

# Legal Analysis & Regulations

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LAR-473e

April 10, 2006

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## *Federal Class Action Litigation Reform Creates New Challenges for Plaintiffs' Bar*

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# Federal Class Action Litigation Reform Creates New Challenges for Plaintiffs' Bar

## Executive Summary

This report briefly addresses the problems associated with modern day class actions and examines the particular provisions of the Class Action Fairness Act (CAFA) that were designed to resolve these issues. It then discusses how CAFA has altered the litigation environment surrounding class actions and what trends have emerged since its enactment, focusing on how the plaintiffs' bar has responded to these changes in class action ground rules.

February 18, 2005 marked a new beginning for class action litigation with the enactment of CAFA. The purpose of the new law is to direct true multistate class actions to federal courts that are considered to be better apt to handle them and, thus, to reign in the routine abuses prevalent in so-called magnet state court jurisdictions that have developed reputations of pro-plaintiff, anticorporate bias. While only a year has passed since becoming law, CAFA has proven to be a modest attempt at curbing some of the worst abuses of the class action process. Although much of the litigation to date has focused on the technical applications of CAFA, plaintiffs' counsels have employed, with limited success, innovative techniques aimed at avoiding the strictures of the legislation, such as limiting the amount in controversy and class size in efforts to keep these cases in what they consider to be friendly jurisdictions. For the most part, however, courts have shown a willingness to adhere to the intentions of Congress and determine that jurisdiction properly lies in federal court. Courts are in consensus that state law will be strictly applied in determining whether a case has commenced after the enactment of CAFA and, as such, properly the subject of federal jurisdiction. Generally speaking, cases filed prior to the effective date of the new law will remain in state court. On the other hand, the addition of new defendants to the action and the broadening of claims after the enactment of the new law may qualify as the commencement of a new action for the purposes of removal to federal court.

Remaining unresolved are certain issues concerning which party has the burden of proof when cases are being considered for removal to federal court or remanded back to state court. The only federal district court to rule on the subject has said that the burden is not shifted under CAFA and the defendant bears the responsibility to show that removal is proper. Although only considered by one court, it has been determined that the evidentiary burden to show that an exception of CAFA applies then shifts to the plaintiff.

## Introduction

Class actions were designed to provide a device by which persons, whose injuries are not large enough to make pursuing their individual claims in the judicial system cost efficient, are able to join together with others suffering the same harm and seek redress for their injuries.<sup>1</sup> As such, class actions are a valuable tool in our jurisprudential system—if used properly and in a manner that is fair and efficient to all parties involved in such a suit. Unfortunately, the class actions of the modern legal world have become overrun with abuses and

inefficiencies that all too frequently have harmed both class members and defendants and ignored the intended purposes of the federal class action rules. In fact, some have argued that “there is no component of the American legal system more prone to abuse than class actions.”<sup>2</sup> While the imaginative tactics employed by entrepreneurial plaintiffs' lawyers are largely to blame, inherent flaws embedded in the federal class action rules also contribute to these problems. In an attempt to resolve such flaws and prevent the worst abuses surrounding class actions, Congress enacted the Class Action Fairness

<sup>1</sup> Senate Report No. 109-14, p. 4 (2005).

<sup>2</sup> 151 Congressional Record S1093 (daily edition February 8, 2005) (statement of Senator Sessions).

Act of 2005 (CAFA or the Act).<sup>3</sup> CAFA focuses on shifting much of class action litigation from state courts—which handled 60 percent of all class actions in 2000<sup>4</sup>—to federal courts, which generally are better suited to handle the complexities of interstate class actions.

### Background<sup>5</sup>

Class actions originally were used as a tool for civil rights litigants seeking injunctions in discrimination cases. In the 1980s, however, plaintiffs' attorneys successfully persuaded judges to expand class action suits to the area of mass torts. Soon thereafter, the problems associated with class action litigation surfaced and abuse filled the system, victimizing both plaintiffs—the very people that class actions were supposed to benefit—and defendants. This misuse of class actions became well known and highly publicized, forcing the federal government to take notice. “. . . [C]lass action abuses are eroding public confidence in our civil justice system. When abuses do occur in the class action system, the public can ultimately pay dearly through spiraling prices, lost jobs, and even bankrupt companies.”<sup>6</sup> The abuses generally referred to when discussing such societal downfalls include: classes of plaintiffs being certified by courts despite a lack of common factual circumstances among their individual members; settlements being reached that bear no resemblance to any alleged harm caused by the conduct at issue; plaintiffs' lawyers reaping huge fees while the members of the class receive *de minimus* amounts of cash or coupons redeemable for future goods or services; defendants being forced to settle because the remote possibility of an adverse judgment poses an untenable catastrophic financial risk, even though the claim against them may be frivolous; plaintiffs' lawyers becoming adept at gaming the system to ensure that cases remain in the friendly state-court forum; some class

members precluded from claiming their often paltry portion of the settlement by baffling “fine print” conditions; and the portion of the settlement not claimed normally reverting back to the defendant.<sup>7</sup>

Putting these issues and their ill effects aside, class actions continue to be recognized as providing a much needed benefit to society. Most importantly, class action suits provide a means for individuals to seek redress for negligent corporate or other institutional behavior from which they would otherwise be unable to recover. They also serve as deterrents for companies to avoid engaging in similar types of conduct in the future. At the same time, class actions benefit those very same entities by enabling them to more efficiently resolve hundreds or thousands of similar claims that would otherwise cause significant financial harm and reputational damage if required to be dealt with on an individual basis.

### The Act

The Senate first began consideration of the Class Action Fairness Act in the 105<sup>th</sup> Congress.<sup>8</sup> Similar pieces of legislation were introduced in the 106<sup>th</sup>, 107<sup>th</sup>, and 108<sup>th</sup> Congresses, however, none proved to be successful.<sup>9</sup> Then, on January 25, 2005, Senators Charles Grassley (R-IA), Herb Kohl (D-WI), and Orrin Hatch (R-UT) introduced the Class Action Fairness Act of 2005. It was quickly approved by Congress on February 17, 2005, and enacted into law upon President Bush's signature the following day on February 18. According to its preamble, the purpose of CAFA is to:<sup>10</sup>

1. Assure fair and prompt recoveries for class members with legitimate claims;

<sup>7</sup> *Op. cit.*, n. 5, p. 67.

