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I. Foreword—The Class Action Fairness Act of 2005

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I. FOREWORD:
DEVELOPMENTS IN THE LAW,
THE CLASS ACTION FAIRNESS ACT OF 2005

*Professor Georgene M. Vairo**

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State court or federal court? It makes a difference.¹ Class actions, because of their potentially high stakes, push the hottest buttons. Whether perceived or real, the forum selection battle between plaintiffs seeking to keep cases in state court and defendants

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1. See generally Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581 (1998) [hereinafter *Win Rates and Removal Jurisdiction*] (finding that plaintiffs' success rates in cases removed to federal court were low compared to cases brought originally in federal court and to state cases, and that the differing case outcomes might also be a result of case selection, whereby removed cases represent the weakest subset of cases litigated); Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119 (1998) [hereinafter *Litigation Realities*] (applying empirical methodologies to find that forum does in fact have an effect on the outcome of various phases of litigation).

trying to remove them to federal court rages on, and Congress and the President have weighed in big-time. This year's *Developments in the Law* issue will focus on the most momentous legislative effort, the Class Action Fairness Act of 2005 (CAFA),² to control the state-federal forum shopping battle that has become so important in today's litigation climate. On February 18, 2005, President Bush signed CAFA, which provides for expanded federal jurisdiction over class actions and seeks to prevent some of the abuses believed to be associated with class action practice. This issue will explore the nuts and bolts of CAFA, as well as its ambiguities and anticipated twists and turns.

A. *The Litigation Landscape*

To understand CAFA and why it was enacted, one must understand the litigation dynamics that led to its enactment. Defendants have long complained about the economic pressure that class actions place upon them.³ Consumer class actions, where individual damages may be minimal, but in the aggregate huge, have been of particular concern.⁴ Critics of class actions complained that in such cases consumers received little of value, while class counsel were awarded millions of dollars in fees.⁵ Although not specifically responding to these complaints, the federal judiciary, led by the United States Supreme Court in *Amchem Products, Inc. v. Windsor*, tightened up the class certification process, making federal court less

2. Pub. L. No. 109-2, 4-5, 119 Stat. 4, 9-13 (codified in scattered sections of 28 U.S.C.).

3. See, e.g., Brief for Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner at 6-7, *Gridley v. State Farm Mut. Auto. Ins. Co.*, 840 N.E.2d 269 (Ill. 2005) (No. 94144). Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1216, 1235-36 (2001) (criticizing "regulation through litigation," particularly in the context of class actions, and pointing to the economic burden placed on corporate defendants faced with such litigation); The Business Roundtable, *Let's Make a Federal Case out of Interstate Class Action Lawsuits* (2000), available at <http://www.businessroundtable.org/pdf/433.pdf>.

4. See Jennifer Gibson, *New Rules for Class-Action Settlements: The Consumer Class Action Bill of Rights*, 39 LOY. L.A. L. REV. 1103 (2006), for a thorough discussion of the criticism surrounding consumer class actions and how CAFA attempts to remedy such concerns.

5. S. REP. NO. 109-14, at 30 (2004), as reprinted in 2005 U.S.C.C.A.N. 3, 29-30.

attractive to plaintiffs in certain kinds of cases.⁶ Additionally, the Court's decisions in the 1986 Trilogy of Summary Judgment cases,⁷ together with its decision in *Daubert v. Merrell-Dow Pharmaceuticals*, have made it tougher for plaintiffs to survive motions for summary judgments in federal courts.

These federal judicial developments led plaintiffs' lawyers to seek out state courts more amenable to class certification and jury trials.⁸ In response, defendants increasingly sought to remove cases from state court to federal court, where they hoped to defeat class certification, and more successfully defend their clients' interests.⁹ Plaintiffs learned to defeat the right to removal by naming non-diverse parties as defendants to destroy complete diversity, or by alleging an amount in controversy less than the amount required for federal diversity jurisdiction under 28 U.S.C. § 1332.¹⁰

6. See Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1564 (2000).

7. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (collectively clarifying standards for making summary judgment motions and for granting summary judgment).

