No. 06-1471

IN THE
Supreme Court of the United States

DENNIS W. GAY, ET AL.,

Petitioners,

v.

SARAH MORGAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF DEFENSE RESEARCH INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Defense Research Institute ("DRI") moves for leave to file the accompanying brief in support of the position taken by Petitioners Dennis W. Gay, et al., under Supreme Court Rule 37.2. Counsel for Respondent Sarah Morgan has withheld consent to the filing this brief.

DRI is an international organization that includes over 24,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, promote the role of the defense attorney, and improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient.

DRI participates as an *amicus curiae* in cases that raise issues of vital concern to its membership. This is such a case. DRI believes that resolution of the important jurisdictional issue this petition presents is necessary because the courts of appeals have fractured when determining the burden of proof that a defendant must meet to establish the amount in controversy for removal based on the federal courts' diversity jurisdiction. The issue presented affects not only class actions removed under the Class Action Fairness Act of 1995 ("CAFA"), but also all cases removed on the basis of the federal courts' diversity jurisdiction. The confusion created by the divergent views of the courts of appeals creates the very impediments to review of cases with national implications by federal courts that Congress sought to eliminate in CAFA. Because removal is an issue of particular significance to defendants, DRI's members are frequently confronted with the issues raised by this petition, and their clients are affected by the lack of a clear rule.

DRI's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT OF THE CASE

The facts relevant to the legal issue presented are as follows:

1. In early 2006, Sarah Morgan filed this putative class action in New Jersey Superior Court. Petitioners' App. at 50a. Plaintiff asserted various claims under New Jersey law against defendants, the manufacturers of the skin cream StriVectin-SD. *Id.* at 68a-73a.

2. Plaintiff's ad damnum sought treble compensatory damages, disgorgement of profits, attorneys' fees, punitive damages, and injunctive relief. *Id.* at 73a-74a. Plaintiff plead in her ad damnum that "the sum total of [plaintiff's] . . . trebled damages, attorneys' fees, punitive damages and costs, on all of plaintiffs [sic] causes of action combined, shall not, in any event, exceed $5,000,000." *Id.* at 73a.

3. Petitioners removed the action under CAFA to the United States District Court for the District of New Jersey. Petitioners' App. at 3a-4a. Plaintiff in turn moved for remand

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

asserting that the $5 million amount in controversy required under 18 U.S.C. § 1332(d) had not been satisfied. The district court granted the plaintiff's motion to remand. *Id.* at 25a.

4. The United States Court of Appeals for the Third Circuit granted petitioners leave to appeal the district court's remand order under 28 U.S.C. § 1453. A panel of the Third Circuit held that the burden of proving the amount-in-controversy requirement for removal under CAFA is on defendants, and that because petitioners did not prove that Plaintiff sought damages exceeding $5 million to a legal certainty, the district court's remand order was appropriate. *Morgan v. Gay*, 471 F.3d 469, 477 (3d Cir. 2006). Rather than join the Fifth, Sixth, Seventh, and Eighth Circuits which had previously held that a removing defendant must prove the jurisdictional amount in controversy by a preponderance of the evidence, the Third Circuit widened an existing circuit split by imposing a burden on removing defendants to prove the amount in controversy "to a legal certainty." *Id.* at 474. Even though the panel acknowledged that the Plaintiff's position that her proposed class "is at least 10,000" and that her trebled compensatory damages alone exceeded $4 million exclusive of punitive damages, profit disgorgement, and statutory attorneys' fees, the panel concluded that defendants had not shown that Plaintiff's recovery would exceed $5 million. *Id.* at 476.

SUMMARY OF ARGUMENT

The Court should grant the petition to resolve a deep and mature circuit split regarding the burden that defendants must meet on removal to prove the amount in controversy. The range of standards the lower courts have created promote the very barriers to federal jurisdiction for class actions involving national issues that Congress intended to eliminate in CAFA. The inconsistent decisions of the lower courts also amply demonstrate the need for this Court's immediate intervention.

This case presents an ideal opportunity for the Court to restore consistency to federal diversity jurisdiction and removal jurisprudence by explaining what burden of proof the defendant must satisfy to prove the amount in controversy. Importantly, the Court can address the requirement in the context of CAFA, Congress' first statutory change to diversity jurisdiction since changing the amount-in-controversy requirement in 1996. Unless the Court clarifies the burden, similarly situated defendants will be treated differently based solely on the federal circuit in which they are sued.

