress did not intend §1367 to overrule *Zahn*").

<sup>63</sup> 538 U.S. 691 (2003).

<sup>64</sup> *Evans*, 449 F.3d 1149 1164.

that the opponent of removal under 28 U.S.C. § 1441(a) must prove that there is an express exception to removability. In essence, defendants argue that “the relation between subparts (d)(2) and (d)(4) of CAFA is analogous to the structure of 28 U.S.C. § 1441(a).” If defendants’ analogy to section 1441(a) holds, it would weigh heavily in this Court’s analysis as upon whom the burden of persuasion lies in this case.<sup>65</sup>

The key line being referenced from *Breuer*, cited over and over again by CAFA courts, is this one: “Since 1948, therefore, there has been no question that whenever the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception.”<sup>66</sup> The lower courts read this passage from *Breuer* to mean that because these are “exceptions” to jurisdiction it is appropriate to shift the burden of proof to the plaintiff to demonstrate their applicability. In this manner, the courts have felt unconstrained by the “near canonical” principle, described above, that the party seeking the federal forum bears the burden of jurisdictional proof.<sup>67</sup>

Citation to *Breuer* by courts in 2006 in the CAFA cases is more than a little remarkable. The case was a rather dubious addition to the Court’s docket in the 2002 term. [As a personal aside, I first learned that the Court had granted *certiorari* in *Breuer* in the fall of 2002 while preparing to teach a first year civil procedure class on subject matter jurisdiction. I distinctly remember thinking at the time that it was rather surprising the Court had taken the case, since the issue it posed hardly seemed to merit the Court’s limited resources.] The *Breuer* issue concerned the Fair Labor Standards Act of 1938. That statute provides—as many other statutes similarly do—that “[a]n action to recover [under the statute] may be maintained ... in any Federal or State court of competent jurisdiction.”<sup>68</sup> Taking advantage of the grant of concurrent jurisdiction, the plaintiff decided to file suit in state court. The defendant promptly removed the case to federal court as a case coming within the court’s federal question jurisdiction. Plaintiff then moved to remand, saying, of all things, that by giving plaintiffs the right to bring a suit in either state or federal court, the Congress was expressly

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<sup>65</sup> *Lao*, 455 F. Supp. 2d at 1054 (citations omitted).

<sup>66</sup> 538 U.S. 691, 697.

<sup>67</sup> See *supra* text accompanying notes \_\_\_ - \_\_\_.

<sup>68</sup> 29 U.S.C. §216(b).

taking away the defendant's right to remove the case once it had been properly filed in the state court.<sup>69</sup>

As remarkable as this sounds, the plaintiff actually found one old Eighth Circuit case that supported its argument—a really old case, decided *before* Congress revised the removal statute in 1948.<sup>70</sup> Every other court that had been presented with this argument had rejected it. But a circuit split is a circuit split, I guess, and the Court decided to take the case.<sup>71</sup>

Oral argument proved to be more of the same, with the justices puzzling out loud the merits (or lack thereof) of petitioner's position. When the Court issued its unanimous opinion affirming the judgment below, it was anything but surprising. That language in the FLSA, the Court concluded, does not amount to an express exception to removal.<sup>72</sup> That should have been the end of *Breuer* but now, four years later, the case has been disinterred and is being cited as one of the key arguments in a technical but critically important question under the CAFA. But does *Breuer* really stand for the proposition that its new CAFA proponents insist upon?

Despite the confidence with which the courts have read *Breuer* as directly on point in terms of the CAFA, I doubt seriously that the Supreme Court will find the case has any applicability in this context. *Breuer* essentially is a case that asks whether Congress had done something it rarely does. That is, did Congress in the FLSA grant concurrent jurisdiction to state and federal courts but withhold the defendant's right to remove such a case if the plaintiff chose to file it in state court, a right that would

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<sup>69</sup> 538 U.S. at 694.

<sup>70</sup> *Johnson v. Butler Bros.*, 162 F.2d 87 (1947).

<sup>71</sup> I ended up getting involved in *Breuer* because of my recent, prior involvement in another case before the Court that also dealt with removal issues. That case was *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2003). For a discussion of the case see *Syngenta, Stephenson and the Federal Judicial Injunctive Power*, in SYMPOSIUM ON COMPLEX LITIGATION, 37 AKR. L. REV. 605 (2004). The only thing I really did in *Breuer* was review a draft of the respondent's brief and make some modest suggestions which, in the event, seemed largely unnecessary since the legal arguments already appeared so lopsided.

<sup>72</sup> *Breuer*, 538 U.S. at 697 (determining that “[w]hen Congress has ‘wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms.’ It has not done so here.”) (citation omitted).

otherwise automatically exist by virtue of §1441?<sup>73</sup> This is the legislative prerogative, but it has been exercised infrequently.<sup>74</sup>

All the Court meant in *Breuer* when it said “there has been no question that whenever the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception” was that the burden ought to be on the party who is trying to show this is one of those rare instances when Congress established a grant of original jurisdiction without a corresponding removal right. In the absence of some express exception to removal—“unless otherwise authorized by Congress,” as §1441 provides—the defendant always has the right to remove a case from state court that is within a grant of original jurisdiction to the district court.<sup>75</sup> The Court in *Breuer* was simply saying that as a matter of statutory interpretation it makes sense to read the opening phrase of §1441 as placing the burden on the plaintiff to show that this is one of those rare occasions where Congress intended to make the federal forum available to a plaintiff but to respect her choice to bring suit in state court.

An additional reason that the Court in *Breuer* should not be read to suggest that all exceptions to removal must be proven by the plaintiff is that this proposition is inconsistent with longstanding judicial practice as to removal exceptions that are far more commonplace and familiar. Consider, for instance, 28 U.S.C. §1441(b), the second sentence of which withholds in diversity cases a defendant’s right to remove that would otherwise exist under §1441(a) when at least one named defendant is a citizen of the state in which the action was filed. Though a limitation or “exception,” if you will, to the general removal right in §1441(a), the courts routinely place the burden on the defendant to prove that removal was not proscribed by §1441(b).<sup>76</sup>

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<sup>73</sup> *Id.* at 694 (observing that “[r]emoval of FLSA actions is thus prohibited under §1441(a) only if Congress expressly provided as much”).

<sup>74</sup> *Id.* at 696-97 (detailing the handful of statutes where an express limitation on removal has been set forth).

<sup>75</sup> 28 U.S.C. §1441(a).

<sup>76</sup> For example, in *Hogge v. A.W. Chesterton Co.*, 2007 WL 1674088 (N.D. Ca., June 8, 2007), the court observed that §1441(b) “further provides that if the basis for federal jurisdiction is diversity of citizenship, removal is available only if no defendant is a citizen of the forum state. As the party seeking to remove the action, the defendant bears the burden of establishing that subject matter jurisdiction exists. Because the Court strictly construes the removal statute against removal, if there is any doubt as to the existence of federal jurisdiction, the Court should remand the matter to state court.” *Id.* at \*1. The court then held that “because the record before the Court does not establish that binding settlement agreements have eliminated all non-diverse Defendants from the state court

Similarly, §1446(b) requires that the notice of removal be filed within thirty days after the defendant receives notice of a pleading that shows the case is removable. There is an exception that courts recognize, referred to as the “revival exception,” which in one form provides that “a lapsed right to remove an initially removable case within thirty days is restored when the complaint is amended so substantially as to alter the character of the action and constitute essentially a new lawsuit.”<sup>77</sup> As with §1441(b)’s forum defendant exception, the defendant always bears the burden of proving this revival exception applicable.<sup>78</sup> The underlying rationale is the same as with §1441(b): The party removing a case to federal court is obliged to demonstrate that the case was properly removed and the court has jurisdiction over it.<sup>79</sup>

Once we correctly understand *Breuer*, it is easy to distinguish this circumstance from CAFA. With CAFA, the question is not whether Congress has withheld any right to remove; we know, instead, that it has expressly granted a removal right in §1453.<sup>80</sup> Nor is the question whether Congress has limited jurisdiction in cases where either §1332(d)(3) or either of the provisions in §1332(d)(4) apply. It has. The only question is who

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action, complete diversity did not exist as of the time of removal. Accordingly, this Court is without subject matter jurisdiction.” *Id.*

<sup>77</sup> *Johnson v. Heublein*, 227 F.2d 236, 241 (5<sup>th</sup> Cir. 2000).

