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II. Removal, Remand, and Other Procedural Issues under the Class Action Fairness Act of 2005

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II. REMOVAL, REMAND, AND OTHER PROCEDURAL ISSUES UNDER THE CLASS ACTION FAIRNESS ACT OF 2005

*Lauren D. Fredricks**

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In passing the Class Action Fairness Act of 2005 (“CAFA”) Congress significantly expanded federal subject matter jurisdiction over class action lawsuits.¹ CAFA amended the diversity statute, 28 U.S.C. § 1332, by creating subsection (d), which gives federal courts original jurisdiction over class actions where: (1) any member of the plaintiff class is a citizen of a different state than any defendant; (2) the amount in controversy exceeds \$5,000,000 exclusive of interests and costs; and (3) the class includes at least one hundred members.² Because defendants will most likely be the party to assert federal jurisdiction,³ removal is the avenue by which many of the newly permissible cases will reach federal court. Consequently, Congress created 28 U.S.C. § 1453, a more liberal removal statute that eases the requirements to remove class actions to federal court.⁴

Part A of this Article looks at choice of forum and removal historically. It explores the occasion for federal jurisdiction prior to CAFA, and looks at the opportunities for abuse and “gamesmanship” on either side. It discusses how this perceived abuse influenced Congress’ motive to enact CAFA. Parts B and C describe the current procedural avenues for class action removal and appeal of a remand order under CAFA, evaluating ambiguous provisions and practical implications. Part D considers additional CAFA-related procedural issues, including CAFA’s effective date and applicability, the burden of proof with respect to federal subject matter jurisdiction, discovery issues that have arisen as a side effect, and the applicability of the new removal provision to class action suits that do not meet the CAFA-enacted requirements set forth in 28 U.S.C. § 1332(d). Part E concludes that despite its drafting errors and imperfections, CAFA successfully expands federal jurisdiction and creates no fatal

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

2. See 28 U.S.C. § 1332(d) (2006).

3. Defendants are thought to prefer federal court primarily because of the perception that federal courts are reluctant to certify class actions. See JEFFREY I. LANG & DEBRA TODRES, SEVERAL FUNNY THINGS HAPPENED ON THE WAY TO THE CLASS ACTION FORUM: RECENT DEVELOPMENTS THAT MAY AFFECT THE CHOICE OF FORUM IN CLASS ACTION LITIGATION 1, 3–5 (1997) (chronicling federal circuit court decisions that either rejected class certification or decertified settlement classes following district court approval of class action settlements).

4. See Class Action Fairness Act § 5.

ambiguity that cannot be adequately addressed through litigation.

A. Understanding Class Action Forum Selection

A class action is a representative suit on behalf of a group of people similarly situated.⁵ They aim to promote judicial economy and efficiency, protect defendants from inconsistent obligations, protect the interests of absentees, provide access to judicial relief for small claimants, and enhance the means for private attorney-general suits to deter wrongdoing.⁶ Despite the seemingly straightforward definition and objectives, to say that class actions are controversial “is to understate the obvious.”⁷ The controversy partially arises because class suits can have far-reaching effects to bring about institutional and governmental change and can force large companies to disgorge significant profits.⁸

Over the last fifteen years, class actions have garnered wide public attention, which has both educated and misled the public about the class action litigation device.⁹ The attention has generally

5. 1 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 1:1 (4th ed. 2005).

6. *Id.* § 1:6; see also FED. R. CIV. P. 23 advisory committee’s note (explaining that class actions can “achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated”).

7. Susan T. Spence, *Looking Back . . . In a Collective Way*, 11 *BUS. LAW TODAY* 21, 24 (2002), available at <http://www.abanet.org/buslaw/blt/2002-07-08/spence.html>.

8. CONTE & NEWBURG, *supra* note 5, § 1:1.

9. See, e.g., Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 *SUP. CT. REV.* 337, 340–41 (arguing that the Supreme Court’s return to rules formalism obscures the development of a “due process-based analysis for the law of representative actions”); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff’s Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 *U. CHI. L. REV.* 1, 6 (1991) (asserting that the agency costs inherent in “entrepreneurial litigation” produce inefficiencies that can only be addressed by a free market for legal claims, in which attorneys may purchase outright the claims of class members); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 *U. CHI. LEGAL F.* 71, 77–83 (objecting that class action litigation is a lawyer-driven hunt for bounty); Charles W. Wolfram, *Mass Torts—Messy Ethics*, 80 *CORNELL L. REV.* 1228, 1231 (1995) (discussing the “low state of ethical practice in class actions” and the “sell-out lawyers who, for millions in fees, are willing to sign away the rights of tens of thousands of faceless and lawyerless class members”). See generally Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 *YALE*

been negative, and class actions have come under attack by a variety of think-tanks, interest groups, and lobbyists.¹⁰ In its report accompanying CAFA, the Senate concluded that “[b]y now, there should be little debate about the numerous problems with our current class action system.”¹¹ Yet, despite this dramatic conclusion, other scholarship suggests that the problems and abuses of class actions have been overstated, and the debate continues.¹²

Forum shopping is one the most prominent issues in the debate.¹³ On the one hand, forum shopping is an inherent attribute of a multi-state judicial system.¹⁴ Given the differences in state substantive law, the various rules of jurisdiction, venue, conflicts, and transfers, counsel may engage in complex strategic moves in an attempt to favorably affect the outcome of his case.¹⁵ Nonetheless,

L. & POL’Y REV. 69 (2004) (focusing on auctioning the lead counsel position in class actions).

10. These advocacy groups uniformly cite to “class action abuse” as the need for reform. *See, e.g.*, American Tort Reform Association, <http://www.atra.org> (last visited Feb. 3, 2006); Legal Reform Now, <http://www.legalreformnow.com/index.php> (last visited Feb. 3, 2006); Center for Legal Policy at the Manhattan Institute, <http://www.manhattan-institute.org/html/clp.htm> (last visited Feb. 3, 2006).

11. S. REP. NO. 109-14, at 4 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 5. Sens. Biden, Brownback, Coburn, Cornyn, DeWine, Durbin, Feingold, Feinstein, Graham, Grassley, Hatch, Kennedy, Kohl, Kyl, Leahy, Schumer, Sessions, and Specter sat on the Senate Judiciary Committee at the time of enactment. *See id.*

12. *See, e.g.*, THEODORE EISENBERG & GEOFFREY P. MILLER, INCENTIVE AWARDS TO CLASS ACTION PLAINTIFFS: AN EMPIRICAL STUDY 6 (Dec. 7, 2005) (finding little evidence of systematic abuse in incentive awards to representative plaintiffs); THOMAS E. WILLGING & SHANNON R. WHEATMAN, AN EMPIRICAL EXAMINATION OF ATTORNEYS’ CHOICE OF FORUM IN CLASS ACTION LITIGATION 40, 54 (2005) (concluding that state and federal courts do not differ greatly in how they resolve class actions).

13. *See* WILLGING & WHEATMAN, *supra* note 12, at 1 (“Attorneys’ choice of whether to file or litigate a class action in a state or federal forum has been of great concern to policymakers who are considering how to regulate class action litigation.”).

14. *See* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 554 (1989) (“Even before *International Shoe Co. v. Washington* heralded the age of long-arm jurisdiction, plaintiffs could take advantage of a multiplicity of available fora.” (footnote omitted)).