The panel's interpretation also raises the troubling problem that a plaintiff can deprive federal courts of jurisdiction simply by including an ad damnum clause for a specific amount less than the jurisdictional amount-in-controversy requirement, even though such clauses are not binding on the plaintiff in most states. In other words, if the panel's rule is allowed to stand, plaintiffs will be able to create barriers to removal based upon the amount in controversy without actually limiting the amount they can recover. The petition for certiorari should be granted.

ARGUMENT

A defendant who seeks to remove a diversity case to federal court confronts several sections of United States Code Title 28, including sections 1332, 1441, 1446, and 1447. Among other requirements, a defendant seeking to remove based on diversity bears the burden of demonstrating that the jurisdictional amount in controversy is met. 18 U.S.C. § 1332(a). In 2005, Congress enacted CAFA and amended § 1332 (as well as other sections of Title 28) to lessen the requirements for removal of class actions to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Petitioners' App. at 31a-32a. Congress included a

$5 million jurisdictional amount-in-controversy requirement for removal under CAFA. 18 U.S.C. § 1332(d)(2). Before CAFA was enacted, the federal courts had reached divergent conclusions regarding the standard by which a removing defendant needed to show the amount in controversy for traditional removal. Since CAFA, the courts have further splintered with the panel below staking out the most extreme position—that the defendant must prove the amount-in-controversy requirement is met to a legal certainty. The petition should be granted to resolve the conflict among the federal courts as to the appropriate standards for traditional removal under 18 U.S.C. § 1332(a) and CAFA removal under 18 U.S.C. § 1332(d).

I. The Petition Should Be Granted To Resolve The Three-Way Split Of Authority On The Standard For Removal To Federal Court.

The petition should be granted to resolve the three-way split of authority among the federal circuit courts of appeals on the standard for removal to federal court. The Third Circuit formulated a standard requiring defendants to prove the amount in controversy to a legal certainty in all circumstances. The Fifth, Sixth, Seventh, and Eighth Circuits have concluded that a preponderance of the evidence is appropriate. The Ninth Circuit has adopted an intermediate position where the court applies a preponderance of the evidence standard unless the plaintiff specifically pleads an ad damnum less than the jurisdictional requirement when it applies the legal certainty test. All of these courts begin their analysis with the Court's decision in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938).

In *St. Paul Mercury*, the Court addressed the standard that federal courts were to apply where a plaintiff brings a suit in federal court based on diversity jurisdiction, and the defendant moves to dismiss on the grounds that the plaintiff has failed to satisfy the amount-in-controversy requirement. 303 U.S. at 288.

The Court held that "the sum claimed by the plaintiff controls if the claim is apparently made in good faith," and explained that "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *Id.* at 288-89.

The Third Circuit ill-advisedly imposed the *St. Paul Mercury* legal certainty standard on defendants—the parties promoting federal jurisdiction—in all situations. *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006). The panel below held that the removing defendant bears the burden of proving the amount in controversy threshold has been met "to a legal certainty." Although the decision below addresses removal under CAFA as codified in 18 U.S.C. § 1332(d), the Third Circuit had already adopted the "legal certainty" burden for removing defendants under 18 U.S.C. § 1332(a) in *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 398 (3d Cir. 2004). In *Samuel-Bassett*, the Third Circuit raised the issue of subject-matter jurisdiction sua sponte. The defendant KIA Motors of America had removed the putative product-defect action to the district court on the basis of diversity. The Third Circuit recognized that the lower district courts had articulated a number of standards for the burden on a defendant to prove the amount-in-controversy requirement including "reasonable probability," "preponderance of the evidence," and "legal certainty." *Id.* at 396. Ultimately, the Third Circuit concluded that dicta in this Court's decision in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938), required the adoption of the legal-certainty standard. *Id.* at 397-98. The court recognized that "requiring a defendant to show a legal certainty that the amount in controversy exceeds the statutory minimum may lead to somewhat bizarre situations." *Id.* The Third Circuit's decisions in *Samuel-Bassett* and *Morgan* stake out the most extreme position taken by any circuit court addressing the burden that a removing defendant bears with regard to the amount-in-controversy requirement.

