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Nicole Ochi

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ARE CONSUMER CLASS AND MASS ACTIONS DEAD? COMPLEX LITIGATION STRATEGIES AFTER CAFA & MMTJA

*Nicole Ochi**

I. INTRODUCTION

This is a story about power. Corporate America is a fearsome thing to behold. It is the prevailing force in modern life; the largest corporations are richer than entire nations and have more rights than people.¹ In the face of the corporate behemoth, it is virtually impossible for individual victims of corporate wrongdoing to obtain compensation unless they band together.² One way that individuals can band together is through a representative class action for damages. In a class action, the named plaintiffs seek monetary relief on behalf of a class of individuals who have suffered a common injury.³

Class actions are controversial because the unnamed members are not parties and do not participate in classwide proceedings yet are bound by the adjudication of common issues.⁴ To bring a class action, plaintiffs must meet stringent requirements, which include a

* J.D. Candidate, May 2009, Loyola Law School, Los Angeles; B.A., Asian Studies, Pomona College, May 2003. Many thanks to the editors and staff of the *Loyola of Los Angeles Law Review* for their long and uncompensated hours on this Article, with special thanks to Winston Stromberg and the Developments team for all their encouragement and support. I also would like to thank my husband for his unwavering support, love, and humor that sustained me throughout this process.

1. See generally TED NACE, *GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY* (2003) (describing the rise of corporate power and addressing the question: "How did corporations get more rights than people?").

2. See Edward F. Sherman, *Decline and Fall: As the Golden Age of Consumer Class Actions End, the Question Now Is Whether They Have Any Future*, A.B.A. J., June 2007, at 51.

3. DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* 1 (2000).

4. See ROBERT H. KLONOFF, *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL* 15 (3d ed. 2007); see also HENSLER ET AL., *supra* note 3, at 79–85 (discussing the temptation for plaintiff counsel to collude with defendants for pecuniary benefit).

demonstration that “common issues of law or fact predominate” and that a class action is “superior to other methods for fair and efficient adjudication.”⁵

A less controversial way for individuals to band together is to bring a mass action, in which numerous named plaintiffs aggregate their claims.⁶ Unlike in class actions, all parties are plaintiffs and participate in the proceedings.⁷ Because a mass action has fewer preliminary requirements, it is frequently used in personal injury cases, when individual causation issues typically preclude class certification.⁸

There are three primary ways to form a mass action. First, plaintiffs may file a joint suit against a common defendant if their claims arise out of the same transaction or occurrence (or same series of transactions or occurrences) and if they have any question of law or fact in common.⁹ Second, if multiple actions are pending in multiple district courts, the Judicial Panel on Multidistrict Litigation, upon its own motion or a motion of a party, can consolidate and transfer cases involving one or more common questions of fact to a single district for pretrial purposes.¹⁰ Third, if multiple actions are pending in the same federal district, the court may consolidate actions involving a common question of law or fact for pretrial and trial purposes.¹¹

The ability to aggregate claims through class and mass actions makes them powerful weapons for plaintiffs. They serve the twin purposes of compensation and deterrence¹² by providing a way for people to obtain compensation when individual litigation does not

5. FED. R. CIV. P. 23(b)(3) (applies to damages class actions). For a discussion of other class categories, see ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 4:1 (4th ed. 2007). In addition, all class actions must satisfy the four prerequisites under FED. R. CIV. P. 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. For a detailed discussion of these prerequisites, see William R. Shafton, *Developments, California's Uncommon Common Law Class Action Litigation*, 41 *LOY. L.A. L. REV.* 783 (2008). See also CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* §§ 1759–71 (2007).

6. Brian Quinton, *What Happened to Class? Plaintiffs' Lawyers Seek Mass Action, Not Class Action, to Push Large Personal Injury Cases*, *CORP. LEGAL TIMES*, Jan. 2005, at 44.

7. KLONOFF, *supra* note 4.

8. Quinton, *supra* note 6, at 44.

9. FED. R. CIV. P. 20 (permissive joinder of parties).

10. 28 U.S.C. § 1407 (2000).

11. FED. R. CIV. P. 42(a).

12. Sherman, *supra* note 2, at 52.

justify the expense¹³ and by deterring corporations from engaging in injurious behavior.¹⁴ For example, class actions have forced corporations to recall harmful products,¹⁵ end unfair business practices,¹⁶ and clean up the environment.¹⁷ Moreover, they promote efficiency by permitting common adjudication of multiple lawsuits.¹⁸

For decades, corporate defendants have decried class and mass actions because they provide tremendous settlement leverage to plaintiffs.¹⁹ According to critics, the possibility of an immense judgment forces corporate defendants to settle even weak or frivolous suits against them.²⁰ In addition, critics allege that plaintiffs' attorneys are the real winners, while individual consumers receive negligible compensation.²¹

In recent years, corporate lobbyists have gained ground against class and mass actions. Their successful reform efforts started in 1995 with the Private Securities Litigation Reform Act ("PSLRA"),²² continued with the Securities Standards Act of 1998 ("SLUSA")²³

13. E. Powell Miller et al., Commentary, *Meritorious Class Actions Survive the Class Action Fairness Act*, MICH. LAW. WKLY., Jan. 30, 2006.

14. *Id.*; see generally Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. (forthcoming Apr. 2008), available at <http://ssrn.com/abstract=1005021> (arguing that class actions perform an "ex post" regulatory function, provide a critical supplement to government regulation, and generate significant external benefits); see also Alec Johnson, Developments, *Vioxx and Consumer Product Pain Relief: The Policy Implications of Limiting Courts' Regulatory Influence over Mass Consumer Product Claims*, 41 LOY. L.A. L. REV. 1039 (2008).

15. *E.g.*, *Medical Tool Firm Settles Defibrillator Investigation*, NAT'L L.J., Sept. 3, 2007, at 16 (discussing defibrillator settlement and recall).

16. *E.g.*, *Calif. Ruling Could Alter Title Business; Old Republic Must Refund \$13.8 Million*, NAT'L L.J., May 28, 2001, at B1 (discussing a case in which title company had to refund \$13.8 million to 400,000 customers for pocketing the secret interest generated in escrow accounts).

17. *E.g.*, *Some Big Judgments Were Settled After Trial*, NAT'L L.J., Jan. 17, 1994, at S14 (discussing *Escamilla v. Asarco Inc.*, No. 91-CV-5716 (Colo. Dist. Ct. Apr. 23, 1993), in which a refinery agreed to spend \$11 million to clean up contaminated soil).

18. *Id.*

19. See generally HENSLER ET AL., *supra* note 3, at 15-37.

20. Sherman, *supra* note 2, at 52.

21. *Id.* But cf. Burch, *supra* note 14, at 3 (explaining that class actions are a public good because they produce litigation that deters wrongdoing).

22. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 26 (codified as amended in scattered sections of 15 U.S.C.) (providing heightened, uniform standards for class actions and other suits alleging fraud in the securities market); see *infra* Part II.A.1.

23. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.) (federalizing most securities actions); see *infra* Part II.A.1.

and the Multiparty Multiforum Trial Jurisdiction Act of 2002 (“MMTJA”),²⁴ and culminated with the Class Action Fairness Act of 2005 (“CAFA”).²⁵ These class action reforms have essentially federalized class and mass actions.²⁶ Because practitioners generally view federal courts as more hostile to class certification and mass joinder, corporate tort reformers heralded CAFA as a victory, while consumer advocates feared that it sounded the death knell for class actions.²⁷

This Article evaluates whether MMTJA and CAFA have, as feared by plaintiffs, killed class and mass actions seeking monetary damages. Although plaintiffs use these procedural devices to adjudicate a wide variety of substantive issues and obtain various types of relief,²⁸ this Article focuses specifically on consumer class actions and mass torts seeking damages based on state law.²⁹ These types of cases pose a significant economic threat to corporations

24. Multiparty Multiforum Jurisdiction Act of 2002, 28 U.S.C. § 1369 (2000 & Supp. V 2005) (expanding federal jurisdiction for certain large mass disasters); *see infra* Part II.B.2.

25. Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.); *see infra* Part II.B.3.

26. *See* Steven M. Puiszis, *Developing Trends with the Class Action Fairness Act of 2005*, 40 J. MARSHALL L. REV. 115, 115 (2006); Laura Offenbacher, Note, *The Multiparty, Multiforum Trial Jurisdiction Act: Opening the Door to Class Action Reform*, 23 REV. LITIG. 177, 205–06 (2004).

27. *See* Dan Zegart, *Tort “Reform” Triumphs*, NATION, March 7, 2005, at 8.

28. Class and mass actions were first used in large-scale commercial litigation and securities fraud actions. They became synonymous with civil rights after *Brown v. Board of Education*, 347 U.S. 483 (1954). *See* Richard L. Marcus, *Reassessing the Magnetic Pull of Megacases on Procedure*, 51 DEPAUL L. REV. 457, 459–64 (2001). Most recently, they have been associated with the topic of this Article: consumer class actions and mass torts. *Id.*

29. Consumer class actions and mass torts involve practices by businesses that harm large groups of individual consumers. Common types of cases include products liability actions, companies that overcharge consumers, and fraudulent advertising. *E.g.*, *Amchem Prod. v. Windsor*, 521 U.S. 591 (1997) (asbestos case); *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 333 F.3d 763 (7th Cir. 2003) (action by buyers and lessees of SUVs equipped with tires that had an abnormally high failure rate against manufacturer); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (action by smokers and nicotine-dependent persons against tobacco companies); *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983) (products liability suit against manufacturers of Agent Orange to recover for damages arising out of Vietnam veterans’ exposure); *Ysbrand v. Daimlerchrysler Corp.*, 2003 OK 17, 81 P.3d 618 (action by buyers for warranty and common law fraud claims regarding defective air bags installed in minivans against manufacturers); *Washington Mutual Bank FA v. Superior Court*, 15 P.3d 1071 (Cal. 2001) (mortgagors action against bank for charging excessive amounts for replacement hazard insurance when mortgagor defaulted on loan obligation to maintain insurance).

because they result in potentially debilitating judgments,³⁰ particularly in state court, where judges and juries tend to be more plaintiff friendly.³¹ Therefore, reformers targeted their efforts on keeping these types of class actions out of state court.³²

Part II of this Article provides a history of class and mass action federalization and the effects of recent legislation. Part III discusses the role of forum selection in class and mass actions. Part IV analyzes strategies to avoid federal jurisdiction under MMTJA and CAFA. Finally, Part V provides some pointers on horizontal forum shopping and other strategies to maintain a viable class or mass action in federal court. The Article concludes in Part VI by answering the question posed in the title: whether class and mass actions are dead.

II. BACKGROUND

A. Statutory Changes: Federalizing Class and Mass Actions

In the past decade, Congress has gradually federalized class and mass actions. This trend can be explained by several factors. First, reformers successfully convinced Congress that class and mass actions hurt the economy by forcing corporate defendants to settle frivolous suits.³³ Second, there was a general sentiment, perpetuated by the Judicial Hellholes series,³⁴ that state courts did not handle complex actions appropriately.³⁵ Reformers continually cited judicial

30. See Sherman, *supra* note 2, at 52 (citing Judge Posner's famous quote in *In re Rhone-Poulenc*, 51 F.3d 1293 (7th Cir. 1995), about how class actions threaten businesses with bankruptcy).

31. See generally AM. TORT REFORM ASS'N, JUDICIAL HELLHOLES 2007 (2007), <http://www.atra.org/reports/hellholes/report.pdf> (describing abuses by state courts). Reports for 2002 through 2006 are also available. For an interesting examination of Judicial Hellholes, see Adam Feit, Developments, *Tort Reform, One State at a Time: Recent Developments in Class Actions and Complex Litigation in New York, Illinois, Texas, and Florida*, 41 LOY. L.A. L. REV. 899 (2008).

32. The controversy over CAFA arises from its jurisdictional provisions, which federalize most class and mass actions. Therefore, it has little effect on federal question actions, which have always been subject to removal if brought in state court.

33. Steven J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77, 78 (2007).

34. AM. TORT REFORM ASS'N, *supra* note 31.

35. See Jonathan Weisman, *Lawsuit Reform a Bush Priority*, WASH. POST, Dec. 16, 2004, at A6; see also Richard A. Oppel, Jr., *House Expected to Pass Bill to Rewrite the Rules on Class-*

abuses in state court, such as enabling forum shopping, adopting novel legal theories that were not supported by existing law, improperly aggregating claims, permitting unnecessarily broad and invasive discovery, allowing “junk science” to constitute evidence, and giving biased jury instructions.³⁶ Third, Congress did not like plaintiff forum shopping and wanted to stop attorneys from “gaming the system.”³⁷ This section briefly addresses the history of complex litigation reform that culminated with CAFA’s passage in 2005.

1. Securities

Modern class action reform began in 1995, when Congress passed the Private Securities Litigation Reform Act (“PSLRA”), to limit allegedly meritless securities litigation that was harming the U.S. economy.³⁸ This legislation heightened pleading standards, limited fees and expenses available to class counsel, required disclosure statements, and otherwise made it more difficult to bring a securities class action in federal court.³⁹ Consequently, plaintiffs avoided federal court and brought their actions under state securities statutes.⁴⁰ To counter this end run, Congress enacted SLUSA in 1998 to ensure that the majority of securities actions would be litigated in federal court under the stricter standards of PSLRA.⁴¹ Today, federal court is the primary forum for class actions involving nationally traded securities.⁴²

2. Multiparty Multiforum Trial Jurisdiction Act of 2002

Next, Congress passed the Multiparty Multiforum Trial Jurisdiction Act (“MMTJA”) of 2002. Unlike PSLRA, SLUSA, or CAFA, this legislation passed quietly and without much fanfare or

Action Lawsuits, N.Y. TIMES, June 15, 2003, at A31. See generally AM. TORT REFORM ASS’N, *supra* note 31.

36. AM. TORT REFORM ASS’N, *supra* note 31, at 1–2.

37. Shapiro, *supra* note 33, at 78.

38. Puiszis, *supra* note 26, at 115 n.2. Congress passed PSLRA over President Clinton’s veto. See Oppel, *supra* note 35, at A31 (noting that Congress overrode Bill Clinton’s presidential veto of PSLRA).

39. Private Securities Litigation Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

40. Puiszis, *supra* note 26, at 116.

41. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.).

42. Puiszis, *supra* note 26, at 116.

controversy.⁴³ MMTJA was ostensibly enacted to promote the consolidation of multiple individual cases arising from a common disaster, such as an airline crash, a fire, or a train wreck.⁴⁴ However, some scholars point out that Congress went beyond the simple “Lexecon fix,” which would have allowed transferee judges in multidistrict litigation to transfer cases to themselves for trial.⁴⁵ Instead, Congress tested a “new species of diversity-based jurisdiction” that opened the door to radical class action reform.⁴⁶

This “new species of diversity-based jurisdiction” is minimal diversity, which confers original federal court jurisdiction over an action if one plaintiff is diverse from one defendant.⁴⁷ Minimal diversity is the constitutional minimum required for federal courts to adjudicate actions based on state law.⁴⁸ Nevertheless, Congress—with a few exceptions⁴⁹—historically limited federal jurisdiction to cases involving complete diversity, which requires all plaintiffs to be diverse from all defendants.⁵⁰

Although MMTJA granted minimal jurisdiction over a very narrowly defined group of mass accident cases,⁵¹ critics correctly forecast that this new species of diversity jurisdiction—minimal

43. Offenbacher, *supra* note 26, at 177–78.

44. Kristine Cordier Karnezis, Annotations, *Construction and Application of Multiparty Multiforum Trial Jurisdiction Act of 2002 (MMTJA)*, 28 U.S.C.A. § 1369, 2006 A.L.R. FED. 2d. 21.

45. See Georgene Vairo, *Legislation Update*, NAT’L L.J., Dec. 16, 2002, at B7 [hereinafter *Legislation Update*].

46. See *id.* (arguing that Congress abandoned the obvious solution to the consolidation problem in favor of a more controversial solution that provides “expanded federal jurisdiction at the expense of the state courts”); Offenbacher, *supra* note 26, at 205–07.

47. See Thomas J. McLaughlin & Adam N. Steinman, *The Multiparty, Multiforum Jurisdiction Act’s Impact on Major Accident Litigation*, BRIEF, Fall 2004, at 16, 17.

48. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967).

49. *E.g.*, 28 U.S.C. § 1335 (2000 & Supp. V 2005) (interpleader statute requires minimal diversity).

50. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

51. MMTJA only applies to cases arising from a single accident where at least seventy-five people have died at a discrete location. Moreover, one of the following three conditions must be satisfied:

1. A defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;
2. Any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or
3. Substantial parts of the accident took place in different States.

28 U.S.C. § 1369.

diversity—would eventually apply to nearly every interstate class action.⁵²

In addition to employing minimal diversity, MMTJA expanded federal court jurisdiction further by amending 28 U.S.C. § 1441 to permit liberal removal.⁵³ Defendants are not only allowed to remove actions that qualify for original jurisdiction; they are also allowed to remove any action that arises from the same incident. Thus, MMTJA represented a tentative, and potentially unconstitutional,⁵⁴ foray into radical complex litigation reform beyond Article III jurisdiction.⁵⁵

3. CAFA

Finally, on February 18, 2005, Congress threw open the doors of the federal court and invited complex state litigants to enter. In passing CAFA, Congress found that abuses of the class action device undermined the national judicial system, interfered with the free flow of interstate commerce, misconstrued the concept of diversity jurisdiction as intended by the Framers, and enriched counsel at the expense of class members.⁵⁶ Congress enacted CAFA to create federal court jurisdiction over interstate cases with national importance, assure fair and prompt recoveries for class members with legitimate claims, and benefit the economy.⁵⁷

To pursue its first goal, Congress conferred federal diversity jurisdiction over class actions where: (1) minimal diversity exists;⁵⁸

52. See 28 U.S.C. § 1332(d)(1) (2000).

53. See Angela J. Rafoth, Note, *Congress and the Multiparty, Multiforum Trial Jurisdiction Act of 2002: Meaningful Reform or a Comedy of Errors?*, 54 DUKE L.J. 255, 271–76 (2004) (arguing that removal provisions are potentially unconstitutional).

54. See *infra* Part IV.A.2.b (discussing potentially unconstitutional application of MMTJA).

55. Although the primary effect of MMTJA is to expand federal jurisdiction, it does contain two provisions to limit jurisdiction. First, there is an abstention provision that mandates a court to abstain from hearing an action where a “substantial majority of all plaintiffs” are citizens of the same state in which the primary defendants are also citizens and the claims asserted would be primarily governed by the laws of that state. 28 U.S.C. § 1369(b). Second, it contains a unique “reverse removal” provision that provides courts the discretion to remand removed cases to their original court for damage proceedings. 28 U.S.C. § 1441(e)(2). The effect of this provision is to allow plaintiffs to “retain their forum choice when the policy interest in providing a single forum is weakest.” Rafoth, *supra* note 53, at 270.

56. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a), 119 Stat. 4, 4–5 (2005).

57. *Id.* § 2(b).

58. Minimal diversity exists whenever:

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

and (2) the aggregate amount in controversy exceeds \$5 million.⁵⁹ This construction of diversity jurisdiction eviscerated the long-standing rule for class actions that required complete diversity between class representatives and defendants⁶⁰ and required that each class member individually satisfy the amount-in-controversy requirement.⁶¹ Since most class actions meet these requirements, the overwhelming majority are removable.⁶² Although the legislation contains several exclusions and exceptions that are intended to keep smaller local controversies in state court, as will be discussed in Part IV.B.3, it is unclear whether this intent will be realized.⁶³

In addition, CAFA's potential impact reaches far beyond traditional "class" actions. CAFA not only expands federal jurisdiction over class actions; it also applies to mass actions. For the purposes of CAFA, a mass action is defined as any civil action in which monetary-relief claims of 100 or more people are proposed to be tried jointly on the ground that plaintiffs' claims involve common questions of law or fact.⁶⁴ In fact, CAFA's influence seems to be spreading beyond its statutory parameters to multidistrict mass tort litigation and even some nonaggregation cases.⁶⁵

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

28 U.S.C. § 1332(d)(2).

59. *Id.*

60. *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 84 (2005).

61. *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973), *superseded by statute*, 28 U.S.C. § 1367, *as recognized in Exxon Mobil Corp. v. Allapattah Sews. Inc.*, 545 U.S. 546, 559 (2005). In *Exxon*, the Supreme Court held that federal courts could exercise supplemental jurisdiction over class members who did not meet the minimum amount in controversy. However, Congress enacted CAFA before the Court decided this case, so its aggregation requirement represented a substantial departure from all prior precedent. Although minimal diversity had been used in the interpleader and MMTJA statutes, CAFA was the first time that Congress allowed it to apply so broadly.

62. Shapiro, *supra* note 33, at 81.

63. See Sarah Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1617, 1621–27 (2006) (enumerating and explaining each exclusion and exception).

64. 28 U.S.C. § 1332(d)(11)(B)(i).

65. See CAFA Law Blog, <http://www.cafalawblog.com/-case-summaries-reach-of-cafa-spreads-smoothly-like-pancake-batter-in-the-griddle.html> (May 28, 2007, 5:23 CST) (discussing nonclass case in which district court judge applied CAFA standards); CAFA Law Blog, <http://www.cafalawblog.com/-case-summaries-the-united-states-district-court-for-the-ed-of-pennsylvania-dreams-a-little-dream-suggesting-an-expansion-of-cafa-to-multidistrict-mass-tort->

Furthermore, to pursue its second goal of protecting class members, Congress included a “Class Action Bill of Rights,” which applies to all class actions filed under Federal Rule of Civil Procedure 23 (“Rule 23”).⁶⁶ These provisions regulate attorneys’ fees when parties agree to a coupon settlement, bar settlements that discriminate geographically, and limit money-losing settlements to situations where the nonmonetary benefits to class members substantially outweigh the monetary benefits.⁶⁷ In addition, CAFA imposes significant notice requirements on defendants who agree to settle.⁶⁸ Although a detailed analysis of these provisions is beyond the scope of this Article, suffice it to say that the “Bill of Rights” has an impact on forum selection and the central question of this Article: whether class and mass actions are dead.⁶⁹

B. Effects of PSLRA, SLUSA, MMTJA, and CAFA

Through its handiwork over the past decade, Congress seemingly accomplished its goal of federalizing class and mass action litigation. Overall, class action activity in federal diversity cases has increased significantly since Congress enacted CAFA. The most recent Federal Judicial Center Report on CAFA’s effects indicates that the average number of diversity class actions nearly doubled from a pre-CAFA level of 27.0 cases per month to a post-CAFA level of 53.4 cases per month.⁷⁰ Surprisingly, original filings have increased more than removals.⁷¹ Although this may indicate

litigation.html (Feb. 21, 2007, 2:38 CST) (discussing multidistrict litigation (“MDL”) case in which judge suggested that Congress expand CAFA to include these actions).