15. *See id.* 556 (“[V]enue often determines the size of a verdict, because the generosity of juries varies from one location to another. . . . [T]he outcome of a lawsuit may depend on whether an action is brought in state or federal court.”).

despite its popularity on both sides, the term “forum shopping” still carries a pejorative connotation.¹⁶ Critics object to what they deem excessive forum shopping, alleging that it causes inconsistent, and thus unfair, outcomes.¹⁷ The inconsistency is a result of the wide variation in state class action law, both procedurally and substantively.¹⁸ In fact, the class action does not exist as a procedural device in some states.¹⁹ Additionally, certain jurisdictions have a “plaintiff-friendly” reputation, which attracts lawsuits from around the nation.²⁰ Because most class actions prior to CAFA were adjudicated in state court,²¹ and there was such variation among state forums, large disparities existed among judgments and settlements.²²

This disparity problem became prevalent only recently because, historically, federal court was a more popular venue for class actions than state court.²³ Class action procedure was largely developed in federal court,²⁴ and parties viewed federal courts as more advantageous because federal courts were better equipped to handle class actions, had more experience in dealing with class suits than their state counterparts, and amended Rule 23 was viewed as more

16. See Juenger, *supra* note 14, at 553.

17. See AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2004, at 6 (2004), available at <http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf>; CTR. FOR LEGAL POLICY, TRIAL LAWYERS INC.: A REPORT ON THE LAWSUIT INDUSTRY IN AMERICA 2003, at 8 (2003), available at <http://www.manhattan-institute.org/pdf/triallawyersinc.pdf>; John H. Beisner & Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, CIV. JUST. REP., July 2002, at 9, available at http://www.manhattan-institute.org/pdf/cjr_05.pdf; American Legislative Exchange Counsel, *Class Action Reform*, <http://www.alec.org/2/2/talking-points/class-action-reform.html> (last visited Mar. 26, 2006).

18. See SECTION OF LITIG., AM. BAR ASS'N, SURVEY OF STATE CLASS ACTION LAW—2004 (Thomas R. Grande ed., 2004) [hereinafter SURVEY OF STATE CLASS ACTION LAW] (chronicling the differences in class action law by state).

19. For example, Mississippi has no class action litigation device. See *Boone v. Citigroup, Inc.*, 416 F.3d 382, 393 (5th Cir. 2005).

20. See AM. TORT REFORM FOUND., *supra* note 17, at 6.

21. See S. REP. NO. 109-14, at 4 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 5.

22. *Id.*

23. CONTE & NEWBERG, *supra* note 5, § 13:22.

24. See Spence, *supra* note 7.

liberal than state court rules.²⁵

Today, however, plaintiffs have come to view those courts as less hospitable forums for class actions, and a series of unfavorable federal court decisions encouraged plaintiffs to move to state court.²⁶ Throughout the 1990s, federal circuit courts repeatedly rejected class certification,²⁷ and plaintiffs thus began to perceive federal courts as hostile towards class actions.²⁸ Commentators also began to identify various factors²⁹ and strategic considerations³⁰ that militated in favor of filing in state court. The perception that state court judges gave more favorable treatment to class actions further bolstered the move

25. *See id.*

26. *See infra* note 27 and accompanying text.

27. *See, e.g.,* Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (decertifying a nationwide tobacco litigation class because the district court (1) failed to properly consider the variations in state law on matters of fraud and negligence, and (2) failed to properly consider manageability problems); *In re* Am. Med. Sys., 75 F.3d 1069 (6th Cir. 1996) (decertifying a nationwide product liability class action because the district court did not properly consider the individual factual issues raised by each class member's claim as well as variations in state law on matters such as negligence); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996) (decertifying a nationwide settlement class, noting that "we cannot conceive of how any class of this magnitude could be certified"); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) (decertifying a nationwide product liability class action because that district court failed to consider the variations in state law, the existence of individual issues, and the problems of manageability); *In re* Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) (decertifying a settlement class and holding that a settlement class should not be subject to a relaxed review).

28. *See* LANG & TODRES, *supra* note 3, at 1.

29. Factors that favor filing a class action in state court include: supportive public opinion; primarily state-law issues; and where administration or distribution to class members may be facilitated by state or local consumer protection or other agencies. STUART T. ROSSMAN & DANIEL A. EDELMAN, CONSUMER CLASS ACTIONS: A PRACTICAL LITIGATION GUIDE 23 (5th ed. 2002).

30. Plaintiffs can obtain several strategic advantages by filing multiple state-court class actions: plaintiffs can take progressive discovery in multiple forums, using discovery in one case (perhaps in a forum with more liberal discovery rules) to augment discovery in other cases; plaintiffs can file in state courts that traditionally have been more sympathetic to plaintiff interests; the opportunities to seek certification of a number of statewide class actions in the state courts may be more advantageous than a single, all-or-nothing opportunity to certify a nationwide class in federal court. LANG & TODRES, *supra* note 3, at 7-8.

to state court.³¹

Jurisprudentially, scholars suggested that there were also more fundamental reasons why state forums were the appropriate forum to hear class actions based on state law.³² Because the Erie doctrine³³ requires federal courts sitting in diversity to apply state law, federal courts cannot create or advance state law; only state courts can create binding precedent in their law.³⁴ There is also concern that federal courts should not allocate their resources to cases that must be controlled by state law.³⁵

Practically, the move to state court was possible because of the U.S. Supreme Court's 1985 decision in *Phillips Petroleum Co. v. Shutts*.³⁶ The Court held that state courts may, with certain due process constraints, adjudicate claims of non-resident class members.³⁷ The ruling thus allowed state courts to hear multi-state and nationwide class actions with binding effect. The force of these judgments increased dramatically when the U.S. Supreme Court decided *Matsushita v. Epstein*,³⁸ which established that class settlements reached in state courts have preclusive effect over even federal claims that were not litigated in the forum state.³⁹

The number of multi-state class actions being adjudicated in state court significantly increased beginning in 1985, possibly because of the perceived practical advantages, the theoretical support for state-court adjudication, or other reasons.⁴⁰ The increase was, of course, a product of plaintiffs' reluctance to file in federal court, but it was equally a product of the defendants' difficulty in removing the

31. Plaintiffs may perceive state court as more favorable because "most state court judges are elected and thus are motivated to make decisions that are politically popular." See Robert H. Klonoff, *Class Actions and Other Multi-Party Litigation in a Nutshell*, in NON-FEDERAL QUESTION CLASS ACTIONS 2002: PROSECUTION & DEFENSE STRATEGIES 331, 341 (2002).

32. See, e.g., CONTE & NEWBERG, *supra* note 5, at § 13:22; Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215, 253-57 (1994).

33. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

34. See *id.* at 79.

35. Weber, *supra* note 32, at 217.

36. 472 U.S. 797 (1985).

37. *Id.* at 822-23.

38. 516 U.S. 367 (1996).

39. *Id.* at 369.

40. See SURVEY OF STATE CLASS ACTION LAW, *supra* note 18, at ix.

action under the former system.⁴¹ Both prior and subsequent to CAFA, a defendant has only two bases to remove a state court class action to federal court: the existence of either a federal question or diversity.⁴² In both instances, removal jurisdiction is premised on the existence of original jurisdiction.⁴³

Prior to CAFA, federal original jurisdiction existed over class actions only where the plaintiff pleaded a federal cause of action or where there was complete diversity,⁴⁴ and thus it was easy for the plaintiff to defeat federal jurisdiction.⁴⁵ To avoid federal question jurisdiction, for example, a consumer class action practice guide counsels: “[D]o not plead a federal credit discrimination, credit reporting, truth in lending, or odometer statute. Instead, plead a state counterpart.”⁴⁶ The practice guide next describes how to “short-circuit” diversity jurisdiction prior to CAFA: “Make sure that at least one named plaintiff and one defendant reside in the same state. Bring the action in a jurisdiction retaining *Zahn*.⁴⁷ Do not plead a claim under a fee-shifting statute that specifies that attorney fees go to the plaintiff’s attorney.”⁴⁸ Because of their distrust of federal courts, plaintiffs attorneys would often engage in these tactics when drafting the class action complaint.⁴⁹

The general removal scheme also allowed plaintiffs to easily avoid federal jurisdiction because of the technical limitations it placed on removal. For example, 28 U.S.C. § 1446(b) imposes a one-year time limitation on removing class actions.⁵⁰ To avoid federal jurisdiction, plaintiffs could initially name a non-diverse

41. See ROSSMAN & EDELMAN, *supra* note 29, at 26–27.

42. See 28 U.S.C. § 1441(a) (2006).

43. See *id.*

44. See 28 U.S.C. § 1331 (2000); 28 U.S.C. § 1332 (2000), *amended by* 28 U.S.C. § 1332(d) (2006).

45. See ROSSMAN & EDELMAN, *supra* note 29, at 26–27.

46. *Id.*

47. In *Zahn v. Int’l Paper Co.*, 414 U.S. 291 (1973), the Supreme Court held that where only named plaintiffs met the jurisdictional amount, the unnamed plaintiffs that fell short could not participate in the class action. *Id.* at 301. The Supreme Court, however, recently overruled *Zahn* in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611 (2005). For a more detailed discussion of *Exxon*’s impact on class actions, see the discussion *infra* Part E.4.