The Ninth Circuit has also adopted the legal-certainty test, albeit only where a plaintiff pleads less than the jurisdictional amount in controversy in the plaintiff's ad damnum. In *Sanchez v. Monumental Life Insurance Co.*, 102 F.3d 398 (9th Cir. 1996), the Ninth Circuit addressed the burden of proof on a removing defendant to prove the amount in controversy and concluded that when the plaintiff's complaint is silent with regard to the amount in controversy, the defendant has the burden of proving the amount in controversy by a preponderance of the evidence. 102 F.3d at 404 (citing *Gaus v. Miles, Inc.*, 980 F.2d 564 (9th Cir. 1992) (per curiam)). *See also Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676, 683 n.8 (9th Cir. 2006) (explaining that the preponderance standard applies only when the plaintiff fails to plead the amount in controversy and reserving the issue of what standard applies when the plaintiff pleads an amount less than the jurisdictional amount) (per curiam). Earlier this year, the Ninth Circuit addressed the issue of what proof the removing defendant must provide to contradict the plaintiff's ad damnum that damages are less than the jurisdictional amount. *Lowdermilk v. United States Bank Nat'l Ass'n*, 479 F.3d 994, 998-1000 (9th Cir. 2007); The Ninth Circuit, citing the Third Circuit's decision in *Morgan*, concluded that a legal-certainty standard applied only when the plaintiff pleads an amount of damages less than the jurisdictional amount. *Id.* at 999. *Cf. Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1356-57 (11th Cir. 1996) (explaining "[w]here a plaintiff has made an unspecified demand for damages" it is inappropriate to impose "the daunting burden of proving, to a legal certainty, that the plaintiff's damages are not less than the amount-in-controversy requirement," but not addressing the effect of a demand for less than the jurisdictional amount) *overruled on other grounds*, *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072-73 (11th Cir. 2000).

The other circuits that have addressed the issue have all concluded that the preponderance-of-the-evidence standard is

appropriate in all circumstances. For example, the Fifth Circuit explicitly rejected the legal-certainty standard where a plaintiff pleads an ad damnum of less than the jurisdictional amount. *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1410-11 (5th Cir. 1995). In *De Aguilar*, the plaintiffs, "in a bold effort to avoid federal court," had specifically alleged that their respective damages did not exceed the jurisdictional amount. *Id.* at 1409-10. The Fifth Circuit recognized that "[t]he majority of states, however, have followed the example of Federal Rule of Civil Procedure 54(c) and do not limit damages awards to the amount specified in the ad damnum clause of the state pleading." *Id.* at 1410. The Fifth Circuit concluded that the changes in the state rules undermined the application of the legal certainty standard on removing defendants:

> These new rules have created the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of their pleading.

Id. The Fifth Circuit ultimately held "that if a defendant can show that the amount in controversy actually exceeds the jurisdictional amount, the plaintiff must be able to show that, as a matter of law, it is certain that he will not be able to recover more than [the jurisdictional amount]." *Id.* at 1411.

Similarly, the Sixth Circuit places a preponderance-of-the-evidence burden on the removing defendant. *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993). Like the Fifth Circuit, the Sixth Circuit recognized that "state counterparts to Rule 54(c) of the Federal Rules of Civil Procedure, might enable a plaintiff to claim in his or her complaint an amount lower than the federal amount-in-controversy requirement in an attempt to

defeat jurisdiction while actually seeking and perhaps obtaining damages far in excess of the federal requirement." *Id.* at 157. The Sixth Circuit adopted the "preponderance of the evidence" test because it "best balances the competing interests of protecting a defendant's right to remove and limiting diversity jurisdiction." *Id.*; *Mitchell v. White Castle Sys., Inc.*, No. 94-1193, 1996 WL 279863, at *1 (6th Cir. May 24, 1996) (applying preponderance of the evidence standard adopted in *Gafford* to case where plaintiff's ad damnum claimed less than the federal jurisdictional amount).

The Seventh Circuit has also adopted the preponderance of the evidence standard, explaining that because the removing defendant "is the proponent of jurisdiction, it has the burden of showing by a preponderance of the evidence facts that suggest the amount-in-controversy requirement is met." *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 511 (7th Cir. 2006) (citing *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 543 (7th Cir. 2006)). Like the Fifth Circuit, the Seventh Circuit applies the legal certainty test only to the party opposing jurisdiction, stating that "[o]nce the defendant in a removal case has established the requisite amount in controversy, the plaintiff can defeat jurisdiction only if 'it appears to a legal certainty that the claim is really for less than the jurisdictional amount.'" *Id.* (quoting *St. Paul Mercury*, 303 U.S. at 289).

