
Steven M. Puiszis
DEVELOPING TRENDS WITH THE CLASS ACTION FAIRNESS ACT OF 2005

STEVEN M. PUISZIS

INTRODUCTION

The Class Action Fairness Act of 2005 (CAFA) is Congress' latest attempt to curb abusive class action practices occurring in state courts. In 1995, Congress determined that meritless class action litigation was undermining the national securities markets. Nuisance filings, vexatious discovery requests and "manipulation by class action lawyers of the clients whom they purportedly represent," were several of the abuses identified which, according to the Congressional Report, resulted in "extortionate settlements." In response, Congress enacted the Private Securities Litigation Reform Act (PSLRA) "to provide uniform standards for class actions and other suits alleging fraud in the securities market." Among other things, PSLRA imposed heightened pleading standards, an automatic stay of proceedings during the pendency of a motion to dismiss, the elimination of joint and several liability in the absence of a knowing violation of
the securities laws, a limitation on fees and expenses available to class counsel, and disclosure requirements to class members. Faced with PSLRA's new substantive and procedural hurdles, plaintiffs "simply abandoned [the] use of federal court[s]"] and brought their class actions "in state courts under state securities laws."³

Three years later, Congress enacted the Securities Litigation Uniform Standards Act of 1998 (SLUSA) after "considerable evidence" was presented that securities class actions were being shifted from federal to state courts, preventing PSLRA from fully achieving its intended purpose.⁷ A joint House-Senate Report concluded that "the decline in federal securities class action lawsuits that occurred after the passage of PSLRA was accompanied by a nearly identical increase in state court filings."³³

SLUSA closed PSLRA's state-court loophole by amending section 16 of the Securities Act of 1933 and section 28 of the Securities Exchange Act of 1934 so that any "covered class action" involving a "covered security" was preempted and subject to SLUSA's mandatory removal provisions.⁹ As a result of SLUSA, federal courts are now the primary forum for most class actions involving allegations of fraud in the purchase or sale of nationally-traded securities.

In Congress' view, the Class Action Fairness Act of 2005 (CAFA) is "a modest, balanced step" that addresses "some of the most egregious problems in class action practice."¹⁰ When judged against SLUSA and PSLRA's more onerous provisions, that assessment is certainly true. Congress itself acknowledged that CAFA was "not intended to be a 'panacea' that will correct all class action abuses."¹¹ Contrary to popular belief, CAFA does not confer a broad right to be in federal court.¹² As the Tenth Circuit Court of Appeals concluded, while Congress' goal in enacting CAFA was to "increase access to federal courts," and while Congress may have instructed courts "to construe the bill's terms broadly," those "general sentiments do not provide carte blanche for federal jurisdiction over [any] state class action."¹³ Rather, CAFA was intended to impact class-action practice in five ways:

11. Id. (internal quotation marks omitted).
13. Pritchett v. Office Depot, Inc. (Pritchett I), 404 F.3d 1232, 1237 n.6 (10th Cir. 2005).
(1) Expanding federal diversity jurisdiction to cover state-court class actions having 100 or more class members where the amount in controversy has an aggregate value in excess of $5,000,000 and minimal diversity exists between any class member and any defendant.

(2) Enhancing the ability to remove state-court class actions to federal court by eliminating several of the traditional barriers to removal, and by authorizing an accelerated appellate review of orders granting or denying a motion to remand a class action to state court.

(3) Treating certain “mass actions” as if they were “class actions,” and by treating unincorporated associations as if they were a corporation for purposes of its class action diversity and removal rules.

(4) Revising the settlement procedures for federal-court class actions by requiring that defendants send notice of any “proposed settlement” to the “appropriate State official of each State in which a class member resides” and to an “appropriate Federal official.”

(5) Regulating class action settlements by limiting fee awards to class counsel in “coupon settlements” to the value of coupons actually redeemed, by requiring with “net loss” settlements that the “non-monetary benefits to the class member[s] substantially outweigh the monetary loss” resulting from such a settlement and by prohibiting settlements where the amount paid to a class member varies depending upon a person’s “geographic proximity to the court.”

15. § 1332(d)(2).
16. Id.; see also Hart v. FedEx Ground Package Sys., Inc., 457 F.3d 675, 676-77 (7th Cir. 2006) (stating that minimal diversity under CAFA only requires that any member of the plaintiff class be a “citizen of a state different from any defendant”).
20. § 1332(d)(10).
22. § 1715(a)(2).
23. Id. § 1715(a)(1).
In 2003, Congress substantially revised Rule 23 of the Federal Rules of Civil Procedure. CAFA was initially drafted years before Rule 23 was amended, which explains why Section 7 of CAFA provides that Rule 23's amendments "shall take effect on the date of enactment of this Act or on December 1, 2003 . . . whichever occurs first." Additionally, this also explains why several of CAFA's other provisions mirror Rule 23's amended requirements. While CAFA does not alter Rule 23's substantive requirements for class certification, it does change several of the procedural requirements regarding the removal, remand and settlement of qualifying class actions.

This article identifies various legal issues and practical problems that will be encountered when attempting to navigate the complexities of CAFA's statutory provisions. It reviews those decisions that have addressed CAFA's various provisions since its enactment. This article also explains when legislative history can be used to clarify CAFA's ambiguities in light of the contradictory district court decisions that have addressed that issue. Finally, despite the fact that CAFA was not intended to apply retroactively, this article discusses strategies and arguments that have been at least partially successful in applying CAFA to class actions filed in state court prior to its enactment, and suggests an alternative to the current approach for determining when a class action is commenced for purposes of CAFA.

31. Currently, federal courts rely on relation-back principles drawn from state law to determine when a class action is "commenced." Under that approach, if an amendment to a class action filed after CAFA's effective date relates back to the original pre-CAFA pleading for purposes of a statute of limitations analysis, a new action is not deemed to have commenced and the action cannot be removed to federal court under CAFA. Where a new claim in an amended pleading does not relate back, its filing is deemed to have commenced a new action triggering the right to remove under CAFA. As this
I. USE OF LEGISLATIVE HISTORY

CAFA is not a particularly well-drafted piece of federal legislation. The Ninth Circuit found the wording of its “mass action” provisions to be “clumsy” and “confusing.” The Tenth Circuit concluded that CAFA’s accelerated appellate review provisions contained a drafting error, which presented one of those “rare cases” where the text of a statute was “demonstrably at odds” with the intention of Congress. A brief review of CAFA reveals that several of its significant terms and phrases were left undefined, and that it fails to address any number of issues involving diversity jurisdiction and removal proceedings that have historically arisen in federal court litigation. Thus, court and counsel must reconcile the interplay of CAFA’s jurisdictional and removal provisions in light of the Act’s intended purpose with pre-CAFA decisions addressing those issues in a different statutory context. The question then is: What role can CAFA’s legislative history play in that endeavor?

A court is obligated to “interpret the words of [a] statute in light of the purposes Congress sought to serve.” In this regard Congress could not have been more clear:

One of the primary historical reasons for diversity jurisdiction is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court. Because interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit, the Committee [on the Judiciary] firmly believes that such cases properly belong in federal court.

But, the use of legislative history is not without its limitations. It is equally clear that where a statute “is plain and unambiguous on its face,” courts have been instructed not to “look to legislative history as a guide to its meaning.” “The plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.”

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32. Abrego v. Dow Chemical Co., 443 F.3d 676, 681 (9th Cir. 2006) (per curiam).
33. Pritchett v. Office Depot, Inc. (Pritchett II), 420 F.3d 1090, 1094 n.2 (10th Cir. 2005).
In view of the uncertainties created by CAFA's use of undefined terms and its silence on various issues, this article refers to the Senate Judiciary Committee Report in an attempt to close several of CAFA's gaps. As the Supreme Court has recognized: "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." However, the Seventh Circuit recently concluded that mere reliance on "naked legislative history," which does not correspond to any statutory provision cannot effectively change the judicial interpretation of a statute.

The Ninth Circuit similarly concluded: "CAFA's silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction." Simply put, "a committee report cannot serve as an independent statutory source having the force of law."

Thus, while legislative history may be used to interpret ambiguous provisions of CAFA, it cannot be used to change the meaning of the statute itself. Additionally, where a statement in the Senate Committee Report cannot be linked to one of CAFA's specific statutory provisions, it may ultimately prove to be of minimal value when used to support a change in the judicial interpretation of a point of law addressed in the Report. A court

(quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

38. See, e.g., Amalgamated Transit Union Local 1309 AFL-CIO v. Laidlaw Transit Servs., Inc., 435 F.3d 1140, 1144 (9th Cir. 2006) (applying the Senate Judiciary Committee Report to clarify an ambiguity in CAFA's accelerated appellate review provisions).


40. See Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (rejecting the approach that had been taken by various district courts which had relied upon CAFA's legislative history in concluding that CAFA changed the parties' initial burden of proof on removal because of the Act's silence on the issue).


43. Compare Brill, 427 F.3d at 446, with Hart, 457 F.3d at 680-81 (observing "for the sake of completeness," that its conclusion was "consistent with the legislative history of CAFA" as expressed in the Senate Judiciary Committee Report). In Hart, the Seventh Circuit concluded that once the removing defendant initially demonstrates that removal under CAFA was proper, the plaintiff bears the burden of establishing one of CAFA's
has "no authority to enforce principles gleaned solely from legislative history that has no statutory reference point."64

Committee reports "represen[t] the considered and collective understanding of those [legislators] involved in drafting and studying proposed legislation."65 To the extent it is appropriate to consider legislative history when engaged in statutory interpretation, committee reports are viewed as the "authoritative source" for determining legislative intent.66 However, as the Supreme Court recognized in Exxon Mobil Corp. v. Allapattah Services, Inc.,67 even committee reports can be abused and should not be employed in the absence of ambiguity. Most district courts that have been called upon to interpret a specific provision of CAFA have relied on its legislative history and the Senate Committee Report for guidance except where a particular provision was found to be unambiguous.

II. EXPANSION OF FEDERAL JURISDICTION OVER CLASS ACTIONS

CAFA expands federal jurisdiction over class actions in several distinct and different ways. The Act: requires only minimal diversity for qualifying class actions; changes how diversity is determined for qualifying class actions; permits aggregating the value of all potential class members claims for purposes of its amount-in-controversy requirement; requires diversity determinations well beyond the traditional date of filing rule; and treats unincorporated associations like corporations.

A. Expansion of Diversity Jurisdiction for Class Actions Covered by CAFA

Section 4 of CAFA expands federal diversity jurisdiction to potentially include (with certain limitations discussed below) any

jurisdictional exceptions. Id. at 681. There is no apparent inconsistency in the Seventh Circuit's rejection of the use of the Senate Committee Report in Brill, and its reference to it in Hart. Rather it affirms that the Report can be employed so long as it is not being used to contradict a preexisting judicial interpretation of the relevant point of law. Indeed, as the Supreme Court in Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 698 (2003), observed, "[s]ince 1948... there has been no question that whenever the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception." Thus, Brill and Hart provide two guideposts to follow when determining if legislative history can be used in addressing CAFA's ambiguities. Court and counsel should also bear in mind that this limitation on the use of legislative history is triggered when the Report cannot be tied to one of CAFA's provisions.

44. Miedema, 450 F.3d at 1328 (quoting Thigpen, 4 F.3d at 1577 (quoting Int'l Bhd. of Elec. Workers Local Union No. 474 v. NLRB, 814 F.2d 697, 712 (D.C. Cir. 1987))) (emphasis in original).
47. 545 U.S. 546, 125 S.Ct. 2611, 2625-2627 (2005).
class action having 100 or more class members where the “matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs,” and any plaintiff class member is diverse from any defendant. 48

The term “class action” is defined by CAFA as “any civil action filed under Rule 23 of the Federal Rules of Civil Procedure” 49 or a “similar state statute or rule of judicial procedure” that authorizes the filing of a class action. 50 The term “class member” includes those “persons (named or unnamed) who fall within the definition of the proposed or certified class.” 51 Thus, CAFA’s provisions are generally applicable to state-court actions before a class is certified. 52

CAFA is not triggered simply because a party is suing in a “representative capacity,” the type of relief sought resembles what is traditionally available in a class action, or a favorable judgment would benefit parties not before the court. Rather, the suit must be “filed under Rule 23 or a similar state statute as a class action.” 53 Similarly, CAFA does not encompass enforcement actions seeking civil penalties and injunctive relief brought by state attorney generals pursuant to state laws designed to protect a state’s citizens. 54 While a “parens patriae” action may resemble a class action in that an attorney general is representing a state’s citizens, it is not considered a class action within CAFA’s reach. Thus, where a lawsuit is not filed as a class action, CAFA does not apply even if for all intents and purposes it resembles one.

50. See 28 U.S.C. §1332(d)(1)(B). Where a state’s substantive law does not authorize the filing of a class action for a particular type of claim, a party “cannot invoke diversity jurisdiction under CAFA” to achieve a different result in federal court. Bonime v. Avaya, Inc., No. 06 CV 1630 (CBA), 2006 WL 3751219 at *2-5, (E.D.N.Y. Dec. 20, 2006) (addressing a New York law that prohibits the recovery of a penalty or “minimum measure of recovery” in a class action unless the statute creating the penalty or imposing a minimum recovery specifically authorizes the recovery thereof in a class action suit). In Bonime, because the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, did not authorize the recovery of statutory damages in a class action, a class action for a purported violation of the TCPA could not be brought in New York state court and CAFA could not be invoked to trigger diversity jurisdiction to pursue a TCPA class action in federal court.
52. 28 U.S.C. § 1332(d)(8); Miedema, 450 F.3d at 1327.
55. Id. at 753.
B. Aggregation of Value Permitted for Qualifying Class Actions

In Zahn v. International Paper Co., the Supreme Court held that all members of a federal class action brought pursuant to diversity jurisdiction had to meet §1332's amount-in-controversy requirement.  Although each of the named class representatives' claims met diversity's amount-in-controversy requirement, not all of the individual class member's claims reached that jurisdictional threshold. Therefore, the district court refused to certify a class, concluding it would not be feasible to define a class of persons whose individual claims met §1332's amount-in-controversy requirement. The Court in Zahn reaffirmed its prior holding in Snyder v. Harris to the effect "that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs' claims" meet the jurisdictional amount-in-controversy threshold. Zahn further elaborated that "any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims."

Zahn's jurisdictional holding and the corresponding notion that the value of the putative class member's claims could not be aggregated to meet §1332's jurisdictional requirement have been eliminated by Section 4 of CAFA. Section 1332(d)(6) now specifically provides: "In any class action, the claims of the individual class members shall be aggregated to determine whether the amount in controversy exceeds the sum or value of $5,000,000 exclusive of interest and costs."

Additionally, in Exxon Mobil, the Supreme Court significantly expanded the scope of a district court's supplemental jurisdiction. Exxon Mobil resolved a split in the circuits over whether the Judicial Improvements Act of 1990, which clarified the supplemental jurisdiction of federal courts, had overruled Zahn. Exxon Mobil held, in the context of a class action based upon diversity jurisdiction, that where the claim of at least one plaintiff reaches the jurisdictional amount-in-controversy threshold, so long as the other elements of diversity jurisdiction are met, a district court has supplemental jurisdiction over the claims of other class members that do not meet §1332's amount-in-controversy

57. Id. at 300-02.
58. Id. at 292.
60. Zahn, 414 U.S. at 300.
61. Id.
63. See 28 U.S.C. § 1367. For an excellent and lighthearted discussion of the split in the circuits on this issue prior to the Supreme Court's decision in Exxon Mobil, see Olden v. LaFarge Corp., 383 F.3d 495, 499-508 (6th Cir. 2004).
requirement." Thus, Exxon Mobil's holding essentially overturned Zahn. While CAFA had no bearing on the Court's analysis in Exxon Mobil, the Court did recognize that it "abrogates the rule against aggregating claims."

Where a plaintiff seeks declaratory or injunctive relief, "it is well established that the amount in controversy is measured by the object of the litigation." The Seventh Circuit has explained that when injunctive relief is sought, "the jurisdictional amount should be assessed [by] looking at either the benefit to the plaintiff or the cost to the defendant" in complying with the requested injunctive relief. The Seventh Circuit refers to this as the "either viewpoint" rule. The Senate Judiciary Committee Report endorses this either viewpoint approach when assessing the aggregate value of the class members' claims "regardless of the type of relief sought."

Not all federal circuits follow the either viewpoint rule.

64. 125 S. Ct. at 2620.
65. Id. at 2627-28. In light of Exxon Mobil, one strategy defendants have pursued is to seek removal under both CAFA and traditional diversity jurisdiction by arguing that the district court has supplemental jurisdiction over all class action claims where at least one plaintiff meets the diversity amount-in-controversy threshold. E.g., Hooks v. Am. Med. Sec. Life Ins. Co., No. 3:06-CV-00071, 2006 WL 2504903 (W.D.N.C. Aug. 29, 2006); Moore v. Genesco, Inc., No. C 06-3897 SBA, 2006 WL 2691390 (N.D. Cal. Sept. 20, 2006). When doing so, care should be taken to establish the basis of the court's jurisdiction under both jurisdictional prongs, and include any "specific facts supporting jurisdiction based on CAFA." Hooks, 2006 WL 2504903, at *4. 28 U.S.C. § 1653 provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." Section 1653 has been applied to removal petitions. See McMahon v. Bunn-O-Matic, 150 F.3d 651, 654 (7th Cir. 1998). A defendant may amend a notice of removal within thirty days of its filing to correct factual information upon which the jurisdictional allegations are based; but, after thirty days, only technical defects can be corrected — not substantive defects in the notice's jurisdictional allegations. See, e.g., Boelens v. Redman Homes, Inc., 759 F.2d 504, 512 (5th Cir. 1985); see also Alsup v. 3-Day Blinds, Inc., 435 F.Supp.2d 838, 844 n.2 (S.D. Ill. 2006) (noting that a notice of removal may be amended more than thirty days after the time to remove has expired "only to set out more specifically the grounds for removal that have already been stated, albeit imperfectly in the original notice").
67. Uhl v. Thoroughbred Tech. & Telecomm., Inc., 309 F.3d 978, 983 (7th Cir. 2002).
68. Id.
70. For a discussion of the split in the circuits over which viewpoint rule should govern how the amount in controversy is determined, see Britain Shaw McInnis, The $75,000.01 Question: What is the Value of Injunctive Relief?, 6 GEO. MASON L. REV. 1013, 1020-23 (1998) (noting the First, Fourth, Seventh, Tenth and D.C. Circuits follow the either viewpoint rule, while the Second, Third, Fifth, Eighth, Ninth and Eleventh Circuits follow the plaintiff
Additionally, at least one circuit that follows the either viewpoint approach in single plaintiff actions, does not follow that rule in cases where there are multiple plaintiffs, unless they are seeking “to enforce a single title or right in which they have a common and undivided interest.” The premise for the various circuits’ rejection of the either viewpoint approach appears to be principally based on Zahn and Snyder’s non-aggregation rule. However, because under CAFA, class members’ claims may now be aggregated, the either viewpoint approach should now be applied even in those circuits which have previously rejected that approach. Because the Senate Judiciary Committee’s endorsement of the either viewpoint approach can be linked to § 1332(d)(6)’s aggregation rule, it should withstand any challenge based upon the Seventh Circuit’s decision in Brill and the Ninth Circuit’s decision in Abrego, which addressed the proper use of legislative history.

Where injunctive relief is the sole remedy sought in a class action, the Seventh Circuit has instructed courts to look “separately at each named plaintiff’s claim and the cost to the defendant of complying with an injunction directed to that plaintiff.” The analysis of each plaintiff’s claim ensured that courts would not undermine “the nonaggregation rule that still applies to class actions where the named plaintiff’s claim does not satisfy the jurisdictional amount.” The aggregation rule found in § 1332(d)(6) of CAFA and the Supreme Court’s recent Exxon Mobil decision, however, have implicitly rejected the Seventh Circuit’s separate analysis approach for class actions involving injunctive relief. Even without CAFA’s “value-aggregation rule,” so long as one of the named plaintiffs can demonstrate a jurisdictionally...
sufficient claim when examined from “either viewpoint,” a district court should have supplemental jurisdiction over the remaining claims following *Exxon Mobil*. 77

The Senate Judiciary Committee recognized the potential difficulties that can occur when attempting to place a value on non-monetary relief sought in a class action. Their Report indicates that it was the Committee's intent that this provision should be “interpreted expansively,” that any assessment include “the value of all relief and benefits that would logically flow” from the relief sought, and if any doubts existed as to whether the class members’ claims reach CAFA’s aggregate threshold, “the court should err in favor of exercising jurisdiction over the case.” 78 For example, a declaration that a product is defective could easily meet CAFA’s aggregate threshold depending upon the number of products that had been sold and the costs associated with a recall and repair of the product.9 moreover, even prior to CAFA, punitive damages could also be considered in determining the amount in controversy. 80 This remains true under CAFA.

