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Advisory | Class Action Litigation

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Class Action Fairness Act Advanced Removal Strategies

This GT Advisory covers the following:
• Advanced CAFA removal strategies • Unique situations that may invoke federal jurisdiction under CAFA • Post-removal strategies that might affect federal jurisdiction • Practical considerations for defense counsel facing motions to remand

I. Executive Summary

The Class Action Fairness Act (CAFA) offers a broader avenue for removal of a case to federal court than traditional diversity jurisdiction. Counsel for plaintiffs and defendants alike have developed unique strategies to either destroy or maintain federal jurisdiction, depending on their objectives. This GT Advisory explores advanced removal strategies that have arisen in complex removal situations.

II. Advanced CAFA Removal Strategies

CAFA is typically invoked by a putative class action defendant wanting to litigate in federal court.[1] As with traditional diversity removal, removing under CAFA is the defendant's burden, but unlike traditional

[1] While CAFA says that "any defendant" may remove, the Supreme Court has held that only the "original defendant" sued by the "original plaintiff" has that right, meaning third-party or counterclaim defendants are out of luck. *Home Depot USA Inc. v. Jackson*, 139 S. Ct. 1743 (2019).

diversity, "no antiremoval presumption attends cases invoking CAFA."[2] In fact, federal courts favor CAFA jurisdiction.[3] Prudent defense counsel looking to remove will analyze the timing rules and scour the complaint to identify whether CAFA's minimal-diversity,[4] class-size,[5] and amount-in-controversy[6] requirements are met. A plaintiff preferring state court will massage those same factors to find facts that defeat jurisdiction. Counsel on both sides have experimented with approaches to reach the desired outcome for their clients. These experiments are creating a robust body of law on CAFA removal.

A. Timing of Removal

Unlike traditional diversity cases, which generally must be removed within one year of commencement, CAFA cases are not subject to a one-year limit.[7] But they are subject to two 30-day rules, which provide that a defendant must remove an action (i) "within 30 days" after receipt of an initial pleading, or (ii) "within 30 days" after receipt of an "amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."[8] These apparently simple timing rules have themselves been the subject of significant litigation.

When an initial complaint reveals the grounds for removal on its face, the rule is clear: the action must be removed within 30 days of receipt.[9] Similarly, if the defendant receives some "other paper" revealing grounds for removal—even if long after the case is underway—the defendant must remove within 30 days.[10] But matters become complicated when neither of these occurs. Suppose the defendant could, through its own internal investigation, establish that the plaintiff's class action satisfies the elements of CAFA jurisdiction, but the plaintiff never files a pleading or serves an "other paper" revealing that information. In that case, a question arises over "whether the two thirty-day periods . . . are the only periods during which the defendant may remove, or if they are merely periods during which a defendant must remove if one of the thirty-day time limits is triggered."[11]

One of the earliest circuit court decisions to wrestle with this issue held that it is the latter—the removal statutes "permit a defendant to remove outside the two thirty-day periods on the basis of its own information, provided it has not run afoul of either of the thirty-day deadlines."[12] There, the Ninth Circuit clarified that while a defendant may conduct its own investigation to establish the elements necessary to remove, the defendant's "subjective knowledge" that the case is removable "cannot convert a non-removable action into a removable one" such that the 30-day time limits begin to run against the

[2] *Dart Cherokee Basin Operating Co*., 574 U.S. 81, 89 (2014).
[3] *Evans v. Walter Indus., Inc*., 449 F.3d 1159, 1163 (11th Cir. 2006) ("CAFA's language favors federal jurisdiction over class actions, and CAFA's legislative history suggests that Congress intended the local controversy exception to be a narrow one, with all doubts resolved "in favor of exercising jurisdiction over the case.").
[4] *Id*. § 1332(d)(2)(A).
[5] *Id*. § 1332(d)(5)(B).
[6] *Id*. § 1332(d)(2).
[7] *Compare id*. § 1446(c)(1) ("A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action") *with id*. § 1453(b) (providing that "the 1-year limitation under section 1446(c)(1) shall not apply" to class actions removed under CAFA).
[8] *Id*. § 1441(b)(1), (b)(3).
[9] *Id*. § 1446(b)(1).
[10] *Id*. § 1446(b)(3); *see Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178, 1184 (9th Cir. 2015) (affirming removal where defendant timely removed within 30 days after discovery responses first revealed amount in controversy over $5 million 14 months after the complaint was filed and one month after plaintiff obtained class certification in state court).
[11] *Roth v. CHA Hollywood Med. Ctr., L.P.,* 720 F.3d 1121, 1124 (9th Cir. 2013).
[12] *Id*. at 1125.

