

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
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5
6 August Term, 2005
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8 (Argued March 3, 2006

Decided December 26, 2006)

9
10 Docket No. 05-8019-cv
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14 Blockbuster, Inc.,
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16 Defendant-Appellee,
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18 v.
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20 Michael Galeno,
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22 Plaintiff-Appellant.
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26 Before:
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28 CARDAMONE, WALKER, and SOTOMAYOR, Circuit Judges.
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32 Named plaintiff in putative class action, Michael Galeno,
33 appeals from the July 13, 2005 order of United States District
34 Court for the Southern District of New York (Daniels, J.),
35 denying his motion to remand the action for lack of federal
36 subject matter jurisdiction to the New York state court. On
37 March 23, 2006 we issued by summary order a judgment vacating and
38 remanding the district court's ruling. In this opinion we
39 explain our reasons.
40

41 Vacated and remanded.
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43

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counsel), for Defendant-Appellee.

1 CARDAMONE, Circuit Judge:

2 On this appeal we consider a class action suit commenced in
3 New York State Supreme Court on February 25, 2005. The action
4 was brought by Michael L. Galeno and other plaintiffs as
5 disgruntled customers of defendant Blockbuster, Inc. (defendant
6 or Blockbuster). They charged in their complaint that
7 defendant's "No Late Fee" program, begun on January 1, 2005, is a
8 deceptive forced sale scheme, which in their view is worse than a
9 "bait and switch" scheme because a customer who holds a video
10 beyond its due date is charged without notice for a sale of the
11 item. This conduct by the defendant, plaintiffs allege, is a
12 deceptive business practice under New York law and constitutes
13 unjust enrichment under the common law. Defendant's conduct
14 resulted in a suit being brought by 47 Attorneys General and the
15 District of Columbia, and after a settlement was reached in that
16 suit, the program entitled "No Late Fee" was scrapped by
17 defendant by March 15, 2005.

18 After Blockbuster removed Galeno's action to federal court,
19 plaintiffs moved to send this class action case back to state
20 court. Plaintiffs have appealed the district court's denial of
21 their motion and assert that the statutory amount-in-controversy
22 requirement has not been met. It is against this backdrop that
23 we must decide the jurisdictional question raised on the appeal:
24 which party -- plaintiffs or defendant -- has the burden of
25 demonstrating federal jurisdiction? To answer this question we
26 address the jurisdictional requirements of the Class Action

1 Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4
2 (codified in scattered sections of 28 U.S.C.).

3 BACKGROUND

4 Plaintiff Michael L. Galeno (plaintiff or appellant), the
5 named plaintiff in this putative class action, appeals from the
6 July 13, 2005 order of United States District Court for the
7 Southern District of New York (Daniels, J.), denying his motion
8 to remand the action for lack of federal subject matter
9 jurisdiction to the New York State Supreme Court.

10 Because appeals from an order denying a motion to remand
11 under CAFA must be decided "not later than 60 days after the date
12 on which such appeal was filed," 28 U.S.C. § 1453(c)(2), on March
13 23, 2006 we vacated the district court's denial by summary order
14 and remanded the case to that court. See Galeno v. Blockbuster,
15 Inc., 171 Fed. Appx. 904 (2d Cir. 2006). In this opinion we
16 explain our reasons for doing so.

17 A. The Parties and the Class Complaint

18 On February 25, 2005 Galeno, a New York resident, filed this
19 putative class action against defendant Blockbuster in New York
20 State Supreme Court, on behalf of himself and all similarly
21 situated New York customers who rented videos from Blockbuster
22 stores from "January 1, 2005 to the present." Plaintiff alleged
23 that Blockbuster had engaged in deceptive business practices
24 through its no-late-fee program.

25 The no-late-fee program was a widely advertised innovation
26 by Blockbuster that the company initiated on January 1, 2005.

1 Under the program, Blockbuster no longer charged customers a late
2 fee for keeping rental videos past their due dates. Rather, if a
3 customer chose to keep a rental (or otherwise failed to return it
4 on time), Blockbuster automatically converted the rental to a
5 sale of the video on the eighth day past the video's original due
6 date. The customer was then billed an additional amount for the
7 selling price of the video, minus the initial rental fee already
8 paid. Blockbuster referred to this action as a converted sale.
9 If a customer returned the video within 30 days after the sale
10 date, Blockbuster agreed to refund or credit the customer the
11 sale price, and to charge the customer only a \$1.25 restocking
12 fee for costs associated with the conversion of the video from
13 rental to sale and then back to rental. Blockbuster advertised
14 that customers could "celebrate" the end of late fees and
15 declared that there are "no more late fees" at Blockbuster.