8. See Vairo, *supra* note 6, at 1596–97.

9. A recently published study by the Federal Judicial Center revealed that defense attorneys believe that with respect to class action cases, the federal forum is more beneficial to their clients' interests; as a result they remove cases based on state law to the federal courts. See THOMAS E. WILLGING & SHANNON R. WHEATMAN, ATTORNEY REPORTS ON THE IMPACT OF *ANCHEM* AND *ORTIZ* ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION: A REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES REGARDING A CASE-BASED SURVEY OF ATTORNEYS, 4–5, 7–8, 18, 29–31 (2004), available at [http://www.fjc.gov/public/pdf.nsf/lookup/amort02.pdf/\\$file/amort02.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/amort02.pdf/$file/amort02.pdf). However, the study indicates that the rate of class certification by state and federal judges for the sample involved is virtually the same. *Id.* at 34. The study also reported, however, that federal judges were more than twice as likely to deny class certification. *Id.* at 35. Other studies have shown that whether a case stays in state court or is successfully removed to federal court will make a difference in outcome. See *Win Rates and Removal Jurisdiction*, *supra* note 1, at 599–602; *Litigation Realities*, *supra* note 1, at 122–25.

10. The Supreme Court had long held that if any named plaintiff and any named defendant are citizens of the same state, the action could not be filed in or removed to federal court under the diversity jurisdiction statute. See *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806). With respect to the amount in controversy, the Court has held that in most cases, the claims of class members may not be aggregated to satisfy the statutory greater than \$75,000

Neither side could be happy with these developments. While plaintiffs' attorneys complained of being deprived of their chosen state court forums, corporate defendants complained of being sued in "Judicial Hellholes."¹¹ Although the problem might have been overstated, some state courts, and certain counties within some states, had become magnets for plaintiffs in certain forms of litigation.¹² CAFA is a significant outgrowth of these dynamics. CAFA is also significant because it may be only the first step by Congress and President Bush to reign in what they see as abuses in the civil justice system. For example, the pending Lawsuit Abuse Reduction Act¹³ is primarily aimed at restoring Federal Rule of Civil Procedure 11 to its full, 1983 draconian version. It also contains a provision that would restrict the venue for litigation in state and federal courts to the state in which the plaintiff is domiciled or was injured, or where the defendant is doing business.¹⁴

B. Purposes of the Class Action Fairness Act

The purpose of CAFA, as Senator Arlen Specter, Chair of the Senate Judiciary Committee, put it, is

jurisdictional amount requirement. *See Snyder v. Harris*, 394 U.S. 332, 336–338 (1969). Even if a named class member's claim met the jurisdictional amount requirement, the Supreme Court held in *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973), that all class members' claims had to allege claims exceeding \$75,000. After CAFA was enacted, the Supreme Court held in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2615 (2005), that supplemental jurisdiction supports the claims of other plaintiffs and class members so long as the complete diversity requirement is satisfied and at least one named plaintiff meets the jurisdictional requirement of § 1332. In doing so, the Court ruled that the supplemental jurisdiction statute, 28 U.S.C. § 1367, overruled *Zahn*, but not *Strawbridge*. *See infra* note 36 and accompanying text.

11. AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2004, at 8–9 (2004), available at <http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf>.

12. *See id.* (describing so-called "Judicial Hellholes" as fora sought out by plaintiffs' lawyers, where judges and juries were particularly likely to award large verdicts against deep pocket defendants).

13. The Lawsuit Abuse Reduction Act, passed by the House of Representatives in September 2004, would amend Federal Rule of Civil Procedure 11 (Rule 11) to its earlier, more draconian, form, applying Rule 11 in certain state cases, and preventing forum shopping. H.R. 4571, 108th Cong. §§ 2–4 (2004). The bill was reintroduced in the House in early 2005. Lawsuit Abuse Reduction Act, H.R. 420, 109th Cong. (2005).

14. H.R. 4571, § 4(a).

to prevent judge shopping to States and even counties where courts and judges have a prejudicial predisposition on cases. Regrettably, the history has been that there are some States in the United States and even some counties where there is forum shopping, which means that lawyers will look to that particular State, that particular county to get an advantage.¹⁵

Moreover, the preamble to CAFA purports to “[t]o amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.”¹⁶

It is fair to note that CAFA is not the first time Congress has attempted to protect interstate commerce through federal jurisdiction. About one-hundred years ago, as the United States became more industrialized after the Civil War and the turn of the nineteenth century, and business entities came to the forefront of the economy, Congress expanded federal jurisdiction to accommodate industry.¹⁷