defendant.[13] Although this issue is not settled everywhere, other circuits have adopted a similar approach.[14]

These rules can create certain tactical advantages. For example, if the plaintiff never serves a paper revealing the elements of CAFA jurisdiction, he or she leaves the door open for the defendant to remove at any time. A defendant able to show the elements of CAFA through its internal investigation could try its luck in state court and, upon learning the state court judge is ill-disposed to it, remove the action to federal court.[15] Similarly, a defendant could simply wait and remove an action when it is most disruptive, such as on the eve of trial.[16] A plaintiff seeking to avoid that result will have to consider whether to disclose the grounds for removal in an earlier pleading or "other paper" to avoid a late removal.

B. Over 100 Class Members

One strategy plaintiffs have used to avoid CAFA removal is to define the class below the 100-class-member threshold. This can be done by carefully defining a narrow class, or by dividing an otherwise-removable class into separate class actions brought on behalf of smaller classes with fewer than 100 putative members. Courts view these efforts through different lenses. Some view them skeptically and prohibit plaintiffs from overtly pleading around CAFA.[17] Other courts allow plaintiffs to intentionally structure their pleadings to sidestep CAFA.[18] Still others take a middle ground, allowing it so long as there is no actual evidence of intent to avoid CAFA.[19]

C. Minimal Diversity

CAFA's minimal diversity requirement also has been a target of manipulation. Under CAFA, a defendant satisfies the minimal diversity requirement by alleging at least one member of the putative class is diverse from the defendant. The defendant cannot rely on speculation alone.[20] Nor is it enough to allege "negative citizenship"—that is, alleging merely that a class member is *not* a citizen of the same state as the

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[13] *Id.* at 1126; *see also Rea v. Michaels Stores Inc.*, 742 F.3d 1234, 1238 (9th Cir. 2014) ("We also recently held in *Roth* . . . that the two 30-day periods are not the exclusive periods for removal) (citing *Roth*, 720 F.3d at 1124–25).

[14] *Romulus v. CVS Pharmacy, Inc.*, 770 F.3d 67, 72 (1st Cir. 2014) ("We now hold that Section 1446(b)'s thirty-day clocks are triggered only when the plaintiffs' complaint or plaintiffs' subsequent paper provides the defendant with sufficient information to easily determine that the matter is removable"); *Cutrone v. Mortg. Elec. Registration Sys., Inc.*, 749 F.3d 137, 145 (2d Cir. 2014) ("in CAFA cases, the removal clocks of 28 U.S.C. § 1446(b) are not triggered until the plaintiff serves the defendant with an initial pleading or other document" establishing the elements of CAFA jurisdiction); *Graiser v. Visionworks of Am., Inc.*, 819 F.3d 277, 285 (6th Cir. 2016) ("[i]f removability is not apparent from the allegations of an initial pleading or subsequent document sent from the plaintiff, the thirty-day clocks of § 1446(b) do not begin") (internal citation and quotation omitted); *Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 823–24 (7th Cir. 2013) ("The 30–day removal clock does not begin to run until the defendant receives a pleading or other paper that affirmatively and unambiguously reveals that the predicates for removal are present"); *but see Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 756–57 (11th Cir. 2010).

[15] *Roth*, 720 F.3d at 1126.

[16] *Id.*

[17] See *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407–09 (6th Cir. 2008) (rejecting plaintiffs' effort to avoid CAFA jurisdiction by diving suit into five separate suits for six-month periods to keep damages at $4.9 million; concluding "there is no colorable basis for dividing up the sought-for retrospective relief into separate time periods, other than to frustrate CAFA"); *Parson v. Johnson & Johnson*, 749 F.3d 879 (10th Cir. 2014); *Guzman v. Peri & Sons Farms of Cal., LLC*, No. 1:21-cv-00348-SKO, 2021 WL 3286063 (E.D. Cal. Aug. 2, 2021), report and recommendation adopted, 2021 WL 4318254 (E.D. Cal. Sept. 23, 2021); *Simon v. Marriott Int'l, Inc.*, No. PWG-19-1792, 2019 WL 4573415 (D. Md. Sept. 20, 2019); *D'Agostino v. Domino's Pizza*, No. 17-cv-11603-PGS-TJB, 2018 WL 1914239 (D.N.J. Apr. 23, 2018).