<sup>8</sup> The Class Action Fairness Act of 1997 was introduced by Senators Grassley and Kohl and was approved by the Subcommittee on Administrative Oversight and the Courts. No further action was taken on the bill.

<sup>9</sup> The Class Action Fairness Act of 1999 was introduced in the 106<sup>th</sup> Congress by Senators Grassley, Kohl, and Strom Thurmond (R-SC). It was approved with an amendment in the nature of substitute by the Judiciary Committee on June 29, 2000. The Senate continued consideration of the Class Action Fairness Act in the 107<sup>th</sup> Congress, when Senator Grassley introduced S. 1712 on November 15, 2001. Hearings were held on the bill; however, no further action was taken on it during the 107<sup>th</sup> Congress. On February 4, 2003, Senator Grassley introduced S. 274, the Class Action Fairness Act of 2003. A compromise version of the bill was introduced by Senator Grassley on October 17, 2003. The Senate failed to invoke cloture on a Motion to Proceed and no further action was taken.

<sup>10</sup> *Op. cit.*, n. 3, Preamble.

<sup>3</sup> Class Action Fairness Act of 2005, P.L. 109-2.

<sup>4</sup> Warren W. Harris and Erin Glenn Busby, *Highlights of the Class Action Fairness Act of 2005, The Future of Class Actions in America*, 72 Defense Counsel Journal 228, 2005.

<sup>5</sup> For a more detailed discussion on the history of problems and abuses surrounding class actions see: Frederick T. Stocker, Ed., *I Pay, You Pay, We All Pay: How the Growing Tort Crisis Undermines the U.S. Economy and the American System of Justice*, Chapter IV, “The Class Action Controversy,” Manufacturers Alliance/MAPI, 2003.

<sup>6</sup> 151 Congressional Record S1094 (daily edition February 8, 2005) (statement of Senator Hatch).

2. Restore the intent of the framers of the U.S. Constitution by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction; and
3. Benefit society by encouraging innovation and lowering consumer prices.

In an effort to achieve these goals, the drafters of CAFA incorporated three main components into the Act: a consumer class action bill of rights, a provision expanding federal court original jurisdiction in interstate class actions, and a directive that the Judicial Conference of the United States conduct a review of class action settlements and attorneys' fees and present Congress with recommendations for ensuring that attorneys' fees are determined in a fair and reasonable way.

### **Consumer Class Action Bill of Rights**

In an effort to ensure that class members are treated fairly and to cure the inequities that often are a result of class action settlements, the Act establishes a Consumer Class Action Bill of Rights which limits attorneys' fees and provides for greater judicial scrutiny of proposed settlements. For instance, this section of the Act attempts to resolve the problems associated with coupon settlements. These well-known problems generally refer to the results in which the class members are awarded vouchers for future goods or services, while the counsel receives monumental fees. Not only would class members prefer to receive cash, but these coupons are often not redeemed, offering absolutely no value to the recipient. Under CAFA, class counsel must base their fees on the value of the coupons that are actually redeemed. Class counsel is no longer allowed to base their fees on a settlement value that assumes a 100 percent redemption rate or be paid until the completion of the coupon redemption process. "Thus, if a settlement agreement promises the issuance of \$5,000,000 in coupons to the putative class members, but only one-fifth of potential class members actually redeem the coupons at issue, then the lawyer's contingency fee should be based on a recovery of \$1,000,000—not a recovery of \$5,000,000."<sup>11</sup> In the alternative, class counsels' fees may be based upon the amount of time counsel reasonably expended working on the action.

CAFA's Consumer Class Action Bill of Rights also requires that prior to the approval of any proposed settlement in which coupons will be

awarded, the judge must conduct a hearing to determine whether the settlement terms are fair, reasonable, and adequate for class members. In adopting this provision, it was the intent of Congress that the fairness of non-cash settlements seriously be questioned. ". . . [I]t does not intend to forbid all non-cash settlements . . . , however, where such settlements are used, the fairness of the settlement should be seriously questioned by the reviewing court where the attorneys' fees demand is disproportionate to the level of tangible, non-speculative benefit to the class members."<sup>12</sup> Furthermore, this section prohibits approval of a proposed settlement under which class members would be required to pay class counsel a sum of money that results in a net loss, unless the court makes a written finding that non-monetary benefits to the class members substantially outweigh the monetary loss. This provision is aimed at avoiding a result as seen in *Kamilewicz v. Bank of Boston Corporation*,<sup>13</sup> where the class members actually lost money as a result of the terms of the settlement. CAFA also prohibits approval of settlements that provide for the payment of greater sums to some class members than to others solely on the basis that the class members to receive the higher awards are located in closer geographic proximity to the court.

To ensure further scrutiny of proposed settlements, CAFA contains a requirement in which defendants must provide notice of any proposed settlement within ten days to the appropriate federal official and to the appropriate state official of each state in which a class member resides. Failure to comply with this requirement allows class members to choose not to be bound by the settlement. CAFA defines the appropriate federal official as the Attorney General of the United States, and the appropriate state official as the person in the state who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the state, if some or all of the matters alleged in the class action are subject to regulation by that person. The government official has 90 days to review and determine whether or not any action needs to be taken to ensure fairness to the plaintiffs. "The Committee believes that notifying appropriate state and federal officials of proposed class action settlements will provide a check against inequitable settlements in these cases. Notice will also deter

<sup>11</sup> *Op. cit.*, n. 1, p. 30.

<sup>12</sup> *Op. cit.*, n. 1, pp. 31-32.