66. Class Action Fairness Act of 2005 § 3, 28 U.S.C. §§ 1711–15 (2005).

67. See generally Edward A. Hosp, *Settlements Under the Class Action Fairness Act of 2005*, 67 ALA. LAW. 125 (2006); Vance, *supra* note 63, at 1632–35; Lauren Walker, *The Consumer Class Action Bill of Rights: A Policy and Political Mistake*, 58 HASTINGS L.J. 849 (2007).

68. 28 U.S.C. § 1715.

69. See *infra* Parts C, E.

70. THOMAS E. WILLING & EMERY G. LEE III, *THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS 2* (2007), available at http://pubcit.typepad.com/clpblog/files/cafa_preliminary_reportiiifinal.pdf. However, the increase is not uniform. A large percentage of this spike is concentrated in cases involving state law contract and fraud claims. Although tort cases involving property damage have also increased, cases involving personal injury claims have remained stagnant. One possible explanation for this anomaly is that plaintiffs are choosing to file personal injury claims as mass actions rather than class actions. See Quinton, *supra* note 6, at 44 (describing a strategy shift from class actions to mass actions).

71. WILLING & LEE, *supra* note 70, at 2.

that plaintiffs do not view federal courts as hostile, the more likely explanation is that plaintiffs are preempting removal and controlling forum selection by filing in a preferred federal circuit.

Regardless, CAFA clearly achieves its objective of federalizing class and mass actions.⁷² What remains unclear are the following: (1) whether there is a way to avoid the federalization of complex litigation; and (2) whether federalization is, in fact, a bad thing for plaintiffs. Specifically, is the federal docket so overloaded with massive state law actions that civil rights and other federal question class actions are denied access to the courts?⁷³ Are the overall numbers of class and mass actions on the decline, indicating the “death” of aggregated consumer litigation? The remainder of this Article will address these controversial issues.

III. THE ROLE OF FORUM SELECTION IN CLASS AND MASS ACTION LITIGATION

At its core, the controversy over class and mass action federalization is a debate about forum selection. Federalization deprives plaintiffs of their traditional right to strategically choose whether to file in state or federal court when jurisdiction is proper in both fora.⁷⁴ Some may argue that this is a positive development because forum shopping is bad. However, forum selection is merely the process of choosing among various *proper* fora to resolve a case.⁷⁵ In fact, a recent study on attorney choice of fora in class action litigation indicates that two of the three primary factors in forum selection are source of law and state connections.⁷⁶ The

72. *But see infra* note 450 and accompanying text (noting that the increased class action activity in federal court involves contract and fraud cases, rather than the tort cases that reformers had in mind when they pushed for the enactment of CAFA).

73. HENSLER ET AL., *supra* note 3, n.10.

74. See Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1650 (2006). It is worth noting that federalization only affects vertical forum selection, which is implicated when there is concurrent jurisdiction. Class and mass action litigants are still free to engage in horizontal forum selection, which is implicated when there is proper jurisdiction in more than one state or district. See *infra* Part V; see also Justin D. Forlenza, *CAFA and Erie: Unconstitutional Consequences?*, 75 FORDHAM L. REV. 1065, 1085 (2006).

75. Georgene M. Vairo, *Is Selecting Shopping?*, NAT'L L.J., Sept. 18, 2000, at A16.

76. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 NOTRE DAME L. REV. 591, 611 (2006). “State connections” is the composite of the average percentage of in-state class members and the percentage of in-state claims-related events. *Id.* at 610 tbl.1.

prevalence of these factors indicates that class action attorneys are generally not manipulating jurisdiction to “keep cases of national importance out of Federal court.”⁷⁷ Rather, they are merely following principles of federalism and maintaining local actions in state courts.⁷⁸ Moreover, even when plaintiffs’ counsel chooses a forum based on a perception of judges’ predispositions, many commentators characterize this decision as the fulfillment of an attorney’s ethical obligation, rather than an exercise in manipulation.⁷⁹

A well-known precept in the world of litigation is that forum selection has a substantial effect on the outcome of a case.⁸⁰ This precept is particularly true in class and mass actions. A plaintiff or class member’s recovery often depends on successful joinder or class certification because small claims are not economically viable unless pursued collectively.⁸¹ However, joinder and certification rules grant judges particularly wide discretion, increasing the likelihood that the forum selected will ultimately determine the outcome of the case.⁸²

For example, in the federal class action context, certification often turns on the predominance and superiority requirements. As one commentator noted, the predominance requirement is “in the eye of the beholder,” and the superiority requirement is necessarily “bound up . . . in a particular trial court’s willingness to undertake

77. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4)(A), 119 Stat. 4 (2005).

78. When a case is based on state law and has a high average of in-state class members and in-state claims-related events, it properly belongs in state court. Shapiro, *supra* note 33, at 83. Although CAFA provides exceptions to allow these actions to remain in state court, Congress drafted them in a way that will make it very difficult for plaintiffs to use. *See id.* at 85; *infra* Part IV.A.3.

79. *See, e.g.*, Vairo, *supra* note 75, at A16; Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79 (1999).

80. *See, e.g.*, Steven M. Pesner, *Initial Considerations in the Litigation Process*, in 584 PRACTISING LAW INSTITUTE, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 17, 25 (1987).

81. *See* Burch, *supra* note 14, at 12. According to one empirical study, “[t]he dichotomy between certified and noncertified cases could hardly be clearer.” Willging & Wheatman, *supra* note 76, at 649. A vast majority (89%) of certified cases concluded with court-approved settlements, whereas 97% of uncertified classes were dismissed, settled on an individual basis, or voluntarily dismissed. *Id.* at 649–50. The reason for this stark contrast is that the risk of immense liability from an adverse class action judgment gives the class tremendous leverage over the defendant. JoEllen Lind, “Procedural Swift”: *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 756 (2004). Therefore, rulings on certification and joinder end up resolving the case in most instances.

82. Elizabeth J. Cabraser, *Mass Tort Class Actions*, in ATLA’S LITIGATING TORT CASES § 9.3 (Roxanne Bartom Conlin & Gregory S. Cusimano eds. 2003).

the management challenges presented by every class action.⁸³ Although class litigants historically viewed federal court as the most advantageous forum,⁸⁴ that changed when the federal judiciary decertified a number of classes in the 1990s because they failed the predominance requirement, were too large to manage, or both.⁸⁵

Today, most practitioners believe that state courts favor plaintiffs and federal courts favor defendants in class and mass actions seeking damages.⁸⁶ This section analyzes the various reasons for this perception, including: favorableness of procedural rules, judicial predispositions, attorney convenience, and the cost of litigation. It concludes with a cursory review of the empirical data on whether forum selection is actually outcome determinative.

A. Favorable Procedural Rules

In the practical sense, procedural rules in federal court tend to favor defendants and are often outcome determinative.⁸⁷ Although a comprehensive discussion of the distinctions between procedural rules in federal and state court is beyond the scope of this Article, two examples are illustrative.⁸⁸ First, a trio of Supreme Court cases has made it much easier for defendants to obtain summary judgment in federal court.⁸⁹ In particular, these cases held that a defendant

83. *Id.*; see CONTE & NEWBERG, *supra* note 5, §§ 4:21--32 (describing predominance and superiority tests and application).

84. Lauren D. Fredricks, *Developments, Removal, Remand, and Other Procedural Issues Under the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 995, 999 (2006).

85. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (decertifying an asbestos settlement class because the predominance requirement under Rule 23(b)(3) and the adequacy requirement under Rule 23(a)(4) were not met); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002) (decertifying a class injured by defective tires because it was unmanageable as a nationwide class action or individual state class actions); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (decertifying a class of smokers and nicotine dependent persons because the district court failed to consider how variations in state law would affect predominance and superiority requirements).

86. *See, e.g.*, Juliana Kreese & Benjamin C. Rosenbaum, *The New Face of Class Action Litigation: An Interview with Professor Tobias Barrington Wolff of UC Davis Law School*, 6 U.C. DAVIS BUS. L.J. 12 (2005).

87. Lind, *supra* note 81, at 717 (arguing that procedural changes in federal courts are undermining substantive state law and producing "profoundly different outcomes in cases").

88. Other potential areas of distinction are the availability of interlocutory review, discovery rules, and the availability of a jury trial. *See, e.g.*, Gita F. Rothschild, *Forum Shopping*, 24 LITIG. 40, 41-42 (1998).

89. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (holding that when a court rules on a motion for summary judgment, it should apply the evidentiary standard of proof applicable at a trial on the merits); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding that a moving

could support its motion for summary judgment by merely pointing out that a plaintiff cannot meet an element of its claim, without providing any affirmative evidence.⁹⁰ In contrast, the plaintiff must offer sufficient affirmative evidence to satisfy the burden of proof that would apply at trial to survive defendant's motion for summary judgment.⁹¹ Many state courts have repudiated, distinguished, and limited the holdings of one or more of these cases.⁹² Thus, plaintiffs face a disproportionate burden when opposing a motion for summary judgment in federal court as compared to state court,⁹³ making it much more likely that their case will be dismissed in a federal forum.

Second, evidence rules in federal court make it much harder for plaintiffs to challenge summary judgment. For example, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁹⁴ the Supreme Court held that a trial judge could exclude unreliable expert testimony, instead of allowing the jury to determine its evidentiary weight.⁹⁵ In practice, this decision excluded expert opinions critical to plaintiffs' cases, thereby making motions for summary judgment that much easier to obtain.⁹⁶ Moreover, class opponents use *Daubert* to defeat motions for class certification because many parties use experts to demonstrate the viability of a class.⁹⁷ Because many states have repudiated or limited *Daubert*,⁹⁸ there is a greater chance that a plaintiff's case will be halted in federal court.

party need not support its motion with affidavits; rather, it is sufficient to point to absence of support for nonmovant); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (allowing the judge to evaluate motive on a motion for summary judgment).

90. *Celotex*, 477 U.S. at 323–27.

91. *Liberty Lobby*, 477 U.S. at 250.

92. Lind, *supra* note 81, at 769–70. One particularly noteworthy state is Oregon, which has rejected all three decisions. *Id.* at 771.

93. According to FED. R. CIV. P. 56(c), the nonmovant must produce some evidence beyond the pleadings to survive the motion. This burden falls more heavily on plaintiffs because they bear the burden of proof at trial. Moreover, there are meritorious cases in which plaintiffs may not be able to meet this burden due to the nature of proof, such as conspiracy cases. See Lind, *supra* note 81, at 767.

94. 509 U.S. 579, 589 (1993).

95. *Id.* at 589.

96. After this decision, “Daubert hearings” proliferated, during which the trial judge tested the admissibility of expert testimony. Generally, these hearings are conducted early in the litigation and exclude the expert testimony evidence necessary to demonstrate a “genuine issue of material fact.” Lind, *supra* note 81, at 772.

97. *Id.* at 774.

98. *Id.* at 773.

B. Predisposition of Judges

Despite differences in procedural rules between the federal and state court systems, states largely follow Rule 23⁹⁹ for class certification. However, Rule 23 permits broad discretion, which results in non-uniform application.¹⁰⁰ In the 1990s, many circuit courts rejected and even decertified classes, while state courts certified classes with similar facts.¹⁰¹ As a result, the view that federal courts kill class actions proliferated.¹⁰²

Class certification is not the only area where a judge may exercise considerable discretion. Judges decide how broadly to construe discovery and evidentiary rules, whether to permit joinder and consolidation, which jury instructions to approve, and whether to entertain novel legal theories.¹⁰³ All of these decisions have a profound impact on a class or mass action litigant's ability to obtain relief.

C. Plaintiff Attorneys Prefer State Court Because It Is More Convenient and Economical

Plaintiffs' attorneys also bemoan federalization because it precludes them from practicing in the forum that is most familiar and convenient.¹⁰⁴ Compared to defense counsel, plaintiffs' attorneys are

99. FED. R. CIV. P. 23.

100. Victor E. Schwartz, et. al., *Guide to Multistate Litigation* §2:3 (1985).

101. 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 6 (discussing state certification of nationwide classes). *But see id.* at 6–7 (discussing state reluctance to certify nationwide classes).

102. See Willging & Wheatman, *supra* note 76, at 625 tbl.6 (75% of defendant attorneys who removed cases to federal court reported that they believed federal judges were more likely than state judges to rule in favor of their clients).

103. See generally AM. TORT REFORM ASS'N, *supra* note 31, at 1–2; Victor E. Schwartz, Leah Lorber & Rochelle M. Tedesco, *Taking a Stand Against Lawlessness in American Courts: How Trial Court Judges and Appellate Justices Can Protect Their Courts from Becoming Judicial Hellholes*, 27 AM. J. TRIAL ADVOC. 215 (2003).

104. See Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 402 (1992). According to this empirical survey, the most important forum selection factor for plaintiffs is attorney convenience. Plaintiffs tend to prefer state court because it is more geographically convenient, more familiar, and lacks the burdensome pretrial requirements of federal court. *Id.*; see also Willging & Wheatman, *supra* note 76, at 613–15 (discussing attorney convenience and geographic convenience of court).

less likely to be litigators and are less experienced in federal court.¹⁰⁵ Less experienced litigators gravitate towards state court, presumably because state court is viewed as more hospitable.¹⁰⁶ Moreover, attorneys predictably prefer to file where they have the most experience, which is usually in state court.¹⁰⁷ By filing in a familiar forum, they have the advantage of already understanding the court rules and having relationships with the judges and their clerks.¹⁰⁸ Moreover, if an attorney has cultivated a particularly good reputation in a forum, then the judge is more likely to use its discretion in favor of the attorney's client.¹⁰⁹

Plaintiffs' attorneys have another practical reason to favor state court: costs of litigation. Practitioners generally agree that federal court is more expensive due to the rules, which tend to be more formal.¹¹⁰ Because they represent individuals, plaintiffs' attorneys usually have fewer resources than defense counsel, who often represent corporations.¹¹¹ Therefore, plaintiffs prefer state court to keep the costs of litigation down.

D. Is Perception Reality?

As discussed above, a widespread belief exists that federal court is an unfavorable forum for plaintiffs pursuing class or mass actions based on state law. At least one empirical study suggests that this perception is reality.¹¹² According to this study, plaintiffs have a substantially lower chance of prevailing when a case is removed

105. Miller, *supra* note 104, at 402 (reporting that 81% of plaintiff attorneys are litigators, compared to 95% for defense counsel; and 10% of plaintiff attorneys practice in federal court, while 44% of defense counsel had a federal court litigation practice).

106. *Id.* For example, some plaintiff attorneys believe that federal courts are more sterile because federal judges typically make decisions based on the writings and do not entertain oral advocacy. See, e.g., Interview with Paul R. Kiesel, Partner, Kiesel, Boucher & Larson LLP, in Beverly Hills, Cal. (Sept. 25, 2007).

107. According to one empirical study, only 10% of plaintiff attorneys practice in federal court, compared to 44% of defendants. Miller, *supra* note 104, at 402.

108. Telephone Interview with Kimberly A. Kralowec, Of Counsel, The Furth Firm LLP, in San Francisco, Cal. (Sept. 21, 2007).

109. See *supra* Part III.B.

110. See Miller, *supra* note 104, at 404; Gina Passarella, *Ruling Shows Potential Pitfalls for Some Discovery Tactics*, LEGAL INTELLIGENCER, Oct. 5, 2007, at 3.

111. Miller, *supra* note 104, at 402.

112. See 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, 593 (1998).

from state court than when a plaintiff chooses federal court.¹¹³ Although the researchers recognize that “case selection”¹¹⁴ may explain the large removal effect, they ultimately conclude that forum selection does have a substantial effect on outcomes.¹¹⁵ In fact, the data suggests that the removal effect may be even greater than attorneys recognize.¹¹⁶

However, a recent study by the Federal Judicial Center regarding class action rulings indicates that the forum impact is overstated.¹¹⁷ According to this study, federal and state judges are equally likely to certify classes, equally likely to approve settlements, and do not differ significantly in their rulings on dispositive motions.¹¹⁸ However, the study did pick up on two statistically significant differences. First, federal judges were more likely to deny certification, while state judges were more likely to take no action on certification.¹¹⁹ This wrinkle explains why both forums certified classes at the same rate, even though federal courts denied certification at a greater rate. It is worth noting that defendants may choose to settle after remand, rather than continue litigating in what they consider to be a biased forum, thus depressing state court class certification numbers.

Second, the Center’s study found that state courts certified larger settlements.¹²⁰ This discrepancy was a function of class size as federal courts actually awarded class members more money per person than state courts.¹²¹ Nevertheless, this difference is important

113. Overall win rate in federal civil cases is 57.97%, whereas removal win rate is 36.77%. *Id.*

114. Case selection occurs when cases that are chosen for removal are weaker than those that are originally filed in federal court. *Id.* at 602.

115. *Id.* at 602–07.

116. *Id.* at 602.

117. See Willging & Wheatman, *supra* note 76, at 653. However, the study did indicate two interesting variances: (1) removal rates are much higher in Illinois, indicating that Illinois state judges are more receptive to class members; and (2) removal rates are significantly lower in New York, indicating that New York state judges are significantly less receptive to class members. *Id.* at 633.

118. *Id.* at 599.

119. *Id.* at 635.

120. *Id.* at 639. In cases removed to federal court and remanded to state court, classes recovered a median amount of \$850,000, whereas classes only received \$300,000 when the case was removed and not remanded. *Id.* tbl. 15.

121. *Id.* (median recovery per class member in cases removed to federal court and remanded to state court was \$350, whereas median recovery in cases removed to federal court and not

because it indicates that state courts certify larger classes, which means larger potential judgments and more attorneys' fees.¹²² Although the empirical studies conflict, it is likely that forum selection does have some affect on outcomes.

IV. HOW TO STAY IN STATE COURT AFTER MMTJA AND CAFA

As discussed above, class and mass action plaintiffs have good reasons to prefer state court. The purpose of this section is to analyze strategies that will allow plaintiffs to maintain their actions in state court. Contrary to popular belief, CAFA was not designed to federalize *all* class and mass actions.¹²³ Congress reserved smaller local controversies for state court but failed to draft the legislation in a way that makes that goal easily achievable.¹²⁴ Part A discusses MMTJA and the subsequent case law interpreting its provisions, which provides critical precedent for CAFA cases. Part B discusses CAFA and how courts have interpreted its provisions.

A. MMTJA: Mass Disaster Scenarios

Without much fanfare, Congress enacted the Multiparty Multiforum Trial Jurisdiction Act MMTJA in 2003 as part of an omnibus Justice Department appropriations bill.¹²⁵ MMTJA breezed through Congress because of its narrow scope and purely procedural justification.¹²⁶ Since the 1970s, Congress had considered federal consolidation of catastrophic single-accident cases to increase efficiency and promote fairness.¹²⁷ Consolidation advances these goals by reducing duplicative liability determinations and ensuring consistent results.¹²⁸ Therefore, MMTJA slipped past the radar of

remanded was \$517).

122. *Id.* at 639–40 (noting that the typical recovery per class member in federal courts was almost 50% higher than in state courts).

123. Shapiro, *supra* note 33, at 83.

124. *Id.* at 85–86.

125. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

126. See Legislation Update, *supra* note 46.

127. Joseph M. Creed, Note, *Choice of Law Under the Multiparty, Multiforum Trial Jurisdiction Act of 2002*, 17 REGENT U. L. REV. 157, 168 (2004). For a comprehensive review of MMTJA's legislative history, see *id.* at 167–72.

128. *Id.* at 171.

most people, even though it was a critical victory in the movement to federalize class and mass actions.

One scholar analogized MMTJA to a vacuum cleaner that can “suck up all of the cases . . . and deposit them in [a] federal court”¹²⁹ Section 1369¹³⁰ authorizes federal courts to hear cases in three ways.¹³¹ First, the statute grants original jurisdiction when there is minimal diversity between adverse parties and the action arises from a “single accident, where at least 75 natural persons have died in the accident at a discrete location”¹³² In addition, the action must satisfy one of three dispersion qualifiers,¹³³ which limit MMTJA application to actions that have the potential to be brought in scattered jurisdictions.¹³⁴ Second, a defendant can remove an action to federal court if either the action could have been brought under § 1369 or if the defendant is a party to an action that is or could have been brought under § 1369 and the action arises from the same accident that is pending in state court (even if the state court action does not have jurisdiction on its own).¹³⁵ Third, a plaintiff can intervene in an action pending in district court if the action was or could have been brought under § 1369, even if the plaintiff could not have brought the action in federal court as an original matter.¹³⁶

129. Peter Adomeit, *The Station Nightclub Fire and Federal Jurisdictional Reach: The Multidistrict, Multiparty, Multiforum Jurisdiction Act of 2002*, 25 W. NEW ENG. L. REV. 243, 247 (2003).

130. 28 U.S.C. § 1369 (2000).

131. See Creed, *supra* note 127, at 174.

132. 28 U.S.C. § 1369(a). Once this threshold is met, the statute creates jurisdiction over personal injury and collateral property damage claims, in addition to wrongful death actions. See Adomeit, *supra* note 129, at 248–49 (explicating § 1369(c)(3)).

133. Section 1369(a) states:

The district courts shall have original jurisdiction . . . if –

(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;

(2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or

(3) substantial parts of the accident took place in different States.

28 U.S.C. § 1369(a).

134. See McLaughlin & Steinman, *supra* note 47, at 18; Offenbacher, *supra* note 26, at 192–93.

135. 28 U.S.C. § 1441(e)(1).

136. 28 U.S.C. § 1369(d). For an interesting discussion of how the intervention provision can be used to circumvent the abstention provisions in order to keep a case in *federal* court, see Rafoth, *supra* note 53, at 268.