[18] See *Ramirez v. Vintage Pharms., LLC*, 852 F.3d 324, 330 (3d Cir. 2017) ("As masters of their Complaint, Plaintiffs may structure their action in such a way that intentionally avoids removal under CAFA."); *Scimone v. Carnival Corp.*, 720 F.3d 876 (11th Cir. 2013); *Anderson v. Bayer Corp.*, 610 F.3d 390, 392 (7th Cir. 2010).

[19] *Marple v. T-Mobile Cent. LLC*, 639 F.3d 1109, 1110–11 (8th Cir. 2011) ("[T]here is no indication that Marple artificially divided the lawsuit to avoid the CAFA. Although the functional effect of Marple's ten separate lawsuits is avoidance of the CAFA, Marple did not structure her lawsuit to circumnavigate it.").

[20] *Dancel v. Groupon, Inc.*, 940 F.3d 381, 385 (7th Cir. 2019) (remanding for jurisdictional discovery, holding defendants' allegation on removal that there was "undoubtedly" diversity between a class member and the defendant insufficient to carry defendant's burden, fining defendant had "provided nothing but a guess of diversity, educated and sensible though it may be").

defendant.[21] Rather, the defendant must identify a specific proposed class member who is diverse and allege that class member's particular state of citizenship.[22] In seeking diversity, defense counsel may question the plaintiff's class definition. People are not fixed in one location, and a plaintiff's class definition may be inaccurate. If, for example, the plaintiff pleads a single-state class of purchasers, the defense may be able to show that members of the class are transient. Even if the defense gets just one declaration from a putative class member and then removes, the burden shifts to the plaintiff to prove CAFA's exceptions and remand.

Determining the citizenship of individuals is inherently complex. The precise formulation varies by circuit, and it is a multi-factor and partly subjective inquiry.[23] Some class actions present unique citizenship challenges, like when a named plaintiff is a dual citizen,[24] or the putative class contains people who may not intend to remain at their domicile (such as nursing home residents),[25] or the class has individuals who may not be U.S. citizens.[26] Counsel looking at the citizenship of transient class members may consider whether the citizenship of the putative class is debatable in the controlling jurisdiction.

The citizenship of artificial entities also can be complex, and the rules vary by entity. A corporation is the "citizen of any State by which it has been incorporated and of the State where it has its principal place of business."[27] A national bank, however, is deemed a citizen only of the state designated in its articles of association as its main office.[28] A "traditional trust" is the citizen of the state in which its trustee is a citizen, while a "business trust" includes the citizenship of all its members.[29] In addition, partnerships and LLCs present unique challenges. Those entities are citizens of the state in which any partner or member is a citizen.[30] When complex LLC structures exist, such as where one or more member of the defendant LLC is itself an LLC with further members, the defendant may be a citizen of several states, which can be difficult to establish and may make diversity hard to establish.[31]

Jurisdictional disputes come with long-term implications. For example, if, after removal, the plaintiff introduces detailed evidence and admissions about subjective intent, the defense may be able to use those