<sup>78</sup> *See, e.g., Doe v. Florida Intern. Univ. Bd. of Trustees*, 464 F. Supp.2d 1259 (S.D. Fla 2006) (remanding suit where the defendant had failed to show enough difference between the original and amended complaint to justify application of the revival exception as to the thirty day limitation on removal in §1441(b)); *City of Kenner v. United Fire and Cas. Co.*, 2007 WL 217781 (E.D. La., July 30, 2007) (observing that “[a]s the removing party, the defendant bears the burden of establishing that federal jurisdiction exists at the time of removal” and that where the case was not initially removed within thirty days of filing and only issue was whether the lapsed right to remove was restored when the plaintiff amended the state court petition, the court remanded the suit, finding that the defendant had failed to demonstrate that the amendments to the original petition altered the character of the action.).

<sup>79</sup> Relatedly, if the defendant removes a case on the ground that the plaintiff fraudulently joined a non-diverse party solely for the purpose of destroying complete diversity, the removing party bears the burden of jurisdictional proof as to the fraudulent joinder, which is to say that the defendant bears the burden of proving that some exception exists to the rule that otherwise precludes him from removing the case to federal court because there is not complete diversity between the parties. *See, e.g., Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 815 (5<sup>th</sup> Cir. 1993). As to federal question cases and the artful pleading doctrine, the same approach is taken. It is the party desiring to gain the federal forum who must prove her right to remove and the court’s subject matter jurisdiction by showing that artful pleading has taken place. *See, e.g., Green v. Ameritrade, Inc.*, 279 F.3d 590 (8<sup>th</sup> Cir. 2002).

<sup>80</sup> 28 U.S.C. §1453.

has the burden of proof to show that the elements of these provisions have been or have not been satisfied. As to this critical question, *Breuer* has no relevance.

#### D. ANALOGIZING CAFA'S PROVISIONS

Some adherents of the “exceptions” school also liken their conception of the words Congress chose in promulgating §§1332(d)(3) and in (d)(4) to doctrines that similarly give judicial discretion to let go of a case, like abstention doctrines. The idea here is that abstention assumes there is subject matter jurisdiction but the court declines to exercise its jurisdiction for some reason.<sup>81</sup> This, at least, is the traditional understanding of abstention doctrine.<sup>82</sup> Another, and better, reference for their purposes is 28 USC §1367(c) since both are legislative pronouncements, though no courts have thought to make the reference.

Any attempted analogy between the language in CAFA and either common law abstention doctrines or the supplemental jurisdiction statute makes sense, if at all, only with regard to the discretionary language in §1332(d)(3). That is, §1332(d)(3) gives the court discretion to keep or decline jurisdiction in certain kinds of cases, just as these other parts of the law sometimes give a court the same power to let go of a state law claim that is appended to a federal claim within the court's §1331 jurisdiction. If §1332(d)(3) were the only limitation of jurisdiction in CAFA, we would perhaps be able to say with more confidence that it was meant to be treated as we treat abstention doctrines which give the court discretion to decline to exercise jurisdiction otherwise and previously given. But §1332(d)(3) is not the only provision that limits jurisdiction, as we have seen. Indeed, it is the only such provision of its kind, outnumbered by the mandatory exclusions from jurisdiction in §§1332(d)(4)(A), (d)(4)(B), (d)(5), (d)(9)(A), (d)(9)(B), and (d)(9)(C). The conceptual framework of likening CAFA's jurisdiction limiting provisions to abstention doctrine falls apart, then, beside the mandatory language in these other sections, all of which give the court

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<sup>81</sup> See, e.g., *Roche v. Country Mut. Ins. Co.*, 2007 WL 2003092 (S.D. Ill., July 6, 2007) (observing that the “local controversy” and “home state exception” “provide for abstention, which means that they presuppose the existence of subject matter jurisdiction”). For a good discussion of this case law, see generally Anthony Rollo, Hunter Twiford and Gabriel Crowson, *Practitioners Review “Abstention” Procedure Under Sections 1332(d)(3) and (4)*, 9 CONS. FIN. SERV. L. REP., (June 15, 2005), at 3.

<sup>82</sup> See *England v. Louisiana State Bd. Of Medical Examiners*, 375 U.S. 411, 415-16 (1964) (observing that abstention “accord[s] appropriate deference to the respective competence of the state and federal court systems” while “recogniz[ing] that abstention does not, of course, involve the abdication of federal jurisdiction”).



precisely no discretion when one of these subsections apply. That's the reason why the *Lao* court recoiled at the attempted analogy of §1332(d)(4)(A) and d(4)(B) to common law abstention doctrine, observing that “no other creature like it [exists] in the law.”<sup>83</sup>

We'll return in a moment to the problem of reconciling §1332(d)(3) and the two sections of §1332(d)(4) and the other mandatory carve-outs in the statute. Before we do that, though, we turn to the last and what turns out to be best argument for burden shifting: the text and its placement in the statutory context.

## E. TEXT AND CONTEXT

The remaining argument for shifting the burden focuses on the language and structure of the statute. As is always the case with questions of statutory interpretation,<sup>84</sup> the best starting place in ascertaining Congress's intent with regard to the burden of proof under CAFA is from the statutory text itself.

### 1. LOOKING AT TEXT

The least persuasive treatments of the text summarily characterize §§1332(d)(3) and (d)(4) as “exceptions” to the grant of federal jurisdiction in §1332(d)(2). By *summarily* I mean that courts, like the Eleventh Circuit in *Evans* and Fifth Circuit in *Frazier*, provide neither an explanation for what language qualifies as an “exception” to jurisdiction nor explain how we can know these provisions so qualify. The conclusions these courts reach—which are virtually identical in structure and content—are bare,

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<sup>83</sup> *Lao*, 455 F. Supp. 2d at 1058. Another, even less convincing analogy that some courts have tried to draw has been to compare §1332(d)(3) and the two parts of §1332(d)(4) to cases concerning state actions involving the Federal Deposit Insurance Corporation that had been removed to federal court, where the statute requires that the opponent of removal must prove the “state action” exception to federal jurisdiction.. These courts have reasoned that when the FDIC removes a case filed in state court, after it satisfies its burden of showing federal jurisdiction is proper, the burden of proving an exception exists is borne by the party objecting to removal. Whatever problems exist with trying to divine congressional intent as to §§1332(d)(3) and (d)(4) by reference to its passage of an unrelated statute composed of different jurisdiction granting- and limiting-language, other courts have declined to follow this reasoning. See *Hart*, 457 F.3d at 680.

<sup>84</sup> See, e.g., *Allapattah*, 545 U.S. at 568 (“As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.”).

punctuated only by a citation to *Breuer* for the proposition that, having found that §1332(d)(3) and the two provisions in §1332(d)(4) are exceptions to federal jurisdiction, the burden is on the plaintiff to prove their applicability.<sup>85</sup>

More cogent is the Seventh Circuit's treatment in *Hart v. FedEx Ground Package System, Inc.*<sup>86</sup> and the Ninth Circuit's in *Serrano v. 180 Connect, Inc.*<sup>87</sup> which focus somewhat better on the language in the statute. The courts in these cases distinguish the jurisdiction granting language in §1332(d)(2) ("the district courts shall have original jurisdiction") from the language in §1332(d)(3) and §1332(d)(4) (respectively, the court "may decline" and "must decline" to exercise jurisdiction). Keying on this difference in the language, both *Hart* and *Serrano* thought that Congress must have meant these to be "exceptions" to the grant of jurisdiction in §1332(d)(2). Recollecting §1441's opening, "Except as otherwise provided by Act of Congress," *Hart* and *Serrano* conclude that creating such exceptions to jurisdiction is what Congress had in mind by formulating §1332(d)(3) and the two sections of §1332(d)(4) with different words than those found in §1332(d)(2).<sup>88</sup> The fit is far from perfect, however—after all, neither §1332(d)(3) nor either part of §1332(d)(4) are expressly identified by the words "except" or "exception," as in §1441, or even words to similar effect—and the court in *Hart* at least had the good graces to concede its reading was not airtight.<sup>89</sup> In any event, having catalogued these subsections as "exceptions" to jurisdiction, it took only a citation to *Breuer* for both courts to conclude that the burden should properly rest with the party trying to prove these "exceptions" to apply.<sup>90</sup>

This suggests the first, real difficulty with *Hart* and *Serrano*'s reasoning: these courts are relying on their reading of *Breuer* to conclude that if §§1332(d)(3) and (d)(4) are indeed "exceptions" to jurisdiction then Congress must have meant for them to be proven by the party opposing jurisdiction. But we've already seen that *Breuer* is inapposite, that it said only that the plaintiff bears the unique burden of showing that Congress has taken the unusual step of providing for concurrent jurisdiction but

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<sup>85</sup> *Evans*, 449 F. 3d at 1164; *Frazier*, 455 F.3d at 546.