Although the scope of § 1369 is already narrowly tailored,¹³⁷ both Congress and the courts limited its application even further by creating an abstention provision that excepted truly local mass disaster scenarios from federal jurisdiction.¹³⁸ The provision is applicable when a “substantial majority” of all plaintiffs and “primary defendants” are citizens of the same state and the law of that state primarily governs.¹³⁹ Another limitation, recognized by at least one court, is that MMTJA does not apply to cases that are likely to be brought in a single forum because the legislative purpose to avoid duplicative judgments and inconsistent awards is not implicated in these suits.¹⁴⁰

In addition to its jurisdictional provisions, MMTJA confers procedural benefits on consolidated federal court actions,¹⁴¹ such as nationwide service of process,¹⁴² subpoena authority,¹⁴³ and the elimination of personal jurisdiction as a restriction on venue.¹⁴⁴ Combined with the consolidation advantages available in federal court, these procedural incentives may cause plaintiffs to prefer federal court.¹⁴⁵ In that case, plaintiffs will not have a problem securing their chosen forum because MMTJA broadens federal jurisdiction and liberalizes removal.

However, plaintiffs who want to litigate in state court will have a difficult time keeping their cases in their chosen forum. To do so, they must first demonstrate that their action could not have been

137. Only the most catastrophic accidents will cause the death of seventy-five people in a discrete location.

138. 28 U.S.C. § 1369(b).

139. *Id.*

140. See *Southall v. St. Paul Travelers Ins. Co.*, No. CIV.A.06-3848, 2006 WL 2385365, at *6 (E.D. La. Aug. 16, 2006). In an action filed by a husband and wife against their insurer for property damage incurred during Hurricane Katrina, the court reasoned, “There is no indication that the adjudication of this suit in a state court forum would lead to inconsistent awards with suits in other fora.” *Id.*; see also *S. Athletic Club, LLC v. Hanover Ins. Co.*, No. CIV.A.06-2605, 2006 WL 2583406, at *5 (E.D. La. Sept. 6, 2006) (“The narrow jurisdiction under the MMTJA is not intended to apply to a case where there are not many plaintiffs and many defendants.”).

141. This is similar to the interpleader statute, which confers procedural benefits while permitting minimal diversity jurisdiction. See 28 U.S.C. § 2361 (2000).

142. 28 U.S.C. § 1697 (2000 & Supp. V 2005).

143. 28 U.S.C. § 1785 (2000 & Supp. V 2005).

144. 28 U.S.C. § 1391(g). See *Rafoth*, *supra* note 53, at 284.

145. See *McLaughlin & Steinman*, *supra* note 47, at 20.

brought under § 1369 and second, that supplemental jurisdiction does not exist under § 1441(e)(1)(B).¹⁴⁶

1. Establishing that an action cannot be brought under § 1369

There are two ways to establish that an action cannot be brought in district court under § 1369: (1) by demonstrating that the action is outside the scope of MMTJA; or (2) by demonstrating that the abstention provisions apply. As in all civil actions, the party seeking removal under MMTJA has the burden to make a prima facie showing that facts exist to support federal court jurisdiction.¹⁴⁷ Therefore, this burden falls on the defendants when plaintiffs file in state court.

Once defendants establish jurisdiction, however, the burden shifts to plaintiffs to prove that the abstention provision applies.¹⁴⁸ The characterization of this provision as a mandatory abstention, rather than a jurisdictional condition, is important.¹⁴⁹ Under the abstention doctrine, the opponent of federal jurisdiction has the burden of proving that the provision applies,¹⁵⁰ and a remand order is subject to appellate review.¹⁵¹ On the other hand, under the jurisdictional condition theory, the proponent of federal jurisdiction

146. Under § 1441(e)(1), an action may be removed if it (1) could have been brought in federal court under § 1369; or (2) if the defendant is a party to an action which is or could have been brought in federal court under § 1369, and if the case arises from the same accident as the action in state court.

147. *Case v. ANPAC La. Ins. Co.*, 466 F. Supp. 2d 781, 795 (E.D. La. 2006).

148. *See Passa v. Derderian*, 308 F. Supp.2d 43, 58 (D.R.I. 2004) (holding that the plain language of the statute and legislative history indicate that § 1369(b) is a mandatory abstention provision).

149. *Id.* Unlike a jurisdictional condition, an abstention implies that federal court jurisdiction exists, but the court must abstain from hearing the matter for policy reasons. *Id.* at 56.

150. Although no court has ever explicitly assigned the burden of proof for this provision, the party advocating abstention usually has the burden of proof. *See id.* at 55 (noting that the proponent of abstention has the burden of proving the applicability of the mandatory abstention clause contained in the Bankruptcy Act, 28 U.S.C. § 1334(c)(2)). Moreover, under CAFA, the proponent of state court adjudication has the burden of proving that an exception applies. *See infra* note 221 and accompanying text. Although the statutes are worded slightly differently (MMTJA uses the word “abstain” while CAFA uses the word “decline”), the legal analysis is the same because courts have determined that the CAFA exceptions are also not jurisdictional. *See infra* note 221 and accompanying text. Therefore, the burden of proof is likely on the proponent of abstention.

151. *See Wallace v. La. Citizens Prop. Ins. Corp.*, 444 F.3d 697, 700 (5th Cir. 2006) (holding that 28 U.S.C. § 1447(d) does not apply to abstention-based remand orders because they are not based on a lack of subject matter jurisdiction).

has the burden of proving that the condition does not apply,¹⁵² and a remand order is not subject to review.¹⁵³ Because it is easier for a party to prevail when it does not bear the burden of proof, a plaintiff will be more successful if it argues that § 1369 does not confer jurisdiction, rather than advocating that the abstention provisions should apply.¹⁵⁴

a. MMTJA does not apply

For an action to fall within the parameters of MMTJA, there must be: (1) a single accident that caused the death of seventy-five people at a discrete location; (2) minimal diversity between adverse parties; and (3) the existence of at least one dispersion qualifier.¹⁵⁵ The most effective way to demonstrate that an action is outside the scope of MMTJA is to argue that an event is not an accident under the statute or that it did not cause the death of seventy-five people at a discrete location.¹⁵⁶ The definition of accident in the statute is ambiguous. According to the statute, it is “a sudden accident, or a natural event culminating in an accident”¹⁵⁷

152. *Passa*, 308 F. Supp. 2d at 55 (“[B]urden of proof in a Rule 12(b)(1) motion is always on the party asserting federal jurisdiction.”).

153. 28 U.S.C. § 1447(d) states, “An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise”

154. *Case v. ANPAC Louisiana Ins. Co.*, 466 F. Supp. 2d 781 (E.D. La. 2006), is a good example of this principle. This action involved pendent property damage claims incurred as a result of Hurricane Katrina. *Id.* at 783. Because the defendant removed the case, it bore the burden of establishing that seventy-five deaths occurred at a discrete location in a single accident. *Id.* at 789. To meet its burden, defendant had to provide some evidence that seventy-five people died at a discrete location as a result of the same levee breach that caused the property damage. *Id.* at 792–93. Under the circumstances of Hurricane Katrina, it is nearly impossible to determine the location and cause of a person’s death, so the defendant will almost certainly fail to meet its burden. *Id.* at 797.

155. 28 U.S.C. § 1369(a).

156. Minimal diversity and its attendant qualifiers are generally not worth contesting because they will almost always be satisfied. Minimal diversity exists when one party is a citizen of a state and the other party is a citizen of different state, a foreign state, or a citizen of a foreign state. 28 U.S.C. § 1369(c)(1). In a mass accident scenario with widespread injury and damage, it is extremely unlikely that no minimal diversity will exist. Although the statute qualifies the application of minimal diversity with dispersion requirements, those are easily met. For example, the first qualifier is that a “defendant resides in a State and a substantial part of the accident [takes] place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place.” § 1369(a)(1). Since most defendants in these cases will be major corporations that have citizenship in more than one state, this condition will almost always be satisfied. See McLaughlin & Steinman, *supra* note 47, at 18.

157. 28 U.S.C. § 1369(c)(4).

On one hand, the term “accident” is fairly inclusive. Courts have expanded the application of MMTJA beyond airline disasters, which were the focus of its legislative history.¹⁵⁸ For example, in *Passa v. Derderian*,¹⁵⁹ the District Court of Rhode Island applied MMTJA to a nightclub fire accident and retained jurisdiction.¹⁶⁰ Moreover, although courts have not had the opportunity to determine whether criminal or terrorist acts qualify as accidents, scholars suggest that they would fall within the scope of MMTJA because the defendant’s intent is irrelevant to the goals of avoiding duplicative and inconsistent litigation.¹⁶¹

On the other hand, Congress and courts have narrowly construed the term “accident” in the context of MMTJA. The act’s legislative history indicates that Congress did not intend for it to apply to multiple suits arising from multiple events, such as products liability or toxic tort actions.¹⁶² Moreover, courts have refused to extend the definition of “accident” to natural events. In *Case v. ANPAC Louisiana Insurance Company*,¹⁶³ the court held that Hurricane Katrina was not an accident but rather a natural event that culminated in multiple accidents (multiple levee breaches).¹⁶⁴ Since § 1369 requires identification of a *single* accident, the deaths that resulted from *multiple* breaches could not be aggregated to satisfy threshold

158. See *Passa v. Derderian*, 308 F. Supp.2d 43, 54 (D.R.I. 2004) (holding that MMTJA is not limited to airline disasters, but applies to all qualifying tragedies resulting in the death of seventy-five or more natural persons).

159. 308 F. Supp.2d 43 (D.R.I. 2004).

160. *Id.* at 54. This case arose out of the fourth worst nightclub fire in American history, which resulted in 100 deaths and injured nearly 190 people. See *id.*; see also Adomeit, *supra* note 129.

161. See Rafoth, *supra* note 53, at 262–63.

162. H.R. REP. NO. 102-373, at 6–7 (1991). However, MMTJA may apply to products liability or toxic tort cases when all the claims arise from a single incident. *E.g.*, *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 197 (2d Cir. 1987). On the night of December 2–3, 1984, winds blew deadly gas from an industrial plant in India into densely occupied parts of the city of Bhopal, causing over 2000 deaths and 200,000 injuries. *Id.*

163. 466 F. Supp. 2d 781 (E.D. La. 2006).

164. *Id.* at 793–95. The court rejected defendants’ contention that the breaches were “one accident” because they occurred along one levee system, reasoning that this broad reading would not fulfill MMTJA’s purpose of consolidating multiple actions with identical issues of liability and causation. *Id.* Each levee breach presented a separate and distinct liability and causation determination. *Id.* at 794.

jurisdictional questions.¹⁶⁵ Consequently, the case was remanded to state court.¹⁶⁶

A related issue with MMTJA is whether the accident resulted in seventy-five deaths at a discrete location. The term “discrete location” is ambiguous because it is not defined in the statute, and there is no legislative history that indicates Congress’s intentions.¹⁶⁷ Courts interpret the statute as requiring both the accident and the deaths to occur at a discrete location.¹⁶⁸

Further, courts have construed “location” narrowly. For example, the Eastern District Court of Louisiana held that the metropolitan area of New Orleans is not a discrete location.¹⁶⁹ The same court held that “discrete location” should not be evaluated in terms of physical boundaries, but according to common facts of liability and causation.¹⁷⁰ Under this construction, the court held that an incident involving multiple levee breaches and widespread damage is not the kind of accident contemplated by the drafters of MMTJA.¹⁷¹

To recap, a catastrophic fire, airplane disaster, or massive building collapse is likely to qualify for federal jurisdiction because both the event and the deaths will most likely occur in the same discrete location. However, any natural disaster, toxic tort, or products liability action is unlikely to fall within § 1369 jurisdiction and will remain in state court. In these cases, a plaintiff’s best bet is to demonstrate that the abstention provision applies.

b. Pleading the application of § 1369(b)

Congress included § 1369(b) to ensure that truly local actions remain in state court.¹⁷² Since its enactment, the abstention provision

165. *Id.* at 793–95.

166. *Id.* at 798.

167. *Id.* at 795–96.

168. *Id.* at 796. Although no court has addressed this precise issue, one court faced a situation involving an accident that occurred in a different location from the deaths. *See id.* at 796 n.24 (discussing *Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc.*, 463 F. Supp. 2d 583 (E.D. La. 2006)).

169. *See Preston*, 463 F. Supp. 2d at 591.

170. *Case*, 466 F. Supp. 2d at 797.

171. *Id.* at 798.

172. *See Offenbacher, supra* note 26, at 199.

has been criticized as vague and poorly drafted.¹⁷³ Specifically, the terms “substantial majority of all plaintiffs,” “primary defendants,” and “primarily governing law” are open to interpretation. The rest of this Part considers judicial interpretations of these ambiguous terms and whether litigators can employ pleading strategies to retain their choice of forum.

i. Substantial majority of all plaintiffs

The phrase “substantial majority of all plaintiffs” is ambiguous in two ways. First, “all plaintiffs” could refer to: (1) all plaintiffs that have filed suit; or (2) all potential plaintiffs.¹⁷⁴ The court in *Passa* chose the latter, holding that this phrase included “all potential plaintiffs, meaning all those who have died or suffered injury as a result of the tragedy at issue.”¹⁷⁵ The court reasoned that a more narrow construction would not serve Congress’s intent because it would result in dispersed suits.¹⁷⁶ The *Passa* court believed that if it chose the first interpretation (referring to all plaintiffs that have filed suit), federal courts would have to remand some cases under the abstention provision and hear others arising from the same accident, resulting in the inconsistency and inefficiency that MMTJA was supposed to prevent.¹⁷⁷

Second, “substantial majority” can be construed as “virtually all plaintiffs” or merely “more potential plaintiffs . . . than any other one state.”¹⁷⁸ In *Passa*, the court took the middle road and held that “substantial majority” is a number that is more than a relative majority (the latter), but less than “virtually all” (the former); it is somewhat in excess of 50 percent, such as “two-thirds or three-fourths.”¹⁷⁹ For example, in *Passa*, 44.18 percent of the potential plaintiffs resided in Rhode Island.¹⁸⁰ Although the number of Rhode Island residents was more than double the number of plaintiffs from

173. See Rafoth, *supra* note 53, at 264.

174. *Passa v. Derderian*, 308 F. Supp.2d 43, 59 (D.R.I. 2004).

175. *Id.* at 60.

176. *Id.* at 59–60.

177. *Id.*

178. *Id.* at 60.

179. *Id.* at 61.

180. *Id.* at 60 (noting that 34.33% were from an unknown residence, 17.01% from Massachusetts, 2.69% from Connecticut, 0.60% from California, 0.30% from Florida, Maine, Nevada, and Ohio).

any other single state, the court declined to find a substantial majority because Rhode Island residents failed to comprise more than 50 percent of the whole—much less a substantial majority.¹⁸¹

ii. Primary defendants

“Primary defendants” is another ambiguous term, which reappears in the CAFA exceptions.¹⁸² At least three different definitions of this term have been suggested: (1) defendants with the deepest pockets; (2) defendants who are most culpable for the accident; or (3) defendants who are directly, rather than vicariously, liable.¹⁸³ In *Passa*, the court adopted the third definition, reasoning that it was the most workable and well supported by precedent in other contexts.¹⁸⁴

One unresolved issue is whether a jurisdictional analysis of “primary defendants” must include all liable parties or only the defendants that are before the court. For example, if 75 percent of potential plaintiffs are from New York, one of the primary defendants is also from New York, and another primary defendant is from California, can the plaintiffs sue only the in-state defendant to remain in state court?

On one hand, considering all potential primary defendants is important because failing to do so could result in scattered litigation.¹⁸⁵ For example, if one group of plaintiffs in the hypothetical above could sue the New York defendant and remain in state court while another group of plaintiffs that sued both defendants remained in federal court, litigation would be scattered. But, on the other hand, considering non-named potential defendants infringes the plaintiff-choice principle.¹⁸⁶ Therefore, this may be an area where a plaintiff’s lawyer can strategically build a case to maintain his or her forum choice.

181. *Id.* at 61.

182. 28 U.S.C. § 1332(c)(2), (d)(4) (2000 & Supp. V 2005).

183. *Passa*, 308 F. Supp. 2d at 61–63.

184. *Id.* at 62.

185. *Id.*

186. See Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 168–69 (2000).

iii. Primarily governing law

No court has explicated the meaning of “primarily governing law.” However, one commentator suggested that it should be defined similarly to “substantial majority” because Congress used both phrases with the intent of maintaining intrastate actions in state court.¹⁸⁷ If this definition is adopted, federal courts must abstain from hearing actions when substantially more than 50 percent of claims are based on state law.¹⁸⁸

2. Supplemental jurisdiction does not exist under § 1441(e)(1)

Even if plaintiffs cannot bring an action in federal court as an original matter, a defendant may remove the action if it is party to an action that was (or could have been) brought in federal court under § 1369 and both actions arise from the same accident.¹⁸⁹ For example, in *Wallace v. Louisiana Citizens Property Insurance Corporation*,¹⁹⁰ a class of claimants that incurred flood damage during Hurricane Katrina sued their insurers in state court.¹⁹¹ The defendants removed, and the district court remanded, holding that the abstention provision prevented it from hearing the action.¹⁹² Nevertheless, on appeal, the Fifth Circuit held that removal was proper because the defendant insurers were also parties to a pending class action in federal court that arose out of Hurricane Katrina and could have been brought under § 1369.¹⁹³ Although subsequent decisions by lower courts repudiated the characterization of Hurricane Katrina as an accident under § 1369,¹⁹⁴ the holding of the case is unmistakable: an action may be removed even if there is no independent federal court jurisdiction.¹⁹⁵ This sweeping removal provision can be avoided by

187. See Offenbacher, *supra* note 26, at 203.

188. See *id.*

189. 28 U.S.C. § 1441(e)(1) (2000).

190. 444 F.3d 697, 701 (5th Cir. 2006).

191. *Id.* at 701.

192. *Id.*

193. *Id.* at 702.

194. See, e.g., *Case v. ANPAC La. Ins. Co.*, 466 F. Supp. 2d 781 (E.D. La. 2006) (finding that Hurricane Katrina is not an accident; it is a natural event that caused multiple accidents; and that each levee breach constitutes a separate accident).

195. *Wallace*, 444 F.3d at 702.

either: (1) distinguishing the accidents; or (2) contesting the constitutionality of the provision.

a.. Distinguishing accidents

Section 1441(e)(1)(B) only applies when “an action which is or could have been brought, in whole or *in part*, under section 1369 in a United States district court . . . , arises from the *same accident* as the action in State court”¹⁹⁶ To conceptualize the application of this provision, consider the following hypothetical based on the Hurricane Katrina litigation.¹⁹⁷ Plaintiff-claimant sues defendant-insurer to compensate her for property damage caused by levee breach *A*, which occurred as a result of the hurricane. Defendant is also a party in federal court to another action, which is under § 1369 and based on damages arising from levee breach *B*—also caused by the hurricane. Assuming the case arising out of breach *A* could not be brought under § 1369, removal would be improper under § 1441(e)(1)(B). Although both cases arise from Hurricane Katrina, it is not an accident. The individual breaches are the accidents. Therefore, breach *A* is a different accident from breach *B*.¹⁹⁸

However, if the pending federal action arose out of multiple levee breaches—breaches *A*, *B*, and *C*—and the defendant was liable for the claims arising out of breach *A* (amongst others), then removal would be proper because the federal court action arises *in part* from

196. 28 U.S.C. § 1441(e)(1)(B) (2000) (emphasis added).

197. The Hurricane Katrina cases interpreting § 1441(e)(1)(B) are confusing. In *Plant Gallery v. Hanover Insurance Company*, the court held that removal was improper, even though the defendant was a party to a case that could have been brought under § 1369, because plaintiffs in the removed action did not allege damages arising from a levee breach, which was the accident that formed the basis of § 1369 jurisdiction for the related action. *Plant Gallery v. Hanover Ins. Co.*, No. CIV.A.06-7692, 2007 WL 128831, at *3, (E.D. La. Jan. 17, 2007). In another case, the court refused to apply this provision because the removed action was not based on a single accident. See *Case*, 466 F. Supp. 2d at 794. In that case, the court held that the related action could be based on multiple accidents, but the removed action had to be based on a single accident. *Id.* It was unclear why the court read the statute in this manner, when the plain language does not indicate that the damages must arise from a single accident under these circumstances. To simplify the application of the rule, I have used a hypothetical instead of actual cases.

198. No case has dealt with this issue specifically. In most of the cases, the removed actions are premised on wind damage from Hurricane Katrina, which does not qualify as an accident at all. See, e.g., *Racca v. La. Farm Bureau Mut. Ins. Co.*, No. CIV.A.06-6645, 2006 WL 3905004, at *3 (E.D. La. Dec. 8, 2006). *Case* is the only case that dealt with a removed action that arose out of an accident. In that case, the plaintiffs did not allege damages that arose out of a different accident from the related action; they failed to specify a *single accident* at all. See *Case* 466 F. Supp. 2d at 794–95.

the same accident.¹⁹⁹ Of course, breach *A* must have independently resulted in seventy-five deaths at a discrete location to qualify for § 1369 jurisdiction, even though it is included in a multi-accident action.

In short, this provision is complex, and courts have not sufficiently clarified its meaning. In practice, it will be possible to distinguish accidents when a natural disaster causes multiple accidents, like in a hurricane or a massive earthquake. However, when the disaster is a single accident, like an airplane crash, nightclub fire, or train wreck, this strategy will not be available.

*b. Contesting the constitutionality of
§ 1441(e)(1)(B)*

Another way to avoid supplemental jurisdiction is to challenge the constitutionality of the section.²⁰⁰ The Constitution requires minimal diversity for a federal court to have jurisdiction over state law actions.²⁰¹ However, § 1441(e)(1)(B) could result in federal adjudication of non-diverse state law actions. For example, suppose a defendant removes a non-diverse, state-law-based action under § 1441(e)(1)(B) to the federal court in the district where it was filed.²⁰² If this is not the same court where the related case with original § 1369 jurisdiction is pending, then no subject matter jurisdiction exists, unless it is consolidated with the minimally diverse case.²⁰³ However, it is not procedurally possible to consolidate the cases because a court lacking subject matter jurisdiction lacks the authority to transfer a case.²⁰⁴ Although § 1631 permits a transfer to cure want of jurisdiction, this solution only applies when the removed action

199. See *Case*, 466 F. Supp. 2d at 793 (assuming that § 1369 jurisdiction is available even though an action involves multiple accidents).