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[21] *Id.*
[22] *Id.* at 386.
[23] *See, e.g., Smith v. Marcus & Millichap, Inc.*, 991 F.3d 1145, 1149 (11th Cir. 2021) ("Courts look to various factors in determining a person's intent to remain in a state, including: the location of real and personal property, business ownership, employment records, the location of bank accounts, payment of taxes, voter registration, vehicle registration, driver's license, membership in local organizations, and sworn statements of intent."); *Lew v. Moss*, 797 F.2d 747, 750 (9th Cir. 1986) ("determination of an individual's domicile involves a number of factors (no single factor controlling), including: current residence, voting registration and voting practices, location of personal and real property, location of brokerage and bank accounts, location of spouse and family, membership in unions and other organizations, place of employment or business, driver's license and automobile registration, and payment of taxes."); *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001) ("Residence is physical, whereas domicile [citizenship] is generally a compound of physical presence plus an intention to make a certain definite place one's permanent abode, though, to be sure, domicile often hangs on the slender thread of intent alone, as for instance where one is a wanderer over the earth. Residence is not an immutable condition of domicile."); *Walden v. Broce Const. Co.*, 357 F.2d 242, 245 (10th Cir. 1966) (citizenship "imports permanent residence in a particular state with the intention of remaining"; "citizenship is not necessarily lost by protracted absence from home, where the intention to return remains").
[24] *Life of the S. Ins. Co. v. Carzell*, 851 F.3d 1341 (11th Cir. 2017).
[25] *See Smith*, 991 F.3d at 1157.
[26] *See, e.g., Kanter*, 265 F.3d at 857 ("To be a citizen of a state, a natural person must first be a citizen of the United States.").
[27] *Hertz Corp. v. Friend*, 559 U.S. 77 (2010); 28 U.S.C. § 1332(c)(1).
[28] *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303 (2006) (a national bank is not "located" under 28 U.S.C. § 1348 in each state in which it has a branch but in the state in which its main office is located).
[29] *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980) (holding citizenship of a trust is based solely on that of the trustee); *Americold Realty Tr. v. Conagra Foods, Inc.*, 577 U.S. 378 (2016) (holding citizenship of a business trust includes the citizenship of all its members); *see, e.g., GB Forefront LP v. Forefront Mgmt. Grp. LLC*, 888 F.3d 29 (3d Cir. 2018) (finding citizenship of a traditional trust—unlike the citizenship of a business trust—determined solely on the citizenship of the trustee and not on the citizenship of the beneficiaries.).
[30] *See, e.g., Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990) (holding citizenship of artificial legal entities aside from corporations is determined by citizenship of "all the members" of the entity).
[31] *See, e.g., Meyerson v. Harrah's E. Chicago Casino*, 299 F.3d 616, 617 (7th Cir. 2002) ("the citizenship of unincorporated associations must be traced through however many layers of partners or members there may be").

admissions on jurisdictional facts to later defeat class certification. A plaintiff may admit that damages are less than what is asserted in the complaint or that the putative class is smaller than what the class definition suggests. This could be useful even if the case is remanded, particularly if the plaintiff's jurisdictional arguments show that claims are individualized and class certification is inappropriate.

Questions also arise as to *when* to measure a diverse class member's status both as a diverse party and a class member. For example, must a diverse class member be a citizen of a diverse state both when the operative pleading is filed *and* when the case was removed? Or is it enough that the diverse class member was a citizen of the diverse state at the time of removal alone? In non-CAFA cases, "diversity must exist both at the time the action is filed in state court and at the time the case is removed to federal court."[32]

Citizenship is also a factor under CAFA's local-controversy, home-state, and interest-of-justice exceptions.[33] Although defendants bear the initial burden of establishing CAFA jurisdiction, that burden flips when a plaintiff invokes one of CAFA's exceptions. But these statutory exceptions have bred disputes as well. For example, plaintiffs sometimes use the potential application of these exceptions to justify early discovery of class list information, even though such information is rarely (if ever) sufficient to show citizenship rather than mere *residence*.[34] Creative plaintiffs may further define the putative class to invoke either the local controversy or home state controversy exceptions, such as by pleading a state-only putative class.[35] Plaintiffs may also allege classes of "citizens" only, but these efforts have run into obstacles.[36] Defining a class as including only "Oklahoma consumers," for example, does not account for the possibility of out-of-state purchasers and therefore does not confine the class to the forum state's borders.[37]

D. Over $5 million in controversy

The defendant bears the initial burden to establish that the amount in controversy exceeds $5 million. But the defendant need not submit evidence with its removal pleading; rather, it need only allege the amount in controversy consistent with Rule 8 pleading standards: "a short and plain statement" of the amount in controversy.[38] To establish the amount in controversy, a defendant may rely on the plaintiff's pleading and reasonable assumptions in estimating the amount in controversy for removal purposes.[39] A plaintiff cannot avoid CAFA removal by disclaiming a recovery greater than $5 million.[40]