The Eighth Circuit has also adopted the preponderance-of-the-evidence standard. It follows the rule that where a plaintiff "alleges no specific amount of damages" or the plaintiff alleges "an amount under the jurisdictional minimum, the removing party . . . must prove by a preponderance of the evidence that the amount in controversy [exceeds the jurisdictional amount]." *In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 834 (8th Cir. 2003). Like the Fifth and Seventh Circuits, the Eighth Circuit places the "to a

legal certainty" burden on the party challenging federal jurisdiction.

The Third Circuit's decision wholly or partially conflicts with every other circuit court that has addressed the burden of proof on a removing defendant in the diversity context. The Court should grant the petition because it provides an ideal vehicle to redress the fractured decisions of the circuit courts of appeals under both 18 U.S.C. § 1332(a) and CAFA, and provide guidance to those courts that have yet to address the issue.

II. The Panel's Decision Gives This Court The Opportunity To Limit Its Decision in *St. Paul Mercury*.

The panel's decision below gives the Court the opportunity to limit the holding in *St. Paul Mercury* to situations where the pleaded amount limits damages as it did in that case. The rules of pleading have changed greatly since the Court's 1938 decision in *St. Paul Mercury*.

The proposition that a plaintiff can bar the door to federal court by specifically pleading damages below the jurisdictional amount first appeared in *Iowa Central Railway Co. v. Bacon*, 236 U.S. 305, 310 (1915), then reappeared in *St. Paul Mercury*. As discussed above, the proposition appeared in *St. Paul Mercury* only as dictum. The question before the Court in *St. Paul Mercury* was whether a post-removal amendment reducing the amount in controversy below the jurisdictional limit could oust federal diversity jurisdiction when at the time of removal the complaint demanded more than the jurisdictional amount. *St. Paul Mercy*, 303 U.S. at 284.

Red Cab Company sued St. Paul Mercury Indemnity Company in an Indiana court. *Id*. St. Paul Mercury removed to federal district court after which Red Cab filed two amended

complaints, the second of which contained an exhibit showing actual damages of $1,380.89—less than the then-jurisdictional amount of $3,000. *Id.* at 284-85. Red Cab did not move to remand, however, and recovered $1,162.98 in a bench trial in the district court. *Id.* at 285. St. Paul Mercury appealed the decision to the Seventh Circuit, which ruled that Red Cab's actual claim was below the jurisdictional amount of $3,000 and that the district court had been without jurisdiction. *Id.* On appeal, this Court ruled that for cases originally brought in federal court, the plaintiff's good-faith demand controls jurisdiction:

> The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction.

Id. at 288-89 (footnotes omitted). Thus the Court determined that the party challenging federal jurisdiction in an action initiated in federal court bore the burden of proving to a legal certainty that the amount in controversy does not exist.

The Court then turned to the question of whether a plaintiff could oust federal diversity jurisdiction by a post-removal reduction of the amount in controversy. The Court held that "events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached." *Id.* at 293 (footnote omitted). In dictum while discussing the merits of its holding, the Court opined that

if a plaintiff "does not desire to try his case in the federal court he may resort to the expedient for suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." *Id.* at 294.

The panel below (as well as the Ninth Circuit in *Lowdermilk*), adopted the Court's dictum to justify inverting the Court's analysis in *St. Paul Mercury* to impose the legal certainty on the removing defendant, the proponent of federal jurisdiction. *Morgan*, 471 F.3d at 474; *Lowdermilk*, 479 F.3d at 999. The panel stated that because "CAFA does not change the proposition that the plaintiff is the master of her own claim," it is appropriate to impose the legal certainty test on the defendant to prove the amount in controversy exists. *Morgan*, 471 F.3d at 474.

Even if the panel's inverted *St. Paul Mercury* analysis would have been proper in 1938, developments in the law have made reliance upon the plaintiff's ad damnum highly problematic. As the Fifth Circuit recognized in *De Aguilar*, the Court's dictum in *St. Paul Mercury* "was premised on the notion that the plaintiff would not be able to recover more in state court than what was alleged in the state court complaint." *Id.* at 1410. For example, in *Woods v. Massachusetts Protective Association*, 34 F.2d 501 (E.D. Ky. 1929), cited in *St. Paul Mercury* in support of the plaintiff's ability to avoid federal diversity jurisdiction by pleading less than the jurisdictional amount, the plaintiff sued for an amount under the jurisdictional amount. Under the state provision in that case, "if there had been no removal and an answer had been filed, plaintiff would not have been entitled to judgment for more than [the amount pleaded]." *Id.* at 504; *see also Iowa Cent. Ry.*, 236 U.S. at 309 ("[t]he state court had authority to determine the effect of the prayer to the petition and it decided that, under the petition, no more than the amount prayed for could be recovered in the action"); *Harley v. Fireman's Fund Ins. Co.*, 245 F. 471, 476 (W.D. Wash. 1913)

(plaintiff cannot recover more than the amount demanded in the initial pleading); *Maine v. Gilman*, 11 F. 214, 215 (C.C.D. Me. 1882) (same).