<sup>86</sup> 457 F.3d 675 (7<sup>th</sup> Cir. 2006).

<sup>87</sup> 478 F.3d 1018 (9<sup>th</sup> Cir. 2007).

<sup>88</sup> *Hart*, 457 F.3d at 680-81; *Serrano*, 478 F.3d at 1023.

<sup>89</sup> *Hart*, 457 F.3d at 680 (Although the match is not perfect, the relation between subparts (d)(2) and (d)(4) of CAFA is analogous to the structure of 28 U.S.C. §1441(a), which the Supreme Court examined in *Breuer*.").

<sup>90</sup> *Hart*, 457 F.3d at 680-81; *Serrano*, 478 F.3d at 1023.

withholding from the defendant a corresponding removal right. Thus, even if §1332(d)(3) and the two parts of §1332(d)(4) are “exceptions,” *Breuer* does not compel the conclusion that the statute triggers a burden shift.<sup>91</sup> Congress may or may not have intended to shift the burden of proof as to §§1332(d)(3) and (d)(4) to the party opposing federal jurisdiction, but merely calling them “exceptions” does nothing to prove this one way or the other. As we have already observed, the courts routinely require the party who desires to litigate in the federal forum to bear the burden of proof as to other, more familiar statutory provisions that act as limitations on and exceptions to the defendant’s removal rights.<sup>92</sup>

A second difficulty with the kind of textual argument advanced by *Hart* and *Serrano* is that, on closer examination, it really is not a textual argument at all, only a gut feeling covered with a patina of textual fidelity. There is no effort to contrast the existing language with some other formulation and to ask whether the choice Congress made thereby reveals the legislative purpose. Neither court contrasts “may decline” and “must decline” in §§1332(d)(3) and (d)(4) with other formulations Congress could have chosen. Instead, the courts were content with applying conclusory labels. Consider the relevant passage from *Hart*: “It is reasonable to understand [1332(d)(4)(A) and 1332(d)(4)(B)] as two “express exceptions” to CAFA’s normal jurisdictional rule, as the Supreme Court used that term in *Breuer*.” But what makes it reasonable? The court does not say.

Perhaps the most amazing thing about the textual argument on which the courts primarily ground their characterization of §1332(d)(3) and §1332(d)(4) as “exceptions” is that their assertion only makes sense if we ignore the actual text of the statute Congress passed. As it turns out, elsewhere in the statute Congress identified other subsections expressly as “exceptions.” Section 1453(d), which is titled “Exception,” begins: “This section shall not apply to any class action that solely involves” a claim for a “covered security” or fiduciary actions under the Securities Act of 1933 and the Securities Exchange Act of 1934, and actions concerning intra-corporate governance.<sup>93</sup> And note the phrasing used here: “shall not apply to.” This same language is mirrored in §1332(d)(5) and §1332(d)(9), other sections that limit the scope of CAFA’s jurisdictional reach. One certainly can read this mirroring of language as compelling evidence Congress meant these subject matters to be “exceptions” to CAFA jurisdiction and that, where Congress used different phrases (“may decline” and “must decline”)

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<sup>91</sup> See *supra* text accompanying notes \_\_\_ - \_\_\_.

<sup>92</sup> See *supra* text accompanying notes \_\_\_ - \_\_\_.

<sup>93</sup> 28 U.S.C. §1453(d).

in §1332(d)(3) and §1332(d)(4), it meant for these subsections to be treated as something other than exceptions.<sup>94</sup>

And then there is §1332(d)(11). This is the other place where Congress used the word “except.” Section 1332(d)(11) is perhaps the best proof that characterizing a provision as an “exception” to jurisdiction need not necessarily trigger a shift in the burden of proof. Subsection §1332(d)(11)(B)(i) provides that jurisdiction will exist over a mass action that meets certain criteria “except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).”<sup>95</sup> The question that this language raises is whether all plaintiffs in a mass action must have a minimum amount in controversy of \$75,000 each in order for the court to have jurisdiction or whether the court can individually remand those plaintiffs whose claims are determined to be below the \$75,000 threshold.

In wrestling with this issue, the Ninth Circuit in *Abrego Abrego* concluded that there must be at least one plaintiff whose claim exceeds \$75,000. Indeed, the Ninth Circuit went further and specifically regarded the obligation to determine that there is at least one plaintiff with \$75,000 as a threshold requirement to be borne by the party trying to demonstrate the existence of jurisdiction under §1332(d)(11). The Eleventh Circuit in *Evans*, which also wrestled with this question, never answered it since the court determined that the defendant had failed to meet its preliminary obligation of showing the aggregate amount in controversy to be over \$5,000,000.<sup>96</sup>

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<sup>94</sup> These textual differences have not been lost on everyone but their significance, oddly, has often been marginalized. For instance, Professor Stephen Shapiro provides an otherwise good account of how parties are to discharge their burdens of proof under the statute, but his acceptance of the characterization of §§1332(d)(3) and 1332(d)(4) and the perceived importance of *Breuer* leads him to treat the statutory text inadequately. See Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search for a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77, 98-99 (2006) (observing that “[w]hile the language of these provisions is different than the language used for the other exceptions, there is nothing inherent in that language to indicate that the provisions were meant to be something other than exceptions to the general grant of jurisdiction”).

<sup>95</sup> 28 U.S.C. §1332(d)(11)(B)(i)

<sup>96</sup> Although it did not reach the question whether a single plaintiff must be shown to have a claim worth at least \$75,000 under §1332(d)(11), *Lowery* nevertheless suggests that, if such a requirement exists, it was favorably inclined to the view that the burden should rest with the party opposing federal jurisdiction to show which plaintiffs have claims in excess of \$75,000.

What all this means is that whether any import attaches to being an “exception” to jurisdiction (little, in my view: as we have seen, merely calling something an “exception” tells us nothing about where Congress intended the burden of proof to lie), had Congress intended §§1332(d)(3) and (d)(4) to be regarded similarly it would have given them the same title and tracked similar language in them. That it did not seems like pretty powerful evidence Congress had no such intention.

## 2. LOOKING AT CONTEXT

In addition to the language in the text, another argument *Hart* found persuasive was in the placement of the language. That is, the court also thought that strong evidence of congressional intent could be found in Congress’s decision to place §§1332(d)(3) and (d)(4) in sections separate from §1332(d)(2). The court observed that its conclusion might have been different in Congress “had put the home state and local controversy rules directly in to the jurisdictional section of the statute, 28 USC §1332(d)(2), but it did not.”<sup>97</sup>

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We note in passing that the law of this circuit shifts the burden of proving the applicability of exceptions to CAFA’s removal jurisdiction to the plaintiff seeking a remand. *See Evans*, 449 F.3d at 1164 (shifting the burden of proof onto the plaintiff where the plaintiff sought “to avail itself of an express statutory exception [i.e., the local controversy exception] to federal jurisdiction granted under CAFA”). The defendants urge us to read *Evans* as shifting the burden onto the plaintiffs to prove which, if any, of the plaintiffs do not have claims exceeding the \$75,000 amount in controversy included in 28 U.S.C. §1332(d)(11)(B)(i). Although we find the argument quite compelling, we decline to address it here.

*Lowery*, 483 F.3d 1183, 1208 n.55. This reading, of course, would be inconsistent with the Ninth Circuit’s conclusion that the existence of at least one \$75,000 claim is a threshold requirement to be borne by the party trying to demonstrate the existence of jurisdiction under d(11). Such inconsistent results—between circuits otherwise in agreement as to allocation of the burden of proof on §§1332(d)(3) and (d)(4)—does much to help illustrate the impact that the courts’ misreading of *Breuer* is having. Indeed, even courts that have correctly resisted the idea that Congress intended to place the burden of proof as to §§1332(d)(3) and (d)(4) on the party opposing federal jurisdiction nevertheless assume that as express exceptions §§1332(d)(5), (d)(9) and (d)(11) must be proven by the party opposing federal jurisdiction. *See Lao*, 455 F. Supp. 2d at 1059 (concluding that “[s]ubsections (d)(5) and (9) are therefore truly exceptions to (d)(2)’s removal provisions, while subsection (d)(4) forms a part and parcel of subsection (d)(2)’s definitional scope”).