Nonetheless, it is interesting to look at CAFA through the prism of the Supreme Court’s federalism decisions. CAFA will channel state-claim based litigation to the federal courts, where the presumption is that class certification will generally be denied.¹⁸ Without the ability to obtain class certification—in state courts because defendants will remove them and in federal courts because of the restrictive *Amchem* decision—the plaintiffs’ bar loses its ability to leverage the claims of thousands of claimants to extract large settlements from deep pocket corporate defendants. There is no question that the use of settlement classes often raised serious questions about whether absent class members were receiving their due.¹⁹ Moreover, there is no question that there is a role for

15. 151 CONG. REC. S999 (daily ed. Feb. 7, 2005) (statement of Sen. Specter).

16. Preamble to Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4.

17. Edward A. Purcell, Jr., *Origins of a Social Litigation System*, in LITIGATION AND EQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 13, 16–20 (1992).

18. See Vairo, *supra* note 6, at 1597, 1599 (discussing the impact of *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), on federal courts’ approach to certifying class actions).

19. Under *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940), class action

Congress and the courts to play in ensuring fair play to all parties. Additionally, there appears to be a sound constitutional basis for CAFA under Article III, Section 2. It has long been understood that Congress may provide subject matter jurisdiction based on minimal diversity.²⁰

The question to ask, however, is whether legislation essentially ousting the state courts from resolving mass tort and other complex state claim based class action litigation violates the spirit or letter of the Supreme Court's federalism decisions. Unquestionably, the removal of state-claim-based litigation to federal court undermines state autonomy and principles of federalism.²¹ Moreover, removal of state-claim cases to federal court resulting in a dismissal by a federal judge—as opposed to the potential to get to a jury if the case had remained in state court—does not seem to square with the spirit of the *Erie* doctrine:²² that the result reached in the federal court be the same as that reached in the state court across the street.²³

The next Parts of this Foreword briefly survey the major provisions of CAFA. The final Part sets forth a hypothetical case that provides ample food for thinking through the various provisions of CAFA that the *Developments in the Law* issue addresses.

C. Specific Provisions of CAFA

1. The Class Action Consumer Bill of Rights

Many politicians, consumers, and defendants complained about

judgments are binding on all class members only if the class has been adequately represented. Both state and federal courts must therefore confirm only those class action settlements that provide this constitutional minimum. *Vairo*, *supra* note 6, at 1601.

20. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967) (holding that complete diversity is not constitutionally required).

21. See *Vairo*, *supra* note 6, at 1610–27.

22. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding there is no federal general common law).

23. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) (“[T]he accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.”); see also *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (discussing the twin aims of the *Erie* doctrine, which are prevention of forum shopping and equal administration of the law).

so-called coupon settlements prior to CAFA's passage.²⁴ Unquestionably, coupon settlements tend to provide class members with little of value,²⁵ although plaintiffs' lawyers justify such settlements because they have the cumulative effect of deterring corporate defendants from inflicting harms on their consumers. Nonetheless, CAFA includes a "Consumer Bill of Rights."²⁶ Section 3 of CAFA amends the federal judicial code to specify the calculation of contingent and other attorneys' fees in proposed class action settlements that provide for the award of coupons to class members.²⁷ It also prohibits a federal district court from approving: (1) a proposed coupon settlement absent a finding that the settlement is fair, reasonable, and adequate;²⁸ (2) a proposed settlement involving payments to class counsel that would result in a net monetary loss to class members, absent a finding that the loss is substantially outweighed by nonmonetary benefits;²⁹ or (3) a proposed settlement that provides greater sums to some class members solely because they are closer geographically to the court.³⁰ Section 3 also specifies requirements for serving notices of proposed settlements on appropriate State and Federal officials, and prohibits the court from granting final approval to a proposed settlement earlier than 90 days after such service.³¹ In some respects, these provisions simply codify the best practices of many federal judges, as well as the requirements of Federal Rule of Civil Procedure 23, the federal class action rule. Now, however, these principles will be enshrined in law.³²

2. Amending Diversity Jurisdiction

Section 4 is the heart of CAFA. It amends 28 U.S.C. § 1332, the diversity jurisdiction statute, and vests the federal district courts with

24. See Gibson, *supra* note 4.

25. S. REP. NO. 109-14, at 30 (2004), as reprinted in 2005 U.S.C.C.A.N. 3, 29-30.

26. 28 U.S.C. §§ 1711-1715 (2006).