48. ROSSMAN & EDELMAN, *supra* note 29, at 27.

49. See *id.*

50. 28 U.S.C. § 1446(b) (2006).

“friendly” defendant to the complaint, whom they would then dismiss one year and one day after filing the action.⁵¹ Additional tactics are identified below in the discussion on CAFA’s removal scheme and its changes to the former system.⁵²

The former class action system that permitted suits to remain in state court would not have required modification were it not for the perceived abuse and injustice that was occurring in state courts.⁵³ The Senate found that a “key reason” for the problems in class action litigation was that “most class actions are currently adjudicated in state courts.”⁵⁴ This meant, according to the Senate, that governing rules were applied inconsistently and in such a way that contravened basic fairness and due process considerations.⁵⁵ Furthermore, state judicial supervision of litigation procedures and proposed settlements was “inadequate,” resulting in settlements that offered little meaningful recovery to claimants.⁵⁶ Finally, class action judgments have nationwide ramifications, so often a state court would overturn well-established laws and policies of other jurisdictions.⁵⁷

Numerous tort-reform interest groups fueled misgivings about state-court adjudication. For example, the American Tort Reform Association (ATRA)⁵⁸ published a report documenting so-called

51. See generally Yosef Rothstein, *Ask Not for Whom the Bell Tolls: How Federal Courts Have Ignored the Knock on the Forum Selection Door Since Congress Amended Section 1446(b)*, 33 COLUM. J.L. & SOC. PROBS. 181, 186–87 (noting that plaintiffs may “manipulate” state court proceedings to avoid federal jurisdiction).

52. See *infra* Part B.

53. See WILLGING & WHEATMAN, *supra* note 12, at 2 (“The call for legislative change reflects fundamental assumptions . . . that the driving force in choice-of-forum decisions is the expected difference in class certification and case outcome based on how state and federal judges apply substantive laws and procedural rules.”).

54. S. REP. NO. 109-14, at 4 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 5.

55. *Id.*

56. *Id.*

57. *Id.*

58. ATRA is a District of Columbia nonprofit organization, comprised of other nonprofit organizations, small and large companies, as well as state and national trade, business and professional associations. AM. TORT REFORM FOUND., *supra* note 17, at 4–5. ATRA named the following as the 2005 Judicial Hellholes: Rio Grande Valley and Gulf Coast, Texas; Cook County, Illinois; West Virginia; Madison County, Illinois; St. Clair County, Illinois; and South Florida. See ATRA, <http://www.atra.org/reports/hellholes/> (last

“Judicial Hellholes”—jurisdictions that ATRA perceived as consistently anti-defendant.⁵⁹ The stated purposes of the report were: “(1) to identify areas of the country where the scales of justice are radically out of balance; and (2) to illustrate how accuracy, efficiency and predictability can benefit the American civil justice system.”⁶⁰ The report described judicial abuses in the following areas: forum shopping, novel legal theories, discovery abuse, consolidation & joinder, improper class certification, unfair case scheduling, excessive damages, junk science, uneven application of evidentiary rules, jury instructions, trial lawyer contributions, and cozy relations among jurists, lawyers, and governmental officials.⁶¹ The report concludes that because of these abuses, the named jurisdictions have developed a “well-deserved plaintiff-friendly reputation,” which “attracts lawsuits from around the nation.”⁶²

Thus, the perceived abuses occurring at the state level, coupled with the difficulty of removing the cases to federal court, encouraged some groups to clamor for reform.⁶³ So prompted, Congress enacted CAFA.⁶⁴

B. Current Removal Procedure Under CAFA

CAFA’s heart is its expansion of federal diversity jurisdiction, which is primarily accomplished by easing the citizenship and amount in controversy requirements with respect to class actions.⁶⁵ In addition to what it believed to be prohibitive substantive requirements, Congress wished to eliminate procedural requirements that enabled lawyers “to ‘game’ the procedural rules and keep nationwide or multi-state class actions in state courts.”⁶⁶ Congress determined that the removal system in place under 28 U.S.C. §§

visited Mar. 26, 2006).

59. AM. TORT REFORM FOUND., *supra* note 14, at 4.

60. *Id.*

61. *Id.* at 8–9.

62. *Id.* at 6.

63. *See, e.g.*, AM. TORT REFORM FOUND., *supra* note 17, at 43.

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

65. *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).

66. S. REP. NO. 109-14, at 4 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 5.

1441 and 1446 created the opportunity for such gamesmanship, and thus a significant portion of CAFA's provisions is dedicated to establishing new requirements and procedures for removal.⁶⁷

Section 5 of the Act creates a new removal statute, 28 U.S.C. § 1453, which governs the removal of only class actions.⁶⁸ The statute provides that the general removal provisions in place under 28 U.S.C. § 1446 continue to apply to class actions, except where they are inconsistent with the provisions of the new statute.⁶⁹ Practically, this means that a defendant must still file a notice of removal containing a short and plain statement of the grounds for removal within thirty days after receiving a copy of the complaint,⁷⁰ and removal is still premised on the existence of original jurisdiction.⁷¹ Even if the action was not removable at the time of filing, the defendant may also remove if the case later becomes removable.⁷²

The modifications to existing removal procedures serve to ease other technical limitations that are in place under the general removal scheme.⁷³ Specifically, the statute makes three major modifications to general removal provisions, each of which will be analyzed in turn: (1) it eliminates the one-year time limit on removing cases, (2) it makes a defendant's citizenship in the forum state irrelevant, and (3) it allows for any defendant to remove.⁷⁴

1. Eliminates One-Year Time Limit

The newly enacted 28 U.S.C. § 1453(b) provides that “[a] class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply).”⁷⁵ This provision explicitly eliminates the one-year limitation on removing cases to federal court,⁷⁶ and requires only that the defendant file papers seeking

67. See Class Action Fairness Act of 2005 § 5 (codified at 28 U.S.C. § 1453).

68. *Id.*

69. § 1453(b).

70. 28 U.S.C. § 1446(a)–(b) (2006).

71. 28 U.S.C. § 1441(a) (2006).

72. § 1446(b).

73. See *infra* Part B.1–3.

74. See § 5, 28 U.S.C. § 1453.

75. § 1453(b).

76. See 28 U.S.C. § 1446(b) (2006); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 69 (1996) (“No case . . . may be removed from state to federal court based on

removal within thirty days of the action becoming removable, regardless of the potential advanced stage of the state court litigation.⁷⁷

In eliminating the one-year limitation, Congress intended to prevent attorneys from engaging in the type of gaming that occurred under the general removal scheme, such as plaintiffs dismissing non-diverse parties one year and one day after filing suit.⁷⁸ Often plaintiffs would simply include non-diverse defendants in the initial complaint thereby preventing removal, even though the plaintiffs never actually intended to fully pursue the action against the non-diverse defendants.⁷⁹ The elimination of the deadline prevents plaintiffs from engaging in these tactics by allowing the defendant to remove at any point that action becomes removable.