<sup>13</sup> 92 F.3d 506 (7<sup>th</sup> Cir. 1996).

collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.”<sup>14</sup> While providing additional protection to the class members, this requirement will also add the burden of additional paperwork and uncertainty, perhaps making it more difficult to close a particular action.

### Diversity Jurisdiction and Removal Under CAFA

The most notable section of CAFA expands original jurisdiction for federal courts to enable them to hear more interstate class action lawsuits that are currently being handled by state courts. The Act expands federal district court diversity jurisdiction over interstate class actions where: (1) any member of the proposed class is a citizen of a different state from any named defendant; (2) the amount in controversy exceeds \$5 million; and (3) the action involves a class of 100 or more members. By requiring that only one plaintiff be diverse from any one defendant, CAFA removes the complete diversity requirement and now requires minimal diversity for removal of a case to federal court.

Under CAFA, diversity jurisdiction requires that the amount in controversy exceed \$5 million. CAFA directs the claims of the class members to be aggregated to reach this threshold. Under prior law, many courts required each plaintiff in a class action to be seeking over the former statutory threshold of \$75,000 in order for the action to have diversity jurisdiction. In *Zahn v. International Paper Company*,<sup>15</sup> the Supreme Court held that each plaintiff in a class action is required to satisfy the jurisdictional amount in controversy before the lawsuit becomes removable. After the enactment of the Judicial Improvements Act of 1990,<sup>16</sup> however, this view was questioned by several circuit courts. “Commentators noted that the language of §1367,<sup>17</sup> the

new supplemental jurisdiction statute, arguably granted courts in diversity cases supplemental jurisdiction over claims brought by parties who did not meet the amount in controversy requirement of §1332.”<sup>18</sup> For example, in *Free v. Abbott Laboratories, Inc.*, the Fifth Circuit held that the supplemental jurisdiction statute enabled a district court to exercise jurisdiction over members of a class even if they did not meet the \$75,000 amount in controversy requirement.<sup>19</sup> Concurring with the decision in *Abbott Laboratories*, the Seventh Circuit in *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.* held that §1367 gave district courts supplemental jurisdiction over individually named plaintiffs who did not meet the jurisdictional minimum, provided that another individually named plaintiff satisfied the threshold.<sup>20</sup> This view would allow a case to be removed so long as one class member’s damages exceed \$75,000, regardless of what amount of damages the other members were seeking. Some courts, however, refused to interpret the Judicial Improvements Act in this manner. Specifically, the Third, Eighth, and Tenth Circuits continued to require each plaintiff to satisfy the \$75,000 threshold individually in order for the action to be removable.<sup>21</sup>

Most recently, the Supreme Court in *Exxon Mobil Corporation v. Allapattah Services, Inc.*,<sup>22</sup> held that §1367 effectively overrules *Zahn*. In doing so the Court asserted that “where the other elements of jurisdiction are present and at least one named plaintiff in the action satisfies the amount in controversy requirement,” §1367 authorizes federal courts to exercise supplemental jurisdiction over the

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this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

<sup>14</sup> *Op. cit.*, n. 1, p. 35.

<sup>15</sup> 94 S.Ct. 505 (1973).

<sup>16</sup> P.L. 101-650, 104 Stat. 5089.

<sup>17</sup> 28 U.S.C. §1367 provides in pertinent part:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of

<sup>18</sup> “Supplemental Jurisdiction—Amount in Controversy Requirement,” 119 *Harvard Law Review* 317, p. 318, 2005.

<sup>19</sup> 51 F.3d 524 (5<sup>th</sup> Cir. 1995), *aff’d.*, 120 S.Ct. 1578 (2000).

<sup>20</sup> 77 F.3d 928 (7<sup>th</sup> Cir. 1996).

<sup>21</sup> *Meritcare, Inc. v. St. Paul Mercury Insurance Co.*, 166 F.3d 214 (3d Cir. 1999); *Trimble v. Asarco, Inc.*, 232 F.3d 946 (8<sup>th</sup> Cir. 2000); *Leonhardt v. Western Sugar Co.*, 160 F.3d 631 (10<sup>th</sup> Cir. 1998).

<sup>22</sup> 125 S.Ct. 2611 (2005). The opinion of the Court decided the consolidated cases of *Exxon Mobil Corp. v. Allapattah Services, Inc.* (No. 04-70) and *Rosario Ortega v. Star-Kist Foods, Inc.* (No. 04-79).

claims of additional plaintiffs in the same case or controversy, “even if those claims are for less than the jurisdictional amount specified in the statute setting forth the requirements for diversity jurisdiction.”<sup>23</sup>

Under CAFA, a class action may be removed where the requirements set forth in 28 U.S.C. §1332(d) are met—there are at least 100 members of the proposed class, the aggregate amount in controversy exceeds \$5 million, and minimal diversity exists. CAFA further amends the rules by permitting removal by a defendant without the consent of any other defendant. According to Congress, this provision is sought at preventing class counsel from involving a “friendly” defendant who could refuse to join in a removal to federal court and thereby thwarting any efforts on the part of the defendant to remove to federal court.<sup>24</sup> The Act also amends the prior rules to allow class actions to be removed more than one year after commencement of the action. The removal provision under CAFA allows parties to file an appeal on an order granting or denying a motion to remand. This provides for discretionary appellate review. Parties must file a notice of appeal “no more than seven days” after entry of the remand order. Courts have construed this provision to require parties to file the notice within seven days after entry of the order.<sup>25</sup> The Ninth Circuit Court concluded that CAFA’s use of the term “less” to establish a waiting period for filing an application “is entirely illogical,” and inserted “a word of the exact opposite meaning” into the statute.<sup>26</sup>