27. § 1712.

28. § 1712(e).

29. § 1713.

30. § 1714.

31. § 1715.

32. See Gibson, *supra* note 4 (addressing CAFA's Consumer Bill of Rights).

original jurisdiction of any civil action in which the matter in controversy exceeds \$5 million, exclusive of interest and costs, and that is between citizens of different States, or citizens of a State and a foreign State or its citizens or subjects.³³ The purpose of this amendment is to abolish the complete diversity rule for class actions, and to clarify the jurisdictional amount in class action cases. By specifying that the amount in controversy exceed \$5 million, CAFA sidesteps the supplemental jurisdiction issue that currently divides the federal courts.³⁴ Nearly all of the courts of appeals have had to decide whether a class action is within federal jurisdiction when the named plaintiff satisfies the \$75,000+ jurisdictional amount, but other class members do not individually meet the requirement.³⁵ Although the Supreme Court has resolved this issue,³⁶ the approach Congress takes in CAFA is to eliminate the need to focus on the damages of individuals, and instead to look at the amount in controversy essentially from the defendant's viewpoint—if one aggregates all of the individual damages, and the amount exceeds \$5 million, the case meets the new jurisdictional amount requirement. As the third Article in this issue demonstrates, the amount in controversy issue is far from simple, and litigators and courts will need to address many thorny issues.³⁷

33. § 1332(d)(2).

34. See Cameron Fredman, *Plaintiffs' Paradise Lost: Diversity of Citizenship and Amount in Controversy Under the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 1025 (2006).

35. See, e.g., *Gibson v. Chrysler Corp.*, 261 F.3d 927, 933–40 (9th Cir. 2001); *Rosmer v. Pfizer, Inc.*, 263 F.3d 110, 114–19 (4th Cir. 2001); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997); *Leonhardt v. W. Sugar Co.*, 160 F.3d 631 (10th Cir. 1998); *In re Abbot Labs.*, 51 F.3d 524, 529 (5th Cir. 1995), *aff'd per curiam by an equally divided Court, sub nom. Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000) (leaving open the issue of whether section 1367 overrules *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973)).

36. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2615 (2005) (holding that supplemental jurisdiction supports the claims of other plaintiffs and class members so long as the complete diversity requirement is satisfied and at least one named plaintiff meets the jurisdictional requirement of § 1332). *Exxon Mobil* will apply outside of the CAFA context, as, for example, when multiple plaintiffs join in an action, or a class action does not meet CAFA's jurisdictional requirements.

37. Fredman, *supra* note 34 (addressing diversity provisions of CAFA).

The complexities presented by these amount-in-controversy issues are likely to pale in comparison, however, to those created by other provisions in CAFA. In order to obtain the consent of a sufficient number of Democrat legislators, and in a nod to principles of federalism, CAFA provides district courts with discretion to decline to exercise jurisdiction when a balancing of a number of enumerated factors suggests that the case is not appropriate for federal resolution.³⁸ In the interests of justice and based on the totality of the circumstances, a district court may decline to exercise jurisdiction over a class action in which more than one-third but less than two-thirds of the members of the proposed plaintiff class, in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed,³⁹ upon considering:

(A) whether the claims involve matters of national or interstate interest; (B) whether the claims will be governed by laws of the State where the action was originally filed or by the laws of other States; (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction; (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; (E) whether the number of citizens of the State of original filing in all proposed plaintiff class is substantially larger than the number of citizens from any other State and the citizenship of other proposed class members is dispersed; and (F) whether, during the three-year period preceding filing, one or more other class actions asserting the same or similar claims on behalf of the same persons have been filed.⁴⁰

Further, CAFA requires the district court to decline jurisdiction when certain conditions are met. First, “greater than two-thirds of the members of all proposed plaintiff classes in the aggregate” must be citizens of the State in which the action was originally filed.”⁴¹ Secondly, at least one defendant must be a defendant “from whom significant relief is sought . . . whose alleged conduct forms a significant basis for the claims asserted . . . and who is a citizen of

38. § 1332(d)(3).

39. *Id.*

40. § 1332(d)(3)(A)–(F).