200. See Rafoth, *supra* note 53, at 271–76 (“[T]he specific drafting of section 1441(e) . . . may present some Article III hurdles to implementation.”).

201. U.S. CONST. art. III, § 2.

202. 28 U.S.C. § 1446(a) (“A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal . . .”).

203. If the removed case is consolidated with the related federal case, minimal diversity will exist because the federal case is minimally diverse. Minimal diversity only requires that one plaintiff is diverse from one defendant, so consolidation with a non-diverse state action will not destroy jurisdiction. However, if the removed case is not consolidated, then no basis for federal jurisdiction exists.

204. Rafoth, *supra* note 53, at 273 n.77.

could have been brought in one of the district courts.²⁰⁵ Since a non-diverse state law action could not have been brought as an original matter in any district court, the section is unconstitutional as applied.²⁰⁶ However, this drafting problem could be remedied easily by requiring removal to the court where the related federal action is pending.²⁰⁷ Because Congress will most likely remedy the drafting error if a constitutional claim is brought, this argument will not go a long way in helping plaintiffs keep their cases in state court.

3. MMTJA Wrap-Up

The bottom line under MMTJA is that most actions arising from single-accident disasters will be litigated in federal court. To analyze a mass accident action, the first step is to determine whether it falls within the scope of § 1369. Any airline crash, train wreck, or hotel fire that results in more than seventy-five deaths will almost certainly qualify because it is highly likely that at least one plaintiff will be diverse from a defendant. However, actions arising out of a natural disaster will generally not qualify, unless it causes an identifiable single accident that meets the threshold requirements.²⁰⁸ If the action did not arise out of a single accident that resulted in seventy-five natural deaths in a discrete location, then neither § 1369 nor § 1441(e)(1) will apply, and the action will remain in state court.²⁰⁹

If an action does fall within the scope of MMTJA, the next step is to determine whether the abstention provision applies. Because the provision has been narrowly construed, it will only apply in rare

205. 28 U.S.C. § 1631 (2000) (“[T]he court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed . . .”).

206. Rafoth, *supra* note 53, at 274.

207. *Id.* at 275.

208. As discussed above, in the Hurricane Katrina litigation, courts held that each levee breach was a “single accident.” However, in most cases, the defendant could not make a prima facie showing that a single levee breach caused seventy-five deaths in a discrete location. See *supra* note 165 and accompanying text. In natural disaster cases, it is unlikely that a single accident can be identified that meets MMTJA’s threshold. However, one could imagine an earthquake that caused a large building to collapse and kill at least seventy-five people. In this scenario, it is likely that the building collapse would qualify as a single accident that meets the requirements of § 1369. However, only actions arising from the building collapse—and not the earthquake generally—would have federal court jurisdiction.

209. Section 1441(e)(1)(B) only applies when the removed action arises out of the same single accident as the related federal action. Therefore, if the removed action arises out of a different accident, subsection (e)(1)(B) will not apply.

circumstances. For example, it may apply if a substantial majority of the passengers of a commuter train crash were in-state citizens and the directly responsible parties all had citizenship in that state. It is less likely to apply in an airplane crash or hotel fire situation because the potential plaintiffs are more likely to have diverse citizenship, making it difficult to achieve the “substantial majority” requirement.²¹⁰

Finally, even if minimal diversity is not met or the abstention provision applies, the action can be removed under § 1441(e)(1)(B).²¹¹ If one of the defendants is party to another suit that arises from the same accident causing seventy-five deaths in a discrete location, the action will be removable.²¹² Although the removal may be unconstitutional, Congress can easily remedy that infirmity by amending the removal statute to require consolidation between § 1441(e)(1) removed cases and related federal cases.²¹³

Even though single-accident mass disasters will likely end up in federal court, this is not necessarily a bad thing. In these rare cases, the advantages of consolidation and the procedural benefits conferred by MMTJA might make federal court the most favorable forum to plaintiffs.

B. CAFA: Class and Mass Actions

CAFA is the “most significant legislative reform of complex litigation in American history”²¹⁴ because it shifts the lion’s share of state-law-based complex litigation to federal court. However, Congress did leave a few types of class and mass actions beyond the reach of federal jurisdiction. These carve-outs can be divided into three categories. First, actions that are not minimally diverse and have an aggregate amount in controversy greater than \$5 million are not removable.²¹⁵ Second, CAFA’s grant of original jurisdiction

210. Although it may be possible to manipulate the “primary defendants” component of the provision by electing not to sue directly responsible parties who are out-of-state residents, the larger barrier will be meeting the “substantial majority of all plaintiffs requirement.” *See supra* Part IV.A.2.b.i.

211. 28 U.S.C. § 1441(e)(1)(B).

212. *Id.*

213. *See supra* Part IV.A.2.b.

214. Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. (forthcoming 2008) (manuscript at 2), available at <http://ssrn.com/abstract=1005477>.

215. *See* 28 U.S.C. § 1332(d)(2) (2000 & Supp. V 2005) (original jurisdiction requirements).

“shall not apply” to three categories of cases: (1) class actions with less than 100 members; (2) class actions in which the primary defendants are states; and (3) securities actions.²¹⁶ For the purposes of this Article, these cases are called “exemptions.” Third, Congress included two mandatory²¹⁷ and one discretionary²¹⁸ exceptions to CAFA jurisdiction. The main difference between these three categories of carve-outs is the burden of proof. Defendants have the burden to prove the jurisdictional requirements,²¹⁹ while plaintiffs have the burden to establish that an exception applies.²²⁰ Courts are still split on which party bears the burden of proof for exemptions.²²¹ Because this burden shifting is “key to determining whether state class-actions will survive at all,”²²² plaintiffs have an advantage when they plead out of CAFA’s jurisdictional requirements because the burden of proof is on the defendant.

216. § 1332(d)(5), (9).

217. § 1332(d)(4) (home-state and local controversy exceptions).

218. § 1332(d)(3) (interest of justice exception).

219. Initially, some courts held that plaintiffs had the burden to prove the basic jurisdictional requirements. *See, e.g., Berry v. Am. Express Publ’g, Corp.*, 381 F. Supp. 2d 1118, 1122–23 (C.D. Cal. 2005). Now, it is virtually settled that the initial burden falls on the party seeking federal jurisdiction, in accordance with the long-standing presumption against federal jurisdiction. *See, e.g., Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 57–58 (2d Cir. 2006); *Morgan v. Gay*, 471 F.3d 469, 472–73 (3d Cir. 2006); *Abrego Abrego v. Dow Chem. Co.* 443 F.3d 676, 683–86 (9th Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1327–28 (11th Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447–48 (7th Cir. 2005). *See generally* Shapiro, *supra* note 33, at 88–98 (arguing that Congress is responsible for correcting any drafting error that does not reflect its intent and that Congress has no discretion to create a presumption of minimal diversity, although it could theoretically create a presumption that the amount in controversy is satisfied); *Hoffman, supra* note 214, at 6–8.

220. All circuit courts and the majority of district courts that have considered this question place the burden of proof to establish an exception on the plaintiff. *See, e.g., Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1021–24 (9th Cir. 2007) (concluding that the party seeking remand bears the burden to prove an exception to CAFA’s jurisdiction); *Preston v. Tenet Healthsystems Mem’l Med. Ctr., Inc.*, 485 F.3d 804, 813 (5th Cir. 2007) (“[O]nce federal jurisdiction has been established under [CAFA], the objecting party bears the burden of proof as to the applicability of any express statutory exception” (quoting *Serrano*, 478 F.3d at 1024)); *Frazier v. Pioneer Ams. LLC*, 455 F.3d 542, 545 (5th Cir. 2006) (noting that the Eleventh Circuit places the burden to demonstrate a CAFA exception on plaintiffs); *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 679–82 (7th Cir. 2006) (agreeing with the Fifth and Eleventh Circuits that the burden shifts to plaintiffs to prove that the local controversy exception should apply). *But see Hoffman, supra* note 214, at 8–45 (arguing that courts have gotten it wrong and that the burden should not shift to the plaintiff to prove the application of an exception).

221. *See infra* Part IV.B.2.

222. Shapiro, *supra* note 33, at 86.

1. Pleading out of CAFA

To plead out of CAFA, a plaintiff's attorney can strategically tailor the class and choose the defendants to avoid minimal diversity, or she can circumscribe the requested relief below the jurisdictional threshold.²²³ Although both strategies are discussed below, it is practically impossible to avoid minimal diversity. Therefore, the majority of strategic maneuvering will occur in pleading the amount in controversy.

a. Avoid minimal diversity

In the vast majority of cases, defendants will have no problem meeting their burden of proving that one defendant is diverse²²⁴ from one class member.²²⁵ Diversity is determined according to citizenship, which is different than residency.²²⁶ Unlike residency, which can be temporary, citizenship is the state where people have their permanent domicile—the place where they intend to return or their previous permanent home.²²⁷ For example, college students and young adults may reside in a particular state but may be citizens where their parents' home is located.²²⁸ Courts consistently hold that residency cannot be equated with citizenship and often presume that a class of residents contains at least one non-citizen.²²⁹

Therefore, the only way to defeat minimal diversity is to define the plaintiff class according to citizenship and sue only those

223. Additional strategies are available for mass actions. See *infra* Part IV.B.1.c.

224. 28 U.S.C. § 1332(d)(2) states that minimal diversity is satisfied when:

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

225. Shapiro, *supra* note 33, at 106. But see *Roche v. Country Mut. Ins. Co.*, No. 07-367-GPM, 2007 WL 2003092, at *2 n.4 (S.D. Ill. July 06, 2007) (holding that class defined as “licensed healthcare providers in Illinois” sufficiently restricts the proposed class to Illinois citizens when defendant fails to produce any evidence that the class includes non-Illinois citizens).

226. Shapiro, *supra* note 33, at 106.

227. *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974).

228. *Holmes v. Sopuch*, 639 F.2d 431 (8th Cir. 1981).

229. See, e.g., *McMorris v. TJX Cos.*, 493 F. Supp. 2d 158, 162–63 (D. Mass. 2007) (noting that the class of Massachusetts residents probably had at least one non-citizen).

defendants who are citizens of that same state.²³⁰ No court has ever had the opportunity to consider a class limited to citizens of a particular state.²³¹ The problem with classes defined by citizenship is that, unlike residency or other local identifiers, “the characteristic of state citizenship usually has virtually no relationship to any real distinctions as to whether someone should be a member of the class or not.”²³² Although defining a class according to state citizenship may be permissible, a judge is unlikely to look favorably upon such gerrymandering.

Moreover, even if a class can be legitimately defined according to state citizenship, plaintiffs can only sue in-state defendants.²³³ Because some courts hold that minimal diversity is satisfied between co-citizens as long as one party is a citizen of more than one state,²³⁴ any corporation that has citizenship in more than one state will create minimal diversity.²³⁵ Considering that consumer class actions are typically filed against corporate defendants, who are usually citizens of multiple states, this is problematic. The contortions necessary to defeat minimal diversity make it unlikely that many plaintiffs will use this strategy, unless the state court forum is substantially more favorable.

230. Shapiro, *supra* note 33, at 107.

231. The case that came closest to using this strategy is *Schwartz v. Comcast Corp.*, No. CIV.A.05-2340, 2005 WL 1799414, at *3 (E.D. Pa. July 28, 2005), in which the plaintiff filed an amended complaint after removal changing the class definition from “residents” to “citizens” of the Commonwealth of Pennsylvania. The court avoided commenting on the amended complaint because it held that a motion to remand must be based on the record as it stood when the action was removed. *Id.*

232. Shapiro, *supra* note 33, at 108.

233. Generally, plaintiffs are allowed to forfeit claims against out of state defendants to keep their action in state court. See *Roche v. Country Mutual Ins. Co.*, No. 07-367-GPM 2007 WL 2003092, at *1 (S.D. Ill. July 6, 2007) (holding that defendants cannot create minimal diversity by invoking mandatory joinder when the plaintiff purposely avoided naming an out-of-state defendant to preserve the local nature of the action). However, it is not permissible to dismiss defendants for the sole purpose of destroying diversity. See *Braud v. Transp. Serv. Co. of Ill.*, 445 F.3d 801, 808–09 (5th Cir. 2006).

234. See *Fuller v. Home Depot Servs., LLC*, No. CIV.A.1:07-CV-1268-RLV, 2007 WL 2345257, at *3 n.2 (N.D. Ga. Aug. 14, 2007); see also *McMorris*, 493 F. Supp. 2d at 164 (“It is possible, though far from clear, that one can have opposing parties in a two-party case who are cocitizens, and yet have minimal Article III jurisdiction because of the multiple citizenship [sic] of one of the parties.” (citing *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 577 n.6 (2004))).

235. See 28 U.S.C. § 1332(c)(1) (2000).

Another way that plaintiffs could potentially evade the minimal diversity requirement is by using a binding stipulation.²³⁶ Although courts have legitimized this practice with respect to the amount in controversy,²³⁷ it is unclear what defendants could gain by stipulating, for example, that all residents in the plaintiff class are also citizens of the state.²³⁸ In sum, defeating minimal diversity will be incredibly difficult, unless courts permit state citizenship classes. A savvy plaintiffs' attorney will have better luck testing the flexibility of the amount in controversy requirement.

b. Limit amount in controversy to less than \$5 million

In addition to minimal diversity, jurisdiction under CAFA requires that the aggregate amount in controversy exceed \$5 million, exclusive of interests and costs.²³⁹ The amount in controversy includes all types of damages (including compensatory and punitive),²⁴⁰ the value of restitution and injunctive relief, and attorneys fees.²⁴¹

Unlike the minimal diversity requirement, which is nearly impossible to defeat, creatively pleading the amount in controversy can enable plaintiffs to retain their choice of forum. Many courts recognize that plaintiffs are "masters of the complaint" and may choose to restrict claims or requested relief to stay in state court.²⁴² At the same time, courts will not permit bad faith pleadings that manipulate the rules to keep cases in state court when they

236. *See Roche*, 2007 WL 2003092, at *2 n.4.

237. *See Smith v. Pfizer, Inc.*, No. 05-CV-0112-MJR, 2005 WL 3618319, at *4-5 (S.D. Ill. Mar. 24, 2005) (discussing how binding stipulations should prevent plaintiff from collecting more than the alleged amount in controversy).

238. Stipulating the amount in controversy limits the amount of damages that the defendant will have to pay. However, a stipulation regarding citizenship does not convey any similar economic benefit that would induce the defendant to enter into the agreement.

239. 28 U.S.C. § 1332(d)(2) (2000 & Supp. V 2005) (establishing jurisdictional amount); § 1332(d)(5) (permitting aggregation).

240. Sometimes, certain legal claims will preclude punitive damages. *See, e.g., Smith v. Nationwide Prop. and Cas. Ins. Co.*, 505 F.3d 401, 407-08 (6th Cir. 2007) (punitive damages not available in breach of contract actions).

241. *See, e.g., Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 1000 (9th Cir. 2007) (noting that attorney fees are properly included in the amount in controversy in a class action); *see also Shapiro*, *supra* note 33, at 112-13.

242. *See, e.g., Lowdermilk*, 479 F.3d at 998-99.

legitimately belong in federal court.²⁴³ When considering the strategies detailed below, it is important to keep the good faith requirement in mind.

i. Standard of proof

As discussed above, most courts hold that the party seeking federal jurisdiction bears the burden of proving the jurisdictional requirements in § 1332(d)(2).²⁴⁴ However, courts are split on whether the standard of proof should be “legal certainty,” “preponderance of the evidence,” or “reasonable probability.”²⁴⁵ Moreover, some courts use different standards depending on whether the amount in controversy is specifically alleged or left unstated.²⁴⁶ Often, the standard is dispositive. For example, defendants face a nearly impossible task of proving that plaintiffs’ relief will exceed the jurisdictional amount as a matter of law but can easily establish the existence of a “reasonable probability.”

Both the Third and the Ninth Circuits require defendants to prove the jurisdictional amount to a *legal certainty* when the plaintiff specifies an amount in controversy less than \$5 million.²⁴⁷ These courts reason that the high burden on defendants is balanced by the good faith pleading requirement and the established principle that plaintiffs are the masters of their own complaint.²⁴⁸ To date, virtually

243. In *Lowdermilk*, the court recognized that the rules permit plaintiffs to evade federal jurisdiction through artful pleading, even when they know that the amount in controversy is greater than \$5 million. *Id.* at 999. The court characterized such manipulation as bad faith conduct that is punishable through judicial estoppel. The court explained that the rules are properly used when the plaintiff cannot anticipate the value of their case. *Id.* at 1002–03.

244. *See supra* note 220 and accompanying text.

245. *See infra* notes 248–69.

246. *See, e.g.,* *Frederico v. Home Depot*, 507 F.3d 188, 196–97 (3d Cir. 2007) (noting that the legal certainty standard is limited to cases where plaintiffs specifically allege that the amount in controversy is less than the jurisdictional amount, but that it does not apply when the complaint is silent).

247. *Lowdermilk*, 479 F.3d at 999; *Morgan v. Gay*, 471 F.3d 469, 475 (3d Cir. 2006), *overruled in part by Frederico*, 507 F.3d at 196 (noting that the legal certainty standard is limited to cases where plaintiffs specifically allege that the amount in controversy is less than the jurisdictional amount; it does not apply when the complaint is silent); *see also* *Thrift Auto Repair, Inc. v. U.S. Bancorp*, No. CIV.A.1:07-CV-1051-TWT, 2007 WL 2788465, at *2 (N.D. Ga. Sept. 21, 2007) (holding that the legal certainty test applies when a plaintiff asserts a specific claim in an *ad damnum* clause for less than the jurisdictional amount); *Cleveland v. Ark-La-Tex Fin. Servs., LLC*, No. CIV.A.07-0444-CG-M, 2007 WL 2460753, at *2 (S.D. Ala. Aug. 24, 2007) (stating in dicta that the legal certainty test applies when plaintiff specifically claims less than the jurisdictional amount in the complaint).

248. *Lowdermilk*, 479 F.3d at 998–99, 1002–03; *Morgan*, 471 F.3d at 474.

no defendant has met the legal certainty standard,²⁴⁹ although some have successfully brought a lower standard of proof into play by arguing that plaintiffs failed to allege the amount in controversy with sufficient specificity.²⁵⁰ For example, in *Frederico* the plaintiff specified her own damages but failed to specify the aggregate amount in controversy or the class size, beyond a general allegation that there are “thousands, if not tens of hundreds of thousands” of class members.²⁵¹ The court held that the complaint did not specifically allege the amount in controversy and that a case should only be remanded “if it appears to a legal certainty that the plaintiff *cannot* recover more than the jurisdictional amount.”²⁵²

Although the burden on defendants seems insurmountable under this standard, it is not. Defendants usually possess the information necessary to determine the amount in controversy. If they fail to produce sufficient evidence, it is most likely because there is no evidence that will satisfy the jurisdictional amount or they are unwilling to disclose the information.²⁵³ For example, in *Lowdermilk*

249. See, e.g., *Lowdermilk*, 479 F.3d at 1002 (defendant failed to prove the jurisdictional amount to a legal certainty in a wage and hour class action because it “speculate[d] as to the size of the class, the amount of unpaid wages owed to the rounding policy, and whether or not members of the class qualify for penalty wages”); *Morgan*, 471 F.3d at 475–76 (defendant failed to prove the jurisdictional amount to a legal certainty in a false advertising case because it did not substantiate its punitive damages allegations, did not specify the amount of profit that would be eligible for disgorgement, and did not support its allegations of compensatory damages with statistical sales information); see also Shapiro, *supra* note 33, at 111 (explaining that the legal certainty standard is rarely met by a removing defendant because there are “few, if any, rules of law [that] require damages of a certain amount to be awarded”). *Contra Faltaous v. Johnson & Johnson*, No. CIV.A.07-1572 (JLL), 2007 WL 3256833, at *7 (D.N.J. Nov. 5, 2007) (defendant met legal certainty standard when plaintiff failed to stipulate that the amount in controversy was less than \$5 million and provided all the information necessary to determine that the amount in controversy exceeded the jurisdictional threshold); *Reibstein v. Cont’l Tire N. Am., Inc.*, No. CIV.A.07-302, 2007 WL 1030486, at *2 (E.D. Pa. Apr. 2, 2007) (finding that defendant satisfied legal certainty test in breach of warranty case where plaintiff failed to offer any evidence tending to rebut defendants’ statistics and calculations).

250. See, e.g., *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 700–01 (9th Cir. 2007) (finding that the complaint did not specifically allege the amount in controversy when it stipulated that damages were less than jurisdictional amount in the jurisdiction section, but that it failed to state the total amount in controversy in the prayer for relief and requests relief in addition to damages); see also *Lowdermilk*, 479 F.3d at 998 (holding that where the court is required to “look beyond the four corners of the complaint to determine whether the CAFA jurisdictional amount is met,” the amount of controversy is not specifically alleged).

251. *Frederico*, 507 F.3d at 197.

252. *Id.* at 195.

253. Some courts justify placing a high burden on the defendant because the “facts necessary for a more precise estimate of the class size are uniquely within its knowledge.” See, e.g., *Wexler v. United Air Lines, Inc.*, 496 F. Supp. 2d 150, 155 (D.D.C. 2007)

v. *U.S. Bank National Ass'n*,²⁵⁴ the defendant-employer tried to prove that the amount-in-controversy was satisfied by producing evidence of the number of employees that left the company during the specified period.²⁵⁵ The Ninth Circuit rejected the sufficiency of this evidence because it did not specify the number of hourly workers.²⁵⁶ Because a large corporate employer is highly likely to classify its workers and keep track of the numbers in each category, it can be inferred that the defendant either could not—or did not want to—produce the information.

At the other end of the spectrum are the Second and Seventh Circuits, which only require defendants to meet a standard of “reasonable probability.”²⁵⁷ Courts using this standard rarely reject defendants’ evidence that the amount in controversy threshold is met.²⁵⁸ For example, in *Brill v. Countrywide Home Loans, Inc.*,²⁵⁹ the defendant met its burden by admitting that one of its employees sent at least 3,800 fax ads in contravention of the Telephone Consumer Protection Act, arguing that damages *could* exceed \$5 million in total

254. 479 F.3d 994 (9th Cir. 2007).