On the other hand, elimination of the one-year deadline gives rise to the same problems that prompted its enactment:

The [one-year deadline] addresses problems that arise from a change of parties as an action progresses toward trial in state court. The elimination of parties may create for the first time a party alignment that supports diversity jurisdiction. Under section 1446(b), removal is possible whenever this event occurs, so long as the change of parties was voluntary as to the plaintiff. Settlement with a diversity-destroying defendant on the eve of trial, for example, may permit the remaining defendants to remove. Removal late in the proceedings may result in substantial delay and disruption.⁸⁰

According to the new statute, a defendant may seek removal to federal court after a class certification order, dismissal decision, summary judgment opinion, directed verdict, or even a jury verdict “from which it may first be ascertained that the case is one which is or has become removable.”⁸¹ Because CAFA is so new, there have

diversity of citizenship ‘more than 1 year after commencement of the action.’”).

77. § 1453(b).

78. S. REP. NO. 109-14, at 50 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 47.

79. *Id.*

80. H.R. REP. NO. 100-889, at 72 (1988), as reprinted in 1988 U.S.C.C.A.N. 5982, 6033–34.

81. Gregory P. Joseph, *The Class Action Fairness Act of 2005: A*

not yet been any cases that fall under the extreme scenarios described above, but the text of the statute does not appear to give a federal court judge any discretion to decline jurisdiction (unless, of course, the requirements of 28 U.S.C. § 1332 are not met).⁸²

Congress thus made a trade-off in enacting CAFA: it wanted to block plaintiffs' attempts to game the system by adding non-diverse defendants, but, by expanding removal, it also opened the possibility that late-stage removal could disrupt and delay actions. Although the extreme scenarios described above seem unlikely, the concern over delay and disruption should outweigh the concern over plaintiffs taking advantage of the one-year deadline, given the other modifications to class-action diversity jurisdiction that curtail plaintiffs' gaming ability. For example, the most common tactic by which plaintiffs would take advantage of the one-year deadline was dismissing a non-diverse defendant one year and one day after commencement of the action.⁸³ But because CAFA eliminates the complete-diversity requirement, this tactic is no longer available even without the elimination of the one-year limitation because the case would have been removable from the start. Elimination of the one-year deadline thus seems unnecessary.

2. Makes Defendants' Citizenship in Forum State Irrelevant

Section 1453 further provides that a class action may be removed "without regard to whether any defendant is a citizen of the State in which the action is brought."⁸⁴ Under the traditional removal scheme's "forum defendant rule,"⁸⁵ a defendant may not remove an otherwise removable case if it is filed in the defendant's own state because, in theory, such a defendant has no need to assert diversity jurisdiction.⁸⁶ Diversity jurisdiction is based, in part, on the goal of protecting the nonresident litigant from local prejudice.⁸⁷ If

Preliminary Analysis, 20 TOXICS L. REP. 264, 270 (2005) (quoting 28 U.S.C. § 1446(b)).

82. 28 U.S.C. § 1441(c) (2006) (indicating that a federal judge has discretion to decline jurisdiction in an action only where a claim is joined with a non-removable claim and state law predominates).

83. *See, e.g.*, *Owen v. Kroger, Co.*, 936 F. Supp. 579 (S.D. Ind. 1996).

84. § 1441(b).

85. *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 378 (7th Cir. 2000).

86. *See* § 1441(b).

87. *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41

the plaintiff files the case in the defendant's own state, then the nonresident litigant would be the plaintiff and there would be no need to protect the defendant from local prejudice. Accordingly, 28 U.S.C. § 1441(b) removes a defendant's option to do so in this scenario.⁸⁸

The Senate believed, however, that imposing this same restriction on removal of class actions would subvert the drafters' intent because it could perpetuate the complete diversity rule, which CAFA purports to eliminate.⁸⁹ A plaintiff could defeat removal jurisdiction by naming both in-state and out-of-state defendants to the complaint.⁹⁰ Even absent the requirement of complete diversity, the defendants would not be able to remove because the forum defendant rule would prohibit it.⁹¹ As the example illustrates, plaintiffs can easily take advantage of the rule to avoid federal jurisdiction. This type of "gaming" is precisely what offended Congress.⁹² Accordingly, Congress eliminated this limitation with respect to removal of class actions.⁹³

3. Allows Any Defendant to Remove Without the Consent of Other Defendants

Finally, § 1453 modifies existing removal requirements by providing that class actions "may be removed by any defendant without the consent of all defendants."⁹⁴ Congress adopted this provision to "prevent a plaintiffs' attorney from recruiting a

HARV. L. REV. 483, 492–93 (quoting James Madison saying, "It may happen that a strong prejudice may arise in some states, against the citizens of others, who may have claims against them.") (citing 2 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 391 (1828)).

88. See § 1441(b).

89. S. REP. NO. 109-14, at 48–49 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 45–46.

90. *Id.*

91. 28 U.S.C. § 1441(b) provides that the action is removable "only if *none of the parties . . . served as defendants is a citizen of the State in which such action is brought.*" § 1441(b) (emphasis added).

92. See S. REP. NO. 109-14, at 4.

93. See 28 U.S.C. § 1453(b) (2006).

94. § 1453(b). Under the general removal scheme of §§ 1441 and 1446, case law requires the consent of all parties to remove an action. See, e.g., *Hewitt v. City of Stanton*, 798 F.2d 1230, 1232 (9th Cir. 1986); *Mitchell v. Kentucky-American Water Co.*, 178 F.R.D. 140, 142 (E.D. Ky. 1997).

‘friendly’ defendant (for example, a local retailer) who could refuse to join in a removal to federal court and thereby thwart the legitimate efforts of the primary corporate defendant to seek a federal forum in which to litigate the pending claims.”⁹⁵ The modification, of course, harms those legitimate defendants who do not want to remove, but it nevertheless fulfills Congress’ intent to expand federal jurisdiction.

C. Appellate Review of Remand Orders

CAFA also modifies the existing removal scheme by expanding appellate jurisdiction. Under the general removal system, 28 U.S.C. § 1447(d) largely precludes appellate review of remand orders.⁹⁶ CAFA-enacted 28 U.S.C. § 1453(c), however, provides that an order remanding a class action to state court is reviewable by appeal at the appellate court’s discretion.⁹⁷

1. Procedural Requirements of Appellate Review

The remand review provision attempts to balance the interest in developing a body of appellate law interpreting the legislation with the interest of speedy resolution.⁹⁸ The statute reaches this balance by imposing time limits on the appellate process.⁹⁹ The parties must file notice of appeal within seven days after entry of a remand order,¹⁰⁰ and the appeals court must issue a final decision on appeal within sixty days.¹⁰¹ The provision permits one ten-day extension “for good cause shown” if an extension is “in the interests of justice.”¹⁰² If the appellate court does not issue a final judgment on

95. S. REP. NO. 109-14, at 49 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 46.

96. See 28 U.S.C. § 1447(d) (2006) (“An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.”).

97. § 1453(c).

98. See *id.*

99. See *id.*

100. The statute actually provides the opposite: application for appeal must be made “not less than 7 days after entry of the order.” § 1453(c)(1) (emphasis added). But courts have assumed this to be a typographical error, and have applied the statute as if it required the application to be made *within* seven days. See *infra* Part C.2.

101. See § 1453(c).

102. *Id.* The court may grant a longer extension if all parties agree to one.

the appeal before the end of the period, the appeal is deemed denied.¹⁰³

2. Timing

The text of CAFA provides that an application for appeal of a remand order must be made “*not less than 7 days* after entry of the order.”¹⁰⁴ According to the literal words of the statute, a party who filed an appeal “less than” seven days after the district court entered its remand order would have appealed *too early*. This timing provision appears to be a drafting error as the Senate Report accompanying CAFA states that “parties must file a notice of appeal *within* seven days after entry of a remand order.”¹⁰⁵ And despite the text’s language to the contrary, the Ninth and Tenth Circuits applied the statute as if it read “within seven days.”¹⁰⁶

In *Pritchett*, the Tenth Circuit held that the statute contains a “typographical error” and must be read to say “‘not *more* than’ seven days after entry of the remand order.”¹⁰⁷ The court noted that the plain meaning of legislation should be conclusive, except in the “rare cases in which a ‘literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters.’”¹⁰⁸ In such cases, the drafters’ intention, rather than the strict language, controls.¹⁰⁹ In applying this presumption to CAFA, the court concluded that:

[g]iven Congress’ stated intent to impose time limits on appeals of class action remand orders and the limited availability of appeals prior to the statute’s enactment, we can think of no plausible reason why the text of the Act would instead impose a seven-day waiting period followed

Id.