State pleading rules have changed greatly since 1938, and most states have adopted rules that, like Federal Rule of Civil Procedure 54(c), do not limit damage awards to the amount specified in a plaintiff's ad damnum. *E.g.*, Ala. R. Civ. P. 54(c); Alaska R. Civ. P. 54(c); Ariz. R. Civ. P. 54(d); Ark. R. Civ. P. 54(c); Cal. R. Civ. P. § 580(a); Colo. R. Civ. P. 54(c); D.C. R. Civ. P. 54(c); Ga. R. Civ. P. § 9-11-54(c); Haw. R. Civ. P. 54(c); 735 Ill. Comp. Stat. 5/2-604 (2007); Idaho R. Civ. P. 54(c); Ind. Tr. R. 54(c); Kan. R. Civ. P. § 60-254(c); Ky. R. Civ. P. CR 54.03(2); La. R. Civ. P. Art. 862; Me. R. Civ. P. 54(c); Mass. R. Civ. P. 54(c); Mich. Ct. R. 2.601(A); Minn. R. Civ. P. 54.03; Mont. R. Civ. P. 54(c); Nev. R. Civ. P. 54(c); N.J. Ct. R. 4:42-6; N.M. R. Civ. P. 1-054(C); N.Y. R. Civ. P. § 3017(a); N.D. R. Civ. P. 54(c); Ohio R. Civ. P. 54(c); Okla. R. Civ. P. § 2004(B)(2); R.I. R. Civ. P. 54(c); S.C. R. Civ. P. 54(c); Tenn. R. Civ. P. 54.03; Utah R. Civ. P. 54(c); Vt. R. Civ. P. 54(c); Wash. R. Civ. P. 54(c); W. Va. R. Civ. P. 54(c); Wis. R. Civ. P. 806.01(c); Wyo. R. Civ. P. 54(c). *But see* Del. R. Civ. P. 54; Miss. R. Civ. P. 54(c).

Reducing the ad damnum or pleading an ad damnum of less than the jurisdictional amount has no effect on the actual stakes in the case.[2] *See BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 552 (7th Cir. 2002). Indeed, even the Third Circuit recognized the illusory effect of reliance on the ad damnum, agreeing with the Fifth Circuit that modern rules of pleading "'have created the potential for abusive manipulation by

[2] As the Seventh Circuit has suggested, the way for a plaintiff to craft his or her pleadings to avoid federal diversity jurisdiction is to stipulate that the plaintiff is waiving any damages exceeding the jurisdictional amount before removal. *BEM*, 301 F.3d at 552.

the plaintiffs, who may plead damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with knowledge that they may be able to evade federal jurisdiction by virtue of the pleading.'" *Morgan*, 471 F.3d at 477 n.8 (quoting *De Aguilar*, 47 F.3d at 1410). The net effect of the panel's adherence to the *St. Paul Mercury* dictum is that the plaintiff's ad damnum is binding only upon the defendant who would otherwise be entitled to remove.

Changes in the law have made the Court's dictum that a plaintiff can avoid federal jurisdiction by "resort[ing] to the expedient for suing for less than the jurisdictional amount" largely obsolete. *St. Paul Mercury*, 303 U.S. at 294. Permitting plaintiffs to deprive defendants of their right to proceed in federal court or imposing higher burdens of proof solely because of plaintiffs' ad damnum creates the very inequities the Court sought to avoid in *St. Paul Mercury*. This case provides the Court with the opportunity to limit the holding in its nearly 70 year-old precedent to those increasingly rare situations where the pleaded amount limits damages as was routinely the case in 1938.

III. The Court Should Grant The Petition To Prevent Plaintiffs From Unfairly Depriving Defendants Of Access to Federal Fora.

The Court should grant the petition to prevent plaintiffs from unfairly depriving defendants of access to federal fora. Although the tripartite conflict among the federal courts of appeals alone warrants this Court's review of the Third Circuit panel decision, the very real potential for procedural gamesmanship by litigants to avoid federal jurisdiction provides an independent basis for this Court's review. This case arises under CAFA, but it will affect all cases removed on the basis of diversity where the amount in controversy is at issue.