C. Only Minimal Diversity Required for Qualifying Class Actions.

While the requirement of complete diversity was neither constitutionally mandated by Article III, nor specifically required by the text of §1332, 81 the Supreme Court “has consistently interpreted §1332 as requiring complete diversity.” 82 However, “the grant of diversity jurisdiction in Article III of the Constitution permits the federal courts to decide cases with only ‘minimal’ diversity — that is, just one party with citizenship different from all others.” 83 The Seventh Circuit recently explained that Congress can “expand or contract the statutory diversity jurisdiction” of federal courts, and “[f]or many years, it has permitted minimal diversity suits under the federal interpleader

77. 125 S. Ct. at 2620.
79. Cf. In re Intel Corp. Microprocessor Antitrust Litigation, 436 F. Supp. 2d 687, 690 (D. Del. 2006) (noting that CAFA’s aggregate monetary threshold was met even when the court considered only the average price of a microprocessor rather than the entire computer, given the number of computers containing the microprocessor sold to households in the class area and in light of the treble damages and attorneys being sought, which can be considered in determining if CAFA’s aggregate threshold has been met).
80. See Bell v. Preferred Life Assur. Soc’y, 320 U.S. 238, 240 (1943) (noting that both actual and punitive damages were recoverable under a complaint and “each must be considered to the extent claimed in determining jurisdictional amount”).
82. Id.
83. *Hart*, 457 F.3d at 676 (citing State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967)).
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statute, 28 U.S.C. § 1335. The requirement of complete diversity has been abandoned for class actions encompassed by CAFA. All that is now required for a qualifying class action is minimal diversity — “any member of a class of plaintiffs [being] a citizen of a State different from any defendant.” CAFA, however, was not intended to “alter current law regarding how the citizenship of a person is determined.”

The long-standing rule for determining diversity of citizenship in class actions was that a court looked to the domicile of the named class representatives rather than the putative class members. Complete diversity was only required between the named plaintiffs and the named defendants in a federal class action based upon diversity. CAFA’s directive that the citizenship of plaintiff class members be examined changes the traditional rule, and should eliminate any attempt to collusively name a class representative in order to either dodge or invoke federal diversity jurisdiction. Additionally, CAFA’s section 4 provides that diversity jurisdiction for a class action can be met where either “any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state,” or where “any defendant is a foreign state or a citizen or subject of a foreign state.”

It bears mentioning that diversity jurisdiction is based on a person’s domicile, not his residency. Allocations of the parties’ “residence,” not their citizenship, is an “obvious shortcoming” that does not establish diversity jurisdiction under 28 U.S.C. § 1332. This remains true under CAFA. “Allegations of residency but not citizenship are insufficient to determine the existence of diversity jurisdiction” for purposes of CAFA. In one extreme case,

84. 457 F.3d at 676-77.
85. Id.
86. 28 U.S.C. § 1332(d)(2)(A); Plubell, 434 F.3d at 1071.
87. S. REP. No. 109-14, at 36, as reprinted in 2005 U.S.C.C.A.N. 3, 34. However, § 1332(d)(10) clearly modifies how the citizenship of unincorporated associations is determined for purposes of CAFA.
89. See, e.g., Snyder, 394 U.S. at 340 (requiring complete diversity only between the named plaintiffs and named defendants in a federal class action); In re Agent Orange Prod. Liab. Litig., 818 F.2d 145, 162 (2d Cir. 1987) (discussing the consequence that would follow an overruling of the aggregation doctrine with regards to federal diversity in a class action suit).
91. See, e.g., Denlinger v. Brennan, 87 F.3d 214, 216 (7th Cir. 1996) (explaining citizenship for diversity purposes “means domicile rather than residence” which requires a voluntary “physical presence in a state with [the] intent to remain there”); Robertson v. Cease, 97 U.S. 646, 650 (1878) (explaining citizenship and residency are not synonymous terms).
93. See Baldwin v. Monier Lifetile, L.L.C., No. CIV05-1058PHXJAT, 2005
defendant's notice of removal, which merely alleged that plaintiffs were "residents of the State of Arizona," was held not to have even established minimal diversity under CAFA.\textsuperscript{94}

\textbf{D. Timing Of The Diversity Determination}

Historically, whether diversity exists is determined as of the date the complaint is filed.\textsuperscript{95} Similarly, removal jurisdiction is determined based on the pleadings as they existed at the time of removal.\textsuperscript{96} While that approach remains generally true for defendants under CAFA,\textsuperscript{97} § 1332(d)(7) requires that diversity

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\textsuperscript{94} Id. at *1. \textit{But see} Blockbuster, Inc. v. Galeno, 472 F.3d 53, 59 (2d Cir. 2006) (addressing a complaint alleging the named plaintiff was a resident of New York and that thousands of New York customers were members of the class). \textsuperscript{95} Id. at *2-3 (D. Ariz. Dec. 7, 2005) (remanding an action because CAFA's minimal diversity requirement was not apparent from the face of the plaintiffs' complaint or defendant's notice of removal, neither of which established the citizenship or domicile of any of the parties).

\textsuperscript{96} See, e.g., Dole Food Co. v. Patrickson, 538 U.S. 468, 478 (2003) ("It is well settled, for example, that federal diversity jurisdiction depends upon the citizenship of the parties at the time suit is filed."); Navarro Savings Assn. v. Lee, 446 U.S. 458, 459-60 (1980) (same).

\textsuperscript{97} Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939).
determinations involving "members of the proposed plaintiff classes," be made at several other stages of a class-action proceeding. Section 1332(d)(7) provides that for class actions encompassed by the Act:

Citizenship of the members of the proposed plaintiff classes shall be determined ... as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion or other paper, indicating the existence of Federal jurisdiction. 98

Several points bear mentioning about the text of § 1332(d)(7). First, Congress' use of the word "shall" signals a legislative intent that the determinations of the plaintiffs' citizenship are mandatory. Second, § 1332(d)(7) contains no time limitation. Thus, it is possible that a determination of the citizenship of the plaintiff class members could be triggered immediately prior to the trial of a state-court action by the filing of a pleading or paper which indicates for the first time that jurisdiction over the action is available under CAFA. Finally, § 1332(d)(7) makes no reference to determining the citizenship of the defendants. Its sole focus is on the citizenship of the proposed plaintiff class members. The potential significance of these points on existing federal practice is discussed below.

When § 1332(d)(7) is applicable to a class action, several issues are of immediate concern. First, can a defendant forfeit the right to invoke federal court jurisdiction by not immediately removing the case when federal jurisdiction first appeared in the original or amended pleading, motion, or other paper, in view of CAFA's intent to broadly expand diversity jurisdiction over class actions? The short answer is yes, unless a pleading amendment triggers a new basis to remove, or so materially changes the nature of the action that it can be characterized as a new suit. 99 As explained below, while section 5 of CAFA eliminates 28 U.S.C. § 1446(b)'s one year absolute time limitation on removal — currently, a notice of removal in a diversity action must be filed within one year of the commencement of the action — it leaves undisturbed § 1446(b)'s requirement that a notice of removal must

be filed within thirty days of receiving a pleading or paper which provides the initial basis for removal. A contrary rule would permit a defendant to sit back, assess a state-court judge's rulings, and if those rulings were unfavorable remove the action to federal court at a later date. CAFA was intended to expand federal jurisdiction over "large" class actions, not allow for forum shopping.

Second, § 1332(d)(7) is not expressly limited to proceedings prior to removal. As discussed below, CAFA's revised diversity rules permit a district court to decline jurisdiction based upon certain enumerated factors including the number of putative class members who reside in the forum state. Section 1332(d)(7) seemingly requires that the citizenship of plaintiff class members be reassessed even after removal, and federal jurisdiction could be lost by the filing of an amended pleading which triggers any of CAFA's one-third/two-thirds jurisdictional exceptions.

Section 1332(d)(7) mandates that citizenship of the plaintiff class members be evaluated at various times during the life of the class action — as of the filing date for either: (1) the complaint; (2) an amended complaint; or, (3) where the initial pleading is not subject to federal jurisdiction, "as of the date of service" of an "amended pleading, motion or other paper indicating the existence of federal jurisdiction." Perhaps CAFA's drafters did not intend this result, but its reference to an "amended complaint" (item 2) is not necessarily the same as an amended pleading that "indicate[s] the existence of federal jurisdiction" (item 3). Otherwise, the timing triggers created by items (2) and (3) would be redundant. Thus, the amended complaint (item 2) referenced in § 1332(d)(7) by definition could be one that does not "indicate[e] the existence of federal jurisdiction." Otherwise, there would be no need to refer to an amended pleading in item (3). Accordingly, the filing of an amended complaint following removal would seemingly require another diversity determination because § 1332(d)(7)'s reassessment requirement is mandatory in nature, and could result in a determination that the court should decline jurisdiction over the action. The filing of an amended complaint following removal mandates a re-examination of the citizenship of the plaintiff class members and could result in a court declining to exercise jurisdiction in the event CAFA's one-third/two-thirds jurisdictional exceptions are met.

Third, can the citizenship of a defendant or group of defendants be reconsidered at other stages of a class action proceeding when § 1332(d)(7) only specifies subsequent consideration of the citizenship of putative plaintiff class

members? Under CAFA, there is no statutory basis for reconsideration of a defendant's citizenship after minimal diversity is established. Had Congress so intended, it could have readily indicated that the defendants' citizenship should also be considered as it did with the citizenship of the proposed plaintiff class members. By specifying that only the citizenship of the proposed plaintiff class members be considered, subsequent amendments to a pleading which merely add or subtract a significant or target defendant from a class action should not provide a basis for a federal court to decline the exercise of diversity jurisdiction under CAFA.

District courts generally appear to be following this approach. Several courts have held that the voluntary dismissal of a defendant or the filing of an amended pleading that eliminates a "target" or "significant" defendant, does not trigger a right to remand that action to state court.102 "When a plaintiff amends his complaint after removal in a way that destroys diversity, a district court must consider the reasons behind the amendment in determining whether remand is proper. If the plaintiff amended simply to destroy diversity, the district court should not remand."103

Historically, once federal jurisdiction attached, the mere substitution of a non-diverse party did not necessarily deprive a district court of diversity jurisdiction.104 This is especially true when the defendant that was added to the case was not an indispensable party at the time the complaint was filed.105 However, the Seventh Circuit explained in Estate of Alvarez v. Donaldson Co. that the subsequent addition of non-diverse indispensable parties under Rule 19(b) can destroy diversity jurisdiction, warranting dismissal of a federal action.106 Whether the holding of Alvarez holds force in light of § 1332(d)(7) remains

102. See, e.g., Braud, 445 F.3d at 808 (reversing a remand order where minimal diversity remained even after defendant was dismissed following the removal to federal court); Dinkel v. General Motors Corp., 400 F. Supp. 2d 289, 294 (D. Me. 2005) (holding plaintiff could not obtain a remand by voluntarily dismissing the defendants who had removed the class action to federal court); Robinson v. Holiday Universal, Inc., No. H-05-5726, 2006 WL 470592, at *3 (E.D. Pa. Feb. 23, 2006) (same).
105. Id.
106. See Estate of Alvarez v. Donaldson Co., 213 F.3d 993, 995 (7th Cir. 2000).
to be seen. Given CAFA's minimal diversity rule, the likelihood appears remote that the addition of an indispensable party as a defendant would even trigger consideration of the issue.

E. Unincorporated Associations are Treated Like Corporations

For diversity purposes, unincorporated business entities and membership associations assume the citizenship of each of its members.107 For purposes of CAFA's revised class action diversity and removal rules, "an unincorporated association is deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized."108 Thus, an unincorporated association is treated like a corporation for diversity purposes under the Act.109

Traditionally, courts have treated limited liability companies, labor unions, worker's compensation insurance pools, and even religious organizations as unincorporated associations for diversity purposes by considering the citizenship of all of their respective members.110 The citizenship of a partnership is similarly determined by looking to the citizenship of all partners.111 While CAFA does not specifically address how those entities are to be treated for diversity purposes on a going-forward basis, a valid argument can be made that given CAFA's intended purpose of enlarging federal jurisdiction over class actions, any entity that can loosely be described as an unincorporated association or that was historically treated like an unincorporated association for diversity purposes should fall within the ambit of § 1332(d)(10)'s coverage.112 However, until that point is firmly established in the

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109. See 28 U.S.C. § 1332(c)(1) ("[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business").
111. Carden v. Arkoma Assocs., 494 U.S. 185, 197 (1990) (holding a limited partnership assumes the citizenship of all partners, not just the citizenship of the general partners).
112. The Supreme Court in Carden, 494 U.S. at 189, reaffirmed "the doctrinal wall of Chapman v. Barney," 129 U.S. 677 (1889) (involving an unincorporated "joint stock company"). Carden also reaffirmed "[t]he tradition of the common law," which is 'to treat as legal persons only incorporated groups and to assimilate all others to partnerships." 494 U.S. at 190 (quoting Puerto Rico v. Russel & Co., 288 U.S. 476, 480 (1933)). Carden also reiterated the point that whether other types of organizations or business
decisional law interpreting CAFA, the safest approach when removing an action against one of those entities would be to specifically assert the citizenship of each individual that comprises the legal entity whenever possible.\footnote{113}

III. CAFA's Jurisdiction Exemptions

While CAFA expands federal jurisdiction over class actions, it also contains several potential exceptions to CAFA's jurisdictional reach. Potentially exempted from CAFA are certain categories of parties or claims: class actions where the "primary defendants" are governmental entities; class actions having less than 100 members; class actions solely involving nationally traded securities; class actions solely directed at internal corporate affairs; and, class actions solely relating to the rights, duties or obligations associated with a security.

A. Governmental Defendants — The "State-Action" Exemption

For over 100 years, the rule has been "a state is not a citizen" for diversity purposes,\footnote{114} and the presence of a state in an action entities should be treated like corporations for diversity purposes "is 'properly a matter for legislative consideration which cannot adequately or appropriately be dealt with by this Court.'" 494 U.S. at 196 (quoting United Steelworkers, 382 U.S. at 147).

The Supreme Court for the most part has drawn an artificial line between corporations on one hand, and all other types of business organizations on the other, treating all the same for diversity purposes depending on which side of the line they fell. Section 1332(d)(10) has now erased that artificial distinction for qualifying class actions under CAFA. Given Congress' stated intent of broadly expanding federal jurisdiction over class actions, any type of business entity that formerly looked to the citizenship of its members or partners for diversity purposes should now be deemed to be a citizen only of the States where it has its principal place of business and under whose laws it was organized. At least one commentator has adopted this view. See 15 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 102.56A, at p. 102-132.7 (3d ed. 2006) ("Under the Class Action Fairness Act of 2005 (CAFA), the citizenship of partnerships and other unincorporated entities is essentially equivalent to that corporation."). The Senate Judiciary Committee Report on § 1332(d)(10) specifically referred to insurance companies organized as "inter-insurance exchanges" or "reciprocal insurance associations" as examples of the artificial distinction drawn by the Supreme Court between corporations and other forms of business entities which has led to frequent criticisms and anomalous results. S.Rep.No. 109-14 at 41, as reprinted in 2005 U.S.C.C.A.N. 3, 43.

\footnote{113. See, e.g., Baldwin, 2005 WL 3334344, at *3 (addressing the removal of an action under CAFA by a limited liability company (LLC) that was subsequently remanded by the district court because, among other things, the pleadings failed to establish the citizenship of the individuals or entities that comprised the defendant LLC).

\footnote{114. Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1891) ("[I]t is well settled that a suit between a State and a citizen or a corporation of another is not between citizens of different states").}
destroyed complete diversity. Section 1332(a)(1) in particular limited diversity jurisdiction to suits between “citizens of different states.” So the first question is whether CAFA changes that historical approach? The answer would seem to be yes. Otherwise, there would be no need for a limited jurisdictional exemption in § 1332(d)(5)(A) for states and state officials who are “primary defendants.” In § 1332(d)(2)(A), CAFA expands diversity jurisdiction over qualifying class actions where any member of the plaintiff class “is a citizen of a State different from any defendant.” Where CAFA is invoked, diversity jurisdiction is no longer limited to actions between citizens of different states. The Fifth Circuit recently reached the opposite conclusion in the context of rejecting a remand motion based upon the CAFA’s local controversy exception. However, the court failed to take into consideration the text of § 1332(d)(2)(A) which appears to be unambiguous and seemingly extends diversity jurisdiction under CAFA over states and state officials.

Section 1332(d)(5)(A) provides that CAFA’s class action diversity rules do not apply to any action in which “the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.” CAFA does not define the term “primary defendants.” However, another section of CAFA, 28 U.S.C. § 1332(d)(4), containing the so-called “home state” and “local controversy” exceptions, which “mandate” that a district court decline jurisdiction over a class action, employs the phrase “primary defendants” in one of those exceptions while also referring to defendants from whom “significant relief is sought in

115. See, e.g., Dyack v. N. Mariana Is., 317 F.3d 1030, 1037 (9th Cir. 2003); U.S.I. Properties Corp., v. MD. Const. Co., 230 F.3d 489, 499 (1st Cir. 2000).
116. 28 U.S.C. § 1332(a)(1). This historical construction of § 1332(a)(1) provided an additional basis to the Eleventh Amendment that blocked federal jurisdiction over lawsuits brought against states. Eleventh Amendment issues triggered by CAFA are briefly discussed above in this section of the article. However, it is worth noting that Wisc. Dept. of Corrs. v. Schact, 524 U.S. 381, 389 (1998), explained that a federal court may ignore the Eleventh Amendment until a state asserts it.
117. CAFA eliminates the requirement of complete diversity so a state’s presence in a class action should not destroy jurisdiction under CAFA. However, that only partially answers the question in light of CAFA’s jurisdictional exceptions in § 1332(d)(4) directed at significant and target defendants who are citizens of the forum state.
119. Compare the text of § 1332(a)(1) with § 1332 (d)(2)(A).
120. Frazier, 455 F.3d at 547. The Frazier court reached its conclusion to avoid “confusion and inconsistency.” Frazier, also based its holding on CAFA’s legislative history.
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another." Thus, it would seem that a “primary defendant” must be someone, or something, different than a party from whom significant relief is sought. Otherwise, the use of the term “primary defendants” in § 1332(d)(4)(B) would be rendered redundant by § 1332(d)(4)(A)(i)(II)’s reference to significant defendants.

The Senate Judiciary Committee Report explained that “primary defendants” are those “that would be expected to incur most of the loss if liability is found” and would normally “include any person who has substantial exposure to significant portions of the proposed class in the action.” Accordingly, it would appear that the governmental entity or official must be a “target defendant” for a large majority of the putative class members in order for this jurisdictional exemption to have any meaning.

However, in Hangarter v. The Paul Revere Life Ins. Co., a district court concluded that a state insurance commissioner was a “primary defendant” even though he was not named in seven of the eight counts of a class-action complaint, and no monetary relief was sought against him. Since the commissioner was the only defendant against whom mandamus relief was sought, through which the insurance policies issued by the co-defendants could be revoked or reformed, the court considered him a primary defendant as to that claim. The court noted that the commissioner would “bear the burden of any mandamus or quasi-mandamus relief” which in its view was “substantial in its own light” and could be potentially liable to the entire putative class. Thus, in Hangarter the state-action exemption was triggered.

The state-action exemption is not directed merely at governmental entities generally, but rather at those governmental entities against “whom the district court may be foreclosed from ordering relief.” The Senate Judiciary Committee Report explains that the purpose of this exemption is to prevent “governmental entities from dodging legitimate claims... and then arguing that the federal courts are constitutionally prohibited from granting the requested relief.”

However, “a state’s voluntary invocation of a federal court’s jurisdiction through removal waives a state’s ‘otherwise valid objection’ to litigation of a state-law claim in a federal forum.”