16 Plaintiff's complaint alleged that Blockbuster's advertising
17 was deceptive in that it omitted the material fact that instead
18 of being assessed a late fee, customers would be charged a sale
19 fee, or if they returned the video, a restocking fee.

20 Blockbuster included on its website some information regarding
21 converted sales and restocking fees. Nonetheless, according to
22 plaintiff, Blockbuster did not make those details clear, but
23 required customers to search the website to find them.

24 Similarly, Blockbuster omitted pertinent details from its store
25 signage and television advertising. This, averred plaintiff,
26 violated New York General Business Law § 349 (deceptive business

1 practices) and enriched Blockbuster unjustly. Plaintiff claimed
2 that there were "thousands of members of the Class," though their
3 exact number and identities are currently unknown. For relief,
4 the complaint requested actual or statutory damages, "whichever
5 are greater." Plaintiff stated that statutory damages would be
6 \$50 per customer. The complaint also sought injunctive relief
7 and attorney's fees.

8 B. Federal District Court Proceedings

9 Blockbuster removed the action on April 1, 2005 to federal
10 court, asserting diversity jurisdiction under both the general
11 diversity provision, 28 U.S.C. § 1332(a), and CAFA, 28 U.S.C.
12 § 1332(d). After Blockbuster filed its answer to the complaint,
13 plaintiff promptly moved to remand the case back to state court
14 on the ground that the federal court lacked subject matter
15 jurisdiction because Blockbuster could not satisfy the amount-in-
16 controversy requisite of \$5 million, see 28 U.S.C. § 1332(d).
17 Blockbuster then filed under seal with the district court a
18 declaration by its senior vice president and corporate
19 controller, James Howell, that described the total amount of
20 restocking fees and converted sales incurred by New York
21 customers under the no-late-fee program from January 1, 2005 to
22 May 19, 2005.

23 Before the district court, Blockbuster asserted that CAFA
24 had reversed the traditional rule that the party seeking removal
25 to federal court bears the burden of establishing federal
26 jurisdiction, citing a recent decision by the United States

1 District Court for the Central District of California,
2 Yeroushalmi v. Blockbuster, Inc., No. CV 05-225, 2005 WL 2083008
3 (C.D. Cal. July 11, 2005), overruled by Abrego Abrego v. Dow
4 Chem. Co., 443 F.3d 676 (9th Cir. 2006) (per curiam). The
5 district court, agreeing with Blockbuster, denied Galeno's motion
6 to remand. The court stated, "On my review of the case, so far
7 I'm in substantial agreement with [the Yeroushalmi court]." The
8 trial judge did not make any factual findings as to the amount in
9 controversy or the diversity of the parties, nor did he explain
10 the basis on which he found subject matter jurisdiction, except
11 to say:

12 Obviously the issue is whether or not a
13 defendant should have the right to be in
14 federal court. And there is a presumption
15 that there is such a right given, [sic]
16 sufficient factual basis consistent with the
17 statute. Therefore, I'm going to deny the
18 motion to remand. . . . I think on the
19 record as it exists, I think the defendant
20 has met its burden at this stage of the
21 proceeding to demonstrate a right to be in
22 federal court and the plaintiff has not met
23 the burden to demonstrate, and that there is
24 not sufficient basis to conclude that there's
25 federal jurisdiction.
26

27 On July 13, 2005 the district court issued a brief order denying
28 plaintiff's motion to remand.

29 C. Appellate Proceedings

30 Galeno filed a motion, pursuant to 28 U.S.C. § 1453(c), for
31 permission to appeal the district court's ruling, which we
32 granted. As noted above, on March 23, 2006 we issued a summary
33 order in this case. In that order we vacated and remanded the

1 order of the district court, instructing that court to "explain
2 its calculation of the reasonably probable damages." Galeno, 171
3 Fed. Appx. at 904.

4 DISCUSSION

5 I Standard of Review

6 On appeal from the denial of a motion to remand for lack of
7 subject matter jurisdiction, we review the court's legal
8 conclusions de novo and its factual findings for clear error.
9 See Briarpatch Ltd. v. Phoenix Pictures, Inc., 373 F.3d 296, 302
10 (2d Cir. 2004).