### Federal Court Abstention

While CAFA’s general rule expands federal court jurisdiction over class actions, the legislature did take notice that some cases are more appropriately litigated at the state level and limited CAFA’s application to certain class actions. One exception—known as the home state exception—requires federal courts to decline jurisdiction over purported class actions where at least two-thirds of the proposed class members and all of the primary defendants are citizens of the state where the action was filed. Conversely, class actions filed in the home state of the primary defendant would automatically be subject to federal jurisdiction

under CAFA—assuming the other prerequisites are met—if less than one-third of the proposed class members are citizens of that state. Although the Act does not define “primary defendants,” the Senate report notes that “primary defendants” should be interpreted in a way to reach those defendants that are the real targets of the lawsuit—“the defendants that would be expected to incur most of the loss if liability is found.”<sup>27</sup> The primary defendant should be the party that was exposed to a significant portion of the class, versus being exposed to just a few individuals of the class. Actions that fall under the local controversy exception also are exempt from federal diversity jurisdiction. This exception covers actions where: (1) the class is primarily local—meaning that more than two-thirds of the members are residents of the state in which the action was filed; (2) at least one real defendant, whose alleged conduct is central to the class’s claim and from whom the class seeks significant relief, also is local; (3) the principal injuries occurred in the state where the suit is brought; and (4) no other similar class actions have been filed against any of the defendants in the preceding three years.

Along with the home-state and local controversy exceptions, CAFA does not extend federal diversity jurisdiction to class actions in which a state, state official, or governmental entity is the primary defendant (state action exception) and class actions with fewer than 100 class members (limited scope cases). CAFA does not apply to class actions that solely involve a claim: (1) concerning a covered security; (2) relating to the internal affairs or governance of a corporation; or (3) relating to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security.

In addition to the mandatory exceptions described above, CAFA provides that a federal court can exercise discretionary abstention from certain types of class actions as well. For instance, the “interests of justice” exception says that if more than one-third but less than two-thirds of the plaintiff class members are citizens of the state in which the action was filed, then the district court “may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction . . . based on consideration of” the following six factors: (1) whether the claims involve matters of national or interstate interest; (2) which state’s laws will apply; (3) whether the complaint has been pleaded in a manner that seeks

<sup>23</sup> *Ibid*, p. 2615.

<sup>24</sup> *Op. cit.*, n. 1, p. 55.

<sup>25</sup> *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, 435 F.3d 1140 (9<sup>th</sup> Cir. 2006).

<sup>26</sup> *Ibid*, p. 1146.

<sup>27</sup> *Op. cit.*, n. 1, p. 50.

to avoid federal jurisdiction; (4) whether the state in which the action was filed has a distinct nexus with the class members, the alleged harm, or the defendants; (5) whether the number of plaintiffs who are citizens of the state in which the action was filed 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 (6) whether a similar class action has been filed within the preceding three years.<sup>28</sup>

### CAFA's Effect on Class Action Litigation

While it is too early to appreciate the full effect of CAFA on class action litigation, early observations and predictions can be made. The numbers seem to reflect a decline in class actions filed in state court, while an increase of cases being filed and/or removed to federal court is being witnessed. In 2004, 82 class actions were filed in Madison County, Illinois—a jurisdiction that has been singled out as the site of some of the worst class action abuses in recent years—and 36 filed in the first month and a half of 2005, prior to CAFA's enactment. But between February 18, 2005 and December 31, 2005, just ten class actions were filed in Madison County. This represented a decline of 87 percent from that time period in 2004.<sup>29</sup> According to *Antitrust* magazine, there were 788 proposed class actions commenced in or removed to federal district courts from February 18, 2005 to August 30, 2005. There were just 507 in that same period in 2004. This represents a 55 percent increase in filings, which can most likely be attributed to the expanded federal jurisdiction under CAFA.<sup>30</sup>

Putting these statistics aside, the enactment of CAFA has resulted in a plethora of satellite litigation seeking to decipher the terms and appropriate application of the Act. As such, judges have taken the role as *de facto* lawmakers in the first year of its enactment. Most of the litigation focuses on two particular questions that are not addressed in the Act: (1) what constitutes the "commencement" of a new suit for purposes of CAFA; and (2) which party bears the evidentiary burden of proving that a case

is or is not subject to removal to federal court under CAFA. More recently, disputes have arisen over whether cases fall under the exceptions laid out in CAFA—a move being pursued by class counsel to avoid federal court jurisdiction.

### What Constitutes the Commencement of a New Action?

Section 9 of CAFA provides that "[t]he amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act."<sup>31</sup> As such, CAFA applies to class actions filed on or after February 18, 2005. It does not apply to actions already pending on that date. While seemingly uncomplicated, the Act fails to define what constitutes the commencement of an action and defendants aggressively have attempted to expand what it might entail. For instance, is removal from state to federal court commencement of an action? Does a change in the class definition or the addition of a defendant classify as an action being commenced? Is amending the alleged misconduct in the complaint the commencement of an action under CAFA? Because the Act has failed to provide adequate guidance on these issues, the courts have been called upon to answer these questions.

In the leading case on the subject, *Knudsen v. Liberty Mutual Insurance Company*<sup>32</sup> (hereinafter *Knudsen I*), the Seventh Circuit Court of Appeals rejected Liberty Mutual's argument that a plaintiffs' change in the class definition "commenced" a new action for CAFA purposes. The original class action was filed against Liberty Mutual in state court in March 2000, alleging that the company short-changed claims under workers' compensation and accident policies. In the compliant, plaintiffs defined the class as "all Liberty insureds, their third party beneficiaries and their assignees who are entitled to payment of medical bills under any medical payments coverages pursuant to a Liberty insurance policy, and who have received a payment from Liberty for less than the medical charge, based upon the application of Liberty's medical cost and utilization database."<sup>33</sup> On February 25, 2005—after the enactment of CAFA—plaintiffs proposed to amend the class definition to include: "All Liberty Mutual Insurance Company and Liberty Fire Insurance Company insureds, their third party beneficiaries and their assignees who submitted medical bills under any medical payments coverages pursuant

<sup>28</sup> 28 U.S.C. §1332(d)(3).

<sup>29</sup> John Beisner and Jessica Davidson Miller, "Fulfilling Framers' Promise," *National Law Journal*, 22, February 13, 2006.