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122. Compare 28 U.S.C. § 1332(d)(4)(A)(i)(II)(aa) (requiring that at least one defendant be a party from whom significant relief is sought), with § 1332(d)(4)(B) (utilizing the phrase “the primary defendants”).
125. Id. at *2-3.
126. Id. at *3.
129. Osmosegbon v. Wells, 335 F.3d 668, 673 (7th Cir. 2003) (quoting
When that limitation on Eleventh Amendment immunity is applied in this scenario, states and state officials may still be able to invoke § 1332(d)'s minimal jurisdictional rules if they seek to remove a case to federal court even when they are the "primary defendant," because the district court would not necessarily be foreclosed from entering relief against them under those circumstances. This is especially true where prospective injunctive relief is the primary remedy sought against a state official under the doctrine of Ex parte Young, and its progeny. Moreover, when the monetary relief is sought merely to remedy the ongoing effects of a continuing constitutional violation, sovereign immunity would not bar such relief irrespective of whether the action is filed in state or federal court. Additionally, "municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit." Furthermore, the Supreme Court has repeatedly refused to extend the defense of sovereign immunity to counties. Accordingly, the state-action exception would not be applicable in many instances even when the governmental entities are the primary defendants.

Section 1332(d)(5) applies where "the primary defendants" are governmental entities. It does not apply where a governmental entity, or where one or more governmental entities are primary defendants. This exception requires that all of the target defendants be governmental entities. Where one or more target defendants are governmental entities and others are not, this exemption should not be triggered. Such an interpretation of § 1332(d)(5) is consistent with the Committee Report, which explained that plaintiffs "should not be permitted to name state entities as defendants as a mechanism to avoid federal jurisdiction

130. Lapides, 535 U.S. at 623-34.
131. See Frazier v. Pioneer Americas LLC, 455 F.3d 542, 546 n.17 (5th Cir. 2006) (noting that the state-action exception was "first outlined in the original 1999 version of CAFA" approximately three years before the Supreme Court announced its decision in Lapides, and concluding "§ 1332(d)(5)(A) may be an obviated response to an eliminated problem"). Frazier also recognized that under CAFA "a state may find itself in a case removed to federal court without having joined in the removal. Such a state, having taken no affirmative action, has not waived immunity and can still assert it." 455 F.3d at 547.
137. Frazier, 455 F.3d at 546 ("The plain text of § 1332(d)(5)(A) using the definite article before plural nouns, requires that all primary defendants be states. Had Congress desired the opposite, it would have used 'a' and the singular or no article.").
over class actions that largely target non-governmental defendants.\footnote{138}

Applying the same logic, § 1332(d)(5)'s exemption should not bar removing the action to federal court unless it appears from the face of a pleading that a common-law defense or immunity would bar the action against all the named governmental defendants, in which case the action should probably have not been brought against them in the first place. The fact that a common-law defense or immunity might preclude relief from being entered against one (but not all) of the governmental defendants should not suffice.

While the Fifth Circuit views § 1332(d)(5) as a jurisdictional exception,\footnote{139} the Ninth Circuit recently disagreed and concluded that it should be treated as a prerequisite to jurisdiction under CAFA.\footnote{140} The Ninth Circuit based its conclusion on the language of § 1332(d)(5) which provides “that ‘paragraphs (2) through (4) shall not apply’ to any class action” in which the primary defendants are States or State officials or where the total number of members of all proposed plaintiff classes is less than 100.\footnote{141} This distinction is important since it impacts which party bears the burden of proof on the issue.

B. Small Class Actions

Section 1332(d)'s diversity rules do not apply to class actions where the total number of class members for all proposed plaintiff classes is less than 100.\footnote{142} The Senate Judiciary Committee Report indicates that a district court “should err in favor of exercising jurisdiction over the matter” when it is unclear whether the total number of potential class members is less than one hundred.\footnote{143}

C. Class Actions Involving Securities

Section 1332(d)'s diversity rules do not apply to class actions solely involving a “security,” as defined under section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934.\footnote{144} State court class actions involving “covered securities” are already subject to the SLUSA's (Securities

\footnote{139} Frazier, 455 F.3d at 546.
\footnote{140} Serrano v. 180 Connect, Inc., No. 06-17366, 2007 WL 601984 at *2, n. 2 (9th Cir., Feb. 22, 2007).
\footnote{141} Id., quoting 28 U.S.C. § 1332(d)(5). The Ninth Circuit in Serrano also noted that its approach, which treats § 1332(d)(5) as a prerequisite to jurisdiction under CAFA, “is consistent with the view of the Seventh Circuit.” Id. (citing Hart, 457 F.3d at 679).
\footnote{142} 28 U.S.C. § 1332(d)(5)(B).
Litigation Uniform Standards Act of 1998) mandatory preemption and removal provisions. Thus, by this exception, Congress was obviously attempting to draw a clear demarcation line between the two Acts, and to leave SLUSA's jurisdictional boundary lines for nationally traded securities undisturbed.\footnote{145}

D. Class Actions Directed at Internal Corporate Affairs

Section 1332(d)'s diversity rules do not apply to class actions solely involving "the internal affairs or governance of a corporation," or some 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."\footnote{146} The Senate Committee Report indicates that this exception is directed at the "internal affairs doctrine" which was described by the Supreme Court in \textit{Edgar v. MITE Corp.}\footnote{147} as "matters peculiar to the relationships among or between the corporation and its current officers, directors and shareholders."\footnote{148}

The internal affairs doctrine essentially "is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs ... because otherwise a corporation could be faced with conflicting demands."\footnote{149} Section 309 of the Restatement (Second) of Conflicts of Law addresses the internal affairs doctrine and specifies that "[t]he local law of the State of incorporation will be applied to determine the existence and extent of a director's or officer's liability to the corporation, its creditors and shareholders."\footnote{150}

The Senate Committee Report cited several other decisions including \textit{McDermott, Inc. v. Lewis},\footnote{151} in an attempt to explain the parameters of this exception. In \textit{McDermott}, the Delaware Supreme Court indicated that when dealing with the internal affairs doctrine:

\footnote{145. \textit{See Estate of Pew v. Cardrelli}, No 5: 05-CV-1317, 2006 WL 3524488, at *6 n.9 (N.D.N.Y., Dec. 6, 2007) ("The effect of Section 1332(d)(9)(A) is to prevent CAFA from disturbing impact of SLUSA on state and federal law affecting nationally traded securities.").
148. \textit{457 U.S. at 645}. \textit{McDermott, Inc. v. Lewis}.
149. \textit{Edgar v. MITE Corp.}
150. \textit{RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 309 (1971)}; \textit{see also Estate of Pew}, 2006 WL 3524488, at *6 (explaining "the law of the state of incorporation normally determines issues relating to the internal affairs of a corporation. The rule meets 'the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation.'" (quoting \textit{First Nat. City Bank v. Banco Para El Comercio, 462 U.S. 611, 621 (1983)})).
151. \textit{531 A.2d 206 (Del. 1987)}.}
It is essential to distinguish between acts which can be performed by both corporations and individuals and those activities which are peculiar to the corporate entity. Corporations and individuals alike enter into contracts, commit torts, and deal in personal and real property . . . The internal affairs doctrine has no applicability in these situations. Rather, the doctrine governs the choice of law determinations involving . . . those activities concerning the relationships inter se of the corporation, its directors, officers and shareholders.152

Another of the cited decisions in the Senate Committee Report, Ellis v. Mutual Life Insurance Co.,153 explained: “[W]here the act complained of affects the complainant solely in his capacity as a member of the corporation . . . and is the act of the corporation . . . then such action is the management of the internal affairs of the corporation.”154

Against that backdrop, a class action involving allegations of a breach of fiduciary duty brought on behalf of the holders of limited partnership units against the general partners over a proposed sale of the partnership's assets, fell within CAFA's internal corporate affairs exception.155 The case, therefore, was remanded to state court.156 There is an obvious overlap between several of CAFA's exceptions found in § 1332(d)(9). As this decision demonstrates, the exception for claims involving the internal affairs or governance of a corporation is broad enough to encompass a breach of fiduciary duty claim involving a security.157

In an attempt to clarify the respective parameters of § 1332(d)(9)'s exceptions, one district court explained, “[a] wide variety of claims relating to corporate internal affairs or governance do not require that a fiduciary duty be established. Those claims, if governed by the law of the state of incorporation, are covered by [the exception for internal corporate affairs].”158 If a class action claim relates to, is triggered by, or arises pursuant to a “security,” then the claim is governed by the fiduciary duty exception freeing that “particular subset of claims from . . . [the] requirement that they be based on the laws of the state of incorporation.”159

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152. Id. at 214-15.
153. 187 So. 434 (Ala. 1939).
154. Id. at 443.
156. Id.
158. Id. at *3.
159. Id. at *2.
E. Class Actions Relating to the Rights, Duties or Obligations Associated with a Security

CAFA does not apply to class actions solely involving a right, duty, or obligation, including a fiduciary duty "relating to or created by or pursuant to any security" as defined in section 2(a)(1) of the Securities Act of 1933. The Securities Act of 1933 defines a security to include an "investment contract" and limited partnerships ordinarily qualifying as an investment contract. However, whether a particular investment qualifies as an investment contract for purposes of the Securities Act must be determined on a case-by-case basis under the test set forth by the Supreme Court in Securities and Exchange Comm’n v. W. J. Howey Co. Following Howey, an investment qualifies as an investment contract — and is treated as a security — whenever it involves an investment of income in a common enterprise and an expectation of profits solely from the efforts of others. Thus, this exception is broader than what might appear at first blush.

For example, this exception was held to have been triggered in a class action brought on behalf of limited partnership owners that challenged a proposed sale of the partnership’s assets. The complaint alleged that the sale, negotiated by the general partners, was fundamentally unfair because it was the product of a flawed bidding process with undervalued assets and misleading proxy statements. The district court held those allegations fell within the coverage of § 1332(d)(9)(C)’s jurisdictional exception. This exception was also found applicable to a shareholder class action where the class members sought equitable relief alleging breach of fiduciary duties and self-dealing in connection with a corporate merger. In that decision, the district court concluded those allegations also fell within the exception, resulting in a remand to state court.

Section 1332(d)(9)(C) encompasses not only the rights, duties and obligations conferred by the terms of a security itself such as "voting rights, rights to receive dividends, rights upon liquidation or any other claim arising from... ownership" of a security, but also any “rights, duties and obligations that are connected with the security.” As one district noted:

Subdivision (d)(9) of Section 1332 carves out a substantial exception for state law securities and business-related claims. The three

162. 328 U.S. 293, 298-99 (1946).
163. Id.
subparagraphs of subdivision (d)(9), read together, evince 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.\textsuperscript{166}

To state the obvious, the three exceptions set forth in § 1332(d)(9), discussed above, do not close CAFA's door to the federal courthouse where a class action complaint raises multiple liability issues or involves claims or theories other than one of those specifically exempted by § 1332(d)(9).

IV. PERMISSIBLE AND MANDATORY GROUNDS TO DECLINE DIVERSITY JURISDICTION: THE ONE-THIRD AND TWO-THIRD RULES

While § 1332(d)(2) may open the door to federal diversity jurisdiction for many class actions, §§ 1332(d)(3) and (4) provide a means to close that door. Section 1332(d)(3) grants district courts with a discretionary basis to decline the exercise of diversity jurisdiction over a class action. Where the factors enumerated by § 1332(d)(4) are met, the district court is required to decline jurisdiction. However, where one-third or less of all putative class members reside in the forum state, the exceptions to class action diversity jurisdiction discussed below are not triggered. When raising these exceptions, the party seeking remand bears the burden of proving the number of putative class members who are citizens of the forum state.\textsuperscript{167} If the party seeking remand fails to meet that burden, a motion to remand based on these exceptions should be denied.\textsuperscript{168}

A. Discretionary Ground to Decline Jurisdiction: The Greater than One-Third But Less than Two-Thirds Rule

Section 1332(d)(3) provides that “in the interests of justice and looking at the totality of the circumstances” a court may decline to exercise jurisdiction “over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes,” and “the primary defendants are citizens of the State in which the action was originally filed . . .”.\textsuperscript{169} Factors that a district court has to consider in making this determination include:

\textsuperscript{166} Id. at *6 (internal citations omitted).
\textsuperscript{167} See, e.g., Evans v. Walter Indus., Inc., 449 F.3d 1159, 1164-65 (11th Cir. 2006).
\textsuperscript{168} Id. at 1168.
(A) whether the claims asserted involve matters of national or state interest;

(B) whether the claims asserted will be governed by the laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action was pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims, on behalf of the same or other persons have been filed.\textsuperscript{170}

Sections 1332(d)(3)’s use of the phrase “the primary defendants” again requires that all of the target defendants be citizens of the forum state.\textsuperscript{171} If one or more of the target defendants are citizens of a different state, then this exception should not apply. Additionally, in the Fifth Circuit’s view, if one of the primary or target defendants is a state agency or the state itself, then neither this exception nor the “home state” or “local controversy” exceptions can be successfully invoked because of the historical rule that a state has no citizenship for diversity purposes.\textsuperscript{172}

The definition of a proposed class will have a major impact on CAFA’s one-third and two-third rules, setting the stage for the

\textsuperscript{171} See Frazier, 455 F.3d at 546 (addressing § 1332(d)(5)(A)’s exception where “the primary defendants are States,” and concluding that all primary defendants must be States to invoke that exception).
\textsuperscript{172} Id. at 547 (citing Cory v. White, 457 U.S. 85, 87 (1982)) Frazier observed that CAFA “does not alter the current law” concerning the determination of citizenship. Id. However, see notes 114-20 and accompanying text for a discussion of CAFA’s impact on the historical rule that a state was not deemed to be a citizen for diversity purposes and the Frazier decision.
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district court's required analysis. Where a plaintiff's proposed class definition does not refer to the citizenship or domicile of the putative class members, CAFA's one-third and two-third exceptions should not be triggered. The plaintiff's proposed class definition will likely be the focus of heated jurisdictional disputes. Class counsel seeking to dodge federal court jurisdiction will fashion proposed class definitions in an effort to maximize the number of in-state class members.

Another contentious litigation issue is whether class counsel can attempt to trigger this exception by intentionally not naming a primary defendant from a different state. New jurisdictional battles implicating the potential joinder of necessary parties under Rule 19 loom on the horizon. Therefore, an issue that will have to be resolved is whether a defendant can be a “necessary party” under Rule 19, because in its absence, complete relief could not be afforded, and if so, still not be a “primary defendant” under the Act?

B. Mandatory Grounds to Decline Jurisdiction — The “Home-State” and “Local Controversy” Exceptions — The Two-Thirds or More Rules

Section 1332(d)(4) sets forth two alternative tests that require a court to decline diversity jurisdiction over a class action where two-thirds or more of all proposed plaintiff class members are citizens of the forum state. The first is where “two-thirds of the potential class members and the primary defendants” are citizens of the state in which the action is filed. This has been referred to as the “home state controversy” exception.

The second is where (1) more than two-thirds of all proposed plaintiff class members and at least one “significant defendant” are citizens of the forum state, (2) the principal injuries caused by

173. See, e.g., Adams v. Fed. Materials Co., Inc., No. Civ.A. 5:05CV-90-R, 2005 WL 1862378, at *5 (W.D. Ky. July 28, 2005) (recognizing that where plaintiffs defined the class as “all other similarly situated owners of structures in the Princeton, Kentucky area,” the court determined that those owners were not necessarily Kentucky citizens); Schwartz II, 2006 WL 487915, at *5-6 (E.D. Pa. Feb. 28, 2006) (holding that plaintiffs' proposed class definition of “all persons and entities residing or doing business in...Pennsylvania” did not trigger these exceptions because a person’s residence is not the same as his or her domicile or citizenship).

174. Cf. Mattera v. Clear Channel Commc'n, Inc., No. 06 Civ. 01878 (DC), 2006 WL 3290836, at *2-6 (S.D.N.Y. Nov. 14, 2006) (dismissing a putative class action for the failure to join an indispensable party where joinder would destroy complete diversity and because there was no basis for jurisdiction under CAFA).


“each defendant” were incurred in the state in which the action was originally filed, and (3) during the immediately preceding three-year period, no other class actions involving the same or similar allegations were brought against any of the defendants.\footnote{177} Under this second test, a significant defendant is one from whom “significant relief is sought,” and whose conduct “forms a significant basis for the claims asserted” by the proposed plaintiff class.\footnote{178} This has been referred to as the “local controversy” exception.\footnote{179} The Eleventh Circuit relied upon the Senate Committee Report in reaching its conclusion that the local controversy exception was narrowly drafted “to ensure that it does not become a jurisdictional loophole,” and that all doubts should be resolved “in favor of exercising jurisdiction over the case.”\footnote{180}

Under these alternative tests, the terms “the primary defendants,” and “at least 1 defendant is a defendant from whom significant relief is sought” are treated differently, and counsel should resist any attempt to merge the two concepts.\footnote{181} The Act does not define what constitutes “significant relief” or what amounts to a “significant basis for the claims asserted.” In light of traditional rules on joint and several liability, theoretically any defendant could qualify as one from whom significant relief is sought. However, the Eleventh Circuit has rejected the notion that the local controversy exception can be met merely through allegations of joint and several liability.\footnote{182} As the court explained, “the mere fact that relief might be sought against [one defendant] for the conduct of others (via joint liability) does not convert the conduct of others into [the] conduct of [that defendant] so as to also satisfy the ‘significant basis’ requirement.”\footnote{183}

Whether a defendant’s alleged conduct forms a significant basis for the claim asserted could also turn on the legal theory under which the action is being brought. It is unclear whether traditional state law concepts such as active versus passive fault, or direct versus vicarious liability will play any role or impact a

\footnote{177} \textit{See} Caruso v. Allstate Ins. Co., No. 06-2613, 2007 WL 64162, at *5 (E.D. La., Jan. 8, 2007) (noting that several other proposed class actions involving similar factual allegations had been filed against several of the named defendants during the prior three year period and concluding the existence of those other class actions was fatal to plaintiffs’ argument that the action should be remanded pursuant to CAFA’s local controversy exception).


\footnote{179} \textit{Schwartz I}, 2005 WL 1799414, at *2.


\footnote{181} \textit{See Caruso}, 2007 WL 64162, at *4 (“Clearly, CAFA intended there to be a substantive difference between ‘primary defendants’ and ‘significant defendants’ as contemplated by the two exceptions to the exercise of jurisdiction under the statute.”).

\footnote{182} \textit{Id}. at 1167 n.7.

\footnote{183} \textit{Id}.
court's analysis when addressing this issue. However, in *Adams v. Federal Materials Co.*, one district court concluded that where a complaint sought the same relief from all defendants, the fact that one defendant might be liable to another under an indemnification theory did not provide a basis for treating one as a "secondary" defendant for purposes of § 1332(d)(4)(B).\textsuperscript{184}

In *Robinson v. Cheetah Transportation*,\textsuperscript{185} the driver of a tractor-trailer was not deemed a defendant from whom significant relief was sought. In reaching that conclusion, the court in *Robinson* observed under the local controversy exception, whether "significant relief" is sought from an in-state defendant requires "not only an assessment of how many members of the class were harmed by the defendant's actions, but also a comparison of the relief sought between all defendants and each defendant's ability to pay a potential judgment."\textsuperscript{186} The *Robinson* court recognized that "[w]ith an amount in controversy of at least $5,000,000, the plaintiffs will seek most of that relief from those who are capable of paying it: the corporate defendants."\textsuperscript{187} An additional factor indicating that plaintiffs were not seeking "significant relief" from the driver was their failure to serve him as of the date of the court's ruling.\textsuperscript{188} When the amount of the relief sought from an in-state defendant is relatively minor in comparison to the amount of the total relief sought in the action, then the local controversy exception would be inapplicable.

The Eleventh Circuit recently endorsed *Robinson*'s approach\textsuperscript{189} in a matter that involved both personal injury and property damage claims based upon allegations involving the release of toxic waste substances from the defendants' manufacturing facilities.\textsuperscript{190} Critical to the outcome however, was plaintiffs' failure to offer any insight as to the role which the forum-state defendant played in the alleged contamination, or the


\textsuperscript{186} *Id.* at *3. *See also In re Ingram Barge Co.*, No. 05-4419, 2007 WL 148647, at *2 (E.D. La., Jan. 10, 2007) (denying a motion to remand, holding the individuals working for the corporate defendant were not primary defendants, their employer was the primary defendant because it was "the party that well and is most able to bear most of the liability if the plaintiffs prevail").


\textsuperscript{188} *Id.*

\textsuperscript{189} *Evans*, 449 F.3d at 1167.