255. *Id.* at 1000.

256. *Id.* at 1001.

257. *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006), *enforced by* *Kocienda v. U-Haul Int’l, Inc.*, No. 3:07-CV-954-WWE, 2007 WL 2572269, at *1 (D. Conn. Sept. 4, 2007)); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005). Although subsequent district court decisions in the Seventh Circuit articulate the test as “preponderance of the evidence,” many apply it like a “reasonable probability” test. *Compare* *Espinosa v. Philip Morris USA, Inc.*, No. 07-C-231, 2007 WL 917383, at *2 (N.D. Ill. March 26, 2007) (“Defendants are not required to establish with overwhelming evidence the precise amount in controversy Defendants need only prove their position by the preponderance of the evidence [standard].”), *with* *Wexler v. United Air Lines, Inc.* 496 F. Supp. 2d 150, 155 (D.D.C. 2007) (“*Miedema* [which used the preponderance of the evidence standard] is instructive as an example of the *substantial burden* the removing party bears in establishing the amount in controversy under CAFA.”) (emphasis added). *But see* *Simenz v. Amerihome Mortgage Co., LLC*, No. 07-C-601, 2007 WL 3129725, at *1 (E.D. Wis. Oct. 23, 2007) (remanding under a “higher burden” preponderance standard, in which “all doubts should be resolved against removal in order to respect the plaintiff’s choice of forum”).

258. *Contra* *Simenz*, 2007 WL 3129725, at *1 (remanding the case when defendant failed to offer evidence that supported its estimate of the class size, its assumption of maximum damages, and its inclusion of punitive damages); *Hall v. Triad Fin. Servs., Inc.*, No. 07-CV-0184-MJR, 2007 WL 2948405, at *4 (S.D. Ill. Oct. 10, 2007) (remanding because defendant calculations contradicted its own figures). Moreover, although courts permit plaintiffs to stipulate an amount in controversy below the jurisdictional threshold, a stipulation is not dispositive. *Morgan v. Gay*, 471 F.3d 469, 474–75 (3d Cir. 2006). Courts will scrutinize the plaintiffs’ actual demands to ensure that the claim is actually for less than the jurisdictional minimum. *Id.* at 475.

259. 427 F.3d 446 (7th Cir. 2005).

if trebled damages were granted.²⁶⁰ Similarly, in *Home Depot, Inc. v. Rickher*,²⁶¹ defendant met its burden by submitting a declaration that enjoining damage waivers *could* bring the total amount in controversy over \$5 million, even though it failed to show that it would be enjoined from selling *all* damage waivers.²⁶² These cases stand in stark contrast to those that employ the legal certainty standard, where the court remands whenever the amount of controversy is speculative.²⁶³

Once the defendant demonstrates a reasonable probability that the jurisdictional amount is met, the burden shifts back to the plaintiff to establish to a legal certainty that the amount in controversy is less than \$5 million.²⁶⁴ Considering the low burden on defendants and the high burden on plaintiffs, it is difficult to imagine a situation where plaintiffs could prevail on a motion to remand. One untested strategy, suggested in dicta,²⁶⁵ is to specifically allege that the amount in controversy is less than \$5 million.

Between the extremes of “legal certainty” and “reasonable probability” is the “preponderance of the evidence” standard.²⁶⁶ The Third, Ninth, and Eleventh Circuits apply this standard when the complaint does not specify the amount in controversy,²⁶⁷ and the

260. *Id.* at 449.

261. No. 06-8006, 2006 WL 1727749 (7th Cir. 2006).

262. *Id.*; see also *Musgrave v. Aluminum Co. of Am., Inc.*, No. 3:06-CV-0029-RLY-WGH, 2006 WL 1994840, at *2 (S.D. Ind. July 14, 2006) (finding that defendant met the burden by alleging that 458 people were injured).

263. See *supra* note 250 and accompanying text.

264. See *Brill*, 427 F.3d at 449.

265. See *id.* (“The complaint did not set a cap on recovery—as it might have done if the plaintiff had represented that the class would neither seek nor accept more than \$5 million in aggregate.”). *But cf.* *Fiore v. First Am. Title Ins. Co.*, No. 05-CV-474-DRH, 2005 WL 3434074, at *2–3 (S.D. Ill. Dec. 13, 2005) (noting that a plaintiff’s stipulation that the amount in controversy is less than \$5 million was not made in good faith when the complaint alleges that the class contains over 8,000,000 members who are each seeking substantial damages).

266. Using a preponderance of the evidence standard to consider naked pleadings can be an awkward exercise. See *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1209 (11th Cir. 2007) (“There is a unique tension in applying a fact-weighting standard to a fact-free context.”). Consequently, many courts have characterized this standard as a “more likely than not” assessment. *Id.* at 1209 n.57 (citing *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996)).

267. See *Frederico v. Home Depot*, 507 F.3d 188, 194 (3d Cir. 2007) (removal upheld); *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 698–99 (9th Cir. 2007) (same); *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1210 (11th Cir. 2007) (same). In addition, district courts in the Fourth, Eighth, Tenth, and D.C. Circuits apply the preponderance standard to evaluate the amount in controversy when the complaint is not specific. See, e.g., *Wexler v. United Air Lines, Inc.*, 496 F. Supp. 2d 150, 155 (D.D.C. 2007) (ordering remand using the preponderance of the evidence

Sixth Circuit applies it when the complaint specifically alleges the amount in controversy.²⁶⁸ Under this standard, some defendants have been able to meet their burden, while others have not. The difference between the two groups turns on the scope of evidence allowed by the court and how carefully the complaint is drafted.

ii. Scope of evidence

The only court to explicitly address the scope of evidence available to defendants to satisfy their burden is the Eleventh Circuit.²⁶⁹ When the propriety of removal is challenged before the Eleventh Circuit,²⁷⁰ a case will be remanded unless the jurisdictional amount is clearly stated on the face of the removing documents or readily deducible from them.²⁷¹ When damages are unspecified, a defendant cannot satisfy its burden by speculating about the potential value of damages.²⁷² Moreover, a defendant may only rely on the papers supplied by the plaintiff²⁷³ and cannot engage in post-removal

standard applied in *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1331 (11th Cir. 2006); *Nowak v. Innovative Aftermarket Sys.*, No. 4:06-CV-01622-ERW, 2007 WL 2454118, at *3 n.2 (E.D. Mo. Aug. 23, 2007) (remanded); *Hooks v. Am. Med. Sec. Life Ins. Co.*, No. 3:06-CV-00071, 2006 WL 2504903, at *1 (W.D.N.C. Aug. 29, 2006) (parties ordered to submit partial discovery plans), *motion to remand denied in*, 2007 WL 880610 (W.D.N.C. Mar. 21, 2007); *Ongstad v. Piper Jaffray & Co.*, 407 F. Supp. 2d 1085, 1090 (D.N.D. 2006) (remanded); *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310, 1318 (E.D. Okla. 2005) (motion to remand denied).

268. *Smith v. Nationwide Prop. And Cas. Ins. Co.*, 505 F.3d 401, 408 (6th Cir. 2007) (upheld on remand). In addition, district courts in the Fourth and Eighth Circuits apply the preponderance of the evidence standard to evaluate specific allegations about the amount in controversy. *See, e.g., Strawn v. AT&T Mobility Inc.*, 513 F. Supp. 2d 599, 604 (E.D. Ark. 2007) (remanded); *Toller v. Sagamore Ins. Co.*, 514 F. Supp. 2d 1111, 1115 (E.D. Ark. 2007) (same).

269. *Lowery*, 483 F.3d at 1211–15 (involving a mass action with over 400 plaintiffs).

270. The Eleventh Circuit differentiates challenging the propriety of removal, which is only available within the thirty-day window following removal, from challenging subject matter jurisdiction, which can be raised at any time. *Id.* at 1213 n.64. When a party challenges the propriety of removal, it can only rely on the removal papers; whereas when a party challenges subject matter jurisdiction, it can present any relevant information. *Id.*

271. *Id.*

272. Defendants in *Lowery* argued that the value of plaintiffs' claims was at least \$12,500 per plaintiff. *Id.* at 1220. Since there were more than 400 plaintiffs, defendants reasoned that the total amount in controversy exceeded \$5 million. *Id.* at 1188. The court rejected this reasoning, holding that defendants' argument amounted to "impermissible speculation-evaluating without the benefit of any evidence [of] the value of individual claims." *Id.* at 1220.

273. *See id.* at 1220–21 (rejecting evidence of the value of purportedly similar tort claims in the same state); *Thrift Auto Repair, Inc. v. U.S. Bancorp*, No. CIV.A.1:07-CV-1051-TWT, 2007 WL 2788465, at *3 (N.D. Ga. Sept. 21, 2007) (holding that when plaintiffs allege the types of fees in the complaint, but fail to allege monetary figures, the defendant cannot provide them through an affidavit).

jurisdictional discovery.²⁷⁴ However, the defendant can introduce evidence when the underlying substantive law provides a rule that allows the court to determine the amount of damages²⁷⁵ or when the court receives evidence post-removal from the plaintiff that supports federal jurisdiction.²⁷⁶ Needless to say, this test is very difficult—if not impossible—to meet.²⁷⁷ Other jurisdictions do not limit removal nearly as much in practice, although it remains to be seen whether other courts will follow the Eleventh Circuit's lead.²⁷⁸

iii. Pleading strategies

In state courts located within the Eleventh Circuit, filing a complaint with unspecified damages will generally be sufficient to protect the case from removal.²⁷⁹ Likewise, filing a complaint in the Third and Ninth Circuits that specifically limits the amount in controversy will probably keep a case in state court.²⁸⁰ Nevertheless, pleading carefully is important, regardless of the jurisdiction. For example, even in the Third Circuit, an express limitation of damages will be trumped if the plaintiff's actual monetary demands exceed the jurisdictional amount.²⁸¹

274. *Lowery*, 483 F.3d at 1218 (“Post-removal discovery disrupts the careful assignment of burdens and the delicate balance struck by the underlying rules. A district court should not insert itself into the fray by granting leave for the defendant to conduct discovery or by engaging in its own discovery. Doing so impermissibly lightens the defendant’s burden of establishing jurisdiction.”).

275. *Id.* at 1214 n.66 (holding that evidence of damages that arise out of a contract provision is admissible because the default measure of damages is expectation damages). *But see Thrift Auto Repair*, 2007 WL 2788465, at *3 (holding that a defendant cannot introduce evidence of damages arising out of a contract when the contract does not lend itself to a fair approximation of the measure of expectation damages).

276. *Lowery*, 483 F.3d at 1214, n.66 (providing example of a defendant that effectively amended its insufficient notice of removal by alleging that plaintiff had offered settlement for an amount greater than the jurisdictional minimum after removal).

277. In *Lowery*, the court recognized that a defendant who satisfied its burden on the pleadings could actually satisfy a much higher standard, such as legal certainty. *Id.* at 1211.

278. *See, e.g., Toller*, 514 F. Supp. 2d at 1120 (ordering parties “to submit summary-judgment-type evidence relevant to the amount in controversy at the time of removal” (quoting *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1336 (5th Cir. 1995))).

279. After *Lowery*, a defendant cannot speculate about unspecified damages or produce its own evidence, so a complaint with unspecified damages will generally preclude removal. *See supra* Part IV.B.1.b.ii.

280. *See supra* Part IV.B.1.b.i.

281. *Morgan v. Gay*, 471 F.3d 469, 474–75 (3d Cir. 2006).

A few general pointers can be gleaned from the case law. First, including an *ad damnum*²⁸² in the demand for relief is important. It is not sufficient to merely allege that the amount in controversy is less than \$5 million in the jurisdictional section of the complaint.²⁸³ Although the defendant can overcome this allegation with evidence, an *ad damnum* clause will heighten the standard of proof in some circuits and alert the judge in any circuit that the plaintiff's choice of forum is state court. Many courts recognize that the plaintiff is the master of the complaint and can limit claims and types of relief to maintain her forum choice.²⁸⁴ However, a major drawback to including a specific damages limitation is the inability to collect more than the jurisdictional amount.²⁸⁵ In particular, such a limitation may pose fairness problems when the class size is unknown.²⁸⁶ Therefore, a specific damages limitation should only be used when the estimated amount in controversy is fairly close to the jurisdictional amount; otherwise, the sacrifice of using the limitation will likely outweigh its benefits.

One way to legitimately reduce the amount in controversy is by defining the class narrowly. For example, the amount in controversy implicated by a statewide class is significantly less than the amount at stake in a nationwide or worldwide class because fewer people are involved. Although defining a class by state residency will not defeat minimal diversity, it will circumscribe the class so that the amount in controversy is smaller.²⁸⁷ Another way to circumscribe the class is to include a specific condition to class membership. For

282. An *ad damnum* clause is a clause in a prayer for relief stating the amount of damages claimed. BLACK'S LAW DICTIONARY 14 (2nd Pocket Ed. 2001).

283. See *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 702 (9th Cir. 2007).

284. See, e.g., *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 999 (9th Cir. 2007) (“[A] plaintiff may sue for less than the amount she may be entitled to if she wishes to avoid federal jurisdiction and remain in state court.”).

285. *Morgan v. Gay*, 471 F.3d 469, 476–78 (3d Cir. 2006) (“[P]laintiffs in state court should not be permitted to ostensibly limit their damages to avoid federal court only to receive an award in excess of the federal amount in controversy requirement.”).

286. See *Shapiro*, *supra* note 33, at 120–21 (discussing the problems of limiting recovery in the class context).

287. Compare *Morgan*, 471 F.3d at 475–76 (motion to remand granted in statewide class where defendant failed to produce state-specific evidence to support the jurisdictional amount), with *Kocienda v. U-Haul Int'l, Inc.*, No. 3:07CV954 (WWE), 2007 WL 2572269, at *1 (D. Conn. Sept. 4, 2007) (denying a motion to remand where plaintiffs requested relief on behalf of a worldwide class).

example, in *Pittman v. Chase Home Finance, LLC*,²⁸⁸ the class was defined as “persons [for whom Chase] . . . both was the mortgagee and failed to record the mortgage satisfaction with the appropriate county recorder’s office in a timely fashion.”²⁸⁹ Defendants produced evidence of the number of Chase’s residential mortgages but failed to prove which of these fell into the specific class definition.²⁹⁰ Therefore, the court granted the plaintiffs’ motion to remand.²⁹¹

Although the class should be defined with specificity, its size and the amount of damages should not, unless a limitation clause is used. Less specific allegations in these areas make it more difficult for defendants to prove, without speculating, that the amount in controversy is met. For example, in *Ongstad v. Piper Jaffray & Co.*,²⁹² an investor brought a class action suit in state court against a securities firm for engaging in unauthorized trading of securities.²⁹³ Because the complaint provided “scant information regarding potential damages,” the court rejected the defendant’s evidence as speculative.²⁹⁴

In contrast, the complaint in *Frederico v. Home Depot*²⁹⁵ contained enough specific facts for defendants to calculate that the amount in controversy exceeded the jurisdictional amount.²⁹⁶ The plaintiff alleged that the class contained “thousands, if not . . . tens of hundreds of thousands” of members and that she was seeking \$287.14 in compensatory damages, plus punitive damages and attorney fees.²⁹⁷ Using these allegations, the court concluded that a class of 2233 individuals—which was well under the “tens of

288. No. 1:05CV2470, 2007 WL 2156395 (N.D. Ohio July 25, 2007).

289. *Id.* at *4.

290. *Id.* This case can be contrasted with *Muniz v. Pilot Travel Centers*, which involved a class of California workers employed by defendant who did not receive overtime compensation or their required meal and rest periods. *Muniz v. Pilot Travel Ctrs.*, No. S-07-0325 FCD EFB, 2007 WL 1302504, at *1 (E.D. Cal. May 1, 2007). Because the plaintiff failed to include any fact-specific allegations that would result in a putative class less than the 100% violation rate used by the defendant in his calculations, the court denied the motion to remand. *Id.* at *4.

291. *Id.* at *5.

292. 407 F. Supp. 2d 1085 (D.N.D. 2006).

293. *Id.* at 1087.

294. *Id.* at 1091.

295. 507 F.3d 188, 199 (3d Cir. 2007).

296. *Frederico v. Home Depot*, 507 F.3d 188, 199 (3d Cir. 2007).

297. *Id.* at 197.

hundreds of thousands” alleged in the complaint—would satisfy the jurisdictional amount.²⁹⁸ In fact, this case provides another important lesson: avoid exaggeration. If the plaintiffs in this case had merely alleged that the class had thousands of members, the defendant could only assume 2000 members and probably would not have met its burden.²⁹⁹

Another pleading issue to consider is punitive damages and injunctive relief. Sometimes, the inclusion of these remedies gives the defendant a window to argue that the amount in controversy exceeds \$5 million. For example, in *Frederico*, the court used the maximum possible punitive damages in its calculations to determine that the jurisdictional amount was satisfied.³⁰⁰ However, many courts are unwilling to include punitive damages in jurisdictional amount calculations, unless the defendant can show that plaintiff’s claims lend themselves to punitive damage awards. In *Lamond v. Pepsico, Inc.*,³⁰¹ the court remanded a case when defendants failed to prove any non-economic injury to support plaintiff’s request for punitive damages.³⁰²

Similarly, requesting injunctive relief can be a wild card. In *Home Depot, Inc. v. Rickher*, the court evaluated the value of injunctive relief from the defendant’s perspective and held that the amount in controversy was met, finding the requested injunctive

298. *Id.* at 199.

299. See *Cleveland v. Ark-La-Tex Fin. Servs., LLC*, No. CIV.A.07-0444-CG-M, 2007 WL 2460753, at *3 (S.D. Ala. Aug. 24, 2007). Where complaint alleged “thousands of persons” and the requisite class size to meet the jurisdictional amount is 3334, it is “pure speculation” that the amount in controversy exceeds \$5 million because it is conceivable that the class consisted of only 2000 persons. *Id.*

300. *Frederico*, 507 F.3d at 199 (“*Frederico* can collect punitive damages of up to five times the compensatory damages.”) (emphasis added); see also *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 408 (6th Cir. 2007) (“[T]his jurisdictional analysis must also take into account the ability of Plaintiff and the putative class to recover punitive damages, ‘unless it is apparent to a legal certainty that such cannot be recovered.’”).

301. No. 06-3043 (RMB), 2007 WL 1695401 (D.N.J. June 8, 2007).

302. *Id.* at *9; see, e.g., *Simenz v. Amerihome Mortgage Co.*, No. 07-C-601, 2007 WL 3129725, at *1 (E.D. Wis. Oct. 23, 2007) (rejecting defendants argument that a \$3 million punitive damage award would not be patently unconstitutional and therefore should be included in the amount in controversy); *Nowak v. Innovative Aftermarket Sys., L.P.*, No. 4:06 CV 01622 ERW, 2007 WL 2454118, at *5 (E.D. Mo. Aug. 23, 2007) (noting that court must determine to a legal certainty that plaintiffs have a valid claim for punitive damages to ensure that Congress’ limits on diversity jurisdiction are properly observed); *Brown v. Jackson Hewitt, Inc.*, No. 1:06-CV-2632, 2007 WL 642011, at *5 (N.D. Ohio Feb. 27, 2007) (refusing to include punitive damages in jurisdictional amount calculation when no court had ever awarded punitive damages on the claim that plaintiff was asserting).

relief carried a substantial cost.³⁰³ However, many courts will value injunctive relief from the plaintiff's point of view.³⁰⁴ Because the standards diverge significantly between different jurisdictions, it is important to research carefully before including punitive damages or injunctive relief in a complaint.

In sum, a case is likely to remain in state court if it is filed in a state within the Eleventh Circuit and the complaint does not specify damages. Under the *Lowery* standard, a defendant will face a nearly insurmountable burden of proving the amount in controversy if it is not specified. A case is also likely to remain in state court if the plaintiff limits damages in an *ad damnum* clause and files in the Third or Ninth Circuits.

However, when the actual amount in controversy significantly exceeds the jurisdictional amount, a plaintiff may choose to split the class into smaller sub-classes or add specific conditions to circumscribe the class rather than limit the damages. Absent an *ad damnum* clause, the more general a complaint, the more likely a case will remain in state court because the defendant bears the heavy burden of producing actual evidence of the amount in controversy. However, a case filed in a state located within the Second or Seventh Circuits is likely to be removed and to stay in federal court because of the substantially lower burden of proof that these jurisdictions impose. Moreover, any case that truly involves more than the \$5

303. *Home Depot, Inc. v. Rickher*, No. 06-8006, 2006 WL 1727749, at *2 (7th Cir. May 22, 2006).

304. See, e.g., *DiTolla v. Doral Dental IPA of N.Y., LLC*, 469 F.3d 271 (2d Cir. 2006); *Toller v. Sagamore Ins. Co.*, 514 F. Supp. 2d 1111, 1119 (E.D. Ark. 2007) ("When an action seeks declaratory or injunctive relief, the amount in controversy is measured by the value of the object of the litigation."). But see, e.g., *Wexler v. United Air Lines, Inc.*, 496 F. Supp. 2d 150, 153 (D.D.C. 2007) ("The value of injunctive relief for determining the amount in controversy can be calculated as the cost to the defendant."). Other courts use the "either viewpoint rule." See, e.g., *Hall v. Triad Fin. Servs., Inc.*, No. 07-CV-0184-MJR, 2007 WL 2948405, at *3 (S.D. Ill. Oct. 10, 2007) ("The either viewpoint rule assesses the jurisdictional amount attributable to injunctive relief by looking at either the benefit to the plaintiff or the cost to the defendant of the requested relief."). The valuation of injunctive relief can be very important in close cases. For example, in *Rickher*, the plaintiff alleged that enjoining Home Depot's sale of damage waivers would have little value because they were unconscionable. 2006 WL 1727749, at *2. The defendant argued that it could incur damages of up to \$1.2 million per year if plaintiff successfully enjoined prohibited sale of future waivers. *Id.* If the court had calculated the value according to the benefit to the plaintiff, it may not have found that the amount in controversy was met. However, the court used the defendant's viewpoint and did find that the amount in controversy exceeded \$5 million. *Id.*

million amount in controversy should be litigated in federal court, unless one of the exceptions, discussed in Part IV.B.3, applies.

c. A note about mass actions under CAFA

The Eleventh Circuit described CAFA's mass action provisions as "an opaque, baroque maze of interlocking cross-references that defy easy interpretation" ³⁰⁵ Although the obtuseness of these provisions makes pleading out of CAFA a confusing matter, the Eleventh Circuit—the only court to comprehensively interpret the mass action provisions—identified at least four jurisdictional elements that can be gleaned from the text: (1) the aggregate amount in controversy must exceed \$5 million; (2) minimal diversity must exist between the parties; (3) the action must involve the monetary claims of 100 or more plaintiffs; and (4) the plaintiffs' claims must involve common questions of law or fact. ³⁰⁶

Even if all of these elements are satisfied, a federal court only has jurisdiction over those plaintiffs whose claims satisfy the \$75,000 amount in controversy requirement in § 1332(a). ³⁰⁷ This provision raises the possibility of a fifth jurisdictional element: that at least one plaintiff has individual claims that exceed \$75,000. ³⁰⁸ Although it did not reach this issue, the 11th Circuit interpreted § 1332(d)(11)(B)(i) as an exception and suggested that the plaintiff has the burden of proving which, if any, of its claims fell below the \$75,000 amount in controversy. ³⁰⁹ This interpretation is consistent

305. *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1198 (11th Cir. 2007).