<sup>30</sup> Charles B. Casper, "The Class Action Fairness Act's Impact on Settlements," *Antitrust*, 26, 30 (2005).

<sup>31</sup> *Op. cit.*, n. 3, 119 Stat. 4 §9.

<sup>32</sup> 411 F.3d 805 (7<sup>th</sup> Cir. 2005).

<sup>33</sup> *Ibid*, p. 807.

to a Liberty Mutual or Liberty Fire insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical costs and utilization database.”<sup>34</sup> Liberty Mutual thereafter removed the case to federal court pursuant to the provisions of CAFA. The case was remanded to state court because, according to the Seventh Circuit, the action commenced prior to CAFA becoming law and Liberty Mutual removed prematurely because the state court had not yet ruled on plaintiffs’ motion to amend the class definition. Liberty Mutual unsuccessfully argued that Liberty Mutual Fire was the only proper defendant because the three named plaintiffs held policies issued by Fire, and that the plaintiffs’ mention of Fire in a proposed post-CAFA amendment to the class definition effectively began a new suit. The court, however, did speculate that if a plaintiff added new defendants, then this action may commence a new piece of litigation through application of Federal Rule 15(c)’s relation-back doctrine.<sup>35</sup> The opinion noted that “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.”<sup>36</sup>

After the case was remanded to state court, the plaintiffs filed a claim for additional relief seeking the court to hold Liberty Mutual responsible for all policies issued by any subsidiary or affiliate—not just those issued by Liberty Mutual itself. Because the opinion in *Knudsen I* explicitly noted that the addition of a new plaintiff would recommence the action, plaintiffs attempted to create liability on the behalf of Liberty Fire through another avenue to avoid removal to federal court. The defendant thereafter removed the case. Relying on *Knudsen I*, the district court remanded the case back to state

court. On appeal, the Seventh Circuit said that although Liberty Mutual is the original defendant, it is faced with new claims for relief. The court determined that the class definition of September 2005 initiated new claims that did not relate back to the originally filed complaint because Liberty Mutual does not adjust all demands for payment of all of its affiliates’ policies. Liberty Mutual, therefore, could not be held liable for such activities because the pre-CAFA pleadings failed to give sufficient notice of such potential liability on behalf of Fire’s policies.<sup>37</sup>

The court in *Pritchett v. Office Depot, Inc.*<sup>38</sup> denied expanding the definition of “commencement” to apply to the removal of a case from state to federal court. *Pritchett* concerned a group of employees who brought a class action suit against Office Depot—their employer—in Colorado state court alleging that the employer violated state law by requiring employees to work extra hours without being paid for overtime. The plaintiffs joined together to file a class action against Office Depot on April 2, 2003. Certification of the class occurred on June 21, 2004 and trial was set for March 14, 2005. About one month prior to the start of trial, CAFA was enacted. Defendant then removed the action to federal district court. The class thereafter moved to remand the proceedings to state court arguing that CAFA did not apply to actions already pending in state courts and, therefore, would not apply to their case that was originally filed in 2003. Defendant argued that the case was “commenced” for purposes of CAFA when it was removed to federal court. The court rejected this line of reasoning stating that “[w]hen a matter is removed to federal court, it is not traditionally viewed as recommenced, nor as a new cause of action.”<sup>39</sup> In finding further support of its opinion, the court relied on the legislative history of CAFA. In particular, it depended on statements made by sponsoring legislators indicating that the bill was not designed to apply to currently pending suits.<sup>40</sup>

<sup>34</sup> *Ibid.*

<sup>35</sup> Federal Rule 15(c) provides in pertinent part:

[A]n amendment of a pleading relates back to the date of the original pleading when . . . (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. . . .

<sup>36</sup> *Knudsen*, p. 807.

<sup>37</sup> 435 F.3d 755 (7<sup>th</sup> Cir. 2006).

<sup>38</sup> 404 F.3d 1232 (10<sup>th</sup> Cir. 2005).

<sup>39</sup> *Ibid.*, p. 1235.

<sup>40</sup> 151 *Congressional Record* S1080 (daily edition February 8, 2005) (statement of Senator Dodd: “[The Act] does not apply retroactively, despite those who wanted it to. A case filed before the date of enactment will be unaffected by any provision of this legislation.”); 151 *Congressional Record* H753 (daily ed. February 17, 2005) (statement of Representative Goodlatte: “Since the legislation is not retroactive, it would have absolutely no effect on the 75 class actions already filed against Merck in the wake of the Vioxx withdrawal.”)

The Ninth Circuit Court, in *Bush v. Cheaptickets, Inc.*,<sup>41</sup> agreed that removal does not commence a new lawsuit for purposes of removal under CAFA. In *Bush*, consumers filed a class action in California state court on February 17, 2005, alleging that the online travel service agency had imposed illegitimate taxes and fees in violation of the California Unfair Business Practices Act. The defendant removed the action to federal court under CAFA and the district court remanded the case back to state court. On appeal, Cheaptickets argued that the suit commenced when it was removed to federal court; alternatively, it argued that the action was not commenced in state court until the defendant received service of process, which was on February 24, 2005. In rejecting both arguments put forward by the defendant, the court held that this action was commenced, for purposes of determining applicability of federal removal jurisdiction under CAFA, on the date that it was filed in California state court. The court notes that several federal courts have recently come to the same conclusion in defining the term “commencement.”<sup>42</sup>

Additionally, the Seventh Circuit Court held that an action is commenced when it is filed in state court, and service of process after the effective date of CAFA does not commence a new action.<sup>43</sup> *Pfizer, Inc. v. Lott* involved a class action brought against Pfizer in Illinois state court, for allegedly overcharging the class members for two prescription drugs in violation of state consumer protection laws. The case was filed on February 17, 2005 and the defendant was served after the enactment of the Act. The court refused to accept the defendant’s assertion that the service of an action was its commencement under Illinois state law and therefore applicable to CAFA.