41. § 1332(d)(4)(A)(i)(I).

the State in which the action was originally filed.”⁴² Finally, “principal injuries resulting from the alleged conduct or any related conduct”⁴³ must have been incurred in the State of original filing, and “during the three-year period preceding filing . . . 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.”⁴⁴ Alternatively, a district court must decline jurisdiction if “two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State where the action was originally filed.”⁴⁵ Determining how these provisions apply in various cases is likely to prove quite vexing for the courts.⁴⁶

3. Mass Actions

An important aspect of CAFA is that it treats “mass actions” as class actions for the purposes of diversity jurisdiction and removal.⁴⁷ Some state courts are rather lenient in allowing plaintiffs to join the claims of hundreds or thousands of plaintiffs in one case.⁴⁸ The same economic considerations that serve to motivate plaintiffs’ counsel to file class actions and spur defendants’ unhappiness with them are implicated in mass actions. One jury trial with the claims of multiple plaintiffs joined presents the same kind of “bet your company” scenario as does a class action, and defendants thus feel pressured to settle such cases. Under CAFA, a “mass action” is defined as any civil action in which monetary relief claims of one-hundred or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact, and where the claims in the mass action satisfy the \$5 million jurisdictional amount requirement.⁴⁹

42. § 1332(d)(4)(A)(i)(II).

43. § 1332(d)(4)(A)(i)(III).

44. § 1332(d)(4)(A)(ii).

45. § 1332(d)(4)(B).

46. See Fredman, *supra* note 34 (surveying and analyzing these problems).

47. § 1332(d)(11).

48. For instance, the court in Jefferson County, Mississippi has gained a reputation for loosely applying joinder rules, which resulted in what was perceived as improper joinder of plaintiffs’ claims. See, e.g., AM. TORT REFORM FOUND., BRINGING JUSTICE TO JUDICIAL HELLHOLES 2003, at 22 (2003), available at <http://www.atra.org/reports/hellholes/2003/report.pdf>.

49. § 1332(d)(11)(B)(i). The mass action provision also notes that

As with the statute's class action provisions, CAFA also provides a few exceptions for mass actions. A case will not be deemed a mass action subject to federal jurisdiction if

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State; (II) the claims are joined upon motion of a defendant; (III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or (IV) the claims have been consolidated or coordinated solely for pretrial proceedings.⁵⁰

A political compromise, over the objections of much of the federal judiciary, resulted in a curious provision. Mass actions removed to federal court may not be transferred to any other court under the multidistrict litigation statute, 28 U.S.C. § 1407, unless a majority of the plaintiffs in the action request transfer pursuant to § 1407.⁵¹ Thus, the plaintiffs maintain some control over the forum. As will be discussed below, the case would be removed to a district court in which the state court action was filed. Thus, plaintiffs filing mass actions will not have to worry about having their cases transferred for pretrial purposes to federal court in a different state. This provision may be good politics, but it will result in inefficiencies. Moreover, if federal judges hated the sentencing guidelines, one wonders how they will feel about applying these provisions. One also wonders how fast and adept plaintiffs' lawyers will be in pleading around these various provisions. The fourth Article in this issue helps explicate the problems likely to arise in connection with the mass action provisions of CAFA.⁵²

jurisdiction exists "only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)," meaning only over those plaintiffs' claims for which the amount in controversy exceeds \$75,000. *Id.*

50. § 1332(d)(11)(B)(ii).

51. § 1332(d)(11)(C).

52. S. Amy Spencer, *Once More Into the Breach, Dear Friends: The Case for Congressional Revision of the Mass Actions Provisions in the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 1067 (2006).

4. Broad Removal Rights

Section 5 of CAFA creates a broad new removal provision, 28 U.S.C. § 1453.⁵³ It provides that a class action may be removed to a district court in accordance with 28 U.S.C. § 1446.⁵⁴ Thus, the case must be removed to a federal court in the state in which the case is filed. However, § 1453(b) also exempts class actions, and mass claims cases, from the 1-year limitation for removal under § 1446(b). Section 1453 broadens removal rights in two other important ways. It allows for removal even if any defendant is a citizen of the State in which the action is brought.⁵⁵ Additionally, a defendant is no longer required to obtain the consent of all other defendants in order to remove.⁵⁶ Finally, defendants have a broader right under CAFA to seek review of remand orders. Although § 1447's prohibition of remand orders generally applies, CAFA provides that a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the state court from which it was removed if application is made to the court of appeals not less than seven days after entry of the order.⁵⁷ As the Fredricks Article discusses, there was likely a drafting error in the provision concerning the time to take an appeal.⁵⁸

CAFA contains a number of other provisions. In keeping with its recent history of desiring active oversight of the federal judiciary, section 6 of CAFA directs the Judicial Conference of the United States to report on class action settlements, including the issuance of recommendations for best court practices to ensure fairness for class members and appropriate fees for counsel.