306. *Id.* at 1202–03.

307. 28 U.S.C. § 1332(d)(11)(B)(i) (2000 & Supp. V 2005). Parties battling over jurisdiction have argued opposing interpretations of this provision. Plaintiffs argue that the provision requires every plaintiff to satisfy the individual jurisdictional amount, while defendants argue that it operates as an exception. *Lowery*, 483 F.3d at 1203–04. According to the defendants' view, the district court could retain jurisdiction over an action even if the total number of plaintiffs in the action fell below 100 or the aggregate amount of controversy became less than \$5 million after the individual claims were remanded. *Id.* The Eleventh Circuit adopted the defendants' view by relying on rules of statutory construction and legislative history. *Id.* at 1204–07. However, adopting the defendants' position has potentially unconstitutional applications when remanding the individual claims results in no diversity.

308. Even if the statute does not require every plaintiff to meet the individual jurisdictional amount, see § 1332(d)(11)(B)(i), the logical inference is that at least one plaintiff must have an amount in controversy over \$75,000. Otherwise, the court would have to remand every single claim.

309. *Lowery*, 483 F.3d at 1208 n.55.

with the generally held view that plaintiffs have the burden to prove express statutory exceptions to CAFA.³¹⁰

In contrast, the Ninth Circuit treated the \$75,000 requirement as a jurisdictional element and placed the burden on the defendant, while explicitly declining to interpret the mass action provisions.³¹¹ Ultimately, plaintiffs' ability to maintain mass actions in state court will turn on whom courts decide to place the burden of proof to establish the \$75,000 requirement.

In sum, the aforementioned pleading strategies that apply to class actions are equally applicable to mass actions. Although the \$75,000 provision is unique to CAFA, pleading out of it will involve the same techniques that can be used to plead out of the \$5 million aggregate amount in controversy.³¹² Additionally, mass action plaintiffs have the option of joining fewer than 100 individuals to avoid CAFA altogether.³¹³

2. Pleading into an exemption

CAFA identifies three categories of cases that are exempt from its grant of original jurisdiction: (1) limited actions;³¹⁴ (2) state actions;³¹⁵ and (3) securities actions.³¹⁶ In addition, there are four exemptions that only apply to mass actions: (1) actions arising from an in-state event that resulted in localized injuries; (2) claims joined

310. *See id.*; § 1332(d)(4).

311. *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 690 (9th Cir. 2006) (remanding the case because defendant failed to establish that any plaintiff's claims involved over \$75,000).

312. *See supra* Part IV.B.1.b; *see also Abrego*, 443 F.3d at 689–90 (rejecting defendants' conclusory allegations that the \$75,000 jurisdictional minimum was satisfied because of the nature of plaintiff's injuries).

313. The numerosity requirement in § 1332(d)(11)(A) through § 1332 (d)(11)(B)(i) is similar to the limited action exemption in § 1332(d)(5)(B), discussed *infra* Part IV.B.2.a. However, in a mass action situation, there is no ambiguity about meeting this requirement—either 100 plaintiffs are named or not. In the class action context, class size is usually speculative. Moreover, the numerosity requirement is part of the definition of a mass action, which means that it is a jurisdictional element that the defendant has the burden of proving. The nature of the numerosity requirement is less clear in the class action context and courts are split on who bears the burden of proof. *See infra* Part IV.B.2.a.

314. 28 U.S.C. § 1332(d)(5)(B) (classes with less than 100 members).

315. § 1332(d)(5)(A) (actions in which the primary defendants are states, state officials, or other governmental entities).

316. § 1332(d)(9) (including class actions solely involving a security that are directed at internal corporate affairs or relate to the rights, duties, and obligations associated with a security); 28 U.S.C. § 1453(d) (2000) (excepting securities actions from the general class action removal rules).

upon motion of a defendant; (3) actions in which all of the claims are asserted on behalf of the general public; and (4) claims that are consolidated or coordinated solely for pretrial proceedings.³¹⁷ Only a handful of courts have analyzed these provisions, and even those have not reached a consensus about who bears the burden of proving them. Some courts, particularly in the limited action context, hold that exemptions are jurisdictional requirements that must be proven by the party seeking federal jurisdiction.³¹⁸ Others hold that they are exceptions and that the party seeking remand has the burden of proof.³¹⁹ Until the burden of proof is definitively assigned, a plaintiff's attorney should assume that she will have the burden of proof and prepare accordingly.

a. Limited actions

The limited action provision under § 1332(d)(5)(B) exempts small class actions with less than 100 class members from CAFA jurisdiction.³²⁰ Most courts interpret this provision as a jurisdictional element of numerosity, which the defendant has the burden of proving.³²¹ For example, one court remanded a class action when the defendant failed to come forward with evidence that the class had 100 or more members, merely alleging that the “expansive and open-ended scope of the purported class allegations” supported federal court jurisdiction under CAFA.³²² The court was particularly irritated that the defendant failed to support its claim with specific facts when

317. 28 U.S.C. § 1332(d)(11)(B)(ii). I have chosen not to analyze these provisions in this Article because no cases have interpreted them. For a good overview of the congressional intent and possible application of these provisions, see S. Amy Spencer, Developments, *Once More into the Breach, Dear Friends: The Case for Congressional Revision of the Mass Action Provisions in the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 1067, 1093–97 (2006).

318. See, e.g., *Ongstad v. Piper Jaffray & Co.*, 407 F. Supp. 2d 1085 (D.N.D. 2006) (stating that § 1332(d)(5)(B) is a jurisdictional element).

319. See, e.g., *Frazier v. Pioneer Ams. LLC*, 455 F.3d 542 (5th Cir. 2006) (holding that plaintiff bears the burden of showing that the state action exception applies).

320. 28 U.S.C. § 1332(d)(5)(B) (2000).

321. See, e.g., *Ongstad*, 407 F. Supp. 2d at 1090.

322. *Pierce v. TTP, Inc.*, No. 06-0712-CV-W-DW, 2006 WL 3827517, at *1–2 (W.D. Mo. Dec. 28, 2006) (noting a class of “all Missouri consumers [of florist products] who have been damaged by Defendant’s deception, misrepresentations, concealment, or fraud arising from its fictitious telephone directory or internet listings”) (alteration in original).

they were within his knowledge.³²³ However, the court in *Kitson v. Bank of Edwardsville*³²⁴ upheld removal when the defendant produced a spreadsheet of commercial loan borrowers, which indicated that 9000 commercial loans were made during the relevant time.³²⁵ Even taking into account the fact that some borrowers in the class held multiple loans from the defendant, the court was satisfied that the class contained far more than 100 members.³²⁶

On the other hand, at least one court interpreted this provision as an exception to jurisdiction that the plaintiff has the burden of proving.³²⁷ In *Garcia v. Boyar & Miller, P.C.*,³²⁸ the plaintiffs argued that their class encompassed fewer than 100 members by presenting defendant's media statements that fewer than 100 employees had been fired or quit due to matters complained about in the litigation.³²⁹ The court held that plaintiffs failed to meet their burden, reasoning that the defendants' statements actually applied to a smaller "universe" of people than the class encompassed and that plaintiffs' own pleadings and evidence supported a conclusion that the class size exceeded 100 members.³³⁰

Several lessons can be taken from these cases. First, if a class cannot be defined narrowly, this provision should not be used to escape federal jurisdiction because it is too easy for a defendant to produce some evidence that the class is larger than alleged.³³¹ Second, alleging facts in pleadings or briefs that contradict allegations of a small class will almost always result in the denial of

323. *Id.* ("In opposition to remand, TTP does not state the number of listings with Missouri addresses or telephone numbers from which it has derived business. Nor does it reveal, or even approximate, how many sales it has made through telephone numbers with Missouri prefixes.").

324. No. 06-528-GPM, 2006 WL 3392752 (S.D. Ill. Nov. 22, 2006).

325. *Id.* at *2.

326. *Id.*

327. *Garcia v. Boyar & Miller, P.C.*, Nos. 3:06-CV-1936-D, 3:06-CV-1937-D, 3:06-CV-1938-D, 3:06-CV-1939-D, 3:06-CV-2177-D, 3:06-CV-2206-D; 3:06-CV-2236-D, 3:06-CV-2241-D, 2007 WL 1556961, at *4 (N.D. Tex. May 30, 2007).

328. *Id.*

329. *Id.* at *5 (proposing a class of employees whom defendants promised to help obtain citizenship through the LIFE Act in exchange for a weekly payroll deduction).

330. *Id.*

331. *See, e.g., Robinson v. Cheetah Transp.*, No. 06-0005, 2006 WL 468820, at *2 (W.D. La. Feb. 27, 2006). The class of individuals and persons that resided in Caldwell parish on October 7, 2004, and were affected by the closure of the Columbia bridge did not contest numerosity because it knew that the class exceeded 100 members; instead, it attacked jurisdiction by arguing that a local action exception applied. *Id.*

a motion to remand.³³² So far, no cases have tested whether it is permissible to break down a larger class action into several smaller classes. For example, could the class of commercial borrowers in *Kitson* have been split into multiple state or county-specific classes, each with fewer than 100 plaintiffs? At least one scholar suggests that such arbitrary divisions would be problematic.³³³ To avoid accusations of manipulation, plaintiffs' attorneys are best off using this provision to define classes narrowly when there are real justifications that warrant drawing those lines.³³⁴ If there are no real justifications for drawing such lines, then other strategies should be considered.

b. State action

The state action exemption under § 1332(d)(5)(A) excludes class actions in which the “primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.”³³⁵ The only court to interpret this provision is the Fifth Circuit in *Frazier v. Pioneer Americas LLC*.³³⁶ In *Frazier*, a class of citizens that lived near a contaminated facility sued the company-owner and the Louisiana Department of Environmental Quality for negligence, seeking damages for personal injury.³³⁷ The company removed, and plaintiffs moved to remand, arguing that the state action exemption precluded jurisdiction.³³⁸ The Fifth Circuit denied plaintiffs' motion, holding that plaintiffs had not

332. See, e.g., *Garcia*, 2007 WL 1556961, at *5 (pleadings and initial disclosures establish that class has more than 100 members); *Kendrick v. Standard Fire Ins. Co.*, No. 06-141-DLB, 2007 WL 1035018, at *2 (E.D. Ky. Mar. 31, 2007) (holding that plaintiff's allegation that there was “likely tens of thousands of members of the Plaintiffs' Class” was sufficient to uphold removal, even if Defendant could not come forth with any actual evidence of plaintiff class size (citing *Ahearn v. Charter Twp. of Broomfield*, 1996 FED App. 0358P at 6–7 (6th Cir.)).

333. See Shapiro, *supra* note 33, at 107–09 (arguing that drawing citizenship lines to avoid minimal diversity may be arbitrary); see also Nancy Morawetz, *Underinclusive Class Actions*, 71 N.Y.U. L. REV. 402 (1996).

334. For example, it may be legitimate to draw state lines in the commercial loan case because different states have different consumer protection statutes. However, it probably would not be legitimate to draw county lines because there is no meaningful difference in the law or facts from one county to another within the same state.

335. 28 U.S.C. § 1332(d)(5)(A) (2000).

336. *Frazier v. Pioneer Ams. LLC*, 455 F.3d 542 (5th Cir. 2006).

337. *Id.* at 544.

338. *Id.*

met their burden of proving that all the primary plaintiffs were state actors.³³⁹

After *Frazier*, merely adding a state entity as a defendant will not be enough to avoid federal jurisdiction. To effectively use this provision, plaintiffs must forfeit suits against all private entities that qualify as “primary defendants.”³⁴⁰ However, most states retain sovereign immunity, protecting governmental agencies and officials from suits for retrospective relief.³⁴¹ As a result, retaining a state court forum may come at the cost of obtaining damages. Therefore, this provision has limited utility, unless the state of filing has waived its sovereign immunity or only equitable relief is sought.

c. Securities actions

Under § 1332(d)(9),³⁴² CAFA’s grant of federal jurisdiction shall not apply to any class action based solely on: (1) claims concerning nationally traded or listed securities;³⁴³ (2) state law corporate governance claims;³⁴⁴ and (3) claims for breach of fiduciary duty or other obligations related to any security. According to one judge, this exemption is significant because it:

339. *Id.* at 546.

340. *See infra* Part IV.B.3.b.

341. 72 AM. JUR. 2D *States, Territories, and Dependencies* § 97 (2007).

342. Section 1332(d)(9) states:

Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

28 U.S.C. § 1332(d)(9) (2000).

343. The purpose of this exemption is to prevent CAFA from disturbing the impact of the Securities Litigation Uniform Standards Act (“SLUSA”) on state and federal law affecting nationally traded securities. *Estate of Pew v. Cardarelli*, No. 5:05-CV-1317, 2006 WL 3524488, at *6 n.9 (N.D.N.Y. Dec. 6, 2006), *rev’d*, 527 F.3d 25, 32 (2nd Cir. 2008) (reversal does not affect this assertion by lower court).

344. The purpose of this exemption is to “preserv[e] the long-established rule that the law of the state of incorporation normally determines issues relating to the internal affairs of a corporation.” *Id.* at *6 n.10.

is the only category of claims that CAFA exempts based on the specific subject-matter of the litigation . . . [and] evince[s] an overall legislative intention to maintain federal protection of ‘the integrity and efficient operation’ of the market for nationally traded securities while preserving the significant role played by states in the regulation of business entities and securities that are not nationally traded.³⁴⁵

Most courts conclude that this provision is an exception and that the plaintiff bears the burden of proof. For example, in *Kurz v. Fidelity Management & Research Company*,³⁴⁶ the court sua sponte ordered the *plaintiff* to show cause why the action should not be dismissed for lack of subject matter jurisdiction under § 1332(d)(9)(C).³⁴⁷

The few courts to interpret the securities exemption have determined that it only applies to claims that arise out of securities as defined by the Securities Act of 1933, which does not include credit card agreements, billing statements, or finance charges.³⁴⁸ These courts have also held that the exemption only applies to actions that *solely* involve claims relating to the rights, duties, and obligations connected to securities.³⁴⁹ Moreover, in the Second Circuit, claims are limited to “suits that seek to enforce the terms of instruments that create and define securities, and to duties imposed on persons who administer securities.”³⁵⁰ Therefore, taking advantage of the securities exemption may require forfeiture of certain claims. In sum, the securities exemption provides some opportunities to remain in state court if securities fraud and related claims are the only issues in the case.

345. *Id.* at *6 (citations omitted).

346. No. 07-CV-592-JPG, 2007 WL 2746612 (S.D. Ill. Sept. 19, 2007).

347. *Id.* at *4.

348. *Davis v. Chase Bank U.S.A., N.A.*, 453 F. Supp. 2d 1205, 1209 (C.D. Cal. 2006) (denying motion to remand).

349. *Id.* (holding that claims do not “solely” involve securities claims because the complaint alleges consumer fraud).

350. *Estate of Pew* 527 F.3d at 33. *But see* *Genton v. Vestin Realty Mortgage II, Inc.*, No. 06-CV-2517-BEN (WMC), 2007 WL 951838, at *3 (S.D. Cal. Mar. 09, 2007) (holding that claim for statutory Elderly Abuse arose out of securities, thus, § 1332(d)(9)(C) covers it and remand is appropriate).

3. Pleading into an exception

To keep “truly local” controversies in state court³⁵¹—and to garner enough votes in the Senate to pass CAFA³⁵²—Congress included several exceptions to federal jurisdiction.³⁵³ The “home-state exception” requires at least two-thirds of the class members and all primary defendants to be citizens of the state in which the action was originally filed.³⁵⁴ The “local controversy exception” is slightly more liberal. It requires at least two-thirds of the class members and a “significant defendant” to be citizens of the state in which the action was originally filed.³⁵⁵ A significant defendant is a defendant from whom significant relief is sought and whose alleged conduct forms a significant basis for the claims asserted by the plaintiff class.³⁵⁶ In addition, the exception will only apply if the following prerequisites are satisfied: (1) the principal injuries occurred in the state of filing; and (2) no class action asserting the same or similar claims has been filed against any of the defendants in the preceding three years.³⁵⁷

In addition to the aforementioned mandatory exceptions, Congress included a discretionary exception based on the home-state exception theory. If more than one-third but less than two-thirds of the class and all primary defendants are citizens of the state in which the action was originally filed, the court may, “in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction”³⁵⁸ Congress provided six factors to guide the court’s discretion: (1) whether the claims involve national or interstate interests; (2) whether the claims are governed by laws of the state in which the action was originally filed; (3) whether the class action has been pleaded to avoid federal jurisdiction; (4)

351. Shapiro, *supra* note 33, at 88.

352. *Id.* at 122.

353. Notably, the statutory text never labels these provisions as exceptions. Instead, the text reads: “A district court shall decline to exercise jurisdiction” See 28 U.S.C. § 1332(d)(4). However, since CAFA’s inception, these provisions have been known as exceptions and courts have treated them as such by placing the burden of proof on the plaintiff to prove their applicability. For a good discussion of this anomaly, see Hoffman, *supra* note 214.

354. 28 U.S.C. § 1332(d)(4)(B).

355. *Id.* § 1332(d)(4)(A).

356. *Id.* § 1332(d)(4)(A)(i)(II)(aa)–(bb).

357. *Id.* § 1332(d)(4)(A)(i)(III)–(ii).

358. *Id.* § 1332(d)(3).

whether a distinct nexus exists between the forum and the class members, the alleged harm, or the defendants; (5) whether the number of citizens of the state in which the action was originally filed is substantially larger than the number of citizens from any other states or the citizenship of the other members is dispersed among a substantial number of state; and (6) whether similar class actions have been filed in the preceding three years on behalf of the same or similar persons.³⁵⁹

All these exceptions have two features in common. First, all require the plaintiff to prove the citizenship of a majority of the class.³⁶⁰ This requirement can be an onerous burden because citizenship is equated with domicile, which requires proof of residency and intent to remain.³⁶¹ Whether a plaintiff can use these exceptions at all will depend on the presumptions that the court permits and the amount of discovery that it allows.³⁶² Second, using any of the exceptions requires suing all “primary” defendants or at least one “significant” defendant in its home state.³⁶³ Courts are still wrestling with how to define these ambiguous terms.³⁶⁴

This section reviews how courts have interpreted these provisions and suggests strategies to help plaintiffs’ attorneys keep their cases in state court. In addition to discussing class membership and the primary/significant defendant issue, this section will analyze the principal injury requirement³⁶⁵ and consider how courts have applied the discretionary factor test.³⁶⁶

a. Artfully define and prove local class membership

Before CAFA, only the named plaintiffs’ citizenship mattered in a diversity action.³⁶⁷ After CAFA, the entire class’s citizenship is

359. *Id.* § 1332(d)(3)(A)–(F).

360. See *supra* note 221 and accompanying text (plaintiff has the burden to prove exceptions).

361. *Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc. (Preston I)*, 485 F.3d 793, 797–98 (5th Cir. 2007).

362. See discussion *infra* Part D.2.c.i.

363. 28 U.S.C. § 1332(d)(3)–(4).

364. See discussion *infra* Part IV.B.3.b.

365. See discussion *infra* Part IV.B.3.c.

366. See discussion *infra* Part IV.B.3.d.

367. Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1917 n.195 (2006).

relevant. The statute uses a “thirds” scheme: if more than two-thirds of the class members are citizens of a particular state, the district court *must* decline jurisdiction if other criteria are met;³⁶⁸ if less than two-thirds but more than one-third are citizens, the district court *may* decline jurisdiction;³⁶⁹ and if less than one-third are citizens, the district court *must* exercise jurisdiction.³⁷⁰ Therefore, plaintiffs must prove that at least one-third of the class members are citizens of the state in which the action was filed to have the slightest chance of retaining a state forum.³⁷¹ In the class action context, it is virtually impossible to investigate the citizenship of every class member.³⁷² Therefore, courts usually rely on the class definition and statistical evidence.

Usually, courts grant a presumption of citizenship when plaintiffs define the class according to indicia of citizenship. These indicia include the place where the litigant votes, pays taxes, owns property, has a driver’s license or other identification, maintains bank accounts, belongs to clubs or churches, has places of business or employment, and maintains a home for her family.³⁷³ For example, one court presumed that a class of state-specific homeowners was comprised of at least two-thirds in-state citizens.³⁷⁴ Another court presumed that a class of New York radio station employees included at least one-third, if not two-thirds, New York citizens.³⁷⁵

368. 28 U.S.C. § 1332(d)(4) (mandatory exceptions).

369. *Id.* § 1332(d)(3) (discretionary exceptions).

370. If less than one-third of the plaintiff class are citizens of the state, then no exception applies.

371. Plaintiffs face a formidable burden to prove that the home-state or local controversy exceptions apply because they both require two-thirds of the class to be citizens of the state. Therefore, if all primary defendants are citizens of the state, the discretionary exception is very useful. The burden of proving the local citizenship of one-third of the class is much less onerous, and courts have construed the factors in favor of remand. *See supra* Part III.B.3.d.

372. Shapiro, *supra* note 33, at 87.

373. *Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc. (Preston I)*, 485 F.3d 793, 801 (5th Cir. 2007).