11 II Congress Grants Jurisdictional Authority With the 12 Class Action Fairness Act of 2005

13
14 As we have often stated, and the Supreme Court has recently
15 reiterated, federal district courts are "courts of limited
16 jurisdiction" whose powers are confined to statutorily and
17 constitutionally granted authority. Exxon Mobil Corp. v.
18 Allapattah Servs., Inc., 545 U.S. 546, ___, 125 S. Ct. 2611,
19 2616-17 (2005); Lyndonville Sav. Bank & Trust Co. v. Lussier, 211
20 F.3d 697, 700 (2d Cir. 2000). Congress, pursuant to its power
21 under Article III to ordain and establish federal courts, U.S.
22 Const. art. III, § 1, has granted to district courts original
23 jurisdiction over cases in which there is a federal question, see
24 28 U.S.C. § 1331, and cases between citizens of different states
25 (diversity jurisdiction), see 28 U.S.C. § 1332.

26 On February 18, 2005 Congress enacted CAFA with the purpose
27 of, inter alia, expanding the availability of diversity

1 jurisdiction for class action lawsuits. CAFA applies to class
2 actions "commenced on or after the date of enactment" of February
3 18, 2005, which was a week before Galeno filed his complaint in
4 this action. 28 U.S.C. § 1332 Note, Effective and Applicability
5 Provisions. The statute, § 1332(d)(1), defines a class action as
6 any civil action filed under Rule 23 of the Federal Rules of
7 Civil Procedure or a similar state rule that allows actions to be
8 brought by representatives of plaintiff classes. 28 U.S.C.
9 § 1332(d)(1)(B).

10 CAFA amends the diversity statute by adding a new § 1332(d)
11 to confer original federal jurisdiction over any class action
12 involving (1) 100 or more class members, (2) an aggregate amount
13 in controversy of at least \$5,000,000, exclusive of interest and
14 costs, and (3) minimal diversity, i.e., where at least one
15 plaintiff and one defendant are citizens of different states. 28
16 U.S.C. § 1332(d)(2), (5)(b), (6).

17 Another section of CAFA, § 1453, enhances the ability of
18 defendants to remove class actions originally filed in state
19 court to federal court. Section 1453 permits a defendant to
20 remove a class action even if a co-defendant is a citizen of the
21 state in which the action was originally brought and without the
22 consent of the other defendants in the action. § 1453(b). This
23 provision overrides the former case law requirement that each
24 defendant consent to removal. See Abrego Abrego, 443 F.3d at
25 681. Section 1453(b) incorporates by reference the general
26 removal procedures of 28 U.S.C. § 1446, "except that the 1-year

1 limitation under section 1446(b) [does] not apply." 28 U.S.C.
2 § 1453(b).

3 III Subject Matter Jurisdiction Under CAFA

4 We turn now to the case at hand to discuss whether the
5 requirements of subject matter jurisdiction were satisfied. We
6 generally evaluate jurisdictional facts, such as the amount in
7 controversy, on the basis of the pleadings, viewed at the time
8 when defendant files the notice of removal. See Vera v. Saks &
9 Co., 335 F.3d 109, 116 n.2 (2d Cir. 2003) (per curiam).

10 With this in mind, a court must assess the three
11 prerequisites for CAFA jurisdiction: no fewer than 100 members
12 of the plaintiff class, minimal diversity, and \$5 million in
13 controversy. With regard to the number of members in the class,
14 neither party disputes the fact that there are more than 100
15 members of the class, and the complaint plainly states that there
16 are thousands of members.

17 Before turning to the jurisdictional requirements of minimal
18 diversity and amount in controversy, however, we first address
19 whether CAFA shifted the burden of proof to the remand-requesting
20 plaintiff to show that federal jurisdiction does not exist.

21 A. Burden of Proof

22 Appellant maintains the district court erred in placing the
23 burden of proof on him to show that the federal court did not
24 have subject matter jurisdiction. Defendant counters that CAFA
25 altered the landscape of federal jurisdiction in class actions to
26 such an extent that it shifted the burden of proving

1 jurisdictional facts, or more precisely a lack thereof, to
2 plaintiff. Even though CAFA's plain language does not mention
3 the burden of proof, Blockbuster would have us accept CAFA's
4 legislative history as evidence that Congress intended plaintiffs
5 to bear the burden.