\textsuperscript{190} *Id.* at 1161.
number or percentage of putative class members who may have claims against that defendant. The Eleventh Circuit also pointed to the fact that the defendant had closed one of its plants in 1951, and that its other plant was not located near the largest concentration of the identified class members. On the other hand, a number of other defendants had operations much closer to the affected area. These factors suggested that the conduct of the forum-state defendant was not significant when compared to the other defendants, and would not form a significant basis for the class members’ claims. Therefore, the plaintiffs failed to establish the applicability of the local controversy exception and removal was proper under CAFA.

Because the determination of whether significant relief is being sought from a forum-state defendant involves a determination of the number of putative class members who were potentially harmed by that defendant and a comparison of the relief sought from all defendants, market share information, if available for the specific state could prove to be determinative on the issue.

Note that under § 1332(d)(4)’s home-state controversy exception, all target defendants must be from the forum state. Under the local controversy exception, only one significant defendant must be from that state. The local controversy exception also states that the principal injuries from each of the defendant’s misconduct must have been incurred (not occurred) in the state in which the action was filed. The term “principal injuries” is not defined, and in many scenarios, what constitutes the principal injury may be far from clear. In a ground-water contamination case, for example, which allegedly results in physical illness or injuries to multiple persons, is the principal injury the contamination of the ground water or the subsequent physical illness? Where multiple parties are suing to recover for monetary losses or lost profits, will the size of an individual’s loss or the number of plaintiffs in a given state be the determinative factor for assessing the state in which the principal injuries were

191. Id. at 1167.
192. Id. at 1168.
193. Id.
195. See Mattera, 2006 WL 3290836, at *11 (observing that the local controversy exception “does not apply to cases in which the defendants engaged in conduct that ‘could be alleged to have injured [persons] throughout the country or broadly throughout several states.’” (quoting Kearns v. Ford Motor Co., No. 05 Civ. 5644, 2005 WL 3967998, at *12 (C.D. Cal. Nov. 21, 2005))).
incurred? As with several of CAFA’s other class action diversity rules, until guidance is provided by the courts, these issues have to be carefully addressed by counsel. The one-third and two-third rules create some room to play for a creative pleader that desires to dodge federal court jurisdiction.

For purposes of the one-third and two-third rules, the existence of other class actions involving the same or similar allegations would seemingly favor the assertion of federal jurisdiction, especially in view of the “multidistrict litigation process” in which all of the proposed actions “could be handled efficiently on a coordinated basis.” The Senate Committee Report explains that this factor should be liberally interpreted so that “plaintiffs [are] not . . . able to plead around it with creative legal theories.” In other words, where the subject matter of a prior class action is the same, a party should not be able to trigger § 1332(d)(4)’s jurisdictional exemption merely by changing legal theories.

Finally, it has been suggested that one strategy that may be employed to avoid CAFA is the filing of coordinated state-wide class actions to take advantage of §§ 1332(d)(3) and (d)(4)’s jurisdictional exceptions. However, both sections 1332(d)(3)(F) and (d)(4)(A)(ii) can be used to negate those exceptions where a similar class action had been filed during the prior three-year period “on behalf of the same or other persons.” Once the first state-wide class action is filed, any subsequent class action filed in another state asserting a similar liability theory should be swept up by subparagraphs (d)(3)(F) and (d)(4)(A)(ii). The use of the phrase “or other persons” in those provisions make them broad enough to encompass any subsequent, similar state-wide class action, and should be able to at least partially blunt such a strategy.

V. POST-REMOVAL JURISDICTIONAL DISCOVERY

The Senate Committee Report recognized that in some instances “a federal court may have to engage in some fact-finding, not unlike what is necessitated by existing jurisdictional statutes.” The Report explained that “limited discovery may be necessary to make these determinations,” but further clarified that “these jurisdictional determinations should be made largely on the basis of readily available information.” The Report further cautioned that:

200. Id.
Allowing substantial, burdensome discovery on jurisdictional issues would be contrary to the intent of these provisions to encourage the exercise of federal jurisdiction over class actions. For example, in assessing the citizenship of the various members of a proposed class, it would in most cases be improper for the named plaintiffs to request that the defendant produce a list of all class members (or detailed information that would allow the construction of such a list), in many instances a massive, burdensome undertaking that will not be necessary unless a proposed class is certified. Less burdensome means (e.g., factual stipulations) should be used in creating a record upon which the jurisdictional determinations can be made. 202

The Ninth Circuit recognized that in light of the aforementioned legislative history, “any decision regarding jurisdictional discovery is a discretionary one, and is governed by existing principles regarding post-removal jurisdictional discovery, including the disinclination to entertain substantial, burdensome discovery on jurisdictional issues.” 203

VI. REVISIONS TO REMOVAL PROCEDURE

Defendants are permitted to remove state court actions that could have been originally filed in federal court. 204 Historically, under federal removal statutes “[t]he scales are not evenly balanced . . . . An in-state plaintiff may invoke diversity jurisdiction, but § 1441(b) bars removal on the basis of diversity “if any ‘part[y] in interest properly joined and served as [a] defendant is a citizen of the State in which [the] action is brought.” 205

CAFA’s expansion of diversity jurisdiction enhances the ability to remove qualifying class actions to federal court. However, there currently exists a complex network of rules regulating removal practice. The law of removal has been described as “a minefield through which unwary litigants pass at their peril.” Congress addressed the complexity of removal

201. Id.; see also Schwartz II, 2006 WL 487915, at *4 (expressing caution over the use of this legislative history in denying plaintiff’s motion for a remand, the district court based its jurisdictional determination upon information “available at this stage of the litigation”); Abrego, 443 F.3d at 684 (concluding the district court did not abuse its discretion in refusing to order post-removal jurisdictional discovery).

202. Abrego, 443 F.3d at 684.

203. See City of Chi. v. Int'l College of Surgeons, 522 U.S. 156, 163 (1997); Jefferson County, Ala. v. Acker, 527 U.S. 423, 430 (1999) (“It is the general rule that an action may be removed from state court to federal court only if a federal district court would have original jurisdiction over the claim in suit.”).


Developing Trends in CAFA practice in CAFA by eliminating three traditional hurdles to removal for qualifying class actions and by providing an accelerated appellate review of remand orders.\footnote{2006}

CAFA's changes to removal practice were directly linked to its revisions of diversity jurisdiction. Section 1453(a) provides that "the terms 'class,' 'class action,' 'class certification order,' and 'class member' shall have the same meanings given [those] terms under section 1332(d)(1)."\footnote{2007} Additionally, CAFA's jurisdictional exceptions applicable to claims solely involving "covered securities," the internal affairs of a corporation, and the rights, duties, and obligations created by a security, are also found in CAFA's removal provisions.\footnote{208}

Section 1441(a) governs removal of claims where a federal court's jurisdiction is based upon diversity jurisdiction. Section 1441(b) authorizes removal of actions involving a federal question (claims based upon the Constitution, laws, or treaties of the United States). Removal of suits against foreign states is also permitted under § 1441(d). CAFA does not affect removal based upon federal question jurisdiction or removal of a suit involving a foreign state. CAFA does however provide an alternative basis to remove a class action when a foreign state or citizen or subject of a foreign state is either a putative class member or a named defendant in the class action.\footnote{209}

A. One-Year Limitation on Removal Eliminated for Class Actions

Section 1446(b) recognizes that federal jurisdiction may not be triggered by the initial pleading filed in state court. It can arise through "an amended pleading, motion, order or other paper," and § 1446(b) permits a party to file a notice of removal within thirty


days after receipt thereof.\footnote{210} Section 1446(b), however, contains its own limitations period: "No case . . . may be removed from state to federal court based on diversity of citizenship 'more than 1 year after commencement of the action.'\footnote{211} CAFA eliminates § 1446(b)'s one year limitation for removal of class actions.\footnote{212}

B. Removal by Defendants who are Citizens of the Forum State

One of the historical supports for diversity jurisdiction was "the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court."\footnote{213} That concern is lessened where one of the defendants is a resident of the state in which the action was brought. Section 1446(b)'s text reflects that distinction: if diversity provides the basis for federal court jurisdiction, a case cannot be removed where one of the defendants is a citizen of the state in which the action is brought.\footnote{214} CAFA also eliminates that prohibition against removal for class actions encompassed by the Act.\footnote{215}

C. Consent of All Defendants Not Required

Traditionally, where a claim is brought against multiple defendants, they are treated collectively for removal purposes. All defendants who have been served must either join in or indicate their consent to removal.\footnote{216} A removal petition is defective where it fails to demonstrate that all properly served parties have either joined or consented to removal.\footnote{217} CAFA eliminates that hurdle to removal.\footnote{218} Section 1453(b) provides that a class action "may be removed by any defendant without the consent of all defendants."\footnote{219}

\footnote{212} See 28 U.S.C. § 1453(b); Braud, 445 F.3d at 806 (holding a newly added defendant can remove under CAFA even when the case had been pending in state court for over a year).
\footnote{213} Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 797 (11th Cir. 1999).
\footnote{214} 28 U.S.C. § 1441(b).
\footnote{215} See 28 U.S.C. § 1453(b) ("A class action may be removed to a district court . . . without regard to whether any defendant is a citizen of the State in which the action is brought.").
\footnote{216} See, e.g., Phoenix Container, L.P. v. Sokoloff, 235 F.3d 352, 353-54 (7th Cir. 2000) (noting "an essential step" to removal is all defendants joining in the petition to remove).
\footnote{217} Shaw v. Dow Brands, Inc., 994 F.2d 364, 368-69 (7th Cir. 1993).
\footnote{218} See Adams, 2005 WL 1862378, at *4.
\footnote{219} 28 U.S.C. § 1453(b).
D. Burden of Proof When Remand is Sought

A court will "resolve all contested issues of substantive fact in favor of the plaintiff,"220 and a case will be remanded "if there is doubt as to the right of removal in the first instance."221 When a motion to remand is filed, historically the party invoking federal jurisdiction through removal bears the burden of demonstrating both the existence of federal jurisdiction and that the procedural requirements for removal have been met.222 These principles spring from the Supreme Court's holding in Shamrock Oil & Gas Corp. v. Sheets, calling for strict construction of the law of removal based upon "successive acts of Congress regulating the jurisdiction of federal courts."223 However, the Court subsequently recognized in Breuer v. Jim's Concrete of Brevard224 that "whatever apparent force this argument might have claimed when Shamrock was handed down has been qualified by later statutory development." Nonetheless, strict construction of removal under CAFA based upon the holding of Shamrock still apparently holds force.225

The Senate Committee Report indicates that after a case has been removed to federal court under CAFA "the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court."226 However, CAFA itself is silent on this point; its statutory text does not specifically address the issue. Thus, in light of CAFA's statutory silence, it is unclear which party bears the burden of proof when remand is sought: the defendant who removed the case, or the plaintiff seeking remand? District courts addressing this issue have reached conflicting results, splitting over the use of CAFA's legislative history. One group, following the lead of Berry v. American Express Publishing Corp.,227 has concluded that CAFA shifts the burden of proof to the party seeking remand.228

222. Doe v. Allied Signal, 985 F.2d 908, 911 (7th Cir. 1993); Shamrock Oil, 313 U.S. at 108-09.
223. Shamrock Oil, 313 U.S. at 108.
224. 538 U.S. at 697.
225. See, e.g., Miedema v. Maytag Corp., 450 F.3d 1322, 1328-29 (11th Cir. 2006) ("The rule of construing removal statutes strictly and resolving doubts in favor of removal however, is well-established."); In re Audi Litigation, 2006 WL 1543752, at *1 n.3 ("It might be argued that the presumption in favor of the states no longer applies after CAFA. Courts deciding removal cases post-CAFA, however, have continued to reaffirm the traditional proposition that doubts about jurisdiction should be resolved in favor of remand.").
In determining that the Senate Committee Report could be used to decipher legislative intent, the district court in Berry observed that “where the statute does not squarely address [an] issue, legislative history is an essential tool for statutory interpretation.”

Significant to its conclusion was that the original diversity statute, just like CAFA, does not contain any reference to the burden of proof issue. “To this end, Committee Reports are ‘the authoritative source for finding the Legislature’s intent,’ and may be consulted as one important resource in the quest for faithful statutory interpretation.”

On the other side of the issue, several district courts have observed that Congress is presumed to be aware of existing precedent when it enacts a new law. Although Congress changed several aspects of existing removal practice in CAFA, it did not address the burden of proof issue. Therefore, those courts concluded that if Congress had intended to change which party bore the burden of proof on removal, it would have addressed the issue in CAFA’s statutory text. Congress’ failure to do so, in those courts’ view, does not render CAFA’s removal provisions ambiguous so as to warrant the use of legislative history.

Given the Federal Judicial Code Revision Project’s acknowledgement of the complexity of removal practice, it is unrealistic to expect that Congress could address every specific issue found in the decisional law. However, the Seventh Circuit, in an opinion written by Judge Easterbrook, forcefully rejected the notion that Congress changed the burden of proof on removal under CAFA. In explaining that “naked legislative history has no legal effect,” he explained:

When a law sensibly could be read in multiple ways, legislative history may help a court understand which of these received the political branches’ imprimatur. But when the legislative history stands by itself, as a naked expression of “intent” unconnected to any enacted text, it has no more force than an opinion poll of legislators — less, really, as it speaks for fewer.

Every other federal circuit that has addressed the issue reached the same conclusion. While the Seventh Circuit recognized “that

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229. Berry, 381 F. Supp. 2d at 1121.
230. Id. (quoting Garcia v. U.S., 469 U.S. 70, 76 (1984)).
232. Brill, 427 F.3d at 448.
233. Abrego, 443 F.3d at 684-85 (discussing several of CAFA’s provisions
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A dozen or so district judges’ had reached a contrary conclusion, practitioners in the Second, Third, Seventh, Ninth and Eleventh Circuits should take care before suggesting that CAFA changed which party bears the initial burden of proof on removal.

Attorneys practicing outside those circuits who would continue to press the issue, should consider citing decisions such as *Corning Glass Works v. Brennan*, where the Court addressed which party bore the burden of proof under the Equal Pay Act, and *Grogan v. Garner*, addressing which party bore the burden of proof under § 523(a) of the Bankruptcy Code in light of the Code’s silence on the issue. In *Corning Glass*, the Court held that “[a]lthough the [Equal Pay] Act is silent on this point, its legislative history makes plain that the Secretary has the burden of proof on this issue.” Based on *Corning Glass*, an argument can be constructed that in determining which party bears the burden of proof, a court first looks at the text of the statute and where the text is silent on the issue, legislative history can be employed to answer the question. Similarly, in *Grogan*, the Court began the “inquiry into the appropriate burden of proof under § 523 [of the Bankruptcy Code] by examining the language of the statute and its legislative history.” However, in *Corning Glass*, the Court was working from a clean slate, whereas with CAFA, the use of legislative history must overcome the historical rule that the party who removes an action to federal court bears the initial burden of establishing the propriety of federal court jurisdiction. Unfortunately, the legislative history of the Bankruptcy Code, like the Code itself, is silent on the burden of proof issue, so the force of *Grogan*’s suggested approach is significantly lessened.

that expand diversity jurisdiction and eliminate barriers to removal, and concluding “that these broadening provisions indicate that Congress carefully inserted into the legislation the changes it intended and did not mean otherwise to alter the jurisdictional terrain”; *Evans*, 449 F.3d at 1164 (“We agree with these courts that CAFA does not change the well established rule that the removing party bears the burden of proof.”); *Miedema*, 450 F.3d at 1328 (same); Morgan v. Gay (Morgan II), 471 F.3d 469, 473 (3d Cir. 2006) (“It should take more than a few lines in a Senate Judiciary Committee Report and some vague language in a statute’s ‘Findings and Purposes’ section to reverse the well-established proposition that the party seeking removal carries the jurisdiction-proving burden.”); *Galeno*, 472 F.3d at 58 (same).

234. *Brill*, 427 F.3d at 448.
239. See *Miedema*, 450 F.3d at 1328 n.5 (distinguishing *Corning Glass* on the basis of existing federal decisions addressing the burden of proof in removal practice).
Alternatively, in *Exxon Mobil* the Court held that legislative history could not be used to contradict the terms of a statute. Here, legislative history is not being used to contradict any statutory provision because neither the original removal statute nor CAFA address the issue. Rather the use of legislative history here is consistent with the underlying purpose of the CAFA, and filling a gap left by Congress is an approach that the Supreme Court approved in *Lamie*.241

Another burden of proof issue that has arisen under CAFA is which party bears the burden of addressing CAFA’s jurisdictional exceptions: the defendant by invoking federal jurisdiction in its removal notice, or the plaintiff when objecting to that jurisdiction in a motion to remand. In *Breuer*, the Supreme Court held “that whenever the subject matter of an action qualifies it for removal, the burden is on [the] plaintiff to find an express exception.”242 Based in large part upon *Breuer*, the Eleventh Circuit concluded that once the removing party initially demonstrates the existence of federal jurisdiction over a class action under CAFA, the plaintiff bears the burden of establishing that the action fits within one of CAFA’s jurisdictional exceptions to bar removal.243 The Fifth Circuit agreed with the Eleventh Circuit’s rationale in reaching the same result.244

The Seventh Circuit subsequently addressed the issue and concluded that the Eleventh and Fifth Circuits’ analysis had “missed an important step, namely, the examination of the language of the statute before it.”245 However, after comparing CAFA’s jurisdictional grant in § 1332(d)(2) with its “home state” exception in § 1332(d)(4), the Seventh Circuit concluded that “the relation between subparts (d)(2) and (d)(4) of CAFA is analogous to the structure of 28 U.S.C. § 1441(a), which the Supreme Court examined in *Breuer*,” and ultimately agreed with the result that the Eleventh and Fifth Circuits reached — the party seeking remand bears the burden of establishing one of CAFA’s jurisdictional exceptions when remand is sought based upon those exceptions.246 Accordingly, while the party seeking removal may continue to bear the initial burden of demonstrating removal was proper under CAFA, once that initial jurisdictional threshold is established, the party opposing removal bears the burden of

243. *Evans*, 449 F.3d at 1165 (holding plaintiffs bear the burden of establishing CAFA’s local controversy exception applied to their action).
244. *Frazier*, 455 F.3d at 546 (“[T]he district court properly placed the burden on plaintiffs, for the reasons explained by the Eleventh Circuit.”).
246. *Id.* at 680-81.
establishing the applicability of one of CAFA’s jurisdictional exceptions.

VII. ESTABLISHING CAFA’S AMOUNT IN CONTROVERSY WHEN SEEKING REMOVAL

While the Seventh Circuit has led the charge in rejecting the argument that CAFA shifted the burden of establishing the propriety of federal court jurisdiction to the plaintiff, it also reaffirmed that the defense’s burden is not a heavy one. It explained that all the removing defendant must show is a “reasonable probability” that the stakes of the litigation exceed CAFA’s aggregate jurisdictional threshold.247 “Defendants seeking removal may meet that burden by a preponderance of the evidence.”248 Once that has been demonstrated, the legal certainty standard “comes to the fore.”249

Under the legal certainty standard, “[o]nce the proponent of [diversity] jurisdiction has set out the amount in controversy, only a ‘legal certainty’ that the judgment will be less forecloses federal jurisdiction.”250 “Generally, dismissal under the legal certainty standard will be warranted only when a contract limits the possible recovery, when the law limits the amount recoverable, or when there is an obvious abuse of federal court jurisdiction.”251

247. Brill, 427 F.3d at 449. In Shaw, 994 F.2d at 366 n.2, the Seventh Circuit held “that the test set forth in McNutt is satisfied if a defendant in a removal action can show to a reasonable probability that more than $50,000 is in controversy.” However, it subsequently explained in Meridian Sec. Ins. Co. v. Sadowski, 441 F.3d 536, 540 (7th Cir. 2006), that “Shaw’s mention of “reasonable probability that jurisdiction exists’... has been taken to mean that uncertainty about the stakes must be resolved against the proponent of jurisdiction. That’s not what Shaw set out to establish. In retrospect, it is clear that the turn of phrase was infelicitous. We now retract that language.” Id. As explained in the text above, Meridian clarified that the preponderance of the evidence standard is the threshold that a removing defendant must meet when jurisdictional facts are contested. Therefore, see Normand v. Orkin Exterminating Co., Inc., 193 F.3d 908, 910 (7th Cir. 1999) (“To maintain a suit in which the stakes must exceed some specified minimum, the plaintiff (or the defendant, if the suit is removed) need demonstrate no more than a good faith, minimally reasonable belief that suit might result in a judgment in excess of that amount.”).