D. A CAFA-Esque Scenario

Many critics of CAFA predicted that its provisions were sufficiently ambiguous and poorly drafted that the legislation would provide fodder for litigants to argue about for decades. This

53. This section is discussed in detail in Lauren D. Fredricks, *Removal, Remand & Other Procedural Issues Under the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 995 (2006).

54. § 1453(b).

55. *Id.*

56. *Id.*

57. § 1453(c).

58. Fredricks, *supra* note 53.

Developments in the Law issue details many of the problems raised by the text of CAFA. While reading the Articles contained herein, it is useful to keep the following hypothetical in mind:

Imagine the booming city of Las Vegas, Nevada. The city has experienced explosive growth for some decades. The hypothetical litigation involves a development project gone awry.⁵⁹ Developer KT enters into purchase and sale agreements with prospective buyers of a residential condominium project. It later abandons the project and proceeds to sell the site, on which the condominium complex was to be built, to a third-party. Developer KT reimburses all buyers with their down payments. Nevertheless, the buyers bring a class action, purportedly on behalf of hundreds of other buyers. The buyers file the action in a Nevada state court, naming as defendants the developer KT, the third-party buyer, and others, seeking recovery of an alleged \$58 million in windfall profits.

Developer KT removes the class action case under CAFA to federal court. Plaintiffs' counsel responds by filing separate lawsuits on behalf of the individual buyers who were included in the original plaintiff class, and also moves to remand the federal case back to state court. Defendants counsel, in turn, responds to these maneuvers by removing the individual lawsuits under CAFA, and by opposing the motion to remand. Some of the newly removed cases are assigned to a different federal judge. Initially, the federal district court judge denies the plaintiffs' motion to remand the class action.

After further hearings, the federal judge handling the class action case remands that case to Nevada state court, and the federal judge handling the individual cases also remands those cases to Nevada state court. The defendants file a notice of appeal within a few days after entry of the order remanding the cases. The United States Court of Appeals for the Ninth Circuit now must deal with the various issues raised, but does not issue a scheduling order for briefing and argument. The issues presented by the above hypothetical are numerous.

1. Timing Issues

First, this case does not present one of the most frequently

59. The facts and legal issues presented by this hypothetical are drawn from an ongoing case. *See* *White v. Krystle Towers, LLC*, CV-S-05-0898-RLH-PAL (D. Nev. Nov. 3, 2005).

litigated issues vexing the courts since the enactment of CAFA, that is, the question of when an action is commenced for the purpose of removal under CAFA.⁶⁰ Nevertheless, it does raise the question of appellate jurisdiction. As the Fredricks Article on removal illustrates, there is an apparently serious drafting error in terms of the time within which a party may appeal a district court order concerning a remand to state court.⁶¹ Section 1453(c)(1) provides for discretionary appellate review “if application is made to the court of appeals not less than 7 days after entry of the order [granting or denying a remand].”⁶² Surely, Congress intended that an appeal be taken sooner rather than later, and intended that appeals be filed *within* seven days of the remand order.⁶³ Normally, Congress sets forth the outside date for taking an appeal, and does not impose a waiting period for taking an appeal.⁶⁴

Moreover, § 1453(c)(3) requires the appellate courts to render a decision within a short time frame. If it accepts the appeal, the court of appeals must issue its final judgment within sixty days from the date that the appeal is filed.⁶⁵ If a final judgment on the appeal is not rendered within that period, the appeal is deemed denied. Under § 1453(c)(3), a court of appeals has discretion to extend the sixty-day period for ten days. Thus, it makes sense for the defendants in this hypothetical litigation to apply for the extension and hope the time it takes the Ninth Circuit to decide whether to grant the extension tolls the sixty to seventy day period. In any event, it appears that Congress wants the forum selection battle to end sooner rather than

60. Accordingly, the hypothetical does not raise the difficult “commencement” issues that are dealt with in Lonny Sheinkopf Hoffman, *The Class Action Fairness Act of 2005: A First Year Retrospective Review*, 39 LOY. L.A. L. REV. 1135 (2006).