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[32] *Woods v. Ross Dress for Less, Inc.*, 833 F. App'x 754, 757 (10th Cir. 2021) (citing *Grupo Dataflux v. Atlas Glob. Grp.*, L.P., 541 U.S. 567, 570–71 (2004), and 28 U.S.C. § 1441(a)).
[33] Although it does not relate to citizenship, parties also debate whether "significant relief" being sought from a home state defendant such that the plaintiff may invoke the local controversy exception of 28 U.S.C. § 1332(d)(4)(A). *See Robertson v. Sun Life Fin.*, No. CV 17-2148, 2018 WL 495402, at *2 (E.D. La. Jan. 22, 2018) (denying remand under local controversy exception because "significant relief" was not being sought from home state defendant).
[34] *King v. Great Am. Chicken Corp., Inc.*, 903 F.3d 875, 877, 879 (9th Cir. 2018) (holding plaintiff failed to carry her burden to show local or home-state controversy applied despite stipulation that "at least two-thirds" of the class members had provided California residential addresses to the defendant because, among other things, "[a] person's state of citizenship is established by domicile, not simply residence, and a residential address in California does not guarantee that the person's legal domicile was in California.").
[35] *See Smith*, 991 F.3d at 1157–58 (collecting cases from First, Fourth, and Seventh Circuits); *McAllister v. The St. Louis Rams, LLC*, No. 4:16-CV-172 SNLJ, 2018 WL 827968 (E.D. Mo. Feb. 12, 2018) (plaintiffs amended complaint post-removal to clarify that putative class consisted only of "Missouri residents"; remand order based on local controversy exception when plaintiffs had commissioned survey of potential class members to determine citizenship).
[36] *Mondragon v. Cap. One Auto Fin.*, 736 F.3d 880, 884 (9th Cir. 2013) (explaining that not every purchaser in a state is necessarily a citizen).
[37] *Potts v. Westside Chrysler Jeep Dodge*, LLC, No. CIV-21-502-D, 2021 WL 4129626, at *2 n.1 (W.D. Okla. Sept. 9, 2021).
[38] *Dart Cherokee*, 574 U.S. at 81–82 ("the plaintiff's amount-in-controversy allegation is accepted if made in good faith").
[39] *Arias v. Residence Inn by Marriott*, 936 F.3d 920, 922 (9th Cir. 2019); *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1195 (9th Cir. 2015).
[40] *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348–49 (2013).

If the plaintiff contests the defendant's amount in controversy allegations, the removing defendant must then go beyond its "short and plain statement" and establish the amount in controversy by a preponderance of the evidence.[41] Courts differ on what this requires. For example, even though the Ninth Circuit has held a removing defendant must support the amount controversy using "summary-judgment-type evidence" to satisfy CAFA,[42] courts disagree over what that showing requires, with some courts holding a broadly worded declaration sufficient, and others subjecting declarations to exacting standards.[43] Courts have also allowed expert testimony on the amount in controversy where appropriate.[44] Adding to this discussion, the Ninth Circuit recently developed a distinction between "facial" and "factual" attacks to the sufficiency of the defendant's showing. If the plaintiff mounts a facial challenge—a challenge that accepts the truth of the defendant's allegations but argues they are insufficient on their face to invoke federal jurisdiction—the defendant need not produce evidence to support its allegations. But if the plaintiff attacks the factual basis of the defendant's offering, both sides may put on evidence, with the defendant bearing the burden to produce competent proof of federal jurisdiction.[45]

Counsel also dispute what amounts can be used to meet CAFA's amount-in-controversy requirement. While it varies by jurisdiction, most types of relief are fair game. Along with monetary relief requested or available, declaratory or injunctive relief[46] and attorneys' fees[47] may count, as may "reasonably possible" punitive damages.[48] And while assumptions about the amount in controversy "cannot be pulled from thin air," a removing party may rest on "a chain of reasoning that includes assumptions" to establish the $5 million threshold.[49]