103. *Id.*

104. *Id.* (emphasis added).

105. S. REP. NO. 109-14, at 49 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 46 (emphasis added); GEORGENE M. VAIRO, CLASS ACTION FAIRNESS ACT OF 2005: WITH COMMENTARY AND ANALYSIS BY GEORGENE M. VAIRO OF THE MOORE’S FEDERAL PRACTICE BOARD OF EDITORS 39–41 (2005).

106. *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 (10th Cir. 2005).

107. *Id.* at 1093 n.2 (emphasis added).

108. *Id.* (quoting *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989)).

109. *Ron Pair Enters.*, 489 U.S. at 242.

by a limitless window for appeal.¹¹⁰

Thus, the court interpreted the statute as if it read that a party must file notice of appeal within seven days of the remand order.

Similarly, the Ninth Circuit held in *Amalgamated Transit Union v. Laidlaw*¹¹¹ that the notice of appeal must be filed not *more* than seven days after the remand order.¹¹² The court analogized the language of 28 U.S.C. § 1453(c) to that found in § 1292(b), which governs interlocutory decisions, finding that Congress intended to create an appeal that is within the court of appeals' discretion.¹¹³ The language of the statute requires filing an “‘application,’ the same word used in § 1292(b), not a ‘notice of appeal,’ and further required that the application be ‘made to the court of appeals,’ as is the case with a § 1292(b) petition under [Federal Rules of Appellate Procedure] 5, whereas a notice of appeal is filed in the district court.”¹¹⁴ The court concluded that given CAFA's legislative history and the similarities in statutory language, Congress intended to mirror the procedures for taking an appeal pursuant to § 1292(b).¹¹⁵ Accordingly, the court held that a party seeking to appeal under § 1453(c)(1) must comply with the requirements of Federal Rule of Appellate Procedure 5.¹¹⁶

While it is likely that the circuits will agree that the timing provision is a clear drafting error, courts have not widely addressed the issue. The safest thing to do at this point is to file the application for appeal on exactly the seventh day. This is precisely what the defendant did in *Bush v. Cheaptickets, Inc.*¹¹⁷ The court in *Cheaptickets* was grateful that it was “not called upon to speculate whether it is appropriate or even permissible for this Court to correct Congress's ‘typographical’ mistake in this case.”¹¹⁸ Because the defendant filed its appeal on exactly the seventh day following the

110. *Pritchett*, 420 F.3d at 1093 n.2.

111. 435 F.3d 1140 (9th Cir. 2006).

112. *Id.* at 1146.

113. *See id.* at 1145.

114. *Id.*

115. *Id.*

116. *Id.*

117. 425 F.3d 683 (9th Cir. 2005).

118. *Id.* at 685 (citing *In re Century Cleaning Servs., Inc.*, 195 F.3d 1053, 1063–64 (9th Cir. 1999)).

remand order, it was “not less than” seven days afterwards.¹¹⁹ Additionally, even under the Tenth Circuit’s “corrected” reading of §1453(c), the defendant’s appeal was timely because it was filed “not more than” seven days after the remand order.¹²⁰

The best solution would be for Congress to correct its own drafting error to ensure the result it intended. Even absent this correction, the courts will likely apply the statute as if it read “within seven days.”

D. Other Procedural Issues

Because of its expansiveness and complexity, CAFA is expectedly producing other technical and procedural questions requiring litigation. Specifically, issues have arisen concerning CAFA’s effective date, the burden of proof with respect to federal court subject matter jurisdiction, the need to conduct discovery, and the applicability of § 1453 to class actions that do not meet the requirements of § 1332(d).

1. Effective Date

The most immediate question for practitioners is whether CAFA applies to a particular case. Section 9 of CAFA provides that “this Act shall apply to any civil action commenced on or after the date of enactment of this Act.”¹²¹ CAFA’s date of enactment was February 18, 2005.¹²² The term “commence” is not defined in CAFA.¹²³ Therefore, parties have broadly litigated its meaning, and it is one of the few CAFA issues to produce an informative body of case law to date.¹²⁴

119. *Id.*

120. *Id.*

121. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 9, 119 Stat. 4.

122. *Id.*

123. *See id.*

124. *See, e.g.,* Natale v. Pfizer, Inc., 424 F.3d 43, 44 (1st Cir. 2005) (holding that an action commences on the date it is first filed in state court); Knudsen v. Liberty Mut. Ins. Co., 411 F.3d 805, 806–07 (7th Cir. 2005) (holding that a purportedly significant change to class definition did not commence a new action for purposes of CAFA); Pritchett v. Office Depot, Inc., 420 F.3d 1090, 1094 (10th Cir. 2005) (holding that an action commenced when it was initially filed in state court, not when it was removed to federal court); Morgan v. Am. Int’l Group, Inc., 2005 WL 2172001 (N.D. Cal. Sept. 8, 2005) (holding that “in removal cases, “commencement” is governed by the law of the state in

a. Date of “commencement”

Those circuits that have addressed issues relating to CAFA’s effective date have agreed that an action is “commenced” when it is filed in state court, rather than when it is removed to federal court.¹²⁵ This decision nullifies defendants’ initial attempts to remove based on the argument that the action was commenced on the date it was removed.¹²⁶

Many of the first decisions to interpret CAFA involved exactly this question: whether CAFA would permit the removal of a case initiated in state court before the legislation became law, but not removed to federal court until after February 18, 2005.¹²⁷ Defendants in these cases argued that “commenced” meant “commenced in federal court,” that is, the date of removal, not the date of filing.¹²⁸ Plaintiffs, on the other hand, argued that the class action commenced just once, when it was initially filed in state court.¹²⁹

For example, in *Natale v. Pfizer*, the plaintiffs filed their action in state court on February 11, 2005, one week prior to CAFA’s enactment.¹³⁰ Pfizer filed a notice of removal in the District Court on March 25, 2005, after CAFA’s enactment, but still within thirty days of plaintiffs’ filing.¹³¹ Pfizer contended that the action was commenced on the date it was removed, March 25, 2005.¹³² Based on this interpretation, CAFA would apply to the case, because CAFA

which the action originated”) (quoting *In re Expedia Hotel Taxes & Fees Litig.*, 377 F. Supp. 2d 904, 905 (W.D. Wash. 2005)).

125. *Id.*

126. *See, e.g., Natale*, 424 F.3d at 44 (1st Cir. 2005) (dismissing defendant’s argument that “the actions were commenced on the date they were removed”); *Pritchett*, 420 F.3d at 1094 (dismissing defendant’s argument that the action commenced in federal court as of the date of removal); *In re Expedia Hotel*, 377 F. Supp. 2d at 905 (dismissing defendant’s argument that “the action commenced either on the date that the state court consolidated the three original suits or on the date that Defendant removed the case”).

127. *See Knudsen*, 411 F.3d at 806; *Natale*, 424 F.3d at 44; *Pritchett*, 420 F.3d at 1095; *In re Expedia Hotel*, 377 F. Supp. 2d at 905–06.

128. *Knudsen*, 411 F.3d at 805; *Natale*, 424 F.3d at 43; *Pritchett*, 420 F.3d at 1090; *In re Expedia Hotel*, 377 F. Supp. 2d at 904.

129. *Knudsen*, 411 F.3d at 805; *Natale*, 424 F.3d at 43; *Pritchett*, 420 F.3d at 1090; *In re Expedia Hotel*, 377 F. Supp. 2d at 904.