248. Meridian, 441 F.3d at 542.

249. Id.

250. Brill, 427 F.3d at 448 (citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938)); see also Meridian, 441 F.3d at 541 (“once these facts have been established the proponent’s estimate of the claim’s value must be accepted unless there is a ‘legal certainty’ that the controversy’s value is below the threshold.”).

other words, when meeting the amount in controversy is a virtual impossibility.

Establishing CAFA's amount in controversy threshold can be accomplished through a "common sense" reading of a complaint. Where a "complaint is silent or ambiguous on one or more of the ingredients needed to calculate the amount in controversy," the Seventh Circuit explained that "[a] defendant's notice of removal then serves the same function as the complaint would in a suit filed in federal court." The requisite amount in controversy can

§ 3702, at 98-101 (2d ed. 1987)).

252. See Brill, 427 F.3d at 449 (holding that "[c]ountrywide did all that is necessary by admitting that one of its employees sent at least 3,800 fax ads," coupled with the available statutory damages that could be trebled); see also Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424, 427 (7th Cir. 1997) ("The starting point in determining the amount in controversy is typically the face of the complaint."); Fiore v. First American Title Ins. Co., No. 05-CV-474-DRH, 2005 WL 3434074, at *3 (S.D. Ill. Dec. 13, 2005) (holding CAFA's aggregate threshold was met by recognizing that where there were 8,653,141 potential members of the putative class, "if each class member's claim averaged just $.58," CAFA's aggregate "jurisdictional threshold would be surpassed."); Chavis v. Fidelity Warranty Services, Inc., 415 F. Supp. 2d 620, 627 (D.S.C. 2006) (recognizing that, where plaintiff's complaint alleged "the amount in controversy can be as much as $50,000 per class member" and plaintiff purports to represent a class having more than 100 class members, by simply multiplying the two numbers, more than $5,000,000 was "in controversy" and removal was proper under CAFA); Robinson, 2006 WL 468820, at *2 (observing that the court "cannot ignore the plain facts of a case and the inferences that follow therefrom" and holding that CAFA's threshold was met in light of "the size of the putative class," the alleged "widespread harm" which resulted, "and the amplifying events surrounding the bridges closure").

253. Brill, 427 F.3d at 449. Information must be provided to the court through which the amount in controversy can be calculated. That information must be set forth in either plaintiff's complaint or defendant's notice of removal. For example, in a matter involving allegations of fraud stemming from the sale of a thirty-five dollar extended warranty to the plaintiff, the fact that there were many thousands of class members and that defendant generated revenues or more than $50 million per fiscal year from the sale of extended warranties did not suffice where no information was provided as to the amount of the plaintiff's claimed damages. Holland v. Cole National Corp., No. 7:04-CV-246, 2005 WL 1242349, at *15 (W.D. Va. May 24, 2005); see also Ongstad v. Piper Jaffray & Co., 407 F. Supp. 2d 1085, 1092 (D.N.D. 2006). In Ongstad, an action involving the unauthorized trading of securities, CAFA's jurisdictional trigger was not established when the district court was merely provided with the number of open accounts, the number of clients and the amount of assets. Ongstad, 407 F. Supp. 2d at 1092. The court observed that "there is little that can be drawn from such figures" and that it was being "asked to speculate as to the potential large dollar amounts at stake based on the total value of assets held." Id. Ongstad recognized that there was "no inherent correlation between the total value of the assets and the amount of damages sustained as a result of unauthorized transactions." Id.; see also Wheeler v. Allstate Floridian Indemn. Co., No. 3:05CV 208/NCR/EMT, 2006 WL 1133249, at *2 (N.D. Fla. Apr. 26, 2006) (holding that the defendant failed
be established by the removing defendant through the use of interrogatory answers or admissions in state court, through calculations taken directly from the complaint’s allegations, from settlement demands and through affidavits or declarations from the defendant’s employees or experts. Additionally, on removal, “[a] court may accept the uncontested, good faith allegations of jurisdictional facts, though of course it may also notice a jurisdictional defect sua sponte.”

In evaluating whether removal is proper, “[t]he question is not what damages the plaintiff will [likely] recover, but what amount is ‘in controversy’ between the parties.” So for example, “the effect of any applicable statutes of limitations” should not be taken into consideration in determining whether CAFA’s five million dollar aggregate threshold is met. As one court recently explained: “When determining the amount in controversy for jurisdictional purposes, however, courts cannot look past the complaint to the merits of a defense that has not yet been established.”

The plaintiff is the master of his case and may attempt to limit his claim to avoid federal jurisdiction under CAFA. Several pre-CAFA decisions suggest “a plaintiff in state court may be able to prevent removal by committing to accept less than the federal
jurisdictional minimum. However, those decisions refer to a "binding cap" on damages and recognize that in many jurisdictions, such as Illinois, a party is permitted to recover more than what is requested in a complaint's prayer for relief. Indeed, in subsequent decisions, the Seventh Circuit concluded that a defendant should still be able to remove a case to federal court in this scenario and explained that in such instances "the district court may look outside the pleadings to other evidence of jurisdictional amount in the record." The Second Circuit recently endorsed a similar approach under CAFA, noting that even where a plaintiff is permitted by state law to limit his or her "monetary claims to avoid the amount in controversy threshold" and attempts to do so, a court "must look to see if the plaintiff's actual monetary demands in the aggregate exceed the threshold, irrespective of whether the plaintiff states that the demands do not."

It is clear that "once a case is successfully removed a plaintiff cannot do anything to defeat federal jurisdiction and force a remand." The Supreme Court in St. Paul Mercury held that a district court is not divested of jurisdiction where a "plaintiff after removal, by stipulation, by affidavit, or by amendment of [the] pleadings, reduces the claim below the requisite amount." In a class action context, the named plaintiffs' stipulation that they would not seek or even accept damages in excess of $75,000 is

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259. Barbers, Hairstyling For Men & Women Inc. v. Bishop, 132 F.3d 1203, 1205 (7th Cir. 1997); see also Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 (7th Cir. 1993) (suggesting that a plaintiff may avoid federal jurisdiction by asking for less than the jurisdictional threshold "so long as the plaintiff, should she prevail, isn't legally certain to recover more").

260. Chase, 110 F.3d at 427-28. Chase further cautioned however, that a district court "is limited to examining only that evidence of amount in controversy that was available at the moment the petition for removal was filed." Id. at 428; see also, Eufaula Drugs, Inc v. TDI Managed Care Servs., Inc., No. 2:05-CV-293-MEF, 2006 WL 986976, at *2-3 (M.D. Ala. Apr. 14, 2006) (holding that plaintiff's complaint asserting that it was not bringing any claim for relief "in excess of $74,500 in the aggregate for each plaintiff or class member," an obvious attempt to dodge traditional diversity jurisdiction, did not preclude removal under CAFA where the defendant presented affidavits demonstrating that the amount "in controversy" exceeded CAFA's jurisdictional threshold).

261. Morgan, 471 F.3d at 474-75. The Morgan court also expressed a word of caution for parties who seek to dodge federal jurisdiction through this tactic. It concluded that plaintiffs "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. The plaintiff has made her choice and the plaintiffs in state court who choose not to opt out of the class must live with it." Id. at 477-78.

262. See Shaw, 994 F.2d at 367; Chase, 110 F.3d at 429 (holding that "post-removal affidavits or stipulations are ineffective to oust federal jurisdiction").

simply not binding on “other members of the class.” 264 Recently, one district court addressed a plaintiff’s attempt to cap a class’s total recovery at less than $5,000,000 in an apparent attempt to dodge CAFA. In rejecting the suggestion that the amount in controversy did not meet CAFA’s jurisdictional threshold, the district court concluded that “a cap is effective only if it is alleged in good faith” and that the “[p]laintiff cannot in good faith place a $5,000,000 limitation on the recovery of the putative class.” 265

VIII. ACCELERATED APPELLATE REVIEW OF REMAND ORDERS

A party objecting to removal can file a motion to remand a case to state court. Where the motion is based on a defect in removal procedure, the motion to remand must be brought within thirty days of the filing of the notice of removal under § 1446(a). Where a jurisdictional defect provides the basis for remand, the motion may be brought “at any time before final judgment.” 266 However, “an erroneous refusal to remand a case” to state court is not “a jurisdictional error” that “remain[s] corrigible until the litigation becomes final by issuance of a final judgment and exhaustion of appellate remedies.” 267

Generally, an order remanding a case to state court is not reviewable on appeal. 268 Quackenbush v. Allstate Insurance Co., 269 observed that a remand based on one of the grounds specified in § 1447(c) is immune from appellate review under § 1447(d). 270 However, where the order remanding the case is not based on a lack of subject matter jurisdiction or a defect in the removal procedure, appellate review may be permitted under 28 U.S.C. § 1291, which confers jurisdiction over appeals from final

264. See Pfizer Inc. v. Lott, 417 F.3d 725 (7th Cir. 2005) (citing Manguno v. Prudential Property & Casualty Ins. Co., 276 F.3d 720, 724 (5th Cir. 2002)).
265. Fiore, 2005 WL 3434074, at *3; see also Buller Trucking Co. v. Owner Operator Ind. Driver Risk Retention Group, Inc., 461 F.Supp.2d 768, 779 (S.D. Ill., 2006) (holding a complaint’s express disclaimer of any recovery in excess of $75,000 was not effective to dodge federal count jurisdiction (citing Smith v. Pfizer, No. 05-CV-0112-MJR, 2005 WL 3618319 at *3-4 (S.D. Ill., March 24, 2005) (concluding that a disclaimer in the ad damnum clause of a complaint cannot preclude a recovery in excess of $75,000 because under Illinois law, the prayer for relief does not limit the damages that a party may recover))).
267. Santamarina v. Sears, Roebuck & Co., 466 F.3d 570, 572 (7th Cir. 2006) (permitting an appeal following the denial of a motion to reconsider a ruling made 15 months earlier denying a motion to remand because among other things, the defendant did not argue that plaintiff’s failure to appeal the original ruling barred appellate review of the motion to reconsider).
270. Id. at 711-12.
In Quackenbush, the Court held that a remand based on abstention grounds was appealable under § 1291. While CAFA provides that § 1447 applies to the removal of a class action, it permits an appeal from an order "granting or denying a motion to remand" the action. The appeal is discretionary in nature. CAFA is silent as to those factors which an appellate court should consider when determining to accept or decline an application for appellate review. However, Rule 23(f) of the Federal Rules of Civil Procedure similarly permits a discretionary appeal from an order granting or denying class certification. In addressing when to accept an appeal under Rule 23(f), the Seventh Circuit concluded:

[I]t would be a mistake for us to draw up a list that determines how the power under Rule 23(f) will be exercised. Neither a bright line approach nor a catalog of factors would serve well — especially at the outset, when courts necessarily must experiment with the new class of appeals.

The Seventh Circuit felt the better approach was to “keep in mind the reasons [the rule] came into being,” one of which was to “facilitate the development of the law.” In reaching that conclusion, the Seventh Circuit aptly recognized that “some fundamental issues about class actions [were] poorly developed.” The same can be said as to law surrounding orders granting or denying motions to remand in light of § 1447(d)'s general prohibition of appellate review. Therefore, a similar approach is likely to be followed on CAFA appeals and counsel should argue the need for development of a particular issue in an appellate petition where appropriate.

Because the appellate review available under CAFA is discretionary in nature, Federal Rule of Appellate Procedure

271. Id. at 712-13.
272. Id. at 714.
274. See 28 U.S.C. § 1453(c)(2) (“If the Court of Appeals accepts an appeal under paragraph (1),” (emphasis added)); Timesys, Inc. v. Eufaula Drugs, Inc., 462 F.3d 1317, 1319 (11th Cir. 2006) (“CAFA provides [appellate courts] discretionary appellate jurisdiction to review such [remand] orders.”); Amalgamated Transit Union, 435 F.3d at 1145 (“[T]he statute and its history show that Congress intended to create an appeal that is within the court of appeals’ discretion.”); Morgan v. Gay (Morgan I), 466 F.3d 276, 277 (3d Cir. 2006) (“Section 1453(c)(1), by using the phrase ‘may accept an appeal,’ provides this Court with discretion as to whether we should grant this petition.”).
275. Blair v. Equifax Check Services, Inc., 181 F.3d 832, 834 (7th Cir. 1999).
276. Id. at 834-35.
277. Id. at 835.
278. See S. REP. NO. 109-14, at 49, as reprinted in 2005 U.S.C.C.A.N. 3, 46 (arguing that class actions are better suited for federal rather than state courts).
(FRAP) 5 governs the initiation of such an appeal. Rather than filing a notice of appeal, FRAP 5 requires a petition (not to exceed 20 pages in length) that sets forth: (1) a statement of facts necessary to understand the question presented; (2) the question or issue presented; (3) the relief being sought; (4) the reasons why the appeal should be allowed; and, (5) its statutory authorization. The filing of a notice of appeal rather than a Rule 5 petition can result in a dismissal of the appeal.

The Senate Judiciary Committee Report explains that “[n]ew subsection 1453(c) provides discretionary appellate review of remand orders under this legislation but also imposes time limits. Specifically, parties must file a notice of appeal within seven days after entry of a remand order.” However, § 1453(c) as drafted provides:

[A] court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

Taken literally, § 1453(c) would not permit an appeal to be taken until seven days elapsed following the entry of a remand order. The Tenth Circuit was the first court of appeals to interpret CAFA and failed to initially comment upon this apparent drafting error in its Pritchett I decision. When the issue was subsequently brought to its attention, the Tenth Circuit issued a superseding opinion that specifically addressed this issue. In Pritchett II, it observed that, in light of “Congress’ stated intent to impose time limits on appeals of class action remand orders . . . [there] [i]s no plausible reason why the text of [the] Act would instead impose a seven-day waiting period followed by a limitless window for appeal.” The court concluded that this was “one of the rare cases in which a ‘literal application of the statute will

279. Amalgamated Transit Union, 435 F.3d at 1144-45; Patterson v. Dean Morris, L.L.P., 444 F.3d 365, 368-69 (5th Cir. 2006); Evans v. Walter Indus., Inc., 449 F.3d 1159, 1162 (11th Cir. 2006); Hart, 457 F.3d at 678-79.
281. Main Drug, 2007 WL 92756, at *2-4 (noting that the requirements of FRAP 5 are jurisdictional and holding even if they were not, the notice of appeal would still have to be dismissed because it did not comply with Rule 5).
285. Pritchett I, 404 F.3d at 1232.
286. Pritchett II, 420 F.3d at 1093 n.2.
287. Id.; see also Morgan I, 466 F.3d at 278 (“As written, § 1453(c)(1) would grant plaintiffs and defendants the ability to potentially abuse the litigation process because the party who loses on the district court’s remand ruling could strategically wait to appeal the remand decision at any time pre-trial.”).
produce a result demonstrably at odds with the intentions of the drafters.\footnote{288} The Tenth Circuit therefore held that § 1453(c) contained “a typographical error” and should be read as providing “that an appeal is permissible if filed ‘not more than’ seven days after entry of the remand order.”\footnote{289} The Third, Ninth and Eleventh Circuits subsequently reached the same conclusion.\footnote{290} Additionally, the Ninth Circuit explained that because CAFA “does not specify the [seven day filing] deadline as calendar days, we construe the seven days as court days, thereby excluding intermediate weekends and holidays.”\footnote{291}

Where an appeal is accepted, CAFA requires that the appellate court complete all action on the appeal, including the rendering of a judgment within sixty days unless an extension is granted.\footnote{292} CAFA permits an extension of the sixty day time limitation “for any period of time” where “all parties to the proceedings agree.”\footnote{293} In the event that all parties cannot reach an agreement, an extension “for a period not to exceed [ten] days” is permitted where good cause is shown and the interests of justice warrant the extension.\footnote{294} CAFA provides that if the court of appeals does not issue its final judgment within the time frame noted above, “the appeal shall be denied.”\footnote{295} Since the appeal is discretionary in nature, the sixty day time limit does not begin to run until the court of appeals enters an order granting permission to appeal.\footnote{296}

The discretionary appellate process permitted under CAFA only applies to orders stemming from removals sought under CAFA. It does not confer appellate jurisdiction where the removal was grounded on some other statutory basis.\footnote{297}

\footnote{288} Id. (quoting United States v. Ron Pair Enterprises, 489 U.S. 235, 242 (1989)).
\footnote{289} Id. at 1093 n.2.
\footnote{290} Amalgamated Transit Union, 435 F.3d at 1146; Miedema, 450 F.3d at 1326; Morgan, 466 F.3d at 279.
\footnote{291} Id. (emphasis in original).
\footnote{294} Id.
\footnote{295} 28 U.S.C. § 1453(c)(4).
\footnote{296} Bush, 425 F.3d at 685-86; Patterson, 444 F.3d at 368-69; Evans, 449 F.3d at 1162; Hart, 457 F.3d at 678; DiTolla, 469 F.3d at 275 (“CAFA’s 60 day clock for rendering judgment starts running on the day that the Court’s order granting permission to appeal is filed.”).
\footnote{297} See Wallace v. La. Citizens Property Ins. Corp., 444 F.3d 697, 700 (5th Cir. 2006) (holding that CAFA’s appellate provisions did not apply where the removal was based on the Multiparty, Multiforum Trial Jurisdiction Act, 28 U.S.C. § 1441(e)(1)(B)); Saab v. Home Depot U.S.A., Inc., 469 F.3d 758, 759 (8th Cir. 2006) (“[Section] 1453(c)(1) does not permit us to accept an appeal from the denial of a motion to remand when a class action has been removed to federal court on the basis of traditional diversity jurisdiction, § 1332(a).”).
Finally, the Seventh Circuit has suggested that “it is arguable... that motions to reconsider orders denying remands under [CAFA], are disfavored.” Indeed, the expedited appellate review process contemplated under the Act was intended to not only bring some clarity to the law of remand but also to provide the parties with some measure of certainty as to whether they would be litigating the class action in a state or federal forum. That measure of certainty will be lost if parties are permitted to appeal from a untimely filed motion to reconsider the denial of a motion to remand. If allowed, such a strategy could result in discovery abuses and a waste of federal judicial resources. That should be a key consideration in determining whether to accept a discretionary appeal under § 1453(c).

IX. QUALIFYING “MASS ACTIONS” SUBJECT TO CAFA’S DIVERSITY AND REMOVAL RULES

Section 1332(d)(11)(A) provides that “a mass action shall be deemed to be a class action removable under [§ 1332(d)(2) through (d)(10)] if it otherwise meets the provisions of those paragraphs.” In other words, the minimal diversity rules and jurisdictional exceptions as well as the revised removal rules discussed above apply to mass actions as defined in CAFA. While at first blush, paragraph (d)(11)(A) may appear to be straightforward, “Congress’ use of the word ‘removable’ in the text of § 1332, a statute establishing original jurisdiction, blurs what had previously been a clear distinction between jurisdiction and removal statutes, and this obscures the reach of jurisdiction over mass actions.” Things get even murkier when CAFA’s definition of a mass action is added to the equation.

CAFA defines a “mass action” as “any civil action [other than a class action]... in which monetary relief” (as opposed to injunctive or equitable relief) is sought, and involves “claims of 100 or more persons... proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact.” However, this section of the Act further provides that “jurisdiction shall only exist over those plaintiffs whose claims in a mass action

298. Santamarina, 466 F.3d at 572 (observing the case was removed and the motion for remand was denied “only a few months after the promulgation of [CAFA], when there was no significant case law interpreting the Act. So some latitude in considering what might in other circumstances indeed be a belated motion to reconsider should be permitted.”). Santamarina made it clear “for future reference” that an erroneous denial of a motion to remand is not a jurisdictional defect that “remain[s] corrigible until the litigation becomes final.” Id.
300. Abrego, 443 F.3d at 682.
satisfy the jurisdictional amount requirements under § 1332(a). In other words, the value of each plaintiff's claim must meet diversity's traditional $75,000 threshold or the claim will be remanded. Thus, CAFA expands the district court's removal jurisdiction to include mass actions where the aggregate amount in controversy exceeds $5,000,000, but leaves in place the rule that the court has subject matter jurisdiction only over those plaintiffs whose claims seek at least $75,000.

CAFA's definition of a mass action appears to codify Zahn's non-aggregation rule regarding diversity's traditional amount-in-controversy requirement for subject matter jurisdiction. However, as discussed above, Zahn was recently overturned by the Supreme Court in Exxon Mobil. Thus, for mass actions encompassed by CAFA, § 1332(d)(11)(B)(i) actually retracts the scope of a district court's supplemental jurisdiction as recognized in Exxon Mobil.