Taking guidance from *Knudsen I*, the U.S. Eastern District Court of Oklahoma in *Plummer v. Farmers Group, Inc.*<sup>44</sup> held that the plaintiffs’ addition of new claims in the amended complaint was the

equivalent of filing a new action under CAFA. The amended complaint, which was filed after the enactment of CAFA, added: (1) thousands of new plaintiffs to the suit; (2) a fraud cause of action; (3) a bad faith cause of action; and (4) a request for certification of the matter as a class action. The court determined that under Federal Rule 15(c), the amended complaint did not relate back to the filing of the original complaint and, therefore, was a *de facto* commencement of a new suit, which made that suit removable pursuant to CAFA.

Similarly, in *Senterfitt v. SunTrust Mortgage, Inc.*,<sup>45</sup> the Southern District Court of Georgia held that amending the complaint by expanding the class claims from a four-year period of alleged misconduct by the defendant to encompass a 20-year period did not relate back to the original complaint, and, thus, for removal purposes, it was a new action filed after the effective date of CAFA. For an amendment to relate back to the date of the original complaint, the original complaint must have provided adequate notice to the defendant “not only of the substantive claims being brought against it, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.”<sup>46</sup> In justifying its holding, the court asserted that Senterfitt did not provide adequate notice of the size of the new prospective class to SunTrust, and, therefore, the amended complaint could not relate back to the original. The court was careful to distinguish amendments that make “a minor modification in the class definition that slightly enlarged the class beyond the scope of the class proposed in the original complaint,”<sup>47</sup> which would not recommence an action and, therefore, would not fall under the scope of CAFA if filed prior to its enactment.

The Eighth Circuit Court in *Plubell v. Merck & Company* held that replacing the class representative did not “commence” a new action for CAFA purposes.<sup>48</sup> The class action was originally filed in Missouri state court on December 13, 2004, alleging deceptive trade practices by the defendant in the development and marketing of the painkiller Vioxx. After the enactment of CAFA, the plaintiffs’ attorney obtained leave to amend the petition by substituting a new class representative. Merck sought to remove the suit arguing that replacing the class representative “commenced” a new action for

<sup>41</sup> 425 F.3d 683 (9<sup>th</sup> Cir. 2005).

<sup>42</sup> *In re Expedia Hotel Taxes and Fees Litigation*, 377 F.Supp.2d 904 (W.D. Wash. 2005) (holding that an action is commenced for purposes of CAFA when it was filed in state court, not when it was removed to federal court); *Lander and Berkowitz, P.C. v. Transfirst Health Services, Inc.*, 374 F.Supp.2d 776 (E.D. Mo. 2005) (holding that an action filed on February 17, 2005 did not fall under the applicability of CAFA); *Natale v. Pfizer*, 379 F.Supp.2d 161 (D. Mass. 2005) (holding that an action is commenced for purposes of CAFA when it was filed in state court, not when it was removed to federal court).

<sup>43</sup> *Pfizer, Inc. v. Lott*, 417 F.3d 725 (7<sup>th</sup> Cir. 2005).

<sup>44</sup> 388 F.Supp.2d 1310 (E.D. Okla. 2005).

<sup>45</sup> 385 F.Supp.2d 1377 (S.D. Ga. 2005).

<sup>46</sup> *Ibid*, p. 1380 (quoting *Cliff v. Payco General American Credits, Inc.*, 363 F.3d 1113, 1131-33 (11<sup>th</sup> Cir. 2004)).

<sup>47</sup> *Ibid*, p. 1381.

<sup>48</sup> 434 F.3d 1070 (8<sup>th</sup> Cir. 2006).

CAFA purposes. The court disagreed, however, noting that the amendment relates back to the original complaint because it sets “forth exactly the same conduct by Merck; the only difference is the class representative.”<sup>49</sup> Therefore, the amended complaint changing the class representative did not “commence” a new action and the suit could not be removed to federal court under CAFA.

Generally, most courts have ruled that the post-CAFA addition of a new defendant commences a new action as to the newly added defendant.<sup>50</sup> Other courts have allowed plaintiffs who filed post-CAFA amended complaints to correct the name of a defendant to do so without subjecting themselves to removal.<sup>51</sup> Further, one court held that although the plaintiffs’ post-CAFA addition of new defendants allowed the new defendants to remove, the plaintiffs’ subsequent dismissal of the new defendants stripped the court of jurisdiction.<sup>52</sup>

### Does CAFA Shift the Burden?

Traditionally, the evidentiary burden of proof with regard to showing remand is proper rested upon the defendant requesting such remand. Although CAFA is silent with respect to this issue, its legislative history suggests that Congress’ intention was to shift this burden of proof to the plaintiff to show that remand is improper. Because of this discrepancy, dozens of cases have arisen to resolve the uncertainty that the enactment of CAFA has brought with respect to this burden shift. In particular, such litigation has focused on whether CAFA requires the plaintiff to prove that removal is improper because diversity jurisdiction is lacking and, in particular, whether the legislative history is binding or whether the language of the Act is the sole authority on the subject.

<sup>49</sup> *Ibid*, p. 1073.

<sup>50</sup> *Adams v. Federal Materials Company, Inc.*, 2005 WL 1862378 (W.D. Ky. July 28, 2005); *Dinkel v. General Motors Corporation*, 400 F. Supp. 2d 289 (D. Me. 2005); *Robinson v. Holiday Universal, Inc.*, 2006 WL 470592 (E.D. Pa. Feb. 23, 2006).

<sup>51</sup> *Eufaula Drugs, Inc. v. Scripsolutions*, 2005 WL 2465746 (M.D. Ala. Oct. 6, 2005); *Morgan v. Am. Int’l Group, Inc.*, 2005 WL 2172001 (N.D. Cal. Sept. 8, 2005); *New Century Health Quality Alliance, Inc. v. Blue Cross and Blue Shield of Kansas City, Inc.*, 2005 WL 2219827 (W.D. Mo. Sept. 13, 2005).