374. *Caruso v. Allstate Ins. Co.*, 469 F. Supp. 2d 364, 368 (E.D. La. 2007). *Contra* *Gerstenecker v. Terminix Int’l Inc.*, No. 07-CV-0164-MJR, 2007 WL 2746847, at *2-3 (S.D. Ill. Sep. 19, 2007) (holding that class of all persons and entities that owned any home, commercial building, or other structure did not pertain solely to Illinois citizens, because it could include people who owned property in Illinois but were not themselves citizens).

375. *Mattera v. Clear Channel Comm’n, Inc.*, 239 F.R.D. 70, 80 (S.D.N.Y. 2006) (noting that those who work in New York are “reasonably likely” to reside in that state); *see also* *Hirschbach v. NVE Bank*, 496 F. Supp. 2d 451, 460-61 (D.N.J. 2007) (finding that class of all persons who

Generally, residency alone is not sufficient to establish citizenship.³⁷⁶ A class defined in terms of citizenship will not necessarily fail, but the plaintiffs will be required to produce some evidence of intent to supplement the class definition. For example, in one Hurricane Katrina case, the class was defined as “patients and the relatives of deceased and allegedly injured patients hospitalized at [defendant hospital] when Hurricane Katrina made landfall.”³⁷⁷ Medical records alone did not satisfy the citizenship requirements of the exceptions, even though they indicated that more than two-thirds of the class lived in Louisiana.³⁷⁸ However, the medical records combined with in-state emergency contact information and affidavits of eight class members who stated their intention to return to Louisiana was sufficient.³⁷⁹

Courts tend to be discriminating about the evidence that they will accept to prove citizenship. For example, *Evans v. Walter Industries, Inc.*³⁸⁰ involved a class of people who were allegedly injured over an eighty-five-year period during which defendant-operated manufacturing facilities released various waste substances.³⁸¹ To prove that two-thirds of the class members were Alabama citizens, the plaintiffs submitted an affidavit by an attorney who had interviewed 10,118 potential plaintiffs, 5,200 of whom were members of the class and 93.8 percent of whom were Alabama residents.³⁸² The court emphatically rejected this evidence because the plaintiffs’ attorney did not offer any information about how the potential plaintiffs were selected or whether the selection was

held certificates of deposit at a bank that operated exclusively in New Jersey was presumptively comprised of at least one-third, if not two-thirds, in-state citizens).

376. See, e.g., *Preston I*, 485 F.3d at 798 (“A party’s residence in a state alone does not establish domicile.”).

377. *Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc. (Preston II)*, 485 F.3d 804, 808 (5th Cir. 2007).

378. *Preston I*, 485 F.3d at 799–800. The difficulty in determining a person’s domicile was complicated by Hurricane Katrina, which dispersed New Orleans residents throughout the nation, many of whom may not have an intention to return. Therefore, a residential address may be sufficient proof of citizenship under other circumstances. See *id.* at 799, 802.

379. *Preston II*, 485 F.3d at 818.

380. 449 F.3d 1159 (11th Cir. 2006).

381. *Id.* at 1161.

382. *Id.* at 1166.

biased.³⁸³ Moreover, the numbers in the affidavit did not provide the court with an idea of the total size of the class, nor did it include the number of people with claims who no longer live in Alabama.³⁸⁴ In another case, the court rejected census statistics as too broad to determine the citizenship of a class of hospital patients.³⁸⁵ The lesson from these cases is that a plaintiff must be prepared to provide specific empirical evidence about the size of the class before it can extrapolate any conclusions about citizenship.³⁸⁶

The major barrier inherent in this requirement is that residency is not equated with citizenship. Professor Stephen J. Shapiro argues that courts should permit a presumption of citizenship to provide the plaintiff with a fair chance to meet its burden.³⁸⁷ This presumption would go a long way in allowing plaintiffs to remain in state court. Until courts show a willingness to reduce plaintiffs' burden, however, careful pleading and presentation of evidence is necessary. For example, classes crafted according to indicia of citizenship are more likely to satisfy an exception. In addition, obtaining affidavits or similar evidence of intent from class members will weigh strongly in favor of remand. Even if affidavits are only available from the named class members, they will go a long way to demonstrate to the court that the action is local in nature.³⁸⁸

b. Sue a primary or significant defendant in its home state

Proving local class membership is only half the battle. CAFA only makes exceptions for cases in which plaintiffs sue all "primary"

383. *Id.* ("Smith's affidavit tells us nothing about how she selected the 10,118 people who were considered 'potential plaintiffs.' We do not know if Smith's method favored people currently living in Anniston over people who have left the area.").

384. *Id.*

385. *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc. (Preston I)*, 485 F.3d 793, 802 (5th Cir. 2007). However, census data may be relevant to determine the citizenship of a broader class that encompassed an entire city or county.

386. These cases indicate that the burden on plaintiffs is extremely high. For example, to determine the actual size of the class in *Evans*, plaintiffs must conduct research on the property owners in the vicinity of the manufacturing facilities over the past eighty-five years, residents of those properties, and individuals that suffered personal injuries during the requisite time period. This may be an impossible endeavor. Although the court recognizes the difficulty that plaintiffs face, it rationalizes these challenges as a "function of the composition of the class designed by plaintiffs." *Evans*, 449 F.3d at 1166.

387. Shapiro, *supra* note 33, at 136.

388. *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc. (Preston II)*, 485 F.3d 804, 815-16 (5th Cir. 2007).

defendants or at least one “significant” defendant in a defendant’s home state. However, the meaning of these terms is far from clear. Most courts and commentators have recognized a substantive difference between a primary defendant and a significant defendant.³⁸⁹ According to the District Court for the Eastern District of Louisiana, “a significant defendant is of less importance than a primary defendant.”³⁹⁰ A student commentator stated, “all ‘primary defendants’ are ‘significant defendants,’ but not all ‘significant defendants’ are ‘primary defendants.’”³⁹¹

The term “primary defendant” has been used before. As discussed above, courts in the MMTJA context defined a primary defendant as a defendant who is directly, rather than vicariously, liable.³⁹² Several courts adopted this definition.³⁹³ For example, in *Anthony v. Small Tube Manufacturing Corp.*,³⁹⁴ the court rejected plaintiffs’ argument that the in-state defendant was the only primary defendant because it had sold the greatest volume of harmful product.³⁹⁵ Instead, the court found that all the defendants were primary because the plaintiffs’ claim was not premised on a theory of vicarious liability, indemnity, or contribution.³⁹⁶ However, other courts variously define “primary defendant” as a party who is liable to the vast majority of class members,³⁹⁷ responsible for a significant

389. See, e.g., *Bennett v. Bd. of Comm’rs for E. Jefferson Levee Dist.*, Nos. CIV.A.07-3130, 07-3131, 2007 WL 2571942, at *6 (E.D. La. Aug. 31, 2007); Amanda Coney, Comment, *Defining “Primary Defendants” in the Class Action Fairness Act of 2005*, 67 LA. L. REV. 903, 917–18 (2007).

390. *Bennett*, 2007 WL 2571942 at *6.

391. Coney, *supra* note 389, at 918.

392. See *supra* Part IV.A.1.b.ii.

393. See, e.g., *Anthony v. Small Tube Mfg. Corp.*, No. CIV.A.06-4419, 2007 WL 2844819, at *10–11 (E.D. Pa. Sept. 27, 2007); *Kearns v. Ford Motor Co.*, No. CIV.A.05-5644, 2005 WL 3967998, at *8 (C.D. Cal. Nov. 21, 2005).

394. No. CIV.A.06-4419, 2007 WL 2844819 (E.D. Pa. Sept. 27, 2007).

395. *Anthony*, 2007 WL 2844819, at *10.

396. *Id.*

397. See, e.g., *Kendrick v. Standard Fire Ins. Co.*, No. CIV.A.06-141-DLB, 2007 WL 1035018, at *5 (E.D. Ky. Mar. 31, 2007).

portion of the loss,³⁹⁸ most able to bear potential judgment,³⁹⁹ or the only defendant named in one particular cause of action.⁴⁰⁰

The narrowest definitions of primary defendant, such as liability to the vast majority of class members or the party most able to bear judgment, are most advantageous to plaintiffs. However, courts will most likely follow the MMTJA definition and interpret a primary defendant as one who is directly liable to the plaintiff,⁴⁰¹ making it fairly difficult to prove that all primary defendants are in-state citizens. One untested strategy to plead around this requirement is to refrain from suing out-of-state defendants. On one hand, plaintiffs are masters of the complaint and are generally free to sue or abstain from suing whomever they please. On the other hand, courts may view a blatant omission as an effort to circumvent the rules in bad faith.⁴⁰²

To avoid this conundrum, many plaintiffs will try to use the local controversy exception, which only requires *one* “significant” defendant to be an in-state citizen.⁴⁰³ A significant defendant is a defendant from whom: (1) significant relief is sought; and (2) whose alleged conduct forms a significant basis for the claims asserted by the plaintiff class.⁴⁰⁴ Unlike “primary defendant,” this term has not been used in any existing statute.⁴⁰⁵

398. See, e.g., *Robinson v. Cheetah Transp.*, No. CIV.A.06-0005, 2006 WL 3322580, at *2 (W.D. La. Nov. 14, 2006).

399. *In re Ingram Barge Co.*, No. CIV.A.05-4419, 2007 WL 148647, at *2 (S.D.N.Y. Sept. 27, 2007).

400. *Hangarter v. Paul Revere Life Ins. Co.*, No. C 05-04558 WHA, 2006 WL 213834, at *3 (N.D. Cal. Jan. 26, 2006) (holding that California’s insurance commissioner is a primary defendant because he is the only defendant potentially liable for injunctive relief, even though he is not liable for any damages).

401. No published opinion has analyzed the meaning of “primary defendant” in the CAFA context. However, courts are likely to find MMTJA decisions highly persuasive, considering the similar goals between these statutes. *Kearns v. Ford Motor Co.*, No. CIV.A.05-5644, 2005 WL 3967998, at *8 (C.D. Cal. Nov. 21, 2005). Moreover, this definition makes the most sense because the primary defendants can be identified by looking at the complaint, without pre-trial determinations of liability or culpability. *Anthony*, 2007 WL 2844819, at *8.

402. If plaintiffs omit an indispensable party, the court may join the party, if feasible, or if not, dismiss the action. See *Matter v. Clear Channel Comm’ns, Inc.*, 239 F.R.D. 70, 73–77 (S.D.N.Y. 2006) (dismissing class action for lack of subject matter jurisdiction when plaintiff filed suit in federal court and failed to join an indispensable party who was non-diverse).

403. 28 U.S.C. § 1332(d)(4)(A)(i)(II) (2000).

404. *Id.*

405. *Coney*, *supra* note 389, at 918.

The Eleventh Circuit is the only appellate court to examine the meaning of this term. In *Evans v. Walter Industrial, Inc.*,⁴⁰⁶ the Eleventh Circuit interpreted “significant” as a relative term.⁴⁰⁷ Therefore, “significant relief” meant a significant portion of the entire relief sought by the class and “significant basis” meant that a significant number or percentage of class members had claims against the defendant.⁴⁰⁸ Here, eighteen defendants were sued for releasing various waste substances over a period of eighty-five years.⁴⁰⁹ The in-state defendant operated two facilities in the area: one closed down before 1951, and the other was located on the fringes of the area occupied by most of the class members.⁴¹⁰ Therefore, the court held that the in-state defendant was not a significant defendant and the local controversy exception did not apply.⁴¹¹

Many courts have adopted the Eleventh Circuit’s interpretation.⁴¹² Some have even added an additional requirement that the defendant is able to bear a substantial judgment.⁴¹³ Unfortunately, this interpretation places a heavy burden on plaintiffs to produce evidence of a defendant’s relative culpability at an early stage of litigation and requires courts to make preliminary decisions about liability.⁴¹⁴ Moreover, this interpretation causes legitimately local actions to be removed from state court when many, but not all, the defendants are in-state citizens but none of them can meet the “significant defendant” test individually.⁴¹⁵

406. 449 F.3d 1159 (11th Cir. 2006).

407. *Id.* at 1166–68; *see also infra* notes 417-20 and accompanying text (discussing the alternative “important party” test).

408. *Evans*, 449 F.3d at 1167.

409. *Id.* at 1161.

410. *Id.* at 1167–68.

411. *Id.* at 1168.

412. *See, e.g.*, *Kearns v. Ford Motor Co.*, No. CIV.A.05-5644, 2005 WL 3967998, at *9–11 (C.D. Cal. Nov. 21, 2005); *Eakins v. Pella Corp.*, 455 F. Supp. 2d 450, 452–53 (E.D.N.C. 2006).

413. *See, e.g.*, *Robinson v. Cheetah Transp.*, No. 06-0005, 2006 WL 3322580, at *2 (W.D. La. Nov. 14, 2006) (plaintiffs offered no evidence to establish ability of in-state defendants to satisfy a judgment potentially amounting to \$5 million or more).

414. Shapiro, *supra* note 33, at 129. In fact, the reason that courts interpreted “primary defendants” to mean defendants charged with direct liability is to avoid requiring pre-trial determinations of liability. *See supra* note 402. The majority significant defendant test is unworkable and inefficient.

415. Shapiro, *supra* note 33, at 129 (arguing that the test leads to “an absurd result” when all but one of the defendants are in-state citizens).

The better interpretation is that a significant defendant is an important party to the suit. At least the District Court for the Eastern District of Louisiana adopted this view. In *Caruso v. Allstate Insurance Co.*,⁴¹⁶ an in-state defendant that was the third largest homeowner's insurer in the state was deemed a significant defendant, even though it only held 7 percent of the market.⁴¹⁷ According to the court, "the third largest insurer in Louisiana, with more than \$105 million in total premiums, is clearly a major player in the insurance market by any measure."⁴¹⁸ This interpretation can prevent fraudulent joinder of peripheral defendants to defeat diversity jurisdiction while still allowing local actions to remain in state court. A plaintiff's attorney should argue for this interpretation. If the court does not accept this argument, then the case will more likely be litigated in federal court because the burden on plaintiffs to prove an in-state defendant's relative culpability is significant.⁴¹⁹

c. Principal injuries and the three-year limitation

After a plaintiff clears the hurdles of proving local class membership and that a significant defendant is an in-state citizen, the local controversy exception contains two additional requirements. First, the principal injuries must occur in the state in which the action was originally filed.⁴²⁰ Although few courts have interpreted this provision, a split has already emerged. Some courts hold that the provision is ambiguous and have relied on the Report from the Committee on the Judiciary⁴²¹ for guidance.⁴²² According to the

416. 469 F. Supp. 2d 364 (E.D. La. 2007).

417. *Id.* at 369–70.

418. *Id.* at 370.

419. *See, e.g.,* *Evans v. Walter Indus., Inc.*, 449 F.3d 1159 (11th Cir. 2006); *Robinson*, 2006 WL 3322580, at *4 (noting that under comparative definition, tractor-trailer driver is not a significant defendant in a bridge accident caused by him because significant relief is not sought from him). *But see* *Phillips v. Severn Trent Env'tl. Servs. Inc.*, No. 07-3889, 2007 WL 2757131, at *3 (E.D. La. Sept. 19, 2007) (holding that under comparative definition, one of two defendants in an environmental contamination case was a significant defendant because all putative class members had claims against it and there was no evidence that the damages from its conduct were insignificant compared to the other defendant); *Mattera v. Clear Channel Comm'ns Inc.*, 239 F.R.D. 70, 73–77 (S.D.N.Y. 2006) (holding that under comparative definition, a defendant that employs and pays most of the current sales representative in New York is a significant defendant in a state wage deduction class action). For a discussion of *Evans*, see *Caruso*, 469 F. Supp. 2d at 377–81.

420. 28 U.S.C. § 1332(d)(4)(A)(i)(III).

421. S. Rep. 109-14, pt. 6, at 40 (2005).

report, the “provision looks at where the principal injuries were suffered by everyone who was affected by the alleged conduct—not just where the proposed class members were injured.”⁴²³ Therefore, a statewide class action alleging injuries from nationwide conduct does not qualify under this exception.⁴²⁴ Clearly, this is troublesome for plaintiffs who want to stay in state court because one of the best strategies for avoiding CAFA jurisdiction is splitting up the class into smaller sub-classes.

However, one court rejected the report as irrelevant because CAFA’s statutory language is unambiguous and the Senate Committee on the Judiciary issued the report post-enactment.⁴²⁵ This court interpreted the provision according to its “natural and ordinary meaning” as the “chief or primary violation of legal rights” asserted by the class.⁴²⁶ Under this interpretation, a statewide class action based on nationwide conduct will satisfy the principal injuries requirement.⁴²⁷

Even if courts adopt this second interpretation, however, the local controversy exception will still preclude statewide class actions that are based on nationwide conduct. The final requirement of the exception is that the class action does not assert the same or similar factual allegations that have been filed against any of the defendants

422. *Kearns v. Ford Motor Co.*, No. CV 05-5644 GAF (JTLX), 2005 WL 3967998, at *11–12 (C.D. Cal. 2005). *see also* *Brook v. UnitedHealth Group Inc.*, No. 06 CV 12954 (GBD) 2007 WL 2827808, at *4 (S.D.N.Y. Sept. 27, 2007) (finding that principal injuries requirement is not met because the defendants’ conduct affected health care providers in other states). *But see Mattera*, 239 F.R.D. at 80.

423. *Kearns*, 2005 WL 3967998, at *12.

424. In *Kearns*, a class of California consumers brought suit against Ford and a local dealer for misrepresentations about Ford’s “Certified Pre-Owned” (“CPO”) program. 2005 WL 3967998, at *2. CPO was a nationwide program, so injuries suffered would have extended throughout the country. *Id.* at *7. Therefore, the principal injuries did not occur in California and the local controversy exception did not apply. *Id.* at *2. *But see Mattera*, 239 F.R.D. at 80. In *Mattera*, the court purportedly applied the Committee Report standard, but it reasoned that a statewide class was permissible because out-of-state individuals affected by the conduct would not have standing to sue under New York law. *Id.* at 80. This sort of reasoning defeats the purpose of the Committee Report interpretation because the same argument could be made for any statewide class action under state law.

425. *Kitson v. Bank of Edwardsville*, No. 06-528-GPM, 2006 WL 3392752, at *8–13 (S.D. Ill. Nov. 22, 2006).

426. *Id.* at *13.

427. *Kitson* involved a class of commercial loan borrowers who alleged that the defendant improperly computed their loan interest. Because the primary violation of legal rights asserted by this class was the improper calculations, which occurred in Illinois (the state of filing), the principal injuries requirement was satisfied. *Id.*

within three years of the removed action.⁴²⁸ This requirement will effectively preclude a strategy of breaking down nationwide class actions into smaller state-wide classes to avoid federal jurisdiction by using the local controversy exception.⁴²⁹ This strategy is still viable, however, if breaking down the class into smaller sub-sets will bring the amount in controversy below the jurisdictional threshold⁴³⁰ or satisfy the requirements for the home state exception.⁴³¹

d. Appealing to a court's discretion

Courts have discretion to decline jurisdiction over local actions in limited circumstances. When the plaintiff can prove that local citizens comprise between one-third to two-thirds of the class and that all primary defendants are in-state citizens, the court may remand a case in the interests of justice. One mistake that several plaintiffs' attorneys have made is to argue that this exception applies without proving its preliminary requirements.⁴³² Assuming these initial requirements are met, the statute provides six factors to guide the court's discretion to determine whether jurisdiction is appropriate in the interests of justice.

First, discretion should be used in favor of remand if the law of the state in which the action was originally filed governs the claims.⁴³³ It is important to note that claims do not have to be governed exclusively by state law to trigger this factor in favor of remand. A court must determine whether state law *predominates* in order to decide whether a peripheral federal claim or application of

428. 28 U.S.C. § 1332(d)(4)(a)(ii).

429. *See* *Brook v. UnitedHealth Group Inc.*, No. 06 CV 12954(GBD), 2007 WL 2827808, at *4 (S.D.N.Y. Sept. 27, 2007) ("Plaintiffs cannot simply evade federal jurisdiction by defining the putative class on a state-by-state basis, and then proceed to file virtually identical class action complaints in various state courts."); *see also* *Caruso v. Allstate Ins. Co.*, 469 F. Supp. 2d 364, 369–70 (E.D. La. 2007) (denying motion to remand because the three-year requirement was not satisfied).

430. *See supra* note 288 and accompanying text.

431. *See supra* Part IV.B.3.a.

432. *See* *Kendrick v. Standard Fire Ins. Co.*, No. 06-141-DLB, 2007 WL 1035018, at *4–5 (E.D. Ky. Mar. 31, 2007) (finding that plaintiffs failed to prove that between one-third and two-thirds of the class were Kentucky citizens or that any defendant was a Kentucky citizen); *Kearns v. Ford Motor Co.*, No CV 05-5644, 2005 WL 3967998, at *8 (C.D. Cal. 2005) (finding that not every primary defendant was a citizen of California).

433. 28 U.S.C. § 1332(d)(3)(B) (2000).

federal regulations may be included without violating the interests of justice.⁴³⁴

Discretion should also be used in favor of remand when the state of filing has a distinct nexus with the class members, the alleged harm, or the defendants.⁴³⁵ This factor is fairly straightforward. Whenever the alleged harm occurs within the state and involves local parties, remand is favored. For example, a distinct nexus existed when a class of predominantly New Jersey citizens sued a bank that was chartered by New Jersey and operated exclusively in New Jersey for financial harms that occurred within the state.⁴³⁶

Moreover, discretion should be used in favor of remand if the number of local citizens is substantially larger than the number of citizens from any other state and the citizenship of non-local class members is dispersed among a substantial number of states. This factor requires a “second body count.”⁴³⁷ Once the plaintiff meets the initial burden to invoke this exception (between one-third and two-thirds of the class and all primary defendants are in-state citizens), however, courts seem willing to grant a presumption in favor of remand. For example, the court in *Preston v. Tenet Healthsystems Memorial Medical Center, Inc.*,⁴³⁸ used the same evidence that the plaintiff produced to prove the citizenship of the class to conclude that this factor weighed in favor of remand.⁴³⁹ Moreover, courts do not appear to require any affirmative evidence of dispersion in the absence of opposition by the defendant.⁴⁴⁰

434. See *Preston v. Tenet Healthsystem Mem'l Med. Ctr. (Preston II)*, 485 F.3d, 804, 822 (5th Cir. 2007) (holding that even if complaint asserted valid federal question claim, the case is appropriately remanded because state law claims predominate over the case in its entirety); *Hirschbach v. NVE Bank*, 496 F. Supp. 2d 451, 461 (D.N.J. 2007) (“[T]he claim may involve application of federal statutes and regulations but is ultimately governed by the law of New Jersey . . .”).