Section 1332(d)(11)(B)(i) contains both CAFA's definition of a "mass action" and the limitation that jurisdiction only exists over those claims which meet diversity's traditional amount-in-controversy requirement. How will courts handle scenarios where a mass action initially has the requisite number of claims to meet CAFA's numerical requirement (100 or more), but where the number of claims that do not meet the diversity's traditional amount-in-controversy would bring the total number of claims beneath CAFA's numerical definitional floor? Should the entire group of claims collectively be remanded to state court, or only those claims which do not involve a jurisdictionally sufficient amount?

Congress could have directly tied diversity's traditional amount-in-controversy requirement to CAFA's definition of a mass action by defining a mass action as any civil action other than a class action in which the claims of 100 or more persons seeking monetary relief, each having an amount in controversy in excess of $75,000 exclusive of interests and costs, are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact. However, Congress did not take that approach in drafting § 1332(d)(11)(B)(i). Rather, it separated diversity's traditional amount-in-controversy requirement from CAFA's numerical mass-action floor by providing that federal jurisdiction exists only over those individual claims that otherwise satisfy diversity's traditional jurisdictional threshold. This suggests that only specific individual claims, rather than the entire lot, would be subject to remand in such a scenario. This construction of CAFA is supported by the Senate Judiciary Committee Report, which indicates:

302. Id.
Under the proviso, however, it is the Committee's intent that any claims that are included in the mass action that standing alone do not satisfy the jurisdictional amount requirements of Section 1332(a) (currently $75,000), would be remanded to state court. Subsequent remands of individual claims not meeting the Section 1332 jurisdictional amount requirement may take the action below the 100-plaintiff jurisdictional threshold . . . . However, so long as the mass action meets the various jurisdictional requirements at the time of removal, it is the Committee's view that those subsequent remands should not extinguish federal diversity jurisdiction over the action.

The Ninth Circuit recently observed that "[t]his clarification is consistent with a logical reading of the statute," but found it unnecessary to reach the issue, or endorse this approach. In that case, the Ninth Circuit concluded that an entire mass action had to be remanded because the defendant failed to establish that even one claimant met the traditional $75,000 threshold for subject matter jurisdiction.

One way to reconcile the interplay of Sections 1332(d)(11(A) and (B) is to view paragraph 11(A) as CAFA's jurisdictional grant by virtue of its incorporation of § 1332(d)(2)'s value aggregation rule, and paragraph 11(B) as creating an exception to that jurisdictional grant through its incorporation of § 1332(a)'s traditional amount-in-controversy requirement for individual claims. While the inclusion of CAFA's definition of the term mass action in paragraph 11(B) muddies the water a bit, this approach to the interplay of paragraphs 11(A) and (B) is logical and consistent with the Senate Committee Report.

It should be recognized that, in addition to CAFA's jurisdictional exceptions for class actions found in Sections 1332(d)(3), (4) and (5), CAFA contains several additional

304. Abrego, 443 F.3d at 686-87.
305. Id. at 689.
306. One district court recently concluded that a defendant could only remove the individual claims of those plaintiffs "that exceed $75,000 in value and were commenced" prior to CAFA's effective date. Lowery v. Honeywell Int'l, Inc., 460 F. Supp. 2d 1288, 1293-94 (N.D. Ala. 2006). In rejecting the argument that only individual cases should be remanded, the district court noted "[t]here is no [similar] jurisdictional limitation for individual plaintiffs in class actions." Id. at 1295. That observation merely begs the question, it does not answer it. While CAFA's mass action provisions are admittedly clumsy, the district courts interpretation appears to conflict with the legislative intent and the text of the statute itself. Ultimately, because the removing defendant had not established that any of the individual cases had a value in excess of $75,000, the entire group of cases was remanded to state court.
exceptions specific to mass actions. Where one of the following exceptions are triggered, traditional diversity and removal rules apply:

Where all claims arise from an occurrence in the State where the action was filed which allegedly resulted in injuries in that state or in contiguous states;

Where the claims were joined on defendant’s motion;

Where the claims are asserted on behalf of the general public and not on behalf of individual claimants or class members pursuant to a state statute authorizing the action; or

Where the claims have been consolidated or coordinated solely for pretrial proceedings or discovery.

Whether CAFA’s class action or its mass action provisions are potentially applicable turns on how the claims were filed. Because the definition of a mass action specifically excludes civil actions filed pursuant to Rule 23 of the Federal Rules of Civil Procedure, or an analogous state statute or rule of procedure authorizing the filing as a class action, counsel should carefully review the original pleading(s). If no reference is made in the pleading to a procedural rule authorizing its filing as a class action, then CAFA’s mass action provisions can potentially be invoked.

For a “mass action” encompassed by CAFA, § 1332(d)(11)(C)(i) prohibits any subsequent transfer of the action unless a majority of the plaintiffs request the transfer. This provision is obviously directed at conditional, or tag-along transfer orders that are typically entered in federal multi-district litigation. A practice that has come under some criticism in mass tort cases is for defense counsel, upon removing an action to federal court, to immediately initiate a “reference” to the judicial panel on multidistrict litigation which will then order the case transferred to the district court designated to handle consolidated pretrial proceedings. “This ‘strategy allows the defense counsel to attempt to secure a transfer order or conditional transfer order

307. Because § 1332(d)(11)(A) states that a mass action shall be treated as a class action “removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs” a defendant removing a mass action must not only navigate through CAFA’s class action diversity exceptions found in 28 U.S.C. § 1332(d)(3), (4) and (5), but also the jurisdictional exceptions specifically applicable in 28 U.S.C. § 1332(d)(11)(B)(i), (ii).


before the original federal district court determines, and in some cases even hears, the anticipated motion to remand. When applicable, § 1332(d)(11)(c)(i) would seemingly prohibit that practice. CAFA's limitation on additional transfers of mass tort actions does not apply where a class has been certified under Rule 23 or where plaintiffs propose the action proceed as a class action.

Finally, the statute of limitations for claims removed under CAFA's “mass action” provisions are tolled during the period of time the claims are pending in federal court.

X. SETTLEMENT PROCEDURES FOR FEDERAL CLASS ACTIONS

CAFA imposes additional notification requirements applicable to the settlement of any class action in which one or more classes have been certified. Section 1715(b) specifies that:

Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in a proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official a notice of the proposed settlement. The notice must include the following:

1. the complaint, any materials accompanying the complaint and any amended complaints;
2. “notice of any scheduled judicial hearing”;
3. “any proposed or final notification to class members” of their right to opt out of the class action or, when applicable, that no such right exists;
4. the terms of any proposed or final settlement of the class action;
5. any “agreement contemporaneously made between class counsel and defense counsel”;

314. See 28 U.S.C. § 1711(2) (Supp. 2005) (defining the term “class action” to include “any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure” (emphasis added)). Thus, the notification requirements found in § 1715(b) are not limited to class actions where federal court jurisdiction is based on CAFA's revised diversity rules but to any federal court class action.
(6) "any final judgment or notice of dismissal";

(7) "the names of class members who reside in each State and the estimated proportionate share of their claims to the entire settlement to that state's appropriate state official," or where this information cannot be feasibly provided "a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the[ir] claims to the entire settlement;" and

(8) any written judicial opinion relating to the items above.\(^{316}\)

Section 1715(b)(1) provides that the materials filed with the complaint are "not required to be served" if they are available through the internet and the notice explains how the materials can be accessed electronically.\(^{317}\) In light of CAFA's definition of a class action as "any civil action filed in a district court" or "that is removed to a district court," § 1715's notice requirements apply to any federal class action commenced after CAFA's effective date and are not limited to those removed by a defendant to federal court.

CAFA specifies that "[a]n order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official" were served with this notice.\(^{318}\) The obvious purpose of this section is to provide federal or state officials with the opportunity to object to a proposed settlement that appears to be unfair to some or all class members or that might conflict with the regulatory policy, custom, or practices of a state or federal agency.

Normally, in the absence of an agreement between the parties, the class representatives bear the expense of notifying class members about a proposed settlement.\(^{319}\) CAFA imposes upon the defendants the cost of notifying the state and federal officials of any proposed settlement. This could prove to be a time-consuming, expensive and potentially onerous proposition, especially where a nationwide class has been certified, which would require that notice be sent to the appropriate officials in all fifty states.

The penalty for noncompliance with CAFA's notice requirements is class members "may refuse to comply with and may choose not to be bound by a settlement agreement or consent

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316. 28 U.S.C. § 1715(b)(1)-(8).
319. See Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177 (1974) (holding that individual notice must be sent to identifiable class members, and that the expense be born by petitioner).
decree in a class action. The class member bears the burden of proving that the notice required under this rule was not provided.

Since each defendant must provide notice under this rule, a single defendant’s failure to provide notice would seemingly not permit a class member to dodge the preclusive impact of a settlement where one or more of the other defendants furnished the required notice. So long as the appropriate state and federal officials received proper notice of the proposed settlement, the purpose of CAFA’s notification requirements has been fulfilled. Nothing useful can be gained by permitting a class member to “opt out” under those circumstances, other than the potential proliferation of related litigation. As the Senate Judiciary Committee Report explains: “[T]his provision is intended to address situations in which defendants have simply defaulted on their notification obligations,” and “that a settlement should not be undermined because of a defendant’s innocent error about which federal or state official should have received the required notice in a particular case.”

CAFA does include a fail-safe provision under which class members are bound by a settlement agreement or consent decree if the notice required by § 1715(b) was sent “to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant.” Thus, as explained below, notice should always be sent to the state attorney general for each state in which a class member resides.

A. Appropriate Federal Officials

The appropriate federal official to whom notice of a proposed class-action settlement should be sent is the Attorney General of the United States, except where the defendant is a bank. Where the defendant is either a state or federal depository institution, a state or federal depository institution holding company, a foreign bank, or a “non-depository institution subsidiary of the foregoing” the appropriate federal official is the person who has the “primary federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.”

321. Id.
B. Appropriate State Officials

The “appropriate state official” is “the person in the State” who either: (1) “has the primary regulatory or supervisory responsibility” over the defendant, or (2) “licenses or otherwise authorizes the defendant to conduct business in the State” so long as “some or all of the matters alleged in the class action are subject to regulation by that person.” In the event “there is no primary regulator, supervisor, or licensing authority,” or where the issues involved in the class action “are not subject to regulation or supervision by that person,” then a state’s attorney general is considered the appropriate state official for receiving notice of the proposed settlement. Where the defendant is a state bank (depository institution), notice should be directed to “the State bank supervisor . . . of the State in which the defendant is incorporated or chartered,” and upon the appropriate federal official so long as “some or all” of the issues in the class action “are subject to regulation or supervision” by the state bank supervisor.

In light of § 1715(e)(2)’s fail-safe provision which prevents a class member from dodging the binding effect of a settlement when notice is sent to the state attorney general, defendants should send the required notice to the attorney general of each state in which a class member resides, as well as to any other state official who arguably has “supervisory, regulatory or licensing authority over a defendant.” CAFA imposes no penalty for providing too many state officials with notice. This will prevent class members from attempting to dodge the impact of a settlement by claiming notice was not sent to the official in their state who had the primary licensing, regulatory, or supervisory responsibility over the defendant or that the issues raised in the action were not subject to regulation or supervision by the state official to whom the notice was sent.

XI. Rule 23’s Class Settlement Hearing Requirement Is Unaffected by the Act

Rule 23(e)(1)(A) requires court approval of a class-action settlement only where a class had been certified. The Advisory Committee notes to Rule 23(e)(1)(A) explain that “[t]he new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.” CAFA should not impact or change this practice.

327. Id.
328. 28 U.S.C. § 1715(c)(2).
Sections 1712, 1713, 1714 and 1715 all employ the term "proposed settlement[s]," which is one of the few terms defined by CAFA, and § 1711(6) defines a "proposed settlement" as "an agreement regarding a class action that is subject to court approval and that if approved, would be binding on some or all class members." Because court approval under Rule 23(e) is only required for certified classes, CAFA's settlement hearing requirements do not apply to settlements that occur prior to certification of a class.

A. Coupon and Net-Loss Settlements

Section 3 of CAFA, 28 U.S.C. § 1712, limits the recovery of attorney's fees in "coupon settlements" and requires a court hearing to address the reasonableness and adequacy of any "coupon settlement." However, CAFA fails to define what constitutes a "coupon" or what qualifies as a "coupon settlement." This omission was probably intentional in view of the wide variety of settlement options that might arguably be characterized as a coupon settlement.

Section 1712's provisions limiting attorney's fees in "coupon settlements" provides some insight into the type of settlements Congress was targeting. Section 1712(a) requires that any portion of class counsel's fee award from a settlement involving coupons "be based on the value...of the coupons that are redeemed." This suggests that Congress was targeting certificate or voucher settlements that require a class member to redeem a certificate or some type of paper in order to obtain the benefit of the proposed settlement. However, Webster's Dictionary defines redeem as: to buy back, or repurchase. CAFA's coupon provisions will likely extend to settlements that require class members to purchase additional services or benefits at a discount through the use of a certificate or voucher system. Whether this provision extends to settlements that provide members with free additional services, benefits, or "in-kind compensation" is less certain, and may turn on other features of the settlement agreement.


333. For a discussion of coupon settlement options that might trigger CAFA's application, see Christopher R. Leslie, A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation, 49 UCLA L. Rev. 991, 994 (2002) (noting that "[s]ettlement coupons may resemble traditional promotional coupons, housing vouchers, or discount contracts" (internal citation omitted)).


336. The Seventh Circuit has recognized: "[C]ompensation in kind is worth less than cash of the same nominal value,' since, as is typical with coupons, some percentage...claimed by class members will never be used and, as a result, will not constitute a cost to [the defendant]." Synfuel Techs., Inc. v.
what constitutes a “coupon settlement” is of primary importance to § 1712’s limitation on attorney’s fees for class counsel because CAFA’s attorney’s fees provisions are limited to coupon settlements and, as explained below, CAFA’s coupon settlement hearing procedures are largely redundant of what is already required by Rule 23(e).

B. Coupon Settlement Hearing Requirement

Rule 23(e)(1)(A) requires court approval of any “settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.” Rule 23(e)(1)(C) provides that a court can approve a settlement or compromise of a class action “that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.” The Seventh Circuit “insist[s] that district courts ‘exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions,’” and describes a district court’s role in evaluating a class action settlement as one “akin ‘to the high duty of care that the law requires of fiduciaries.’”

CAFA’s required judicial scrutiny of coupon settlements for the most part mirrors Rule 23(e)’s requirements. Section 1712(e) requires a hearing and a written finding by the court that “the

DHL Express (USA), Inc., 463 F.3d 646, 654 (7th Cir. 2006) (quoting In re Mexico Money Transfer Litig., 267 F.3d 743, 748 (7th Cir. 2001). Synfuel addressed a proposed class action settlement which the Seventh Circuit vacated involving prepaid express letter envelopes “because the [district] court did not adequately evaluate whether the settlement [was] fair to [the] class members.” Id. at 648. While noting that the Synfuel’s class action was not covered by CAFA because it was commenced prior to CAFA’s effective date, the Seventh Circuit nonetheless observed that “Congress required heightened judicial scrutiny of coupon-based settlements” in CAFA. Id. at 654. While also recognizing “that the pre-paid envelopes are not identical to coupons, since they represent an entire product, not just a discount on a proposed purchase,” the Seventh Circuit in Synfuel concluded “they are a form of in-kind compensation that shares some characteristics of coupons, including forced future business with the defendant and, especially for heavier users, the likelihood that the full amount of [the defendant’s] gains will not be disgorged.” Id. Based on the sentiments expressed in Synfuel, it seems inevitable that settlements involving this type of “in-kind compensation” will fall under CAFA’s attorney fee provisions and its coupon settlement hearing requirements. Id.

338. FED. R. CIV. P. 23(e)(1)(A).
339. Id. at 23(e)(1)(c).
340. Synfuel, 463 F.3d at 652-53 (quoting Reynolds v. Beneficial Nat’l Bank, 288 F.3d 277, 279-280 (7th Cir. 2002)).
settlement is fair, reasonable, and adequate for class members. CAFA does not list factors that a court should consider in evaluating reasonableness or fairness of a coupon settlement. In view of the wide array of terms and conditions that could potentially be included in a “coupon” itself, this omission was also probably deliberate. Factors that have been considered in evaluating the reasonableness of settlements include:

1. the complexity, duration and expense of the litigation;
2. the reaction of the class and the level of opposition to the settlement;
3. the stage of the proceedings and the amount of discovery completed;
4. the risks of establishing liability;
5. the risks of establishing damages;
6. the risks of maintaining a class action;
7. the ability of the defendants to withstand a greater judgment;
8. the opinion of competent counsel;
9. the range of reasonableness of the settlement in light of the best recovery; and
10. the range of reasonableness of the settlement in light of all the attendant risks of litigation.

However, “[t]he ‘most important factor relevant to the fairness of a class action settlement’ is: ‘the strength of [the] plaintiff’s case on the merits balanced against the amount offered in the settlement.”

Section 1712(e) authorizes a district court to “require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to one or more charitable or governmental organizations, as agreed to by the

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342. In re Gen. Motor Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995); see also Isby v. Bayh, 75 F.3d 1191, 1199 (7th Cir. 1996) (setting forth six factors that have been consistently used by courts in evaluating the fairness of settlements); In re Mexico Money Transfer Litig., 164 F. Supp. 2d 1002, 1014 (N.D. Ill. 2000), aff’d, 267 F.3d 743 (7th Cir. 2001) (discussing in detail six factors the court used to determine if a settlement was reasonable).
343. Synfuel, 463 F.3d at 653 (quoting In re Gen. Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1132 (7th Cir. 1979)).
However, it has become common in class actions for courts, using their broad equitable powers, to approve *cy pres* distributions of residual settlement funds to charitable, educational or public service entities or programs that provide some benefit to the class members. Additionally, § 1712(d) permits a court to receive expert testimony from a qualified witness as to "the actual value to the class members of the coupons that are redeemed." Many district courts were also following that practice even before CAFA became effective. Thus, these provisions exemplify procedures already being followed in many district courts.

C. Net-Loss Settlement Hearing Procedures

CAFA changes the governing standard for approval of class action settlements in which "any class member is obligated to pay sums to class counsel that would result in a net loss to the class member." In that scenario, the court approving the settlement must make a finding that the "non-monetary benefits to the class member[s] substantially outweigh the monetary loss." CAFA offers no guidance on what type of benefits should be considered by the court when engaged in this analysis or how those benefits should be evaluated.

D. Prohibition of Settlements Based on Geographic Location

CAFA prohibits the settlement of any class action that provides for the payment of a greater sum to class members "solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court." However, § 1714 does not preclude geographic proximity as a factor that can never be considered for any purpose. For example, proximity to an environmental contamination site is a factor to be considered in fixing the amount paid to class members who live near the site and are theoretically more likely to have suffered an exposure and injury. Rather, § 1714 targets

344. 28 U.S.C. § 1712(e).
346. 28 U.S.C. § 1712(d).
347. See, e.g., Mexico Money Transfer, 164 F. Supp. 2d at 1017-19 (illustrating the use of several experts in assessing a settlement value).
349. Id.
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settlements that have no legitimate basis to distinguish the amounts paid to various class members other than their proximity to the courthouse.

E. Attorney Fee Provisions In Coupon Settlements

Rule 23(h) provides that in any action where a class has been certified, a "court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties." That rule requires class counsel claiming attorney fees must do so pursuant to a motion under Rule 54(d)(2). Notice of the motion must be served on all parties and must be "directed to class members in a reasonable manner." CAFA supplements Rule 23's hearing requirements for claims involving coupon settlements.

Section 1712(a) requires that in any class action settlement which "provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed." Where the "recovery of coupons is not used to determine the attorney's fee" paid to class counsel, § 1712(b)(1) provides that the fee award "shall be based upon the amount of time class counsel reasonably expended working on the action." This is one of the traditional criteria used in determining the appropriate amount of a fee award to class counsel involved in the creation of a common fund.

Section 1712(b)(2) specifies that in those cases where class counsel obtained equitable relief, any fee award shall include an appropriate fee for obtaining that relief. When a settlement involves a combination of equitable relief and coupons for the class members, § 1712(c) is consistent in requiring that the portion of any fee award paid to class counsel based upon the inclusion of coupons must be calculated on the value of the redeemed coupons and the remaining portion of the fee award should be based on the amount of time "reasonably expended" by class counsel.