130. *Natale*, 424 F.3d at 44.

131. *Id.*

132. *Id.*

governs “any civil action commenced on or after” February 18, 2005.¹³³ On the other hand, if the action commenced when plaintiffs filed in state court, CAFA would be inapplicable.

The First, Seventh, and Tenth Circuits, along with several district courts within other circuits, have all rejected the defendants’ reading of the word “commenced,” and have agreed that an action is commenced when it is filed in state court.¹³⁴ These decisions are consistent with a body of pre-CAFA case law establishing that “[t]raditionally, a cause of action is commenced when it is first brought in an appropriate court.”¹³⁵ When a matter is removed to federal court, it is not usually viewed as recommenced, nor as a new cause of action.¹³⁶ Case law has further established that in removal cases, “‘commencement’ is governed by the law of the state in which the action originated.”¹³⁷

Traditional rules of statutory construction also supported the interpretation of “commencement” as the date of filing in state court. The federal courts have tended to narrowly construe statutes that confer jurisdiction upon the federal courts, particularly removal statutes.¹³⁸ In *Pritchett v. Office Depot*, the Tenth Circuit noted that “if there is an ambiguity as to whether [CAFA] confers federal jurisdiction over this case, we are compelled to adopt a reasonable,

133. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 9, 119 Stat. 4.

134. *See supra* note 124.

135. *Pritchett*, 420 F.3d at 1094 (citing FED. R. CIV. P. 3); *see also* *Kieffer v. Travelers Fire Ins. Co.*, 167 F. Supp. 398, 401 (D. Md. 1958) (“[W]e do not usually think of an action as having been commenced in a district court by removal.”); 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3721 (3d ed. 1998) (noting that removal jurisdiction is unique, because it allows a federal court to hear a claim over which it has no original subject matter jurisdiction and, therefore, to adjudicate a suit that could never have commenced there).

136. *See Kieffer*, 167 F. Supp. at 401.

137. *Provenza v. Yamaha Motor Co.*, 295 F. Supp. 2d 1175, 1177 (D. Nev. 2003); *accord* *O’Brien v. Powerforce*, 939 F. Supp. 774, 777 (D. Haw. 1995); *Perez v. Gen. Packer*, 790 F. Supp. 1464, 1469 (C.D. Cal. 1992); *Coman v. Int’l Playtex, Inc.*, 713 F. Supp. 1324, 1328 (N.D. Cal. 1989); *Greer v. Skilcraft*, 704 F. Supp. 1570, 1582–83 (N.D. Ala. 1989); *Dravo Corp. v. White Consol. Indus. Inc.*, 602 F. Supp. 1136, 1139 (W.D. Pa. 1985); *see also* *Rezendes v. Dow Corning Co.*, 717 F. Supp. 1435, 1437 (E.D. Cal. 1989) (using California law to determine when an action commenced).

138. *See* *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941); *United States ex rel. King v. Hillcrest Health Ctr.*, 264 F.3d 1271, 1280 (10th Cir. 2001).

narrow construction. Here, we find Plaintiff's interpretation of the word 'commenced' in the Act to be such a construction."¹³⁹

Finally, the courts apply a presumption against a statute's retroactivity absent a clear congressional intent to the contrary.¹⁴⁰ Far from a clear intention in favor of retroactivity, CAFA's legislative history suggests an intention *against* retroactivity. When CAFA was originally introduced in the House, the removal provision applied both to cases commenced on or after the enactment date and to cases in which a class certification order was entered on or after the enactment date.¹⁴¹ In contrast, neither the Senate version of the bill nor the final statute passed by both houses of Congress provided for removal of actions certified on or after the enactment date.¹⁴² The Senate version and the final statute provided only for application of CAFA to civil actions commenced on or after the date of the enactment.¹⁴³

This development led the Tenth Circuit to conclude, "[i]t is thus clear that Congress initially started out with broader language that could have included a number of then-pending lawsuits in state courts. By excising the House provision, Congress signaled an intent to narrow the removal provisions of the Act to exclude currently pending suits."¹⁴⁴ This legislative intent further dissuaded the court from giving effect to the removal date as the commencement date, because, by doing so, the court would be enforcing the statute retroactively.¹⁴⁵ The Seventh Circuit, per Judge Easterbrook, noted finally "that § 9 of the new Act [governing its effective date and applicability] must be taken seriously. Deconstructionist tactics do not permit its evasion."¹⁴⁶

b. Re-commencing the action by amending the complaint

The above line of decisions does not, however, preclude entirely

139. *Pritchett*, 420 F.3d at 1095.

140. *Id.* at 1095 n.3 (citing *Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 280 (1994)).

141. *See* H.R. 516, 109th Cong. § 7 (2005).

142. *See* S. 5, 109th Cong. (2005); Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

143. S. 5, § 9; Class Action Fairness Act § 9.

144. *Pritchett*, 420 F.3d at 1095.

145. *See id.* at 1095-96.

146. *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 806 (7th Cir. 2005).

the possibility of removing an action to federal court where the complaint was filed prior to CAFA's enactment. For instance, where the complaint has been modified in such a way that does not "relate back" to the original pleading, courts have held the amendment "commenced" a new action to which CAFA therefore applied.¹⁴⁷

For example, in *Plummer v. Farmers Group, Inc.*,¹⁴⁸ the plaintiff originally filed suit on October 7, 2002, alleging that the defendant, an insurance company, undervalued the plaintiff's loss when evaluating a claim pursuant to his insurance policy after a car collision.¹⁴⁹ On May 23, 2005, the plaintiff filed an amended petition in state court alleging that the defendant potentially undervalued thousands of additional claimants' automobiles.¹⁵⁰ The amended petition added: "(1) thousands of new parties to the suit (all plaintiffs); (2) a fraud cause of action; (3) a bad faith cause of action; and (4) a request for certification of the matter as a class action."¹⁵¹ The court held that filing the amended complaint was de facto commencement of a new suit for purposes of determining CAFA's applicability.¹⁵²

The court noted that "there is a significant body of law that suggests that an amended complaint or petition is tantamount to commencing a new cause of action in certain circumstances."¹⁵³ Specifically, the court found that filing an amended complaint may

147. *See, e.g.*, *Heaphy v. State Farm Mut. Auto. Ins. Co.*, No. C05 5404RBL, 2005 WL 1950244, at *4 (W.D. Wash. Aug. 15, 2005) (holding that adding a new plaintiff to the complaint commences a new action unless: "(1) [there is] adequate notice of the new claims[;] (2) [there is] an identity of interest between the original plaintiff and the new plaintiff; and (3) relation back does not unfairly prejudice the defendant") (citing *Immigration Assistance Project, L.A. County Fed'n of Labor v. INS*, 306 F.3d 842 (9th Cir. 2002)); *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310, 1316 (E.D. Okla. 2005) (holding that a drastic modification of a complaint commenced a new action when it added a class action not present in the case before the passage of CAFA); *Senterfitt v. SunTrust Mortgage, Inc.*, 385 F. Supp. 2d 1377, 1381 (S.D. Ga. 2005) (holding that amending the complaint to expand the class of plaintiffs did not relate back to the time of the original complaint and, therefore, that it commenced a new action for purposes of CAFA).

148. 388 F. Supp. 2d 1310 (E.D. Okla. 2005).

149. *Id.* at 1312.

150. *Id.* at 1312–13.

151. *Id.* at 1313.

152. *Id.* at 1316.

153. *Id.* at 1314.

constitute a new action, unless the amended complaint “relates back” pursuant to Federal Rule of Civil Procedure 15(c).¹⁵⁴

Rule 15(c) provides that an amendment of a pleading can only relate back to the date of the original pleading: (1) when permitted by the applicable statute of limitations; or (2) when the new claim or defense arises from the same conduct, transaction, or occurrence.¹⁵⁵ Unless at least one of these conditions is met, an amendment commences a new action. An amendment post-CAFA may therefore suffice to make an action removable, even though the original complaint was filed prior to CAFA’s enactment.