435. 28 U.S.C. § 1332(d)(3)(D).

436. *Hirschbach*, 496 F. Supp. 2d at 461.

437. Gregor P. Joseph, *Federal Class Action Jurisdiction After CAFA*, Exxon Mobil, and Grable, 8 DEL. L. REV. 157, 173 (2006).

438. 485 F.3d 804 (5th Cir. 2007).

439. *Id.* at 823 (stating that the overwhelming number of patients permanently resided in New Orleans, that the vast majority of emergency contact phone numbers had a New Orleans area code, and that the affidavits of evacuees who intended to return all indicated that the number of class members who are Louisiana citizens is substantially larger than citizens from any other state).

440. *Id.* (finding that although some evacuees hold no intention of returning to Louisiana, they are surely dispersed throughout the nation as opposed to one other state); *Hirschbach*, 496 F. Supp. 2d at 461 (“While there is no proof before the Court regarding the domicile of the non-New

If the claims involve matters of national or interstate interest, however, a court's discretion should weigh against remand.⁴⁴¹ This factor reflects Congress's concern that a state court might adjudicate the claims of a large number of out-of-state citizens and inappropriately apply the laws of other states.⁴⁴² In this context, "national concern" does not mean national interest in the case.⁴⁴³ Therefore, local cases arising from Hurricane Katrina do not involve matters of national interest, even though Hurricane Katrina was an issue of national concern.⁴⁴⁴

A court's discretion should also be used against remand if the class action has been pleaded in a manner that seeks to avoid federal jurisdiction.⁴⁴⁵ Some examples of bad faith pleading may include splitting a nationwide class action into identical state actions, omitting an important out-of-state defendant, or defining the class in terms of citizenship.⁴⁴⁶

Finally, discretion should be used against remand if one or more other class actions asserting the same or similar claims have been filed in the preceding three years. This factor is the same as the requirement under the local controversy exception discussed above.⁴⁴⁷ The only difference is that a parallel action would not automatically preclude a remand order; it would merely weigh against remand.

In sum, we know that actions predominantly involving local parties and state law claims will most likely be remanded, while actions involving matters of national interest that have been arbitrarily split up to avoid federal jurisdiction will not. However, we do not know how courts weigh these factors against each other because of the dearth of case law.

Jersey members of the class, there is no indication that any other single state has as great an interest in litigating the controversy as New Jersey does.").

441. 28 U.S.C. § 1332(d)(3)(A).

442. *Preston II*, 485 F.3d at 822.

443. *See id.*

444. *Id.*; *see also Hirschbach*, 496 F. Supp. 2d at 461 (holding that dispute involving predominantly New Jersey citizens seeking redress for claims under New Jersey law from a bank that is chartered by New Jersey, operates only in New Jersey, and is not affiliated with any national bank, does not involve a matter of national or interstate interest).

445. 28 U.S.C. § 1332(d)(3)(C).

446. *See Hirschbach*, 496 F. Supp. 2d at 461 (implying that one potential example of bad faith pleading is expressly limiting a class to citizens of a single state).

447. *See supra* Part IV.B.3.c.

e. Do the exceptions work?

The CAFA exceptions were included to keep truly local matters in state court. However, the clumsy drafting of these provisions combined with the high standard of evidentiary proof that some courts require plaintiffs to meet makes it questionable whether this goal will be realized. To achieve the objective of these exceptions, courts should grant plaintiffs a presumption of citizenship when they define their classes according to state residency. Further, judges should construe the term “significant defendant” narrowly, in order to not force plaintiffs to make pre-trial determinations of culpability. Unless and until courts change their interpretation of these provisions, plaintiffs will have a difficult time keeping truly local controversies in state court.

4. CAFA Wrap-Up

Undoubtedly, CAFA revolutionized complex litigation. Empirical studies indicate that it resulted in a profound exodus of state-law-based claims to federal court,⁴⁴⁸ albeit an exodus of contract and fraud cases rather than the mass tort cases CAFA proponents had in mind.⁴⁴⁹ Moreover, the provisions that Congress included with the very purpose of maintaining local actions in state court do not have their intended effect. The high evidentiary burden that courts have imputed on plaintiffs makes it extremely difficult to satisfy any of the so-called CAFA exceptions. Nevertheless, a close look at CAFA cases reveals that there are more opportunities than anticipated to maintain a class or mass action in state court. In particular, pleading

448. See WILLGING & LEE, *supra* note 70, at 2 (noting that average monthly numbers of diversity class actions nearly doubled after CAFA); see also FED. JUD. CTR., PROGRESS REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES ON THE IMPACT OF CAFA ON THE FEDERAL COURTS 4 (2007), [http://www.fjc.gov/public/pdf.nsf/lookup/cafa1107.pdf/\\$file/cafa1107.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa1107.pdf/$file/cafa1107.pdf) (comparing preliminary federal and state data in California and indicating that class action activity increased in California and that a larger proportion of that activity was in the federal court, most likely due to the CAFA effect).

449. The average number of monthly filings and removals has more than doubled in contract cases and more than tripled in fraud claims. WILLGING & LEE, *supra* note 70, at 2. Although the average number of monthly filings and removals in property damage cases has doubled, personal injury cases have remained stagnant. *Id.* at 3. Most of this increase is the result of increased original filings, suggesting that plaintiff attorneys are anticipating removal and choosing to file actions in federal court to maintain some degree of control over forum selection. *Id.* at 17. Because personal injury cases face the strictest limitations on class certification in federal court, it makes sense that plaintiff attorneys are acquiescing to federal jurisdiction in other cases, but are choosing to take a stand in state court in personal injury cases. *Id.* at 8.

out of CAFA by limiting the jurisdictional amount or failing to specify the amount has been a successful strategy.⁴⁵⁰

V. LITIGATING CLASS AND MASS ACTIONS IN FEDERAL COURT: HORIZONTAL FORUM SHOPPING

In many cases, the strategies discussed above will not be viable. No strategic pleading can keep a large interstate class or mass action in state court. However, federalization does not necessarily mean that a plaintiff is without forum choices. Even though CAFA effectively precludes vertical forum shopping, it has no effect on horizontal forum shopping, and plaintiffs can file in any proper venue.⁴⁵¹ A study of patent cases, which are exclusively within the purview of federal courts, indicates that horizontal forum shopping can be just as strategic as vertical forum shopping.⁴⁵²

For the most part, horizontal forum shopping involves the same factors discussed in Part III that relate to vertical forum shopping. The main difference is that procedural rules are uniform throughout the federal system, and horizontal forum shopping accordingly involves choosing the venue with the most favorable interpretation and application of the law.⁴⁵³ In this case, a plaintiff's attorney will be particularly concerned with how a particular district or circuit court interprets Rule 23's certification requirements for damages classes. Although an empirical evaluation of class certification within the federal court system is beyond the scope of this Article, some observations may be useful.

450. See *supra* Part IV.B.1.b.

451. Venue is proper in a judicial district where any defendant resides, if all residents reside in the same state, a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought. 28 U.S.C. § 1391(a). For venue purposes, a corporation resides in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. § 1391(c). Since most defendants in consumer class actions are corporations, they are likely to be subject to personal jurisdiction in many districts, giving consumer plaintiffs the opportunity to forum shop.

452. Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation*, 79 N.C. L. REV. 889, 889 (2001) (stating that most patent cases are brought only in a handful of jurisdictions).

453. See generally Algero, *supra* note 79, at 99–102 (discussing factors that motivate litigants to seek out a particular forum).

The Supreme Court has provided limited guidance in this area.⁴⁵⁴ In *Eisen v. Carlisle and Jacquelin*,⁴⁵⁵ it held that courts are not permitted to conduct a preliminary inquiry into the merits of the action when determining whether Rule 23 has been satisfied.⁴⁵⁶ However, it also held that a class should only be certified if the district court is satisfied that the prerequisites of Rule 23 are satisfied, indicating that judges should probe behind the pleadings.⁴⁵⁷ In reconciling these cases, all courts agree that inquiry beyond the pleadings is acceptable, but they differ on when further inquiry is warranted and the quantum of proof that the plaintiff must provide to support its class allegations.

Some courts refuse to inquire about the merits of the case beyond the pleadings, presuming that the allegations are true.⁴⁵⁸ However, the vast majority of circuits permit inquiry into the merits, as long as it is relevant to class certification issues.⁴⁵⁹ Some circuits even weigh the evidence and require plaintiffs to produce a substantial evidentiary showing to prevail on a motion for class certification. For example, in *In re Initial Public Offering Securities Litigation*,⁴⁶⁰ the Second Circuit decertified a class because the district court had improperly used a “some showing” standard and failed to weigh the evidence.⁴⁶¹

The Sixth and Ninth Circuits have the most plaintiff-favorable interpretation of class certification standards. The Sixth Circuit recognizes that class certification may be determined by the court on

454. Jonathan M. Hoff, et al., *Recent Trends in Class Certification Standards: From Eisen to Enron*, in SECURITIES LITIGATION & ENFORCEMENT INSTITUTE 2007, at 133 (PLI Corporate Law & Practice, Course handbook Series, 2007).

455. 417 U.S. 156 (1974).

456. *Id.* at 177.

457. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

458. See Hoff, *supra* note 454, at 135 (arguing that courts that presume the factual allegations to be true have viewed the *Eisen* prohibition on merits inquiries to constrain the *Falcon* admonition to “probe beyond the pleadings” (citing *Blackie v. Barrack*, 534 F.2d 891, 901 & n.17 (9th Cir. 1975))).

459. See, e.g., *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001) (certification decision requires a thorough examination of factual and legal allegations, so preliminary inquiry into the merits is sometimes necessary); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001) (reversing certification because district court improperly accepted the allegations in the complaint as true and failed to resolve contested issues).

460. 471 F.3d 24 (2d Cir. 2006).

461. *Id.* at 42.

the basis of the pleadings, if sufficient facts are set forth.⁴⁶² Moreover, the Ninth Circuit held that evaluating the weight of the evidence or the merits is improper at the class certification stage and that plaintiffs' evidence should be relied on.⁴⁶³ Therefore, a class is more likely to be certified in the Sixth or Ninth Circuits than in the other circuits. However, district courts maintain broad discretion⁴⁶⁴ and sometimes do not follow the precedent in their circuit.⁴⁶⁵

Circuits also diverge on their amenability to partial class certification. For example, the Second and Third Circuits permit partial or conditional certification,⁴⁶⁶ while the Eighth Circuit does not.⁴⁶⁷ Even partial certification can provide a class with considerable settlement leverage.⁴⁶⁸

Only a few state-law-based consumer cases have reached the circuit court level since Congress enacted CAFA. Nevertheless, combined with pre-CAFA precedent, some trends already seem apparent. First, the Fifth Circuit seems to be a particularly hostile venue in which to try to certify a class. All post-CAFA motions for class certification have failed the predominance requirement.⁴⁶⁹ In

462. See *In re Am. Med. Sys., Inc.* 1996 FED App. 0049P at 23–27 (6th Cir.).

463. *Dukes v. Wal-Mart, Inc.*, Nos. 04-16688, 04-16720, 2007 WL 4303055, at *4 (9th Cir. Dec. 11, 2007).

464. The standard of review for class certification decisions is abuse of discretion. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335 (9th Cir. 1982).

465. See Hoff, *supra* note 454, at 141–42.

466. See, e.g., *In re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006) (holding that the district court may certify a class on a particular issue, such as liability, even if the action as a whole does not satisfy certification rule's predominance requirement); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1008–09 (3d Cir. 1986) (conditional class certification to determine common issues).

467. See, e.g., *In re Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297, 1303 (8th Cir. 1995).

468. Robert M. Brava-Partain, Note, *Due Process, Rule 23, and Hybrid Classes: A Practical Solution*, 53 HASTINGS L.J. 1359, 1386 (2002).

469. See *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 725 (5th Cir. 2007) (predominance requirement not satisfied in proposed class of nationwide automobile owners due to variations in state law); *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 526 (5th Cir. 2007) (affirming denial of class certification to uninsured patients who filed an action against a non-profit health care provider for charging them unreasonable rates and violating an agreement with the state by charging them undiscounted rates for medical services, while providing discounts to insured patients; predominance requirement not satisfied because there was an array of charges tailored to each patient's treatment); *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 604 (5th Cir. 2006) (individual issues predominate in an action brought by individuals allegedly exposed to smoke from fire at a chemical plant because each individual plaintiff suffered different alleged periods, different magnitude of exposure and different alleged symptoms as a result; and there

contrast, the Ninth Circuit has affirmed, at least in part, all the district court decisions to certify a proposed class during the same time period.⁴⁷⁰ In addition, the Sixth Circuit has produced a favorable post-CAFA certification ruling.⁴⁷¹

Although factual differences between the cases account for some of these discrepancies, a comparison of similar cases in different circuits indicates some potentially significant differences. For example, the Fifth Circuit reversed the district court's decision to certify a nationwide class of automobile owners who alleged breach of warranty claims for defective installation of side airbag components because of variations in state law.⁴⁷² In a case involving similar facts, the Sixth Circuit affirmed the district court's ruling to deny certification of the nationwide class but certified a statewide class instead.⁴⁷³

Additionally, the Fifth Circuit affirmed the district court's refusal to certify a proposed class of individuals who were exposed to smoke from a fire at a chemical plant due to individual medical causation, injury, and damages issues—notwithstanding the fact that plaintiffs' alleged injuries all arose from a single accident.⁴⁷⁴ In contrast, the Ninth Circuit affirmed the district court's decision that individual circumstances would not defeat predominance of common issues in an unfair business practice action—notwithstanding the company's contention that the claim required individualized analysis of awareness and knowledge of its billing practices.⁴⁷⁵

was no common formula for computing damages); *Corley v. Orangefield Indep. Sch. Dist.* 152 Fed. Appx. (West) 350, 355 (5th Cir. 2005) (individual damages calculations preclude certification).

470. *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 737 (9th Cir. 2007) (holding that the district court did not abuse its discretion in certifying a California subclass of customers for claims under the California Unfair Competition Law); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 962 (9th Cir. 2005) (noting that the court denied manufacturer's petition for interlocutory appeal of district court's certification).

471. *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006) (holding that the district court did not abuse its discretion when it certified a class of Ohio residents).

472. *Cole*, 484 F.3d at 725.

473. *Daffin*, 458 F.3d at 552 (class sought damages for defective throttle body assembly).

474. *Steering Comm.*, 461 F.3d at 604.

475. *Lozano*, 504 F.3d at 537 (holding that the district court did not abuse its discretion in finding that *Lozano's* claim was based on uniform disclosures, so the individual circumstances regarding how these disclosures were read or understood would not destroy predominance). This comparison is significantly weaker than the one mentioned previously because the Fifth Circuit case is a mass torts case. The Supreme Court indicated in *Amchem Products Inc. v. Windsor* that courts should be skeptical of certifying large, nationwide classes in mass torts actions because

Although it is far too early to draw conclusions about horizontal forum shopping, it is apparent that the circuits do interpret and apply certification rules and precedent differently. The few post-CAFA cases on certification indicate that the Sixth and Ninth Circuits may be more favorable to plaintiffs, while the Fifth Circuit is particularly unfavorable. Moreover, circuits that permit partial certification, such as the Second and Third Circuits, are more likely to attract plaintiffs than those that do not, such as the Eighth Circuit. This area is ripe for additional research, particularly as CAFA pushes the majority of class action cases into the federal system.

VI. CONCLUSION

At the end of our long and arduous journey through the maze of MMTJA and CAFA, the ultimate question remains: Has Congress killed class and mass actions with these statutes? Are individual consumers left without remedy when their cases are swept into federal court? Does this signal yet another victory of the corporate behemoth?

The answer appears to be yes and no. Yes, invariably more mass and class actions will end up in federal court, but CAFA does not appear to sound the death knell of class actions for several reasons. None of the preliminary data on CAFA indicate that consumer class action activity is decreasing or that federal question actions are getting pushed out of federal court. In fact, overall class action filings have increased since CAFA was enacted,⁴⁷⁶ and many categories of federal question cases have also seen increases.⁴⁷⁷

Moreover, not all class and mass actions are swept up in CAFA. In fact, plaintiffs can practically make their cases removal-proof if

they involved individual issues of causation and damages. 521 U.S. 591, 622–25 (1997). Although *Steering Committee* did not involve a nationwide class, it did involve individual issues of causation, injury, and damages. *Steering Comm.*, 461 F.3d at 604. Therefore, the disparate outcomes between the two cases may be the consequence of factual differences rather than divergent interpretations and applications of the law.

476. See FED. JUD. CTR., *supra* note 448, at *4 (noting that since CAFA was enacted, total class action activity increased in California, but a larger proportion of that activity was in federal court).

477. See WILLGING & LEE, *supra* note 70, at 2, 11–13 (stating that most of the increase in class action activity in federal court is from federal question cases, particularly labor and securities). Although this data indicates that individuals are not hesitating to file class actions, it remains to be seen whether the federal docket will become clogged with state law based cases and result in negative outcomes for federal question class litigants.

they file an action of unspecified damages in a state within the Eleventh Circuit. Plaintiffs can achieve a similar benefit by filing in a Third or Ninth Circuit state, if willing to limit their damages below the jurisdictional amount.⁴⁷⁸

In addition, CAFA's notice and settlement provisions may actually operate as a disincentive for defendants to remove. Specifically, these provisions severely restrict and disincentivize coupon settlements,⁴⁷⁹ prohibit "money-losing" settlements unless non-monetary benefits substantially outweigh the loss,⁴⁸⁰ ban settlements that discriminate geographically,⁴⁸¹ and impose burdensome notice requirements on defendants when they agree to settle a class action.⁴⁸²

These new provisions pose several problems for defendants. First, restrictions on coupon settlements make class actions more expensive for defendants because it limits a relatively painless method of compensation that costs defendants little out of pocket. Second, the notice provision shifts the burden of notifying class members about proposed settlements to defendants and extends it to appropriate federal and state officials in each state where a class member resides.⁴⁸³ Failure to comply with the notice provisions can negate the binding effect of the settlement.⁴⁸⁴ Therefore, defendants may choose to leave cases in state court because settlement in federal court is more expensive and time-consuming.⁴⁸⁵

Moreover, federalization may not be such a bad thing. Just as certain state courts attracted significant class and mass action activity because of their predisposition towards class certification, particular federal circuits have demonstrated a particular amenability towards certifying classes as discussed in Part V.⁴⁸⁶ A survey of circuit court

478. See *supra* Part IV.B.1.b.

479. 28 U.S.C. § 1712 (2006).

480. *Id.* at § 1713.

481. *Id.* at § 1714.

482. *Id.* at § 1715.

483. See Puiszis, *supra* note 26, at 168.

484. 28 U.S.C. § 1715(e)(1) (2000).

485. See Andrew J. McGuinness & Richard Gottlieb, *Class Action Fairness Act 2005 – Potential Pitfalls for Defendants*, ANDREWS CLASS ACTION LITIG. REP., Oct. 19, 2006, at 16, available at 13 No. 9 ANCALR 16 (WestLaw).

486. Mark Herrmann & Pearson Bownas, *Possible Unintended Consequences of the Class Action Fairness Act*, METROPOLITAN CORP. COUNS., Apr. 2005, at 5 (predicting the formation of federal class action "magnet courts"); see *supra* Part V.

opinions on Rule 23(b)(3) motions for class certification after CAFA indicates that the Sixth and Ninth Circuits have been particularly inclined to uphold class certifications or reverse denials.⁴⁸⁷ On the other hand, the Fifth Circuit seems particularly hostile to class certification.⁴⁸⁸

Litigating in federal courts has other potential benefits for plaintiffs. For example, even though CAFA exceptions largely prohibit breaking a nationwide class action into identical state class actions to litigate in state court, nothing prevents plaintiffs from using this same strategy in federal court.⁴⁸⁹ Because a state-based class action only involves the law of one state, it will more likely be certified, and plaintiffs can still enjoy substantial settlement leverage if all the statewide classes are transferred and coordinated by the federal Judicial Panel on Multidistrict Litigation.⁴⁹⁰

In conclusion, the class and mass action is not dead. Although a substantial portion of consumer class action activity will move to federal court, legitimate classes will still be certified in both systems. If anything, CAFA forces plaintiffs' attorneys to rethink their strategies for class and mass actions. Hopefully, this Article provided a rough guide to the jurisdictional terrain after CAFA. At least one plaintiff's lawyer sees the bright side of CAFA. According to Victor M. Diaz, Jr., a recipient of numerous honors from the plaintiffs' bar, "[o]n the whole, the potential shift of nearly all class actions to federal court has elevated the class action bar and meant better quality judicial review of corporate class-wide abuses."⁴⁹¹

487. See, e.g., *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718 (9th Cir. 2007) (affirming class certification); *Powers v. Hamilton County Pub. Defender Comm'n*, 501 F.3d 592 (6th Cir. 2007) (affirming class certification); *Daffin v. Ford Motor Co.*, 458 F.3d 549 (6th Cir. 2006) (affirming District Court's certification of Ohio consumers); *Carroll v. United Compucred Collections, Inc.*, 2005 FED App. 0101P (6th Cir.) (affirmed class certification); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (denying manufacturer's petition for interlocutory review after District Court certified class).

488. See, e.g., *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521 (5th Cir. 2007) (denial of class certification affirmed).

489. Some courts have refused to certify nationwide classes, but sua sponte certified state classes. See, e.g., *Daffin*, 458 F.3d at 552 (plaintiff proposed a nationwide class, but court certified a class of Ohio residents).

490. Herrman, *supra* note 486, at 5.

491. Posting of Walter Olson, CAFA: One Plaintiff's-Side View, to *Overlawyered* (June 1, 2007, 11:33 EDT), http://overlawyered.com/2007/06/cafa_one_plaintiffsside_view.html.