6 As a preliminary matter, we observe that though the parties
7 have indicated the district court placed the burden on the
8 plaintiff, it is not obvious from the district judge's order or
9 comments at oral argument whether he ruled on this legal issue.
10 The district court stated, without explanation, both that
11 "defendant has met its burden" and that "plaintiff has not met
12 the burden." Because the court expressed that it was persuaded
13 by the decision in Yeroushalmi, it appears to us that it agreed
14 with Yeroushalmi that CAFA places the burden on the named
15 plaintiff to establish the absence of federal jurisdiction. See
16 Yeroushalmi, 2005 WL 2083008, at *3. If that is indeed what the
17 district court held, we think it was wrong.

18 An old proverb teaches that "Heaven suits the back to the
19 burden." The Concise Oxford Dictionary of Proverbs 94 (J.A.
20 Simpson ed., 1982). It is well-settled that the party asserting
21 federal jurisdiction bears the burden of establishing
22 jurisdiction. R. G. Barry Corp. v. Mushroom Makers, Inc., 612
23 F.2d 651, 655 (2d Cir. 1979). So in this case we may correctly
24 say that the law suits the back to the burden. Under this rule,
25 Blockbuster ought to shoulder the burden because it removed the
26 action to federal court from state court. See DiTolla v. Doral

1 Dental IPA of New York, No. 06-2324, 2006 WL 3335125, *3-4 (2d
2 Cir. Nov. 17, 2006) (ruling simply that CAFA has not changed the
3 traditional rule that the party asserting federal jurisdiction
4 bears the burden of establishing jurisdiction).

5 In response Blockbuster points to a Senate Committee Report
6 as proof that Congress intended plaintiffs to bear the burden of
7 proof. See S. Rep. No. 109-14, at 42 (2005), as reprinted in
8 2005 U.S.C.C.A.N. 3, 40. The report states: "If a purported
9 class action is removed pursuant to these jurisdictional
10 provisions, the named plaintiff(s) should bear the burden of
11 demonstrating that the removal was improvident (i.e., that the
12 applicable jurisdictional requirements are not satisfied)." Id.
13 As the Ninth Circuit points out, the Judiciary Committee issued
14 this report ten days following CAFA's enactment into law. Abrego
15 Abrego, 443 F.3d at 683.

16 Congress included no such language in the text of the
17 statute. We assume that the drafters of CAFA were well aware of
18 the statutory language necessary to express an intent to shift
19 the burden of proof to the plaintiff, especially in light of
20 long-standing judicial rules placing the burden on the defendant.
21 Cf. Desiderio v. Nat'l Ass'n of Securities Dealers, 191 F.3d 198,
22 205-06 (2d Cir. 1999). The line of cases confirming the rule
23 that the party invoking jurisdiction bears the burden is a
24 venerable one. See, e.g., Turner v. Bank of N. Am., 4 U.S. (4
25 Dall.) 7, 11 (1799); McNutt v. Gen. Motors Acceptance Corp., 298
26 U.S. 178, 182-83 (1936).

1 It is true that Congress displayed in CAFA an aim to broaden
2 certain aspects of federal jurisdiction for class actions, see
3 §§ 1332(d), 1453. However, we think that, rather than evincing
4 an intent to make as drastic a change to federal jurisdiction as
5 Blockbuster proposes, CAFA's detailed modifications of existing
6 law show that Congress appreciated the legal backdrop at the time
7 it enacted this legislation. Moreover, the Senate report was
8 issued ten days after the enactment of the CAFA statute, which
9 suggests that its probative value for divining legislative intent
10 is minimal. In the absence of a clear textual directive to alter
11 such a long established principle of federal jurisdiction, we
12 decline to do so. See Brill v. Countrywide Home Loans, Inc., 427
13 F.3d 446, 448 (7th Cir. 2005) ("The rule that the proponent of
14 federal jurisdiction bears the risk on non-persuasion has been
15 around for a long time. To change such a rule, Congress must
16 enact a statute with the President's signature."); see also
17 Abrego Abrego, 443 F.3d at 686; Miedema v. Maytag Corp., 450 F.3d
18 1322, 1328-29 (11th Cir. 2006) (rejecting an argument identical
19 to Blockbuster's and noting that "a committee report cannot serve
20 as an independent statutory source having the force of law"). To
21 enshrine the Committee Report as law would be to ignore the
22 Constitution's requirement of bicameralism and presentment.