<sup>97</sup> *Hart*, 457 F.3d at 679.

That is worth thinking about further. What if Congress had written §1332(d)(2) so that what is now §§1332(d)(3) and (d)(4) were all part of the same paragraph? It would look something like this (for the sake of brevity, I'm not reproducing here all of the language after each subsection):

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds. . . (A) but a district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes. . . and (B) a district court shall decline to exercise jurisdiction under paragraph over a class action in which greater than two-thirds of the members of all proposed plaintiff classes . . .

There it is, all in one place. Would this placement make a difference?

With due respect to *Hart*, it is hard to see how this new structure is more revealing evidence that Congress intended to leave the entire burden on the party seeking to maintain the suit in federal court. As the court in *Lao* has already realized, focusing on whether Congress placed the jurisdiction-limiting language alongside, instead of separately from, the jurisdiction-granting language in §1332(d)(2) ignores §1441.<sup>98</sup> In the general removal statute, Congress expressly and famously placed an exception right along with a grant of jurisdiction.

Additionally, even if we were to give credence to the idea that placement of these provisions matters, *Hart* ignores that the case for burden shifting would be far stronger had Congress placed all of the jurisdiction conferring sections in one place (say, in §1332(d)(2)), and articulated the home state and local controversy sections in separate paragraphs. Instead, these two jurisdiction limiting provisions were sandwiched in the middle of the different jurisdiction-conferring sections, a point that *Hart* glosses over. According to the court, following the jurisdiction conferring language in §1332(d)(2) the “statute goes on to say” when the district court must decline jurisdiction.<sup>99</sup> But, in fact, the statute doesn’t “go on” to say anything. The exceptions are bracketed on both sides by jurisdiction-conferring rules in

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<sup>98</sup> *Lao*, 455 F. Supp. 2d at 1059.

<sup>99</sup> *Hart*, 457 F.3d at 679.

§1332(d)(2) and §1332(d)(5), as *Hart* even acknowledges.<sup>100</sup> Indeed, §1332(d)(11)(A) also includes what have been considered jurisdiction conferring rules for mass actions under CAFA.<sup>101</sup> That makes *Hart*'s reliance on statutory structure seem even less plausible as evidence of Congress's intent to treat (d)(3) and (d)(4) differently by virtue of their placement in the statute. Had Congress really meant to signal a distinction that jurisdiction-conferring sections and jurisdiction-limiting sections were to be treated differently, based on their placement in the statute, one assumes it would have more cleanly separated the two from each other.

### III. READING SECTIONS 1332(d)(3) AND (d)(4), AS WELL AS (d)(5) AND (d)(9), AS NON-WAIVABLE JURISDICTIONAL PROVISIONS

I have shown thus far that in trying to divine legislative intent with regard to the allocation of the burden of jurisdictional proof we should not place much stock in the characterization of §§1332(d)(3) and (d)(4) as "exceptions." Even if that's what Congress meant them to be, merely calling them "exceptions" doesn't demonstrate Congress intended the party arguing for their applicability to bear the burden of proof. *Breuer*, correctly understood, does not stand for the proposition that all "exceptions" to jurisdiction must be proven by the party opposing it. In any event, such a proposition is belied by recognition that courts routinely require the party who desires to litigate in the federal forum to bear the burden of proof as to other, more familiar statutory provisions that act as limitations on and exceptions to the defendant's removal rights.<sup>102</sup>

#### A. FOCUSING ON WAIVER

In the absence of any express language regarding the burden of jurisdictional proof, a better approach is to consider whether Congress intended the conditions set forth in the statutory sections to be waivable or bargainable conditions. That is, can we determine whether Congress expected parties to be able to waive, intentionally or inadvertently, arguments regarding the applicability of one of CAFA's provisions that plainly apply? Focusing on whether CAFA's provisions were meant to be waivable is a better approach because it helps to get at what we are really

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<sup>100</sup> *Id.* (citing to both §1332(d)(2) and §1332(d)(5) as jurisdiction-conferring rules in CAFA).

<sup>101</sup> *See Lowery*, 483 F.3d 1183 (for a "mass action" to be deemed a "class action" within the meaning of the statute, it has to meet the provisions of §1332(d)(2) through (d)(11)).

<sup>102</sup> *See supra* text accompanying notes \_\_\_ - \_\_\_.

after with regard to the burden of proof debate in CAFA.

If a statutory rule or requirement can be waived, then it makes some sense to talk in terms of a legislative intent to shift the burden of proof as to that rule or requirement onto the party trying to demonstrate its applicability. This holds true even for some aspects of a court's jurisdiction. For instance, although a court without personal jurisdiction over a defendant is powerless to impose any binding order against it,<sup>103</sup> challenges to the exercise of personal jurisdiction over the defendant are subject to waiver if not timely brought.<sup>104</sup>

There is a far different presumption as to subject matter jurisdiction. To say that federal courts are courts of limited subject matter jurisdiction is to say, more precisely, that the ultimate burden of persuasion as to the court's subject matter jurisdiction rests with the party that desires to litigate there.<sup>105</sup> That's why federal judges, both trial and appellate, are given the extraordinary power and responsibility of determining on their own whether jurisdiction exists.<sup>106</sup> To be sure, Congress can reallocate and otherwise tinker with the quantum of proof obligations that parties bear in regards to a particular rule or statute that limits federal jurisdiction.<sup>107</sup> But it is notable that Congress has rarely done so. This explains why it is not surprising to find that the courts routinely require the party who desires to litigate in the federal forum to bear the burden of proof as to familiar provisions that limit removal rights, such as §§1441(b) and 1446(b).

### 1. The Mandatory Language in CAFA

There are a number of good reasons for concluding that Congress similarly meant to treat §§1332(d)(4), (d)(5) and (d)(9) as nonwaivable rules of jurisdiction, whose nonapplicability must be shown by the party

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<sup>103</sup> See generally Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023, 1023-24(2004) (observing that for U.S. courts "judicial jurisdiction is as essential to institutional existence as oxygen is to human beings. Without it, courts are unable to render binding judgments; without it, they are paper tigers").

<sup>104</sup> See, e.g., FED. R. CIV. P. 12(g) and 12(h)(1).

<sup>105</sup> Cf. *U.S. v. Swiss American Bank, Ltd.*, 191 F.3d 30, 41 (1<sup>st</sup> Cir. 1999) (implementing a burden-shifting model for Rule 4(k)(2) and citing Stephen B. Burbank, *The United States' Approach to International Civil Litigation: Recent Developments in Forum Selection*, 19 U PA. J. INT'L. ECON. L. 1, 13 (1998)).

<sup>106</sup> See FED. R. CIV. P. 12(h)(3) ("Whenever it appears by the suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action").

<sup>107</sup> See *infra* text accompanying notes \_\_\_ - \_\_\_.



desiring to litigate in the federal forum. The starting point in thinking about congressional intent with regard to party waiver and §§1332(d)(4), (d)(5) and (d)(9) is to observe that the language in all of these provisions is mandatory. Although mandatory language need not always equate to nonwaivable rules (for instance, a statute of limitations might provide that a case shall not be heard if brought more than X number of years later and is a classic example of an affirmative defense that, if not timely raised, can be lost), in the context of subject matter rules that grant and limit the scope of a court's jurisdiction, its use is significant. By using "shall decline" and "shall not apply to," Congress in these sections can reasonably be read as having carved out space from the expanded grant of jurisdiction in (d)(2) such that a court is bound to make certain—which is to say it lacks any discretion to do otherwise—that any case coming within one of these provisions is dismissed or remanded. It doesn't seem likely that if the legislature had intended §§1332(d)(4), (d)(5) and (d)(5) to be waivable conditions it would have gone out of its way to use mandatory language in the sections. The formulations of "shall decline" and "shall not apply to" seem ill-suited for use as rules that a party can choose to ignore, if she wants to.<sup>108</sup>

Alongside these mandatory carve outs, §1332(d)(3) stands in stark contrast. Here, Congress used discretionary language which, at least when we compare it directly to the "shall decline" and "shall not apply to" formulations elsewhere in the statute, reads with considerably more pliancy. Congress used such discretionary abstention language—and only such discretionary language—in §1367(c), a jurisdictional statute that has been treated as subject to party waiver.<sup>109</sup> But even if §1332(d)(3) and §1367(c) resemble each other, it is hard to draw analogies between CAFA and a statute that only contains discretionary abstention language and no comparable mandatory formulations.