61. See Fredricks, *supra* note 53.

62. § 1453(c)(1).

63. *Id.*

64. See, e.g., *Amalgamated Transit Union v. Laidlaw Transit Servs.*, 435 F.3d 1140, 1145-46 (9th Cir. 2006) (discussing analogies between 28 U.S.C. § 1453(c)(1) and 28 U.S.C. § 1292(b), and Congress’s intent for parties seeking an appeal under the former provision to comply with Federal Rule of Appellate Procedure 5, which sets an outside date for taking an appeal).

65. § 1453(c)(2)–(3). Subsection 2 provides for a 60-day period for ruling, with a 10-day extension permitted under subsection 3. See also *Patterson v. Dean Morris, L.L.P.*, 444 F.3d 365 (5th Cir. 2006) (adopting the Ninth Circuit’s approach).

later and does not want the litigants to play jurisdictional games. The end result may, however, be that litigants will face difficulty in effectively appealing remand orders given the time constraints of § 1453(c).

2. When Is Remand Appropriate?

Turning to the merits, the hypothetical raises interesting problems. First, one might think that a local development dispute would easily be beyond the reach of CAFA. However, there was no question that the Nevada class action fits within CAFA jurisdiction. The plaintiff class allegedly consisted of “hundreds” of buyers and an amount in controversy of \$58 million. Moreover, the facts suggest that large numbers of the buyers were citizens of different states, not citizens of Nevada, and were diverse from at least some of the defendants. Accordingly, the minimal diversity and amount in controversy requirements of CAFA were satisfied. Thus, the case was properly removed to federal court. The question is whether the case will remain there.

E. Conclusion

This hypothetical raises the difficult question of whether the case should be remanded to state court based on either the mandatory or discretionary provisions of CAFA that allow the district court to decline to exercise jurisdiction. First, some of the defendants were citizens of Nevada, but were the “primary defendants” citizens of Nevada or some other state?⁶⁶ This will be an important factor that determines whether it is appropriate for the district court to decline to exercise its jurisdiction. Second, how many members of the plaintiff class were citizens of Nevada? If more than two thirds of the plaintiff class members are citizens of Nevada, then depending on whether other criteria are satisfied, the district court must remand the case.⁶⁷ On the other hand, if between one third and two thirds of the members of the plaintiff class are citizens of Nevada, then depending on whether certain criteria are satisfied, the district court would have discretion to remand the case.⁶⁸ Further, if the court is dealing with

66. See 28 U.S.C. § 1332(d)(3) (2006); see Fredman, *supra* note 34 (discussing CAFA’s ambiguous phrase “primary defendants”).

67. § 1332(d)(4)(A).

68. § 1332(d)(3).

the discretionary range, there are six factors that the court must balance correctly in determining whether to remand.⁶⁹

The inquiry of whether to remand is not a simple one. Who is a primary defendant? CAFA does not provide a definition, although some legislative history suggests that Congress intended the primary defendant to mean the real “target[]” of the lawsuit.⁷⁰ Assuming a court can identify who the primary defendant is, it must then determine the citizenship of that defendant. The rules for determining citizenship have been modified by Congress in the context of CAFA.

Third, the removal of the individual actions raises yet another thorny issue. Obviously the plaintiff was trying to make an end run around the removal of the original action. Is that what Congress intended? Can the mass action provision of CAFA be used successfully by the defendant to keep those cases in federal court, assuming the defendant persuades the Ninth Circuit to reverse the district court order with respect to the original class action case? It is difficult to believe that Congress would want plaintiffs to be able to orchestrate such an end run around CAFA by filing individual lawsuits. Nevertheless, the questions left unanswered by Congress’s drafting of the mass action provisions make it hard for one to imagine how those provisions could be used successfully by the defendants in this litigation scenario.

These are only a few of the issues raised by the hypothetical. The courts have had to deal with many more. The Articles that follow provide judges and practitioners alike with a guide to the various issues with which the courts have had to deal and with which the courts are likely to deal in the coming years.

69. *Id.*

70. S. REP. No. 109-14, at 43 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 41.