<sup>52</sup> *Brown v. Kerkhoff*, 2005 WL 2671529 (S.D. Iowa Oct. 19, 2005). A different result was reached, however, by a federal district court in Maine in *Dinkel v. General Motors Corporation*, 400 F.Supp.2d 289 (D. Me. 2005) and by a federal district court in Pennsylvania in *Robinson v. Holiday Universal, Inc.*, 2006 WL 470592 (E.D. Pa. Feb. 23, 2006).

One of the leading cases on the subject, *Berry v. American Express Publishing Corporation*, involved a class action suit filed in a California state court against a credit card company seeking injunctive relief to end an allegedly unlawful business practice whereby defendants charged credit card holders for unsolicited magazine subscriptions unless they took affirmative actions to discontinue the subscription.<sup>53</sup> In the initial complaint, plaintiffs alleged that “no monetary award in the amount of \$5,000,000 or greater is sought” that would provide the U.S. District Court with diversity jurisdiction pursuant to CAFA.<sup>54</sup> Defendants then filed a notice of removal under CAFA’s jurisdictional and removal procedures. Plaintiffs filed a motion for remand, arguing that the defendants bear the burden of showing that the amount in controversy exceeds \$5 million, and that the defendants failed to meet this burden when the complaint contained only claims for injunctive relief and that the plaintiffs affirmatively indicated that the relief sought does not meet CAFA’s statutorily prescribed amount in controversy. In response, defendants insisted that CAFA be interpreted according to its legislative intent to confer jurisdiction on federal courts and to shift the burden to plaintiffs to show that removal is improper. Additionally, defendants argued that the recovery could exceed the statutory requirement of \$5 million. According to defendants, the value of the injunctive relief—whether measured from the prospective potential recovery by or value to a plaintiff or the cost to defendants—exceeds the requisite amount in controversy.

In its decision finding in favor of the defendants, the court looked to the legislative history of CAFA to determine that it was meant to shift the burden of proving that removal is improper to the plaintiff. It asserted that committee reports are the “authoritative source for finding the Legislature’s intent.”<sup>55</sup> Specifically, the Senate report stated that “it is the Committee’s intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption.”<sup>56</sup> The court rejected the plaintiffs’ argument that Congress’ failure to codify the Senate report’s intentions on the burden of proof demonstrated an explicit intent to maintain the status quo. Rather, it opined that although the omission of any burden-shifting provisions could be “an opaque means of preserving

<sup>53</sup> 381 F.Supp.2d 1118 (C.D. Cal. 2005).

<sup>54</sup> *Ibid*, p. 1119.

<sup>55</sup> *Ibid*, p. 1121.

<sup>56</sup> *Op. cit.*, n. 1, p. 44.

the status quo,” it was just as likely there had been an oversight on the part of Congress, that it is difficult for statutes to address all circumstances, and, more likely, that Congress expected that the clear statements in the Senate report would be sufficient to shift the burden of proof.<sup>57</sup>

Federal district courts in Washington state and New Jersey have concurred with the *Berry* court, also finding that CAFA’s intent was to shift the burden of proof to the party opposing diversity jurisdiction. In *Harvey v. Blockbuster, Inc.*,<sup>58</sup> the U.S. District Court of New Jersey noted that “it appears that the party opposing removal under Section 1332(d) bears the initial burden of demonstrating that an action should be remanded.” The court relied upon the Senate report, as well as statements of Representative James Sensenbrenner (R-WI) in the *Congressional Record* indicating such a shift in the evidentiary burden.<sup>59</sup>

Similarly, the court in *Waitt v. Merck & Company, Inc.*<sup>60</sup> held that it is the plaintiffs’ responsibility to demonstrate that removal from state court is improper. The court noted that CAFA was designed to allow federal courts to hear more interstate class actions. And although CAFA does not broach the topic of burden-shifting, “it is not difficult to divine Congressional intent from CAFA’s legislative history.”<sup>61</sup> Based on the legislative history, it is the plaintiffs’ responsibility to demonstrate that a case should not be removed to federal court, according to the court. On the contrary, the Western District of Washington in *Rodgers v. Central Locating Service, Ltd.*,<sup>62</sup> explicitly disagreed with the holding in *Waitt* and held that CAFA did not alter the traditional presumption against jurisdictional removal or the defendant’s burden to overcome that presumption. This split among this district court has yet to be resolved.

The court in *Brill v. Countrywide Home Loans*<sup>63</sup> firmly disagreed with the decision and, in particular, with the reasoning in the *Berry* case. This class

action, filed in an Illinois state court, was initiated by recipients of faxed advertisements against the defendant-sender under the Telephone Consumer Protection Act. The defendant removed the action pursuant to the terms of CAFA. The plaintiffs moved to remand, which was granted. Thereafter the defendant appealed the decision to remand. Countrywide, following the holding of *Berry*, argued that CAFA reassigns the burden to the proponent of remand. The court rejected this line of reasoning relied upon in the *Berry* case: “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.”<sup>64</sup> The court relied on the ruling in *Pierce v. Underwood*,<sup>65</sup> where the Supreme Court held that naked legislative history has no legal effect. Because the Act is unambiguous the court refused to rely on the legislative history to determine whether it intended to shift the burden of proof in regard to diversity jurisdiction. According to the Seventh Circuit, it was the obligation of Congress to include such a provision in the Act.

The court in *Schwartz v. Comcast*, also disagreed with the holding in the *Berry* case and ruled that CAFA does not shift the burden of proof from the removing defendant to the plaintiff seeking remand.<sup>66</sup> *Schwartz* involved a class action suit against Comcast in which the class members filed a motion to remand arguing that the removing defendant failed to prove federal court jurisdiction. Comcast argued that CAFA’s legislative history demonstrates Congress’ intent to place the burden of proof with respect to jurisdiction on the remanding plaintiff. In granting plaintiffs’ motion to remand, Judge O’Neill noted that “[h]ad Congress intended to make a change in the law with respect to the burden of proof, it would have done so expressly in the statute. . . . It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result.”<sup>67</sup>

While the courts are split as to which party bears that initial burden of proving that jurisdiction is not appropriate, they seem to be in agreement that the plaintiff bears the burden to show that an

<sup>57</sup> *Berry*, p. 1122.