Perhaps even more telling than the use of the mandatory language in §1332(d)(4), as contrasted with the discretionary phrasing in §1332(d)(3), is to also consider what the Congress could have said if it really had intended to make these CAFA provisions subject to party waiver. In this regard, one point of comparison to consider is 28 U.S.C. §1334(c)(2):

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<sup>108</sup> Cf. *Lao*, 455 F. Supp. 2d at 1059 (observing that the mandatory provisions in (d)(4)(A) and (d)(4)(B) are "a part and parcel of subsection §1332(d)(2)'s definitional scope").

<sup>109</sup> See *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000 (9<sup>th</sup> Cir. 1997) (*en banc*).

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.<sup>110</sup>

“Upon timely motion of a party” sends an unmistakable message that the nature of this statutory brand of mandatory abstention is more like a personal jurisdiction challenge than a true limitation on the grant of jurisdiction to the court. This, indeed, also is precisely the way the same distinction between waivable and non-waivable rules is drawn in the Federal Rules of Civil Procedure.<sup>111</sup> Just as the failure to timely file a personal jurisdiction challenge, for instance, amounts to waiver of otherwise ironclad proof of nonamenability, absent a timely motion under §1334(c)(2) any argument for abstention, however substantively valid, is nullified.

The claim I am making is not that the Congress had to track this same language in §§1332(d)(4), (d)(5) and (d)(9) to demonstrate its intent to make this mandatory abstention rule waivable. Certainly, such language is not necessary to create waivable conditions. Section 1367(c) makes no reference to a party’s obligations but nevertheless may be an example of a rule that is subject to party waiver.<sup>112</sup> The point, instead, is that there were a number of ways in which Congress could have demonstrated its intention to treat §§1332(d)(4), (d)(5) and (d)(9) as waivable rules—it could have used only discretionary abstention language in all of the CAFA provisions, akin to what it did in §1367(c); or it could have expressly conditioned exercise of the court’s abstention on a party timely making an abstention challenge—but it did none of these things. We may say, then, that the “shall decline” and “shall not apply to” language in §§1332(d)(4), (d)(5) and (d)(9), along with the lack of clear waiver language, such as that found in 28 U.S.C. §1334(c)(2) and in the contrasting formulations between waivable and

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<sup>110</sup> 28 U.S.C. §1334(c)(2).

<sup>111</sup> Compare FED. R. CIV. P. 12(h)(1) (“A defense of lack of jurisdiction over the person...is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof...”) with FED. R. CIV. P. 12(h)(3) (“Whenever it appears by the suggestion of the parties *or otherwise* that the court lacks jurisdiction of the subject matter, the court shall dismiss the action”) (emphasis added).

<sup>112</sup> See *supra* note \_\_\_\_.

nonwaivable defenses found in Rule 12 of the Federal Rules of Civil Procedure, provides powerful textual evidence that that CAFA's mandatory carve-outs are more in the nature of conditions that cannot be involuntarily waived or bargained for.<sup>113</sup>

## 2. The Relevance of "Decline"

But wait, some may object, isn't there a difference between "shall decline" in §1332(d)(4) and the use of "shall not apply to" in (d)(5) and (d)(9)? In other words, can't we discern in the choice of the word "decline" an intention to shift the burden of jurisdictional proof to the party who seeks the federal court to stay its hand under (d)(4)?

Although the phrasing in (d)(4) is peculiar, the better view is to place emphasis on the entire, mandatory phrase, "shall decline" and not to read into the choice in (d)(4) of "decline," itself and alone, a legislative intent to shift the burden of persuasion as to the court's subject matter jurisdiction. To see why, assume for argument's sake that instead of saying that the district court "shall decline jurisdiction" the statutory subsection tracked (d)(5) to provide that "the jurisdiction granted in (d)(2) "shall not apply to" cases coming within (d)(4)" or (perhaps even more pointedly) had said the court "shall not have jurisdiction when the (d)(4) criteria apply." Would this amount to better evidence that Congress intended the home state and local controversy sections to be integrated into jurisdictional grant and, thus, part of the burden to be borne by the party seeking federal jurisdiction?

As a practical matter, there would seem to be little operational difference between the statutory language Congress chose and our hypothetical phrasing. Both limit the jurisdictional reach of §1332(d)(2) and, constructively, in the same way. If one of the subparts of §1332(d)(4) applies, that's it, the court has to dismiss or remand the case. Perhaps it would have been less opaque to use "shall not have jurisdiction" or "shall not apply to" as a signal of their nonwaivability; but focusing only on the solitary word "decline" suffers from the equivalent difficulty that it ignores that Congress chose different preceding verbs in (d)(3) and (d)(4). Standing alone, then, the use of "decline" in (d)(4) probably tells us nothing about

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<sup>113</sup> *Cf.* *Hirschbach v. NVE Bank*, 2007 WL 2119414 (D.N.J., July 24, 2007) (observing that whatever the burden-bearing rule may be in this Circuit, it is the Court itself that is not satisfied that this case does not fall within the home state exception to CAFA jurisdiction" and remanding suit).

what Congress meant with regard to the jurisdictional burden of proof in CAFA.<sup>114</sup>

We might also be aided by comparing the language in §1332(d)(4) to other similar statutory formulations. As it turns out, there are few close statutory comparisons to (d)(4) and its peculiar choice of “shall decline.” In the past, when Congress has used the word “decline” in a jurisdictional statute it has appended discretion to it, as in a district court “may decline” jurisdiction in such and such circumstances. The most prominent example is 28 U.S.C. §1367(c), a section that we’ve already said calls to mind §1332(d)(3). The closest comparison to §1332(d)(4), however, is not this discretionary provision in the supplemental jurisdiction statute but 28 U.S.C. §1369(b) from the Multiparty, Multiforum Trial Jurisdiction Act of 2002 (MMTJA).<sup>115</sup> If we could divine legislative intent with regard to §1369(b) that would be important evidence as to congressional intent in §1332(d)(4), not only because there is a resemblance between §1369(b) and §1332(d)(4) but also, and more generally, because MMTJA was CAFA’s most immediate, if less comprehensive, statutory ancestor.<sup>116</sup> Section 1369(b) provides:

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<sup>114</sup> In considering the existing language in (d)(4), one district court thought the mandatory phrasing susceptible to more than one interpretation, that is, of “signifying either Congress’ attempt to create a form of statutory abstention or simply its inartful way of further refining subsection (d)(2)’s jurisdictional criteria.” *Id.*

<sup>115</sup> 28 U.S.C. § 1369. Two other, less related examples, are §9(E) of the Small Business Act, 15 U.S.C. §637 (“The adjudicator selected to preside over a proceeding conducted under this authority of this paragraph shall decline to accept jurisdiction over any matter that (i) does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification of the Administration’s position; (ii) is untimely filed; (iii) is not filed in accordance with the rules of procedure governing such proceedings; or (iv) has been decided by or is the subject of an adjudication before a court of competent jurisdiction over such matters.”); and the Indian Child Welfare Act, 25 U.S.C. §1920 (Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.”).

<sup>116</sup> No court has directly spoken to what Congress meant in terms of the jurisdictional burden of proof in §1369(b). The Fifth Circuit’s decision in *Wallace v. Louisiana Citizens Prop. Ins. Corp.*, 444 F.3d 697 (5<sup>th</sup> Cir. 2006)—the only circuit court opinion to interpret the Act—comes closest. Section 1369(b), the court says,

is an abstention provision. It assumes subject matter jurisdiction under §1369(a), but abstains where the “substantial majority” of the plaintiffs and the “primary defendants” are citizens of the same state and the claims at issue are “governed primarily by the laws of that State.” It does

The district court shall abstain from hearing any civil action described in subsection (a) in which (1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and (2) the claims asserted with be governed primarily by the laws of that State.