Affirmative defenses, however, may not be included in this calculus. Plaintiffs looking to avoid federal jurisdiction have invoked the defendant's defenses to reduce what is at stake.[50] But a plaintiff cannot "rewrite his complaint to avoid federal court," nor can he "smuggle in merits-based arguments into the jurisdictional inquiry, which is supposed to be simple and mechanical."[51] In *Greene v. Harley-Davidson, Inc.*, for example, the Ninth Circuit decided that Harley-Davidson had satisfied its burden of establishing the $5 million threshold, even though the statute of limitations would likely limit the availability of punitive damages and keep the recovery beneath the jurisdictional minimum. The court explained that the plaintiff had "sued under laws that allow for punitive damages, exposing Harley-Davidson to higher damages."[52] As a result, "Harley-Davidson may successfully assert certain defenses, but if the class succeeds in receiving what Green asked for, Harley-Davidson could pay more than $5 million in

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[41] *Dart Cherokee*, 574 U.S. 82, 88.
[42] *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997) (adopting Fifth Circuit standard and requiring parties to submit "'summary-judgment-type evidence relevant to the amount in controversy….'") (quoting *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995)).
[43] *Compare Lewis v. Verizon Comms., Inc.*, 627 F.3d 395, 399–400 (9th Cir. 2010) *with Davis v. Barney's, Inc.*, No. CV 18-6627-JFW(SKX), 2018 WL 4940801, at *2 (C.D. Cal. Oct. 11, 2018).
[44] *Zamora v. Penske Truck Leasing Co., L.P.*, No. 2:20-cv-02503-ODW-MRWX, 2020 WL 4748460 (C.D. Cal. Aug. 17. 2020).
[45] *Harris v. KMI Indus., Inc.*, 980 F.3d 694 (9th Cir. 2020).
[46] *S. Fla. Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312, 1315 (11th Cir. 2014) ("the value of declaratory or injunctive relief" count toward amount in controversy, but "must be sufficiently measurable and certain to satisfy the amount-in-controversy requirement"); *Anderson v. Wilco Life Ins. Co.*, 943 F.3d 917 (11th Cir. 2019) (same); *Excel Pharmacy Servs., LLC. v. Liberty Mut. Ins. Co.*, 825 F. App'x 65, 68 (3d Cir. 2020) (holding amount in controversy met in action seeking declaratory and injunctive relief where defendant's cost of compliance with injunction in the class's favor would exceed $5 million).
[47] *Fritsch v. Swift Transp. Co. of Ariz.*, LLC, No. 18-55746 (Aug. 18, 2018); *but see ABM Sec. Servs., Inc., v. Davis*, 646 F.3d 475, 479 (7th Cir. 2011).
[48] *Greene v. Harley-Davidson, Inc.*, 965 F.3d 767, 769, 772 (9th Cir. 2020); *Pirozzi v. Massage Envy Franchising, LLC*, 938 F.3d 981, 984 (8th Cir. 2019) (proposed punitive damages equal to compensatory damages and attorneys' fees was sufficient); *Keeling v. Esurance Inc. Co.*, 660 F.3d 273, 275 (7th Cir. 2011) (allowing punitive damages estimate if prior decisions reflecting award make it "not impossible").
[49] *Arias v. Residence Inn by Marriott*, 936 F.3d 920, 925 (9th Cir. 2019).
[50] *See Greene*, 965 F.3d at 774 (finding error when district court, in measuring amount in controversy, assumed defendant would prevail on a statute of limitations defense).
[51] *Id.*
[52] *Id.*

damages."[53] Thus, even if the entire claim would be barred under the statute of limitations, the pleadings establish the amount in controversy.[54]

E. Post-removal strategies

The maneuvering of counsel does not always end at removal. Indeed, parties unsuccessful at either removal or remand may continue pursuing their forum of choice even after the federal court has ruled on removal. A dissatisfied plaintiff may try to amend or refine class definition post-removal, just as a remanded defendant may regroup and try again. These efforts meet with mixed success.

A plaintiff who has been unsuccessful at remand may try to blue-pencil her claims to defeat CAFA jurisdiction. But courts limit a plaintiff's ability to revise the pleading.[55] Courts generally agree that "the time-of-removal rule prevents post-removal actions from destroying jurisdiction that attached in a federal court under CAFA."[56] Still, some circuits have permitted a plaintiff "to provide some amplification, for federal jurisdictional purposes, of the nature of plaintiffs' allegations"; in other words, in the Ninth Circuit at least, a post-removal amendment consistent with the pre-removal pleading may defeat CAFA jurisdiction.[57] The party favoring jurisdiction here may consider showing how the post-removal amendment conflicts with the pre-removal pleading, while the party seeking amendment might consider explaining how the amendment merely provides "amplification" of what was previously pleaded.