2. Burden of Proof

Traditionally, upon a motion to remand, the burden of establishing federal subject matter jurisdiction is on the party seeking removal, and courts will strictly construe removal statutes against removal jurisdiction.¹⁵⁶ A circuit split has developed, however, with respect to cases removed pursuant to CAFA.¹⁵⁷

CAFA’s legislative record clearly imparts an intent to shift the burden to the party opposing removal. The Committee Report states that “[i]t is the Committee’s intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption.”¹⁵⁸ Despite this language in the Committee Report, nowhere does the statute’s text speak of a burden shift.¹⁵⁹ Because CAFA makes no such provision, certain courts have refused to shift the burden of proof to plaintiffs.¹⁶⁰ There is currently a circuit split as some courts

154. *Id.*

155. FED. R. CIV. P. 15(c).

156. *Prize Frize, Inc. v. Matrix, Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999); *In re Expedia Hotel Taxes & Fees Litig.*, 377 F. Supp. 2d 904, 905 (W.D. Wash. 2005).

157. *See infra* note 161.

158. S. REP. NO. 109-14, at 44 (2005) *as reprinted in* 2005 U.S.C.C.A.N. 3, 41.

159. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

160. *See, e.g.,* *Schwartz v. Comcast*, No. Civ.A. 05-2340, 2005 WL 1799414, at *4 (E.D. Penn. July 28, 2005); *In re Expedia Hotel Taxes & Fees Litig.*, 377 F. Supp. 2d 904, 905 (W.D. Wash. 2005); *Sneddon v. Hotwire, Inc.*, No. C05-0951 SI, C05-0952 SI, C05-0953 SI, 2005 WL 1593593, at *1 (N.D. Cal. June 29, 2005).

have relied solely on legislative intent while others have relied on the statute's text in conjunction with past removal precedent.¹⁶¹

Accordingly, those jurisdictions that have placed an emphasis on congressional intent tend to hold that the plaintiff has the burden of showing why remand is appropriate, while those jurisdictions that look only to the statute's text tend to find that the burden remains with the moving party.¹⁶² This type of distinction—based on the judge's or justice's personal theory of interpretation—results in a significant opportunity for inconsistent rulings.

In *Schwartz*, Judge O'Neill of the Eastern District of Pennsylvania held that the burden remained with the defendants to demonstrate that federal jurisdiction is proper, noting "I am guided by Justice Jackson's concurrence in *Schwegmann Bros.*: 'Resort to legislative history is only justified where the face of the Act is inescapably ambiguous.'"¹⁶³ He found that where—as with CAFA—"the statutory language is plain and unambiguous, further inquiry is not required, except in the extraordinary case where a literal reading of the language produces an absurd result."¹⁶⁴ Unsurprisingly, Judge O'Neill applied past precedent with respect to burden of proof, requiring the defendants to demonstrate the appropriateness of federal subject matter jurisdiction.¹⁶⁵

In the Central District of California, however, Judge Stotler held to the contrary in *Berry v. American Express Publishing Corp.*¹⁶⁶ The plaintiffs in that case argued that the "failure to incorporate [the] directive on the burden of proof into the statute evinces an explicit intent to maintain the status quo."¹⁶⁷ Judge Stotler held that "this contention cannot be squared with the uncontradicted statements

161. See, e.g., *Yescavage v. Wyeth*, No. 205CV294FTM335PC, 2005 WL 2088429, at *1–2 (M.D. Fla. Aug. 20, 2005); *Berry v. American Express Pub. Corp.*, 381 F. Supp. 2d 1118, 1122–23 (C.D. Cal. 2005). *Contra Schwartz*, 2005 WL 1799414, at *4; *In re Expedia Hotel*, 377 F. Supp. 2d at 905; *Sneddon*, 2005 WL 1593593, at *1.

162. See *supra* note 161.

163. *Schwartz*, 2005 WL 1799414, at *6 (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395–96 (1951) (Jackson, J., concurring)).

164. *Id.* (quoting *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir. 1998)).

165. *Id.*

166. 381 F. Supp. 2d 1118 (C.D. Cal. 2005).

167. *Id.* at 1122.

contained in the Committee Report [evinced a clear intention to shift the burden of proof]” and, therefore, shifted the burden of proof to the plaintiffs to show why remand was appropriate.¹⁶⁸

The Supreme Court’s recent opinion in *Exxon Mobil Corp. v. Allapattah Services, Inc.*¹⁶⁹ suggests that Judge O’Neil’s reading of the statute is the appropriate one. In discussing traditional rules of statutory interpretation, the Court noted:

As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. We need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances, a point on which Members of this Court have disagreed.¹⁷⁰

Because there is no “ambiguous” term in CAFA regarding the burden of proof (there is no mention of burden of proof at all),¹⁷¹ the *Exxon* court’s rule of statutory construction demands that a court not use the Senate Judiciary Committee Report to interpret CAFA’s meaning.

168. *Id.*

169. 125 S. Ct. 2611 (2005).

170. *Id.* at 2626.

171. *See supra* notes 160–61 and accompanying text.

Furthermore, the use of the Senate Judiciary Committee Report is problematic because subsequent legislative history is a questionable source of legislative intent,¹⁷² and the report was filed *after* CAFA's enactment. The Senate passed CAFA on February 10, 2005, but the Judiciary Committee did not file its report until February 28, 2005.¹⁷³ This timing raises constitutional issues because neither Congress nor the President passes upon or enacts into law the language used by a committee in a post-legislative report.¹⁷⁴

Which party carries the burden of proof is often dispositive of the outcome, and, furthermore, it helps a district court insulate itself from reversal. For these reasons, the issue requires speedy resolution, either by Supreme Court decision or congressional amendment.

3. Discovery Issues That Have Arisen as "Side Effects" of CAFA

In determining proper federal subject matter jurisdiction, the threshold issue is whether a class action meets the diversity jurisdiction requirements set forth in 28 U.S.C. § 1332(d)(2).¹⁷⁵ But even if these requirements are met, jurisdiction is not automatic. A series of provisions set forth in 28 U.S.C. § 1332(d)(3) spell out three categories into which a class action may fall: (1) mandatory federal jurisdiction; (2) prohibited federal jurisdiction; or (3) discretionary federal jurisdiction.¹⁷⁶ The category into which a case falls depends on the fraction of class members and the fraction of certain defendants in the forum state.¹⁷⁷

For example, under the "home state controversy" exception, district courts must decline to exercise jurisdiction where two-thirds or more of the members of the proposed plaintiff class, and the

172. See *Blanchett v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 132 (1974) ("[P]ost-passage remarks of legislators, however explicit, cannot serve to change legislative intent of Congress expressed before the Act's passage.").

173. See S. REP. NO. 109-14, at 1 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 3.

174. See Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAN. L. REV. 1457, 1521-22 (2000).

175. For more detailed analysis of these provisions, see *infra* Part III.

176. See 28 U.S.C. § 1332(d) (2006).

177. *Id.*

primary defendants, are citizens of the original filing state.¹⁷⁸ Under the “local controversy” exception, district courts must decline jurisdiction where four circumstances are met: (1) greater than two-thirds of the members of the proposed plaintiff class are citizens of the original filing state; (2) at least one defendant is a defendant from whom members of the proposed plaintiff class seek significant relief, whose alleged conduct forms a significant basis of the asserted claims, and who is a citizen of the original filing state; (3) the principal injuries resulting from the alleged conduct of each defendant were incurred in the original filing state; and (4) no other class action asserting the same or similar factual allegations has been filed against any of the defendants within three years preceding the filing of the instant class action.¹⁷⁹

These provisions are dependent on issues of fact because they require discovering each party’s citizenship. This fact-specific inquiry has raised unanticipated discovery issues. At least one court has allowed the parties to engage in limited discovery with respect to the jurisdictional question. In *Schwartz v. Comcast*,¹⁸⁰ the plaintiffs brought suit against the defendant corporation for breach of contract, unjust enrichment, and violation of Pennsylvania’s Consumer protection law, alleging that the defendant failed to provide high speed internet service to various customers despite making promises to do so.¹⁸¹ After the defendant removed the action, the plaintiffs moved to remand.¹⁸² The parties agreed that CAFA’s numerosity and amount in controversy requirements were met in the case.¹⁸³ The plaintiffs argued that remand was nonetheless proper because the class definition in the amended complaint fell within both the “home state controversy” and the “local controversy” exceptions.¹⁸⁴

In the complaint, the plaintiffs defined the class as all persons or entities residing or doing business in the Commonwealth of Pennsylvania who subscribed to Comcast’s high-speed internet service during the relevant time period.¹⁸⁵ Because being a citizen of

178. See § 1332(d)(4)(B).

179. See § 1332(d)(4)(A).

180. No. CIV.A. 05-2340, 2005 WL 1799414 (E.D. Penn. July 28, 2005).

181. *Id.* at *1.