Although the text of §1369(b) may give no greater purchase than that in §1332(d)(4), §1369(b)'s title is notable. Congress chose to precede this section with the title, "Limitation of jurisdiction of district courts." While one should not overread this evidence, characterization of the statutory form of mandatory abstention in §1369(b) as an express limitation on jurisdiction would appear to offer some signal of legislative intent to treat this provision, just like other subject matter jurisdictional rules are treated, as not subject to party waiver. Thus, to the extent that there is a close resemblance between §1369(b)'s "shall abstain" and §1332(d)(4)'s "shall decline," then the latter should also then be read to embody a nonwaivable, express jurisdictional limit.

### 3. Jurisdictional v. Claims-Processing Rules

Treating §1369(b)—and, likewise, §1332(d)(4)—as setting express jurisdictional limits is consistent with the Court's recent efforts to distinguish jurisdictional rules from those that are non-jurisdictional. The Court has distinguished, on the one hand, between subject matter jurisdictional rules, which are rules that define "classes of cases" to which a statute does or does not apply, and what it calls "claims processing rules." The first case to draw this distinction was *Kontrick v. Ryan*,<sup>117</sup> where the Court held that a party's failure to timely meet a filing requirement in the bankruptcy rules did not deprive the court of subject matter jurisdiction. "The label 'jurisdictional' [is appropriate] not for claim-processing rules," the Court said, "but only for prescriptions delineating the classes of cases (subject- matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."<sup>118</sup> The distinction seems now

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not deprive federal courts of subject matter jurisdiction, but rather, acts as a limitation upon the exercise of jurisdiction granted in §1369(a).

*Wallace* thus reinforces a view that it is possible to distinguish between jurisdiction-conferring and jurisdiction-limiting rules. But *Wallace* says nothing about who bears the burden of proof as to the applicability of this mandatory abstention doctrine.

<sup>117</sup> 540 U. S. 443 (2004).

<sup>118</sup> *Kontrick*, 540 U. S. at 455.

firmly established,<sup>119</sup> as even both the majority and dissent in the recent *Bowles v. Russell*<sup>120</sup> case recognized it, though they disagreed mightily over its application to the time limitation in that case.

To be sure, these cases struggle with the proper characterization of rules in deciding different ultimate questions. In *Arbaugh v. Y & H Corp.*, for instance, the court was after the distinction between jurisdictional issues and issues that go to the substantive merits of the claim under federal law (namely, whether the defendant had fewer than the minimum number of employees, for if it did, the federal statute did not purport to regulate its conduct).<sup>121</sup> Similarly, *Kontrick*, *Scarborough*, *Eberhart* and *Bowles* all had to decide how best to characterize rules that set out time limits with which the parties in those cases, for different reasons, had failed to comply.

But the distinction between “claims processing” and “jurisdictional” rules set out in these cases nevertheless should inform our thinking about CAFA as well. Whatever one thinks of the proper characterization of a time deadline imposed (by judge or by rule), §§1332(d)(4), (d)(5) and (d)(9), along with §1369(b), are plainly not claims processing rules. Instead, they indisputably mark the classes of cases to which the statute applies. That suggests the best characterization of these provisions is as jurisdictional rules and, as we have seen, the traditional understanding has always been that the party who desires to maintain suit in federal court is obligated to prove the applicability (or inapplicability) of any relevant jurisdictional rules.

To be sure, Congress can always reallocate the burden of proof as to a particular jurisdictional rule. The traditional understanding, however, is that the burden is borne by the party trying to establish the rule’s applicability. By writing rules that are plainly jurisdictional—in the classic sense that they are rules that delineate the classes of cases within and beyond the federal court’s adjudicatory authority—and without expressly reallocating the burden of jurisdictional proof—CAFA’s provisions should be read as not departing from the traditional formula.<sup>122</sup>

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<sup>119</sup> See also *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Eberhart v. U.S.*, 546 U.S. 12 (2005); *Scarborough v. Principi*, 541 U.S. 401 (2004).

<sup>120</sup> \_\_\_ U.S. \_\_\_, 127 S.Ct. 2360 (2007).

<sup>121</sup> *Arbaugh*, 546 U.S. at \_\_\_, 126 S. Ct. at 1238.

<sup>122</sup> Cf. *Arbaugh*, 546 U.S. at \*, 126 S. Ct. at 1245 (“If the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue.”); *Rockwell Intern. Corp. v. U.S.* 549 U.S. \_\_\_, \_\_\_, 127 S.Ct. 1397, 1405 (2007) (“a clear and explicit withdrawal of jurisdiction...undoubtedly withdraws jurisdiction”).

#### 4. Legislating Against Backdrop of Existing Law

This suggests a last, and broader, reason for regarding the statutory language in §§1332(d)(4), (d)(5) and (d)(9) as placing on the party seeking to litigate in federal court the burden of proof as to the inapplicability of these sections. An additional important consideration in interpreting what Congress intended as to the burden of proof is to recall that Congress legislates with an awareness of existing law.<sup>123</sup> Indeed, in rejecting the defendant's bid to shift the burden of proof as to the *prima facie* jurisdictional case, the Eleventh Circuit in *Miedema v. Maytag Corp.* specifically relied on this longstanding legal precept:

While the text of CAFA plainly expands federal jurisdiction over class actions and facilitates their removal, “[w]e presume that Congress legislates against the backdrop of established principles of state and federal common law, and that when it wishes to deviate from deeply rooted principles, it will say so”<sup>124</sup>

It's hard to square this awareness with the subsequent decision by another panel of the Eleventh Circuit in *Evans* to shift the burden of proof as to §§1332(d)(3) and (d)(4), even though Congress was no more explicit as to the jurisdictional burden in these sections than it was in §1332(d)(2). As we have seen, there are other, more familiar examples in the removal statutes where Congress imposed limitations on and exceptions to the defendant's right to remove a state case to federal court and the courts have always required that the defendant prove they do not preclude her from gaining the federal forum.<sup>125</sup> Congress could have chosen to ignore the traditional practice and allocate the burden of proof as to CAFA's provisions elsewhere, of course; but it did not expressly do so. Just as the courts have recognized that Congress legislates against the backdrop of existing law and

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<sup>123</sup> See *Abrego Abrego*, 443 F.3d at 684 (noting that in construing CAFA courts should be mindful that, “[g]iven the care taken in CAFA to reverse certain established principles but not others, the usual presumption that Congress legislates against an understanding of pertinent legal principles has particular force”).

<sup>124</sup> *Miedema v. Maytag Corp.*, 450 F.3d 1332, 1329 (11<sup>th</sup> Cir. 2006) (quoting *United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 900 (11<sup>th</sup> Cir.2003)).

<sup>125</sup> See *supra* text accompanying notes \_\_\_ - \_\_\_.

thereby refused to shift the threshold burden of jurisdictional proof,<sup>126</sup> so should we apply a similar understanding as to CAFA's other provisions.<sup>127</sup>

#### B. RECONCILING §§1332(d)(3) AND (d)(4)

So far, so good but how, then, do we characterize §1332(d)(3)? Earlier I bracketed the problem of trying to reconcile §1332(d)(3) and (d)(4).<sup>128</sup> At first glance, this might appear problematic. We have already observed that if §1332(d)(3) and its discretionary language is likened to abstention doctrines, one could reasonably decide Congress meant to place the burden on the party trying to prove the section applicable but that account cannot be squared with the two provisions in §1332(d)(4).<sup>129</sup> But isn't it also true that if we regard the mandatory nature of these latter provisions as proof Congress meant them to be proven as part of the threshold jurisdictional showing, that would equally ignore §1332(d)(3)? Why should we favor one inconsistent reading over another?

One answer is that we don't have to. We could read the mandatory carve-outs in §1332(d)(4)(A) and (d)(4)(B) as evidence that Congress intended these sections—and not §1332(d)(3)—to be treated as part of the threshold jurisdictional case. Such a reading finds support in the Court's recent observation in *Bowles v. Russell* that “[b]ecause Congress decides

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<sup>126</sup> See *supra* text accompanying notes \_\_\_ - \_\_\_.