A defendant who faces remand or does not succeed at removal at first may also have options to stay in or return to federal court. If remand seems imminent, a defendant may want to seek jurisdictional discovery to satisfy CAFA. Circuits are split as to whether jurisdictional discovery is allowed in CAFA removal. The Seventh and Ninth Circuits allow it,[58] but there are practical ramifications to consider. A request for jurisdictional discovery may turn out to be a pyrrhic victory, as the information subject to discovery may be information the defendant would have otherwise resisted producing. This decision becomes a particularly close call when CAFA's exceptions are invoked. For example, in an employment matter where the class members likely at least reside in (and may be citizens of) the state in which the action is pending, defendants risk immediate disclosure of the class list.[59]

Although parties are generally not entitled to a successive removal on grounds that have been rejected, new information may breathe new life to removal efforts. In non-CAFA removal situations, a successive removal is allowed only if there has been a change in circumstances such that removal is based on a new and different ground. But it is unclear whether that applies to CAFA removals. A successive removal is permissible under CAFA when a change in the law allows a defendant to allege jurisdiction where it could not before.[60] But authority is split on whether successive removals on the same grounds are permissible

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[53] *Id.*
[54] *Id.*
[55] *Broadway Grill, Inc. v. Visa, Inc.*, 856 F.3d 1274, 1277 (9th Cir. 2017) (allowing amendment "only to provide some amplification, for federal jurisdictional purposes, of the nature of plaintiffs' allegations" but disallowing amendment that would alter "the definition of the class itself"); *Salzer v. SSM Health Care of Okla., Inc.*, 762 F.3d 1130, 1133 (10th Cir. 2014); *In re Burlington N. Santa Fe Ry. Co.*, 606 F.3d 379, 380–81 (7th Cir. 2010); *Amoche v. Guar. Tr. Life Ins. Co.*, 556 F.3d 41, 51 (1st Cir. 2009) (allowing "specification" of allegations post-removal).
[56] *Cedar Lodge Plantation, LLC v. CSHV Fairway View I, LLC*, 768 F.3d 425, 427 (5th Cir. 2014); *Hargett v. RevClaims, LLC*, 854 F.3d 962, 966–67 (8th Cir. 2017) (denying post-removal request to amend class definitions from Arkansas "residents" to Arkansas "citizens").
[57] *Broadway Grill*, 856 F.3d at 1277.
[58] *Dancel*, 940 F.3d at 386; King, 903 F.3d at 881 (allowing jurisdictional discovery on home-state exception).
[59] *See generally King*, 903 F.3d at 876.
[60] *See, e.g., Rea*, 742 F.3d at 1238 (allowing successive CAFA removal following Supreme Court decision disallowing a plaintiff to waive damages in excess of $5 million).

under CAFA.[61] Although the potential exists, multiple removal attempts may be rejected and could expose counsel to fee shifting.[62]

III. Conclusion

Counsel have used creative arguments to sketch out CAFA's jurisdictional contours over the past two decades as they have worked to guide their cases to the desired forum, be it state or federal. In doing so, counsel for plaintiffs and defendants have created a robust body of law and advanced arguments for each side to consider over class size, diversity, amount in controversy, and more. Given the importance of jurisdiction to each side, counsel for plaintiffs and defendants will continue to develop creative strategic considerations and maneuvers that build upon this foundation.

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[61] *Compare id.* (suggesting that successive CAFA removals on the same grounds are not prohibited because "CAFA explicitly allows review of remand orders"), *with Reyes v. Dollar Tree Stores*, 781 F.3d 1186, 1188 (9th Cir. 2015) (determining that successive removal petitions are available only when there has been a "relevant change of circumstances").
[62] *Muniz v. UtiliQuest, LLC*, No. CV 19-08759 PA (SKX), 2019 WL 6827270, at *7 (C.D. Cal. Dec. 5, 2019).