23 Every circuit court that has considered this issue has
24 reached the same conclusion. Abrego Abrego, 443 F.3d at 686;
25 Evans v. Walter Indus., 449 F.3d 1159, 1164 (11th Cir. 2006);
26 Brill, 427 F.3d at 448. We note that some courts of appeal have

1 gone further and have held that once the defendants have carried
2 the burden of establishing, pursuant to the general
3 jurisdictional requirements of CAFA, that the amount in
4 controversy is greater than \$5 million and that there is minimal
5 diversity of the parties, 28 U.S.C. § 1332(d)(2), a plaintiff
6 seeking remand bears the burden of establishing that they are
7 eligible for one of CAFA's express exceptions to jurisdiction
8 enumerated at § 1332(d)(3)-(5). Hart v. FedEx Ground Package
9 Sys. Inc., 457 F.3d 675, 680 (7th Cir. 2006); Frazier v. Pioneer
10 Ams. LLC, 455 F.3d 542, 546 (5th Cir. 2006); Evans, 449 F.3d at
11 1164. The § 1332(d)(3) and (5) exceptions are not before us, and
12 therefore we need not comment on whether we agree with these
13 circuits.

14 In sum, we hold that CAFA did not change the traditional
15 rule and that defendant bears the burden of establishing federal
16 subject matter jurisdiction. Blockbuster must show that it
17 appears to a "reasonable probability" that the aggregate claims
18 of the plaintiff class are in excess of \$5 million. Mehlenbacher
19 v. Akzo Nobel Salt, Inc., 216 F.3d 291, 296 (2d Cir. 2000); 28
20 U.S.C. § 1332(d)(2), (6).

21 B. Was Minimal Diversity Satisfied?

22 Although the jurisdictional dispute in this appeal focuses
23 on the amount-in-controversy question, we pause briefly to
24 consider the diversity of the parties. As we have noted above,
25 § 1332(d)(2) requires only minimal diversity of the parties,
26 which occurs when

1 (A) any member of a class of plaintiffs is a
2 citizen of a State different from any
3 defendant; (B) any member of a class of
4 plaintiffs is a foreign state or a citizen or
5 subject of a foreign state and any defendant
6 is a citizen of a State; or (C) any member of
7 a class of plaintiffs is a citizen of a State
8 and any defendant is a foreign state or a
9 citizen or subject of a foreign state.

10
11 28 U.S.C. § 1332(d)(2).

12 A corporation is "deemed . . . a citizen of any State by
13 which it has been incorporated and of the State where it has its
14 principal place of business." 28 U.S.C. § 1332(c)(1).

15 Blockbuster is therefore a citizen of Delaware and Texas.

16 The class complaint alleged only that Galeno, the named
17 plaintiff, was a resident of New York; it made no declaration as
18 to his citizenship. However, the complaint also stated that
19 there were "thousands" of "New York customers" who were members
20 of the class. The district court failed to make a finding as to
21 whether minimal diversity was established, but it seems plain to
22 us that Blockbuster is able to meet its burden of showing there
23 is a reasonable probability that at least one of these class
24 members is a citizen of New York and thus is "a citizen of a
25 State different from . . . defendant," 28 U.S.C. § 1332(d)(2)(A).

26 C. Was the \$5 Million Amount in Controversy Satisfied?

27 Unlike the general diversity statute which requires at least
28 one claim to meet the amount-in-controversy minimum of \$75,000,
29 see, e.g., Exxon Mobil Corp., 545 U.S. at ___, 125 S. Ct. at
30 2620, CAFA explicitly provides for aggregation of each class

1 member's claims in determining whether the amount of controversy
2 is at least \$5,000,000. 28 U.S.C. § 1332(d)(6).

3 The district court made no findings and offered no
4 explanation as to how it calculated the amount in controversy
5 here to be more than \$5 million. As we stated in the previously
6 issued summary order in this case, Galeno, 171 Fed. Appx. at 904,
7 we therefore cannot properly review the district court's ruling
8 on this issue. On remand the district court should explain its
9 calculation of the reasonably probable damages.

10 CONCLUSION

11 Under CAFA, as under the traditional rule, the party
12 asserting subject matter jurisdiction has the burden of proving
13 it. To satisfy its burden, defendant must prove to a reasonable
14 probability that there is the necessary minimal diversity and
15 that the amount in controversy exceeds \$5 million.

16 Accordingly, we vacate the order of the district court and
17 remand this case to it for further proceedings as outlined above.