<sup>127</sup> The assumption that Congress was aware the jurisdictional burden has always rested with the party seeking to maintain suit in the federal forum calls to mind Einer Elhauge's "preference-eliciting default" rule. See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002). Basically, Elhauge's rule provides that if in doubt because the words of a statute are not clear, the court should reject the statutory interpretation that favors the most "politically powerful group with ready access to the legislative agenda." The idea here is that, if it turns out the court's reading of the statute was not what Congress had in mind, then such a group has a better chance of actually getting Congress to come back and be more explicit next time. *Id.* at 2165-66 (arguing, *inter alia*, that a "preference-eliciting default rule [] is more likely to provoke a legislative reaction that resolves the statutory indeterminacy and thus creates an ultimate statutory result that reflects enactable political preferences more accurately than any judicial estimate possibly could"). Given the success of the United States Chamber of Commerce and other business groups in shepherding CAFA through to passage in February 2005, Elhauge's rule suggests it may be appropriate to favor the conclusion that Congress did not intend to shift the burden of jurisdictional proof from the place it has always rested. If that interpretation is wrong, those groups are in a far better position to try to correct it than the converse. On the other hand, one could argue that the political winds have already shifted and that the window of opportunity these groups possessed to influence public policy reform of complex litigation has now closed.

<sup>128</sup> See *supra* text accompanying note \_\_\_.

<sup>129</sup> See *supra* text accompanying notes \_\_\_ - \_\_\_.



whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.”<sup>130</sup> Thus, Congress could have intended for the ultimate jurisdictional burden of persuasion to be borne by the party seeking the federal forum only for the mandatory carve-outs, and not the discretionary one.<sup>131</sup>

Although plausible, it is better to construe the statute as leaving the burden of jurisdictional proof for both §1332(d)(3) and the two mandatory carve-outs in (d)(4) on the party trying to maintain the suit in federal court. There are several reasons for this.

We have already observed that the mandatory aspect of the two carve outs in §1332(d)(4) suggests there really is no other way to adequately conceptualize these provisions except as nonwaivable jurisdictional rules. That’s not true as to (d)(3), but these three subsections indisputably are of a piece with one another. Section 1332(d)(3) covers cases where between one-third and two-thirds of the proposed class members and the primary defendants are forum citizens. Correspondingly, §1332(d)(4)(A) comes into play when more than two-thirds of the putative class and at least one defendant is a forum citizen and is alleged to bear “significant” responsibility for the plaintiffs’ alleged injuries, while its counterpart, §1332(d)(4)(B) covers roughly the same class size but provides a different formulation as to the defendants. It would be peculiar if Congress meant for the burden of jurisdictional proof to vary among such closely related cousins, especially when it said nothing explicitly about treating them differently. We should interpret the choice to track similar language in §1332(d)(3) as indicative that Congress was signaling it wanted the subsections to be treated similarly.

Second, and in a similar vein, there will be considerable overlap in the factual jurisdictional proof that will be required for §1332(d)(3) and for the two parts of §1332(d)(4). It is hard to imagine that Congress would have

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<sup>130</sup> \_\_\_ U.S. \_\_\_, \_\_\_, 127 S.Ct. 2360, 2365 (2007).

<sup>131</sup> Alternately, we could read the difference between “may decline” and “shall decline” as signaling an intent to shift the burden of production as to § 1332(d)(3) onto the party trying to prove its applicability, but leave the burden of production as to (d)(4) and the burden of persuasion as to both on the party desiring to remain in federal court. This is not an unreasonable approach, given the close but notably different formulations in (d)(3) and (d)(4). On the other hand, this cuts the onion rather finely. It’s not that Congress is unable to do so, but had this been the legislative intent, one expects it would have been addressed more directly. That, and the reasons I elaborate below, suggest the better construction is to assume Congress intended both the burden of production and persuasion as to both sections to rest with the party who seeks to litigate in federal court.

meant for the defendant (in a removal context) to prove that less than two thirds of the class are forum citizens but that, once such evidence has been tendered, the burden then would shift to the plaintiff to prove that between one third and two thirds of the putative class is comprised of forum citizens. It makes far more practical sense for Congress to have kept the burden as to (d)(3) and both provisions in (d)(4) on the party trying to remain in federal court.

Finally, we can again draw some further support for reading §§1332(d)(3) and (d)(4), along with the provisions in (d)(5) and (d)(9), as nonwaivable jurisdictional rules by recalling that Congress legislates against a backdrop of existing law. It is difficult to make a credible case that, without saying so expressly, Congress intended to depart from existing law and, on top of that, engaged in a precise, scalpel-like reallocation of the burden of jurisdictional proof, shifting it as to (d)(3) onto the party opposing federal jurisdiction but leaving it on the one desiring to litigate in federal court as to (d)(4). I take seriously Congress's awareness of the traditional legal rule that the party seeking to establish jurisdiction has the burden of proving its existence.<sup>132</sup> It is free to depart from this traditional approach, but we should not read into the statute an intent to do so absent clear language to this effect.

#### CONCLUSION

Each of the arguments that has been credited by courts as grounds for finding Congress intended to shift the burden of jurisdictional proof seem far less supportable when subjected to closer scrutiny.

The plaintiff will sometimes have better access to jurisdictional proof, but not always. In any event, this argument seems less an attempt to divine legislative intent in the statute than a patent policy judgment best left to lawmakers. Reliance on legislative history lacks the necessary foundational credence. No court that has turned to legislative history has convincingly made the case that any language in the statute is sufficiently ambiguous to justify doing so. There is a surreal inconsistency in watching courts readily dismiss as unreliable the same Senate Committee Report published after the statute's enactment as to other questions of statutory interpretation but not hesitate in drawing on it as evidence of Congress's intent to shift the burden

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<sup>132</sup> See *Abrego Abrego*, 443 F.3d at 684 (noting that in construing CAFA courts should be mindful that, “[g]iven the care taken in CAFA to reverse certain established principles but not others, the usual presumption that Congress legislates against an understanding of pertinent legal principles has particular force”).

of proof as to §§1332(d)(3) and (d)(4). Worse still, though, are arguments that find justification for burden shifting in CAFA's spirit and its colorful "Findings and Purposes." Untethered, if not disdainful of the actual text that was enacted into law, this argument seems little different from treating Congress's passage of the statute as a blank check on which the most expansionist hopes and dreams of CAFA's proponents can endlessly draw.

While not all courts have been swayed by these previous arguments, all courts—even including the few that have refused to ultimately find Congress intended any burden shift—have thought the Court's decision in *Breuer v. Jim's Concrete of Brevard, Inc.* is on point. On this view, if §§1332(d)(3) and (d)(4) are "exceptions" to a separate grant of jurisdiction, then *Breuer* commands the conclusion that Congress intended to shift the burden of proof as to these provisions onto the party trying to establish their applicability.

We saw, however, that the line cited from *Breuer* has no application to this statutory context. The Court in *Breuer* meant only that the best reading of §1441 is that the burden should be on the plaintiff to show to show this is one of those rare instances when Congress expressly intended to grant original jurisdiction to the district courts without giving a corresponding right to remove to the defendant. Taking the line from *Breuer* literally and without any consideration to context, one can see its applicability to the CAFA burden of proof problem. But, reading naked sentences from an opinion is dangerous business, as even the Fifth Circuit has observed in addressing a related CAFA question.<sup>133</sup>

My reading of the statutory text departs from the prevailing view. It does not aid thinking to characterize §§1332(d)(3) and (d)(4) as "exceptions." Even if they were so intended, *Breuer* doesn't command a burden shift and, further, fails to account for the burden that is regularly placed on defendants to prove the inapplicability of other common exceptions to removal authority. In any event, the predicate assumption that §§1332(d)(3) and (d)(4) represent "exceptions" to the grant of jurisdiction in (d)(2) falls apart as soon as one reads the whole statute and realizes that

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<sup>133</sup> *Preston v. Tenet Healthsystem Memorial Medical Center, Inc.*, 485 F.3d 793, 799 (5<sup>th</sup> Cir. 2007) (rejecting plaintiffs' reading of a case as grounds for using a different method of determining domicile for purposes of applying one of the carve-out provisions in CAFA and observing that plaintiffs' "proposed approach for determining citizenship gives undue attention to the naked statements of law as opposed to the substance of the relevant opinions").

Congress knew how to write exceptions into the statute and did so, in other places.