These provisions were drafted to provide an economic incentive for class counsel to negotiate favorable terms for coupons that are part of any class action settlement. Factors that limit the number of coupons that are ultimately redeemed include: limits on transferability, the timing of the coupon expiration date, restrictions on the aggregation of coupons, administrative

352. FED. R. CIV. P. 23(h).
353. Id. at 23(h)(1).
355. Id. at § 1712(b)(1).
356. Id. at § 1712(b)(2).
357. Id. at § 1712(c), (b)(1).
obstacles to redemption, and product restrictions that limit the items or services class members can acquire.\textsuperscript{358}

As a result of § 1712(a) and (c)'s requirement that the fee award be based on the value of redeemed coupons, class counsel's fees cannot be calculated until the time specified for redemption of those coupons has expired. Some courts have permitted a fee award to class counsel on the estimated likely rate of redemption of the coupons involved in a settlement. CAFA now prohibits that practice. Section 1712, however, does not preclude the payment of class counsel's fees on a periodic installment basis where the amount paid is based upon the actual number of coupons redeemed during that installment period.\textsuperscript{359} This approach ensures that the fee award is proportionate to the actual value to the class, and minimizes the economic disincentive for class counsel to negotiate a longer redemption period.

Additionally, the value a coupon provides to a class member is reduced by any increase in the price of the goods or services related to the coupon during its redemption period.\textsuperscript{360} It is doubtful however, that a court would take that into consideration in calculating class counsel's fee award because counsel has no real ability to control a defendant's pricing strategies.

XII. When is a Class Action Commenced?

Section 9 of CAFA provides that its amendments “shall apply to any civil action commenced on or after the date of enactment of this Act.”\textsuperscript{361} The President signed the Act into law on February 18, 2005, and its provisions do not apply retroactively.\textsuperscript{362} The determination of when a class action is “commenced” has been the most heavily litigated issue under CAFA since its enactment. Federal courts have been universal in their narrow construction of the commencement issue.

As one court of appeals explained, permitting the wholesale removal of pre-existing state court class actions under CAFA would “have serious consequences” not only for “the federal judiciary,” but also for their “colleagues on the state bench.”\textsuperscript{363} A contrary approach was viewed by both Congress and the federal

\[\text{References}\]
\textsuperscript{358} See Leslie, supra note 320, at 1014-1029 (discussing restrictions on the use of settlement coupons).
\textsuperscript{359} See Duhaime v. John Hancock Mut. Life Ins. Co., 989 F. Supp. 375, 378-79 (D. Mass. 1997) (addressing the “staging” of an attorney fee award in a class action settlement to ensure “the fee awarded is appropriate to the value actually received by the class members”).
\textsuperscript{360} See Mexico Money Transfer, 267 F.3d at 748.
\textsuperscript{362} Exxon Mobil, 125 S. Ct. at 2628.
\textsuperscript{363} Pritchett I, 404 F.3d at 1238.
Developing Trends in CAFA judiciary as being "disruptive to federal-state comity" principles. As a result, it should come as no surprise that federal courts have not been overly receptive to defense attempts to remove state-court class actions filed prior to CAFA's effective date.

The Tenth Circuit concluded that a cause of action is commenced for purposes of CAFA when it is originally filed in state court, not when it is removed to federal district court. In reaching that conclusion, the court recognized that when CAFA was originally introduced in the House, it authorized removal not only of actions "commenced" after its effective date, but also "cases in which a class certification order was entered on or after the enactment date." The Court further noted that "neither the Senate version of the Bill nor the final statute passed by both Houses of Congress provided for removal of actions certified on or after the enactment date." Thus, the Tenth Circuit concluded, "[b]y excising the House provision, Congress signaled an intent to narrow the removal provisions of the Act to exclude currently pending [law]suits.

In a series of decisions, the Seventh Circuit agreed with the Tenth Circuit's conclusion that a civil action is commenced for purposes of CAFA when the action is filed with the state court, not at some later time in its prosecution. As Judge Posner explained:

While it is true that the proceeding in federal court was "commenced" by the filing of the removal petition, that filing was not the beginning of the suit. For what was removed was the suit that had been brought in the Illinois state court, and under Illinois law the filing of the complaint had "commenced" the suit.

364. Id.
365. 420 F.3d 1090 (10th Cir. 2005) (amending and superseding Pritchett I).
366. Id. at 1094-96.
367. Id. at 1095.
368. Id.
369. Id.; see also Natale v. Pfizer, Inc., 424 F.3d 43, 44 (1st Cir. 2005) (per curiam) (adopting Pritchett's interpretation of the commencement issue and rejecting the contention that the length of time a case had been pending in state court was a distinguishing factor that would justify removal); Bush, 425 F.3d at 686 ("CAFA's 'commenced' language surely refers to when the action was originally commenced in state court. It is axiomatic that an individual or entity may not remove a dispute before it has commenced in state court.").
370. Knudsen v. Liberty Mut. Ins. Co. (Knudsen I), 411 F.3d 805, 806 (7th Cir. 2005); see also Pfizer, 417 F.3d at 726 (explaining that "commenced" indeed means 'filed' rather than 'removed'); Schorsch v. Hewlett-Packard Co., 417 F.3d 748, 749-50 (7th Cir. 2005) (reiterating the meaning of "commenced" as set forth in Knudsen and Pfizer); Schillinger, 425 F.3d at 334 (noting that an amendment expanding the class definition, did not "commence" a new action under CAFA).
371. Pfizer, 417 F.3d at 726.
Thus, CAFA does not generally apply to class actions that were pending in state court prior to the effective date of the Act.\footnote{372} Notwithstanding this narrow construction of the commencement issue, several strategies have emerged that have been at least partially successful in removing state court class actions filed prior to CAFA’s effective date.

A. State Procedural Rules Defining When a Lawsuit is Commenced May Provide an Opportunity to Remove Class Actions Filed Prior to CAFA’s Effective Date

The general consensus among those circuits that have addressed the commencement issue “is that state law determines when an action is commenced for purposes of CAFA.”\footnote{373} Recognizing that “different legal systems understand [the] term [commencement] differently,” the Seventh Circuit elaborated that “state [law] rather than federal practice must supply the rule of decision.”\footnote{374} In many states, like Illinois, a suit is commenced when the complaint is filed.\footnote{375} The fact that a defendant was “served” after CAFA’s effective date is simply irrelevant in those jurisdictions.\footnote{376} There are however, several states, such as Minnesota, Connecticut, and New York, where service of process commences the action.\footnote{377} Thus, actions filed in those states prior to


\footnote{373. Timesys, 462 F.3d at 1319 (Eleventh Circuit); e.g. Natale, 424 F.3d at 44 (First Circuit); Braud, 445 F.3d at 803 (Fifth Circuit); Pfizer, 417 F.3d at 725 (Seventh Circuit); Plubell, 434 F.3d at 1071 (Eighth Circuit); Bush, 425 F.3d at 686 (Ninth Circuit); see also Pritchett II, 420 F.3d at 1094 (Tenth Circuit); Knudsen I, 411 F.3d at 807 (Seventh Circuit). This approach is seemingly consistent with pre-CAFA decisions; see, e.g., Herb v. Pitcairn, 324 U.S. 117, 120 (1945) (“Whether any case is pending in the Illinois courts is a question to be determined by Illinois law.”); Cannon v. Kroeger Co., 837 F.2d 660, 664 (4th Cir. 1988) (“It is clear that a federal court must honor state court rules governing commencement of civil actions when an action is first brought in state court and then removed to federal court.”).}

\footnote{374. Schorsch, 417 F.3d at 750.}

\footnote{375. See Bush, 425 F.3d at 686 (interpreting California law).}

\footnote{376. See, e.g., Lussier, 2005 WL 2211094, at *3 (holding that under the particular state law, an action is commenced when the lawsuit is filed).}

\footnote{377. See MINN. R. CIV. P. 3.01; CONN. GEN. STAT. § 52-45(a) (1958); Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 351-52 (1999) (observing that in New York, service of summons commences an action).}
CAFA's enactment could be removed to federal court where service was obtained after its effective date.

Additionally, other jurisdictions provide that an action is commenced by the filing of a complaint only if service is obtained within a specified timeframe.\(^{378}\) Still other states equate commencement with the filing of a complaint so long as it is filed with a "bona fide intention of having it immediately served."\(^{379}\)

As a result, one district court concluded that because service was not obtained within the ninety-day window contemplated by Kansas' procedural rules, the action could be removed to federal court by defendants who were not served until after CAFA's effective date, despite the fact that the class action was filed in state court prior to CAFA's enactment.\(^{380}\) A similar result was reached by another district court when it concluded that plaintiff did not file a state court class action with the bona fide intention of having it immediately served. Thus, the defendants who were served after CAFA's effective date were permitted to remove the action to federal court despite the action being filed before CAFA went into effect.\(^{381}\)

Finally, where the original complaint filed prior to CAFA's effective date was a legal nullity under a particular state's law,\(^{382}\) a subsequently filed post-CAFA pleading would commence a new action because there would be nothing to which the amended complaint can relate back. A right to remove the case to federal court would be triggered as a result.\(^{383}\) Accordingly, a careful review of the forum-state's procedural rules is necessary to determine when an action is commenced, making it potentially removable under this approach.

\(^{378}\) See, e.g., Dinkel, 400 F. Supp. 2d at 292 (holding that under Kansas' procedural rules, the filing of a lawsuit commences an action only when process is served within ninety days of that filing and if the suit is served after that ninety-day window, the action is not deemed to have commenced until service was obtained).


\(^{380}\) Dinkel, 400 F. Supp. 2d at 293.

\(^{381}\) Main Drug, 455 F. Supp. 2d at 1323-24.

\(^{382}\) For example, under Illinois law, the filing of a lawsuit against an individual who is deceased at the time of that filing is a legal nullity. See Volkmar v. State Farm Mut. Automo. Ins. Co., 432 N.E.2d 1149, 1159 (5th Dist. 1982). As stated in Volkmar, proceedings instituted against a deceased person or a non-existent entity are considered *void ab initio* and do not invoke the jurisdiction of an Illinois court. *Id.*

\(^{383}\) See Whitehead v. The Nautilus Group, Inc., 428 F. Supp. 2d 923, 926-27 (W.D. Ark. 2006) (holding plaintiff's original complaint filed prior to CAFA's effective date was not a legal nullity under state law, and thus the amended pleading related back, thereby rendering CAFA inapplicable).
B. Some Types of Post-CAFA Amendments to Preexisting Class Actions Trigger the Opportunity to Remove

Three different approaches have emerged on the issue of whether a post-CAFA amendment to a state court pleading "commences" a new action for purposes of removal under the Act. Various district courts have taken an "absolutist position," concluding that because a civil action can only be commenced once, no amendment to a pleading filed after CAFA's effective date can trigger application of the Act. However, both the Fifth and Tenth Circuits have specifically rejected this approach. As explained below, every federal circuit that has addressed the issue has concluded that some types of pleading amendments will commence a new action removable under CAFA.

A second approach applies the law "governing the relation-back of pleading amendments" to the commencement issue. The third approach emerges when a pleading amendment adds a defendant. The Fifth and Seventh Circuits, while generally following the relation-back approach, have nevertheless concluded that an amendment to a pleading that adds a defendant, commences a new action under CAFA as to that defendant — unless the amendment merely corrects a scrivener's error in a

385. Id. at 1286. Several district courts have rejected the relation-back approach to the commencement issue under CAFA. Weekley v. Guidant Corp., 392 F. Supp. 2d 1066, 1067 (E.D. Ark. 2005), is the leading case in this regard. Weekley involved a pleading amendment subsequent to CAFA's enactment which sought the certification of a nationwide class. The district court suggested that in various removal statutes Congress had employed the terms "claim or cause of action" separate from "civil action" to distinguish when removal of an entire proceeding in a civil case was authorized from where only "a claim or cause of action in a civil action" could be removed. Id. at 1067-68. The district court in Weekley concluded that CAFA's use of the term civil action referred to the entire case, and concluded that "the whole proceeding can only be commenced once." Id. at 1067-68 (citing Sneddon, 2005 WL 1593593, at *2). Accordingly, under this view, a new action cannot be commenced when pleadings are amended irrespective of whether or not they relate back, and removal under CAFA would not be permitted by pleading amendments. Weekley, 392 F. Supp. 2d at 1068; see also Comes v. Microsoft Corp., 403 F. Supp. 2d 897, 903 (S.D. Iowa 2005) (adopting Weekley's approach and holding an amendment did not commence a new cause of action rendering removal under CAFA inappropriate); Hot Springs County Solid Waste Auth. v. United Health Group, No. Civ. 05-6065, 2006 WL 376545, at *2-3 (W.D. Ark. Jan. 13, 2006) (applying the Weekley approach); Smith v. Collinsworth, No. 4:05CV01382-WRW, 2005 WL 3533133, at *2 (E.D. Ark. Dec. 21, 2005) (involving a proposed amendment from a statewide to a nationwide class where the court followed Weekley, but also concluded that even if the relation back approach was applied, removal would still fail).
386. Braud, 445 F.3d at 803-06; Prime Care, 447 F.3d at 1287-89.
387. Prime Care, 447 F.3d at 1286.
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prior pleading.\textsuperscript{388} The Tenth and Eighth Circuits apply a relation-back analysis to all pleading amendments, even those that add a new defendant.\textsuperscript{389} The relation-back approach and its variations among the circuits are discussed in the following sections of this article.

1. The Relation-Back Approach to the Commencement Issue

In \textit{Knudsen I}, the Seventh Circuit addressed the impact of a post-CAFA amendment to a class action filed in state court prior to CAFA's enactment. \textit{Knudsen I} held that a mere change in the definition of the class, even a significant one, does not trigger the right to remove that action to federal court under CAFA.\textsuperscript{390} The court in \textit{Knudsen I} concluded that "[a] doctrine of 'significant change' would go against the principle that the first virtue of any jurisdictional rule is clarity and ease of implementation."\textsuperscript{391} In the Seventh Circuit's view, a proposed change in the class definition that merely expands the size of a putative class will not suffice to invoke the Act's coverage.\textsuperscript{392} However, the Seventh Circuit in \textit{Knudsen I} recognized that certain types of amendments to an existing action may trigger the right to remove under CAFA:

\begin{quote}
[A] new claim for relief (a new "cause of action" in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes.\textsuperscript{393}
\end{quote}

\textit{Knudsen I} explained that even under preexisting law, amendments to pleadings that add a federal claim where only state-law claims had preexisted, or that add a new defendant open "a new window of removal."\textsuperscript{394} It then "imagine[d]:"

\begin{quote}
[A] similar approach will apply under the 2005 Act, perhaps modeled on Fed. R. Civ. P. 15(c), which specifies when a claim relates back to the original complaint (and hence is treated as part of the original suit) and when it is sufficiently independent of the original contentions that it must be treated as fresh litigation.\textsuperscript{395}
\end{quote}

The Seventh Circuit subsequently explained that in \textit{Knudsen I}, it referenced Rule 15(c) merely "to illustrate the difference between claims that relate back and those that do not."\textsuperscript{396} In this

\textsuperscript{388} E.g., Braud, 445 F.3d at 804; Schillinger, 425 F.3d at 333.

\textsuperscript{389} Prime Care, 447 F.3d at 1286 (citing Plubell, 434 F.3d at 1071-72).

\textsuperscript{390} Knudsen I, 411 F.3d at 807.

\textsuperscript{391} Id. at 806.

\textsuperscript{392} See Schorsch, 417 F.3d at 751 ("Amendments to class definitions do not commence new suits.").

\textsuperscript{393} Knudsen I, 411 F.3d at 807.

\textsuperscript{394} Id.

\textsuperscript{395} Id.

\textsuperscript{396} Schorsch, 417 F.3d at 750.
regard "the relation-back concept is applied as an analytic tool, a way of determining whether amended pleadings so change the claims or parties as to be a new civil action."\(^{397}\)

Under this approach, an amendment to a state court class action that does not relate back to the original pleading filed prior to CAFA's effective date triggers the right to remove that action to federal court. However, claims that do relate back would not be removable under CAFA.\(^{398}\) Thus, under this approach, the forum state's law that governs whether a claim set forth in an amended pleading relates back to the original complaint for statute of limitation purposes, also determines whether a preexisting action is removable under CAFA. This presents an intriguing problem for court and counsel. Theoretically, a new claim might relate back under one state's law but not another, and the ability to successfully remove a class action to federal court under CAFA could turn on where the class action is filed.

2. Amendments Substituting Class Representatives or Changing Class Definition

There currently exists a split in the circuits over whether an amendment to a pleading which substitutes a new class representative relates back to the original complaint. The Seventh and Eighth Circuits have concluded that such an amendment does not trigger a right of removal under CAFA.\(^{399}\) The Sixth Circuit held that an amendment changing the class representative prior to certification of a class "constituted a new action for purposes of CAFA."\(^{400}\) The basis for the Sixth Circuit's conclusion is that "unnamed putative class members are not technically parties to the action prior to class certification."\(^{401}\) The Seventh Circuit expressed a similar point of view in Jackson v. Resolution GGF OY,\(^{402}\) where it observed "as the case was not certified as a class

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398. Santamaria, 466 F.3d at 573 ("An amended complaint kicks off a new action only if under the procedural law of the state in which the suit is filed, it does not 'relate back' to the original complaint.").
399. Plubell, 434 F.3d at 1073-74 (Eighth Circuit); Phillips v. Ford Motor Co., 435 F.3d 785, 788 (7th Cir. 2006).
402. Jackson v. Resolution GGF OY, 136 F.3d 1130, 1132 (7th Cir. 1998); see also In re Navigant Consulting, Inc., Sec. Lit., 275 F.3d 616, 619 (7th Cir. 2001), where the court explained: "Class members (other than the representatives) are not parties; if they were, their citizenship would count for diversity purposes of the complete-diversity requirement in suits under 28 U.S.C. § 1332, yet it is established that class members' citizenship is disregarded." Since under CAFA, the citizenship of the plaintiff class members is now to be considered, this particular underpinning of the Seventh Circuit's rationale concerning a pleading amendment which changes the class
action, the only claims before the court are those of the plaintiff personally.” However, in the Seventh Circuit’s view even after certification, class members “are not litigants themselves.”

Should the result be different if the class representative is substituted prior to class certification rather than afterwards? The Sixth and Seventh Circuits’ approach to the party status of putative or unnamed class members appears to be in tension with the Supreme Court’s holding in Devlin v. Scardelletti. Devlin recognized that unnamed class members may be considered parties to a class action “for some purposes and not others. The label ‘party’ does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context.” While Devlin recognized that unnamed class members should not be considered parties for diversity purposes in a traditional class action context, the Court reached that conclusion because “considering [the citizenship of] all class members for these purposes would destroy diversity in almost all class actions.” That concern is of no moment with class actions encompassed by CAFA in light of its specified approach for determining the existence of minimal diversity. Moreover, Devlin reiterated that putative class members are considered parties “in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them.”

Perhaps the answer lies in the fact that “[a] properly certified class has a legal status separate from and independent of the interest asserted by the named plaintiff.” As a result, after a class has been certified, the fact that the class representative’s individual claim becomes moot does not render the class action moot. A new class representative may be substituted and the class action will continue on. When a class representative is substituted prior to certification, it kicks off a new action from the perspective of the newly added class representative.

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403. Schorsh, 417 F.3d at 750.
405. Devlin, 536 U.S. at 9 (emphasis added).
406. Devlin, 536 U.S. at 10. Devlin’s conclusion on this point was intended to preserve traditional diversity jurisdiction in a class action context. In view of CAFA’s intent to broadly expand diversity jurisdiction over qualifying class actions and Devlin’s context – specific approach, the opposite conclusion would likely now be searched in the context of a class action under CAFA. CAFA’s test for minimal diversity requires an examination of the citizenship of the putative plaintiff class members.
408. Whitlock v. Johnson, 153 F.3d 380, 384 (7th Cir. 1998).
The Sixth, Seventh, and Eighth Circuits merely addressed the substitution of a new class representative. None of those cases involved the addition of a new claim. Thus the defendants could not claim that they were prejudiced by having to defend identical allegations in the amended pleading. In rejecting the argument that the substitution of a new class representative triggered a right to remove under CAFA, the Seventh Circuit explained “[s]ubstitution of unnamed class members for [the] named plaintiffs...is a common and normally an unexceptionable ('routine') feature of class action litigation both in the federal courts and in the Illinois courts.” However, a class had already been certified in that case when the substitution occurred. Whereas in the Sixth and Eighth Circuit cases, the substitution of the class representative occurred prior to class certification. Accordingly, whether a pleading amendment that adds or changes the class representative triggers a right to remove under CAFA may turn on whether the amendment occurs pre- or post-certification and the particular circuit involved.