182. *Id.* at *2.

183. *Id.*

184. *Id.*

185. *Id.* at *1. After defendants removed, the plaintiffs amended the

Pennsylvania is not a qualification for class membership under this definition, the court observed that “[h]ypothetically speaking, there may be numerous members of the proposed class who are citizens of different states but who resided or did business in Pennsylvania and subscribed to Comcast’s high-speed internet service during the relevant time period.”¹⁸⁶ In order to determine the appropriateness of federal subject matter jurisdiction, each class member’s residency requires resolution.

The court concluded that because the defendant had control over the information that would establish the citizenship of the various members of the plaintiff’s proposed class, it would allow the parties to engage in limited discovery.¹⁸⁷ In arriving at this conclusion, the court followed precedent regarding jurisdictional discovery, which provides that it should be allowed unless the plaintiffs’ claim is “clearly frivolous.”¹⁸⁸ The court held that the plaintiffs’ claim was not clearly frivolous and discovery was necessary to determine whether jurisdiction was proper.¹⁸⁹

In future cases, attorneys will likely anticipate jurisdictional issues and clearly define the class from the outset in such a way that demands either the “home controversy” or “local controversy” exception.¹⁹⁰

complaint to include all persons and entities who *are citizens of the Commonwealth of Pennsylvania*, who resided or did business in the Commonwealth of Pennsylvania, and who subscribed to Comcast’s high-speed internet service during the relevant time period. *Id.* The court observed that, under the amended complaint, it is clear that all class members are citizens of Pennsylvania and thus, more than two-thirds of the class members are citizens of Pennsylvania and not diverse from Comcast. *Id.* at *2. In this scenario, the class definition would clearly preclude diversity under the “home state controversy” and “local controversy” exceptions. *Id.* However, the court concluded that it could not rest upon the allegations of an amended complaint after the defendant had filed notice of removal. *Id.* at *3 (“Generally speaking, the nature of plaintiff’s claim must be evaluated, and the propriety of remand decided, on the basis of the record as it stands *at the time the petition for removal is filed.*” (citing *Westmoreland Hosp. Ass’n v. Blue Cross of W. Pa.*, 605 F.2d 119, 123 (3rd Cir. 1979)) (emphasis added)).

186. *Id.* at *3.

187. *Id.* at *7.

188. *See id.* at *7 n.11 (quoting *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n*, 107 F.3d 1026, 1042 (3d Cir. 1997)).

189. *Id.*; *see also* Fredman, *supra* note 65.

190. For example, including forum state citizenship as a requirement of class membership. *See* discussion of amended complaint *supra* note 92.

4. Possibility to Remove Pursuant to § 1453 Even Where § 1332(d) Is Not Met

A close reading of CAFA's text suggests that, even where a class action does not meet the CAFA-enacted diversity requirements of 28 U.S.C. § 1332(d), a defendant may still remove the case pursuant to CAFA-enacted § 1453 if it meets any of the other traditional bases of federal subject matter jurisdiction.¹⁹¹ Over most of the six years that the legislature debated CAFA, the possibility of a class action meeting traditional federal subject matter jurisdiction requirements, but not CAFA-enacted federal subject matter requirements, seemed rare due to the difficulty in asserting federal jurisdiction under the traditional standards.¹⁹² But since the Supreme Court's ruling in *Exxon Mobile Corp. v. Allapattah Services*,¹⁹³ which gave an expansive interpretation to 28 U.S.C. § 1367 supplemental jurisdiction,¹⁹⁴ the possibility now seems more likely.

Prior to § 1367's enactment, the Supreme Court held in *Zahn v. International Paper Co.*¹⁹⁵ that each class member must individually meet the amount-in-controversy requirement for a federal court to assert jurisdiction.¹⁹⁶ The court in *Allapattah*, however, held that Congress' enactment of § 1367 overruled *Zahn*.¹⁹⁷ According to *Allapattah*, where at least one named plaintiff in the action satisfies the amount-in-controversy requirement, 28 U.S.C. § 1367 "does authorize supplemental jurisdiction over the claims of other plaintiffs in the same . . . case or controversy, even if those claims are for less than the jurisdictional amount specified in the statute setting forth requirements for diversity jurisdiction."¹⁹⁸ The court specifically noted that CAFA had no bearing on its analysis,¹⁹⁹ and, thus, it is possible for cases to meet supplemental jurisdiction requirements without meeting CAFA's diversity jurisdiction requirements.²⁰⁰

191. See 28 U.S.C. § 1453 (2006).

192. See discussion *supra* Part B.

193. 125 S. Ct. 2611 (2005).

194. See *id.* at 2632 ("The Court adopts a plausibly broad reading of § 1367.") (Ginsburg, J., dissenting).

195. 414 U.S. 291 (1973).

196. *Id.* at 302.

197. *Allapattah*, 125 S. Ct. 2611, 2625 (2005).

198. *Id.* at 2615.

199. *Id.* at 2627.

200. Of course supplemental jurisdiction is not the only scenario by which

If this scenario does occur, the statute's text suggests that parties may remove class actions pursuant to CAFA-enacted § 1453 despite the failure to meet the all the substantive requirements of CAFA-enacted § 1332(d). Subsection (a) of the removal statute instructs that the statute applies to class actions as defined in § 1332(d)(1): "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action."²⁰¹ The substantive CAFA diversity jurisdiction requirements—partial diversity, \$5,000,000 in controversy, and a one-hundred-member class—are not enumerated until § 1332(d)(2) and (d)(5), and thus, have no bearing on the definition of "class action." Consequently, § 1453 applies equally to a class action removed pursuant to § 1332(d) or pursuant to a traditional basis of federal jurisdiction.

E. Conclusion

Despite particular drafting errors, omissions, and ambiguities, CAFA accomplishes its primary goal of expanding federal subject matter jurisdiction over class actions. It is easier for plaintiffs to file class actions in federal court, and it is easier for defendants to remove class actions to federal court. What remains to be seen is whether this achieves the fairness and consistency that CAFA's drafters hoped would result. Because CAFA did not affect the *Erie* doctrine,²⁰² federal courts will still apply state substantive law, varying dramatically among states.²⁰³ Furthermore, wide variation occurs within and among federal courts, as is evinced by the opposite rulings regarding which party carries the burden of proof to establish federal jurisdiction. Nonetheless, concerns over ambiguities and other technical issues will likely be resolved through litigation, and, thus, ultimately pose little threat to the statute's effectiveness in expanding federal court jurisdiction over class actions.

class actions might come under non-CAFA federal subject matter jurisdiction; it is also possible for a class action to meet either traditional diversity requirements or federal question requirements without meeting CAFA-enacted requirements. This discussion is applicable to those scenarios as well.

201. 28 U.S.C. § 1332(d)(1)(B) (2006).

202. S. REP. NO. 109-14, at 49 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 46.

203. See SECTION OF LITIG., AM. BAR ASS'N, *supra* note 18.