The better way to read the statute is to regard the mandatory language in §1332(d)(4), along with the provisions in (d)(5) and (d)(9), as nonwaivable jurisdictional rules. As such, the party desiring to remain in federal court bears the ultimate burden of persuasion to show that the court has jurisdiction and that none of the mandatory carve outs to jurisdiction otherwise apply. Concededly, the phrasing in (d)(4) is peculiar. Rather than look at the word “decline” in isolation, we should (i) focus on the whole, mandatory phrase, “shall decline,” which is an unlikely formulation if the rule was meant to be waivable by parties, inadvertently or at their choosing; and acknowledge the legislative choice to craft the provision (ii) without familiar waiver language (such as “On the motion of a party, the court shall decline jurisdiction...”) and (iii) in such a way that it indisputably is directed at marking a category of cases to which the statute does not apply. All this suggests that the better reading of (d)(4) is that the party who wants to be in federal court must prove it does not apply in order to satisfy his burden of persuasion as to the court’s jurisdiction.

This raises a question mark as to §1332(d)(3). But, because there is no other viable way to characterize the mandatory carve-outs, because §§1332(d)(3) and (d)(4) are obviously meant to fit together closely, and because we must assume Congress legislates with an awareness of existing law and, as such, would probably not have used such plainly jurisdictional language (or would have been explicit if it had intended to bring about a shift in the jurisdictional burden), the better conclusion is that the Congress did not intend to shift the burden of proof as to any of these provisions in CAFA.

There are few subjects that are as important—and divisive—a part of the American legal and social landscape as class action litigation.<sup>134</sup> The question of the jurisdictional burden of proof is one of the most important CAFA interpretative questions with which the courts are now engaged as the empirical evidence underlines the virtually dispositive nature of a shift

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<sup>134</sup> See Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT’L. L. 179, 212 (2001) (“In the United States, many see the class action rule as the key to opening the monster’s cage and setting it free. . . . The great question facing civil justice regimes in the United States and elsewhere is what the role of the judiciary should be in responding to large-scale harms.”) (referencing Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action,”* 92 HARV. L. REV. 644 (1979)).

in the burden of jurisdictional proof.<sup>135</sup> For this reason alone, we may be excused for dwelling so long on these technical questions of statutory meaning and application. The proper allocation of jurisdictional proof under the statute is a vital interpretative question precisely because it is one of the key post-enactment developments that have made the new class action statute as consequential as early studies have already shown it to be.<sup>136</sup>

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<sup>135</sup> See supra note 6 and Appendix.

<sup>136</sup> See THOMAS E. WILLGING AND EMERY G. LEE, III, THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: THIRD INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (April 2007). The report's authors summarize their main findings as follows:

In the sixteen months since CAFA went into effect on February 18, 2005, [] we find a substantial increase in class action activity based on diversity of citizenship jurisdiction. Given that one of the legislation's primary purposes was to expand the diversity jurisdiction of the federal courts, it is likely that much of this observed increase in diversity removals and, of particular interest, original proceedings in the federal courts is attributable to CAFA.

*Id.* at 2; see also Edward F. Sherman, *Decline and Fall*, 93 A.B.A. J. 51 (June 2007) (remarking that following CAFA's passage "the consumer class action has reached a crucial juncture, and the direction that courts and legislatures take over the next few years will likely determine whether it has any kind of viable future").

APPENDIX

Table 1: Shift in Burden of Jurisdictional Proof Under 28 U.S.C. §§1332(d)(3), (d)(4), (d)(5) or (d)(9)

<b>Case Citation</b>	<b>Burden Shift?</b>	<b>Result</b>
<b>Scott v. Ing Clarion Partners, LLC</b> 2006 WL 3191184 N.D.Ga.,2006. October 31, 2006	Yes	Motion to remand denied.
<b>Eakins v. Pella Corp.</b> 455 F.Supp.2d 450 E.D.N.C.,2006. September 27, 2006	Yes	Motion to remand denied.
<b>Sullivan. v. State Farm, 2006 U.S. Dist. LEXIS 95817</b> Civil action no. 06-0004 Section K E.D. La April 6, 2006	Does Not Resolve	Motion to remand denied.
<b>Escoe v. State Farm</b> 2007 WL 1207231 E.D.La.,2007 April 23, 2007	Yes	Motion to remand denied
<b>Robinson v. Cheetah Transp.</b> Not Reported in F.Supp.2d, 2006 WL 468820 W.D.La.,2006. February 27, 2006	Yes	Motion to remand denied
<b>Preston v. Tenet Healthsystem Memorial Medical Center, Inc.</b> 485 F.3d 793 C.A.5 (La.),2007	Yes	Motion to remand denied
<b>Preston v. Tenet Healthsystem Memorial Medical</b>	Yes	Motion to remand granted

<b>Center, Inc.</b> 485 F.3d 804 C.A.5 (La.),2007.		
<b>Serrano v. 180 Connect, Inc.</b> 478 F.3d 1018 C.A.9 (Cal.),2007.	Yes	No final outcome—sent back to lower district court to reconsider remand motion in light of appellate ruling on allocation of burden
<b>Hart v. FedEx Ground Package System Inc.</b> 457 F.3d 675 C.A.7 (Ind.),2006.	Yes	Motion to remand denied
<b>Frazier v. Pioneer Americas LLC</b> 455 F.3d 542 C.A.5 (La.),2006.	Yes	Motion to remand denied
<b>Evans v. Walter Industries, Inc.</b> 449 F.3d 1159 C.A.11 (Ala.),2006.	Yes	Motion to remand denied
<b>Martin v. Lafon Nursing Facility</b> Slip Copy, 2007 WL 162813 E.D.La.,2007. January 18, 2007	Yes	Motion to remand denied
<b>Morris v. TJX Companies, Inc.</b> 2007 WL 1885137 D.Mass.,2007. June 26, 2007	Yes	Motion to remand denied
<b>Garcia v. Boyar &amp; Miller, P.C.</b> 2007 WL 1556961 N.D.Tex.,2007. May 30, 2007	Yes	Motion to remand denied
<b>Mattera v. Clear Channel Communications</b> , 239 FRD 70 (S.D.N.Y.	Yes	Motion to dismiss granted (suit initiated by P in federal court; so motion by defendant to

2006) Decided Nov. 14, 2006		dismiss)
<b>Kitson v. Bank of Edwardsville</b> , 2006 WL 3392752 (S.D.Ill. Nov 22, 2006)	Y	Motion to remand granted
<b>Lowery v. Alabama Power Company</b> 483 F.3d 1184 April 11, 2007	Yes (though in dicta only)	Motion to remand denied but not on exceptions grounds: concludes that threshold jurisdictional requirements not satisfied by defendant
<b>Caruso v. All State Insurance Company</b> , 469 F. Supp. 2d 364 (January, 8, 2007)	Yes	Remand denied.
<b>Murray v. RUBY TUESDAY, INC.</b> , Defendant. Civil Action No. CV207-050. Aug. 3, 2007. 2007 WL 2284542 (S.D.Ga.)	Yes	Motion to remand denied
<b>Kendrick v. Standard Fire Ins. Co.</b> 2007 WL 1035018 E.D.Ky.,2007. March 31, 2007	Yes	Motion to remand denied
<b>Genton v. Vestin Realty Mortg. II, Inc.</b> 2007 WL 951838 S.D.Cal.,2007. March 09, 2007	Yes	Motion to remand granted
<b>Gauntt v. Louisiana Citizens Property Ins. Corp.</b> 2007 WL 128801 E.D.La.,2007. January 16, 2007	Yes	Motion to remand denied
<b>Schwartz v. Comcast</b>	Not resolution	No relevant finding



<p><b>Corp.</b> Not Reported in F.Supp.2d, 2005 WL 1799414 E.D.Pa.,2005. July 28, 2005</p>		
<p><b>In re Textainer Partnership Securities Litigation</b> Not Reported in F.Supp.2d, 2005 WL 1791559 N.D.Cal.,2005. July 27, 2005</p>	Yes	Motion to remand granted
<p><b>Waitt v. Merck &amp; Co., Inc.</b> Not Reported in F.Supp.2d, 2005 WL 1799740 W.D.Wash.,2005. July 27, 2005</p>	Yes	Motion to remand denied
<p><b>Berry v. American Express Pub., Corp.</b> 381 F.Supp.2d 1118 C.D.Cal.,2005. June 15, 2005</p>	Yes (in dicta)	No relevant finding