Similarly, the Seventh Circuit concluded that a “substantial change” to the definition of a class does not trigger the right to remove that action under CAFA. A proposed amendment to the class definition merely expanding the size of a putative class does not suffice to invoke the Act’s coverage in the Seventh Circuit’s view. The Seventh Circuit’s conclusion on this point again appears to be rooted in the concept that “[c]lass members are represented vicariously but are not litigants themselves.”

However, it does not appear that all circuits agree with the Seventh Circuit’s position that any amendment to a class definition inevitably relates back. In Cliff v. Payco General American Credits, Inc., plaintiff filed an action seeking to certify a class of Florida residents. After the statute of limitations ran on

410. Plubell, 434 F.3d at 1073.
411. Phillips, 435 F.3d at 787.
412. Plubell, 434 F.3d at 1071.
413. See, e.g., Bemis v. Allied Prop. & Cas. Ins. Co., 2006 WL 1064067, at *6 (S.D. Ill. Apr. 20, 2006) (amendment adding a new class representative who was “an unnamed member of the original class action Complaint” and which did not alter the class definition did not trigger a right to remove under CAFA).
415. See Schorsch, 417 F.3d at 751 (“Amendments to class definitions do not commence new suits.”); Schillinger, 425 F.3d at 334 (“[T]he expansion of a proposed class [from a statewide to a nationwide class] does not change the parties to the litigation nor does it add new claims.”).
416. Schorsch, 417 F.3d at 750. As noted above, the Supreme Court in Devlin rejected this type of across-the-board approach and recognized “that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement.” 536 U.S. at 10.
417. 363 F.3d 1113 (11th Cir. 2004).
one of his claims, plaintiff filed an amended complaint seeking to represent not only a class of state residents, but also a nationwide class. 418 Clifford held the amended pleading did not relate back because plaintiff's initial complaint did not provide the defendant with notice about the possibility of defending a nationwide class and would unfairly prejudice the defendant. 419 Clifford emphasized that the case did not involve "a minor modification in the class definition that slightly enlarged the class beyond the scope of the class proposed in the original complaint." 420 Clifford recognized that class definitions are frequently modified and emphasized that its "opinion should not be understood to declare a rigid rule that any amendments that modify and thus enlarge a class will not relate back under any circumstances. 421 Rather, such a determination must be made on a case-by-case analysis. 422

In reaching its conclusion, Clifford borrowed a principle from American Pipe & Construction Co. v. Utah, 423 that the commencement of a class action must adequately notify a defendant:

[N]ot only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation .... 424

Thus, where a proposed amendment to a class definition triggers the involvement of a different state's laws, includes citizens from different jurisdictions, or geometrically increases the size or number of putative classes and/or class members, careful consideration of a possible removal of the action should be made in light of Clifford's holding and its application of American Pipe to the relation back issue. Clearly, a plaintiff's initial complaint in those scenarios would not provide a defendant with all of the information necessary to prepare a defense to class action claims brought in the amended pleading. Following this rationale, one district court recently concluded that an amended complaint which sought to expand a class to include claimants from an additional

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418. Id. at 1119.
419. Id. at 1132; see also Heaphy v. State Farm Mut. Auto. Ins. Co., No. C05 5404RBL, 2005 WL 1950244, at *4 (W.D. Wash. Oct. 12, 2005) ("[N]otice from the initial individual complaint... cannot serve as 'adequate' notice of all claims [that] might someday fall within the class definition.").
420. Clifford, 363 F.3d at 1133 n.16.
421. Id.
422. Id.
sixteen-year period did not relate back to the original pleading and held removal to be proper under CAFA.425

Seventh Circuit practitioners should recognize, however, that in Schillinger, just as in Cliff, plaintiffs sought to expand their action from one asserting a statewide class into one involving a putative nationwide class. The Seventh Circuit in Schillinger concluded “that the expansion of the class was not significant enough to create a new claim or new action” for purposes of CAFA.426 The fact that the defendant would be forced to analyze the putative new class members’ claims under state laws that were different “than if it was facing only a class of Illinois plaintiffs,” did not warrant a different result.427

However, the Seventh Circuit offered the following comment on its approach to the issues presented in Schillinger:

We recognize, however, that this is a complex question. CAFA may make state rules about statutes of limitations irrelevant to the type of commencement that is necessary for federal removal . . . . We prefer to save this complex issue for another day, when the choice of law and interpretation of federal law will govern the outcome.428

The Fifth Circuit in Braud429 similarly observed “[i]t is less certain whether state law provides the applicable rules for the relation back analysis.”430 The Fifth Circuit chose not to resolve this issue because in the case before it, the result was the same under either option. The Tenth Circuit also noted the issue but passed on addressing it by finding that it was “unlikely that a choice between federal and state law [was] necessary to [their] resolution of [the] case.”431

3. Amendments Adding New Defendants

Under the approach taken by the Fifth and Seventh Circuits, when a plaintiff files an amended pleading adding a new defendant, a new action is “commenced” as to that defendant.432

426. Schillinger, 425 F.3d at 332.
427. Id. at 334.
428. Id. at 335.
430. Id.
431. Prime Care, 447 F.3d at 1289 n.6 (“At this juncture, however, [the court does not express an opinion as to whether federal or state law should control.”).
432. See Schorsch, 417 F.3d at 749; Knudsen I, 411 F.3d at 807; Braud, 445 F.3d at 804 (agreeing with the Seventh Circuit that “amendments that add a defendant ‘commence’ the civil action as to added party”); see also Adams, 2005 WL 186237, at *4 (“Plaintiff’s decision to add . . . a defendant presents precisely the situation in which it can be and should be said that a new action has commenced for purposes of removal pursuant to CAFA.” (internal
Thus, defendants added to state court class actions after CAFA’s enactment have the right to remove the action under CAFA.433

The Seventh Circuit in Schillinger clarified that when a post-CAFA addition of a defendant to a preexisting action was the result of a “scribener’s error,” removal under the Act is not permitted.434 Additionally, an amendment which merely corrects a “mismomer” does not commence a new action for purposes of CAFA.435 Clearly in the case of a mismomer — suing the right party by the wrong name — an amended pleading relates back and its filing does not commence a new action for purposes of CAFA.436 However, where a previously unknown defendant is added in an amended pleading, the mismomer exception does not apply.437 On this last point, “[i]t is important to maintain the distinction between correcting an honest error in the name of a correctly named party and joining a new party in the litigation for the first time under the guise of a claim of mismomer.”438

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4. Amendments Adding New Claims

In *Knudsen II*, the Seventh Circuit held an amended pleading that added a novel claim triggered a right to remove under CAFA where the original pleading did not supply notice of the events that underlie that new claim.\(^{439}\) *Knudsen II* stemmed from a post-CAFA amendment which sought to hold Liberty Mutual "responsible for all policies issued by any subsidiary or affiliate."\(^{440}\) Since the claims against those subsidiaries and affiliates were not based on the same underlying acts as the claim set forth in the original pleading, the Seventh Circuit concluded that Liberty Mutual faced new claims for relief.\(^{441}\)

In light of *Knudsen II*, the key is whether the original pleading provided the defendant with "notice of the facts that form the basis of the claim asserted" in the amended complaint.\(^{442}\) As one district court explained, the relevant inquiry is "not whether every individual factual element of the [amended] claim is identical to every individual factual element of the [original] claim."\(^{443}\) That type of argument "misconstrues the level of generality at which the relation-back inquiry must be conducted."\(^{444}\) Minor amendments to the pleadings clearly will not trigger the right to remove under this standard.\(^{445}\) If the plaintiff's

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440. *Id.* at 756.
441. *Id.* at 757-58. *See Heaphy*, 2005 WL 1950244, at *3-5 (holding that an amendment adding a new lead plaintiff who was not a member of the prior putative class and asserting a new cause of action which was filed after a motion for class certification had been denied were "sufficiently independent of the original contentions" to trigger the right to remove under CAFA); *Plummer*, 388 F. Supp. 2d at 1313-1316 (holding that an amended pleading which for the first time sought to certify a class and which added fraud and bad faith claims was a *de facto* commencement of a new suit and therefore was removable under CAFA); *Moniz*, 447 F. Supp. 2d at 38 (holding the amendment of a class action involving a price fixing conspiracy for certain rubber and urethane products adding allegations about neoprene, a new product, added a distinct and novel claim that triggered the right to remove under CAFA).
442. *See In re Audi*, 2006 WL 1543752, at *3 (holding an amendment adding a strict liability claim related back to plaintiffs' original consumer fraud claim because both claims arose out of the same transaction or occurrence).
443. *Id.* at *4.
444. *Id.*
445. *See, e.g.*, *Judy*, 2005 WL 2240088, at *1-3 (finding that removal under CAFA was not triggered by an amendment which the court characterized as adding "additional factual allegations which elaborate [plaintiff's] original claims" and which "refined" the class allegations); *McAnaney v. Astoria Fin. Corp.*, 233 F.R.D. 285, 288-89 (E.D.N.Y. 2005) (holding that a proposed amendment that added a reference to CAFA's jurisdictional provisions was futile because the proposed amended pleading related back to the original complaint, and the case was therefore commenced as of the original filing date, thereby rendering CAFA inapplicable); *In re Methyl Tertiary Butyl Ether*
original claim did not provide the defendant with the information necessary to defend the newly asserted one, then removal would seemingly be appropriate under the circumstances.\textsuperscript{446} The Seventh Circuit in \textit{Schorsch} appeared to suggest that an existing defendant may only remove the newly added claim rather than the entire lawsuit.\textsuperscript{447} However, this suggestion flies in the face of CAFA's plain language which provides: "A class action may be removed to a district court . . . without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants."\textsuperscript{448} Based upon this language, the Fifth Circuit concluded that any single defendant can remove the entire class action.\textsuperscript{449} As one district court explained, "[under removal practice, the entire lawsuit is removable or not removable, not merely the claims against particular defendants."

XIII. PROPOSED ALTERNATIVE TO RELIANCE ON STATE LAW RELATION-BACK PRINCIPLES

The current approach addressing when a class action commences for purposes of CAFA relies on state law relation-back principles that admittedly raise several knotty questions. Under that approach, state law controls the door to the federal courthouse. While a number of state relation-back statutes are at least partially modeled upon Rule 15(c) of the Federal Rules of Civil Procedure, it cannot be gainfully argued that there is any uniformity in the text or the interpretation of the fifty state laws addressing when a pleading relates back for statute of limitations purposes. The more restrictive a state's relation-back statute, the

\textsuperscript{446} See \textit{Santamarina}, 466 F.3d at 574 (explaining that unless "the original complaint is so cursory that someone reading the amended complaint would not know it referred to the same conduct charged in the original" the filing of an amended pleading would relate back and a right to remove under CAFA would not be triggered by that amendment).

\textsuperscript{447} \textit{Schorsch}, 417 F.3d at 750.

\textsuperscript{448} 28 U.S.C. § 1453(b) (Supp. 2005) (emphasis added).

\textsuperscript{449} See \textit{Braud}, 445 F.3d at 808 (holding that it is the "action" that is removable, not claims against particular defendants); \textit{Dinkel}, 400 F. Supp. 2d at 294 (permitting three defendants against whom plaintiff's action was commenced after CAFA's effective date to remove the entire action against all defendants rather than simply the claims brought against them).

\textsuperscript{450} \textit{Dinkel}, 400 F. Supp. 2d at 293; see also \textit{Robinson}, 2006 WL 470592, at *3 ("Under CAFA, any single defendant can remove . . . and the entire lawsuit is removed, not merely the claims against the removing defendant.").
more likely a pleading amendment will result in a successful removal to federal court. As a result, the right to remove a class action to federal court under CAFA could theoretically change depending on the state in which a class action was originally filed. Thus, the current approach to the commencement issue could potentially lead to inconsistent results depending on the vagaries of state law.

CAFA was enacted to “restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.” Federal courts are intended to be an independent judicial system capable of enforcing federal law. CAFA was specifically enacted to curb certain abusive state court class action practices. However, the current approach to the commencement issue ignores those interests by permitting state law to control the invocation of federal court jurisdiction.

As noted above, the Fifth, Seventh, and Tenth Circuits have expressed some uncertainty over whether state law or Rule 15(c) should be applied, but have not addressed the issue. This should come as no surprise. Historically, “[t]here has been considerable uncertainty whether a federal court sitting in diversity jurisdiction is free to apply the relation back principle embodied in Rule 15(c) instead of a conflicting state rule on the subject.” The circuits have avoided answering the question of whether state or federal law should control by concluding the test under state law was functionally the equivalent as under Rule 15(c). Adding to the conundrum is that the “line between ‘substance’ and ‘procedure’ shifts as the legal context changes. Each implies different variables depending upon the particular problem for which it is used.” Indeed, a state statute of limitations is “treated as

451. Plubell, 434 F.3d at 1073.
453. See, e.g., Schorsch, 417 F.3d at 751 (“Illinois has a relation-back rule that is functionally identical to Rule 15(c), however, so we need not fret over fine points.”); Plubell, 434 F.3d at 1072 (“The Missouri Supreme Court interprets Rule 55.33(c) to embody Rule 15(c)’s rationale.”); Prime Care, 447 F.3d at 1289 n.6 (“Given the essentially identical test of Rule 15(c) and Kan. Stat. Ann. § 215(c) . . . it appears unlikely that a choice between federal and state law is necessary to our resolution of this case.”). However, this does not answer the question involving those states “that have a clearly different doctrine of relation back than is prescribed for the federal courts.” See 6A WRIGHT, MILLER & KANE, supra note 435, § 1503, at 168.
454. Hanna v. Plumber, 380 U.S. 460, 471 (1965) (internal quotation marks omitted). There are three different contexts in which a particular rule may be classified as substantial or procedural:

[When] determining whether it is within the scope of a court's rulemaking power; when resolving questions of conflict of laws; or when determining whether to apply state or federal law. These three contexts
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procedural” and therefore governed by the forum state’s law for choice of law purposes under the Full Faith and Credit Clause, and “substantive” for purposes of federal diversity jurisdiction. 455

In Hanna, the Supreme Court concluded that in a diversity action, when a federal procedural rule addressed a specific topic or issue, it trumped a conflicting state law, even when use of the state law would achieve a different outcome. 456 Hanna suggests that Rule 15(c) should be applied in this context. Complicating the matter however, is that the amendment triggering removal is made in state court rather than federal court. However, because the use of Rule 15(c) in this context does not purport to control state court procedures or enlarge any substantive right, its application seemingly does not violate any constitutional guarantee or the Rules Enabling Act. 457

Reliance upon state law relation-back principles precludes the goal of a uniform approach and a consistency in the application of a federal law (CAFA) as well as the access to federal court that CAFA was intended to provide. It arguably runs headlong into “the first virtue of any jurisdictional rule [which] is clarity and ease of implementation” that initially led the Seventh Circuit to reject the doctrine of “substantial change” in Knudsen I. 458

In light of the complexity of these issues, an alternative approach based on principles drawn from American Pipe, is offered as a solution. Admittedly, American Pipe’s tolling doctrine has its legitimate critics. 459 Additionally, not all jurisdictions follow the doctrine across state or jurisdictional lines. 460 However, in this context the principles being drawn upon are not being used for tolling purposes, but rather as an analytical tool, in a fashion similar to the current use of state law relation-back principles.

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456. Hanna, 380 U.S. at 463-64.
458. Knudsen I, 411 F.3d at 806.
460. See, e.g., Portwood v. Ford Motor Co., 701 N.E.2d 1102, 1104 (Ill. 1998) (“[V]ery few states to date have even considered the issue of cross-jurisdictional tolling, let alone adopt it.”); In re Copper Antitrust Litig., 436 F.3d 792, 793-97 (7th Cir. 2006) (holding that a state class action raising state law antitrust claims does not toll the statute of limitations in a cross-jurisdictional context for a federal class action under the Clayton Act).
Based on the Eleventh Circuit's approach in *Cliff* — a case addressing the relation back of an amendment to a class action — the application of certain principles from *American Pipe* in this context offer a practical alternative to the issues surrounding CAFA's application to class actions that were pending prior to its effective date.

First, the *American Pipe* doctrine was specifically directed at class action practice and "is not inconsistent with the purposes served by statutes of limitations." Therefore, it would be consistent with the current relation-back approach to CAFA's effective date that is based on a statute of limitation principle. Second, "different or peripheral claims to which the defendant was not fairly placed on notice by the [original] class suit are not protected under *American Pipe*." As Justice Powell explained, a defendant should normally not be prejudiced by tolling because, "[w]ithin the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation." The same rationale can be applied to CAFA's commencement issue. Where a new claim or a proposed amendment to a class definition filed after CAFA's effective date falls outside the parameters of *American Pipe* because the original pre-CAFA action did not provide the defendant with all of the information necessary to defend the new claim or claims brought on behalf of the newly added class members, because of either the involvement of different states' law(s), different time periods, or the addition of new putative class action members from different jurisdictions, removal under CAFA would be permitted. Such amendments so change the nature of class action litigation as to amount to the commencement of a new action. Additionally, it would provide an adequate filter so that federal courts are not flooded with newly removed actions, which is an unstated, but practical consideration at work in this area. Moreover, this approach would address the concern about the relevancy of state procedural rules driving the application of a federal statute in federal court while also hopefully providing some clarity and consistency of implementation to this problem.

XIV. UNINTENDED CONSEQUENCES OF CAFA ON STATE COURT CLASS ACTION PRACTICE

While CAFA will limit the number of multistate and national class actions that are filed, one of its unintended consequences may be to increase the number of coordinated state court class

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462. *Id.* at 354-55 (Powell, J., concurring).
463. *Id.* (emphasis added).
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action filings in an attempt to take advantage of CAFA's "home state" and "local controversy" exceptions built into its minimal diversity rule. The filing of multiple state-wide class actions in various local jurisdictions challenging the same product defect or contesting the same business practice will at least in the short run increase the cost of defense and increase the possibility of inconsistent rulings or judgments in those actions. Thus, one of CAFA's unintended consequences may be that it increases rather than reduces the cost of defending class action claims.

CAFA will also likely shift to federal court many indirect purchaser class actions filed under state antitrust laws.\footnote{Indirect purchasers are parties who claim to have overpaid for a given product due to the alleged anticompetitive practices of one or more defendants. Indirect purchasers, as the term suggests, do not purchase the product directly from the defendant, but rather from another party in the product's distribution chain which was also overcharged due to the same allegedly anticompetitive practices. A party who purchases the product directly from the defendant may sue for damages under federal antitrust law. However, indirect purchasers (consumers) typically can only seek injunctive relief under \textit{Illinois Brick Co. v. Illinois}.\footnote{465} \textit{Illinois Brick} prompted more than two-thirds of the states to enact legislation which allow indirect purchasers to sue for treble damages under state antitrust laws.\footnote{466} This means that as a result of CAFA, federal courts will be called upon to interpret and develop those states' antitrust laws.\footnote{467}}

CONCLUSION

Only time will tell whether CAFA accomplishes its purpose of directing large class actions to federal court. While CAFA appears to have lessened the number of actions in which a multistate or nationwide class is sought, it will likely produce a proliferation of state-wide actions invoking CAFA's "home state" and "local controversy" jurisdictional exemptions.

Following the enactment of PSLRA in 1995, class counsel engaged in a strategy of shifting securities fraud class actions to state court which prompted Congress three years later to enact SLUSA. We may see history repeat itself with class counsel adopting specific strategies in an attempt to dodge CAFA's expansion of federal court jurisdiction. Thus, CAFA's immediate effect will likely result in the proliferation of coordinated, state

\footnote{464. See In re Hydrogen Peroxide Antitrust Litig., No. 05-666, 2006 WL 999955, at *1 n.2 (E.D. Pa. Apr. 11, 2006).}
\footnote{465. 431 U.S. 720 (1977).}
\footnote{466. E.g. In re Hydrogen Peroxide, 2006 WL 999955, at *1.}
\footnote{467. Id.}
class action filings in an attempt to take advantage of CAFA's one-third and two-third's rules.