The effects of the Third Circuit's decision are particularly pernicious to the public policies underlying Congress' enactment of CAFA. Congress adopted CAFA to curb abuse of the class action device. Petitioners' App. at 31a-32a. These abuses included plaintiffs' collusive use of multiple class actions arising from the same operative facts asserting the same claims on behalf of the same people proceeding simultaneously in multiple state courts to multiply defendants' costs and blackmail defendants into settling even frivolous claims. S. Rep. 109-14, at *4, *20-21, *reprinted in* U.S.C.C.A.N. 3. Congress also expressed disapproval for many state courts' willingness to "freely issue rulings in class action cases that have nationwide ramifications, sometimes overturning well-established rules and policies of other jurisdictions." *Id.* at *4.

Congress expressly incorporated its finding that abuses of the class action device arose from manipulative pleading by plaintiffs to avoid federal diversity jurisdiction:

> (4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—
>
> (A) keeping cases of national importance out of Federal court;
>
> (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
>
> (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

> (b) PURPOSES.—The purposes of this Act are to—
>
> . . . .
>
> (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction

Petitioners' App. at 31a-32a.

The Third Circuit's imposition of an impossibly high evidentiary burden on removing defendants in conjunction with deference to plaintiffs' non-binding ad damnum clauses in their state court complaints combine to frustrate the purposes for which Congress enacted CAFA. The Third and Ninth Circuits' decisions reward state-court forum shopping by wily class action plaintiffs' counsel who know that by pleading ad damnum clauses of less than the jurisdictional amount, they can ensure that defendants are denied access to federal fora, at least until after important decisions regarding class certification, choice of law, and the like are made. Even if defendants can later remove, they are stuck with the decisions made in state courts because "[w]hen a case is removed the federal court takes it as though everything done in the state court had in fact been done in the federal court." *Munsey v. Testworth Labs.*, 227 F.2d 902, 903 (6th Cir. 1955); *Savell v. Southern Ry. Co.*, 93 F.2d 377, 379 (5th Cir. 1937); *see also Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 436 (1974) ("After removal, the federal court 'takes the case up where the State court left it off.'" (quoting *Duncan v. Gegan*, 101 U.S. 810, 812 (1880)).

Likewise, the Third and Ninth Circuits' formulations of the burden on removing defendants make it more difficult, if not

impossible, to aggregate and efficiently manage nationwide litigation. Not only is such piecemeal litigation inefficient, but it creates the type of situations for plaintiffs to engage in "judicial blackmail" to coerce defendants to settle even frivolous claims. These are the very schemes CAFA was designed to prevent.

The deference given to plaintiffs' non-binding ad damnum allegations under the Third and Ninth Circuits' formulation of the burden on removing defendants has a deleterious effect on removal under CAFA under 28 U.S.C. § 1332(d) and traditional removal under 28 U.S.C. § 1332(a). Under CAFA, a defendant is left with the unpalatable options: It can wait until it has a smoking gun to prove the amount in controversy to a legal certainty (and bear the risks of litigating class certification and other issues in state court or courts); it can remove with the risk of remand barring the doors to federal court barred by means of the law-of-the-case doctrine; or it can remove on the assumption that if the case is remanded, the parties can play judicial ping-pong between state and federal courts until the amount in controversy is met or the plaintiff enters a binding stipulation limiting damages. Even if the state court applies judicial estoppel to limit the plaintiff's damages to less than the jurisdictional amount, the Defendant remains unable to access federal court, and the policies underlying CAFA are negated.

But the defendant subject to traditional removal requirements under 28 U.S.C. § 1332(a) is subject to a worse predicament because unlike CAFA removal, traditional removal must occur within 30 days of service of the complaint or other pleading conferring jurisdiction, but never more than one year after the suit is initiated. 28 U.S.C. § 1441(b). After a year passes, the plaintiff is free to modify his or her ad damnum or file pleadings demanding more than the jurisdictional amount without capping monetary damages or the risk of judicial estoppel.

The Third and Ninth Circuits' formulation of the burden on removing defendants gives rise to risks of jurisdictional manipulation and gamesmanship that will unfairly deprive defendants of their statutory right to litigate in federal court. For this additional reason, the Court should grant the petition and clarify the appropriate standards for removal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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