<sup>58</sup> 384 F.Supp.2d 749 (D. N.J. 2005), p. 752.

<sup>59</sup> 151 *Congressional Record* H732 (daily edition February 17, 2005) (statement of Representative Sensenbrenner: “[i]f a purported class action is removed under these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improper”).

<sup>60</sup> 2005 WL 1799740 (W.D. Wash. July 26, 2005).

<sup>61</sup> *Ibid*, p. 2.

<sup>62</sup> 412 F.Supp.2d 1171 (W.D. Wash. 2006).

<sup>63</sup> 427 F.3d 446 (7<sup>th</sup> Cir. 2005).

<sup>64</sup> *Ibid*, p. 448.

<sup>65</sup> 108 S.Ct. 2541 (1988).

<sup>66</sup> Slip Copy, 2005 WL 1799414 (E.D. Pa. July 29, 2005).

<sup>67</sup> *Ibid*, p. 6.

exception in CAFA applies, and therefore, eliminates federal jurisdiction. The court in *In re FedEx Ground Package System, Inc.*<sup>68</sup> held that the plaintiff bore the burden to prove that the facts of the case presented an exception to jurisdiction. Support for this decision can again be found in the Senate report which states that “[i]t is the committee’s intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption.”<sup>69</sup> Congress recognized that this level of inquiry would require some sort of discovery, however, but cautioned that it should be limited in scope. “The committee further understands that in some instances limited discovery may be necessary to make these determinations. However, the committee cautions that these jurisdictional determinations should be made largely on the basis of readily available information. 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.”<sup>70</sup>

### Plaintiffs’ Response to CAFA

Since its date of enactment, plaintiffs’ lawyers have worked hard to find avenues to avoid the new limitations of CAFA. The most common technique being used by class counsel to avoid federal court jurisdiction is to construct a case that falls under one of CAFA’s enumerated exceptions. Boston class action defense lawyer Donald R. Frederico commented that “[w]hat I’ve seen in some complaints is plaintiffs’ counsel attempting to track the language of the exceptions as closely as possible, and frame their allegations to the statutory exception.”<sup>71</sup> For example, there has been a handful of cases emerge containing stipulations seeking less than \$5 million in damages. In *Yeroushalmi v. Blockbuster*,<sup>72</sup> the complaint, in a clear attempt to avoid federal jurisdiction, alleged that aggregate damages for the named plaintiff and the class totaled less than \$5 million. The court appropriately identified “this kind of facially limiting provision as one of the problems of ‘misuse’ plaguing

class actions.”<sup>73</sup> Blockbuster estimated that the amount in compensatory damages, restitution, and disgorgement sought by the plaintiff alone exceeded \$5 million, and, according to the court, plaintiff did not show that the amount in the controversy requirement had not been met or that it would be limited in any way as required. Furthermore, the court relied on the Senate Judiciary Committee’s direction that “[when] a federal court is uncertain about whether ‘all matters in controversy’ in a purported class action ‘do not in the aggregate exceed the sum or value of \$5,000,000,’ the court should err in favor of exercising jurisdiction over the case.”<sup>74</sup> Similarly, in *Fiore v. First American Title Insurance Company*,<sup>75</sup> the court held that a cap of damages is effective only if alleged in good faith. In denying the plaintiffs’ motion to remand, the court determined that the plaintiff could not in good faith place a \$5 million limitation on the recovery of the class. These two cases show a willingness on the part of district courts to advocate the intentions of CAFA and eliminate the abuses that have haunted the judicial system in the past.

The governmental defendant exception also has been used as a device by plaintiffs in which to avoid federal diversity jurisdiction under CAFA. In *Hangarter v. Paul Revere Life Insurance Company*,<sup>76</sup> the plaintiffs filed a class action against two insurance companies and the California insurance commissioner. Seven claims were brought against the insurance companies, alleging, among other things, that they unlawfully accepted premiums on disability insurance policies. Plaintiffs brought one claim against the commissioner, alleging that he failed to fulfill his statutory duties to prevent the sale of misleading policies and sought an order that the commissioner revoke the policies. The case was removed and remanded. Upon appeal, the court ruled that removal was improper under CAFA because the commissioner was a “primary defendant,” stating that “the relief sought from him is substantial in its own light, because he is the only defendant potentially liable on the eighth cause of action and because he would be liable to the entire class.”<sup>77</sup> The court further noted that the Senate report cautioning the use of this exception carried little

<sup>68</sup> Slip Copy, 2006 WL 148945, (N.D. Ind. Jan. 13, 2006).

<sup>69</sup> *Op. cit.*, n. 1, pp. 43-44.

<sup>70</sup> *Op. cit.*, n.1, p. 44.

<sup>71</sup> Correy E. Stephenson, “Class Action Fairness Act Slow to Make Impact on Court System,” *Daily Record*, October 27, 2005.

<sup>72</sup> 2005 WL 2083008 (C.D. Cal. July 11, 2005).

<sup>73</sup> *Ibid*, p. 2.

<sup>74</sup> *Ibid*, p. 5.

<sup>75</sup> 2005 WL 3434074 (S.D. Ill. Dec. 13, 2005).

<sup>76</sup> 2006 WL 213834 (N.D. Cal. Jan. 26, 2006). Note: Defendants’ petition for permission to appeal is pending in the Ninth Circuit.

<sup>77</sup> *Ibid*, p. 3.

weight because “[t]he report represents nothing more than the view of thirteen members of the Senate Judiciary Committee.”<sup>78</sup> This holding is troubling because it seems to be contrary to the purpose set out in CAFA by opening the door for plaintiffs to simply add government officials to a purported class to strategically avoid removal under CAFA—a maneuver that we will likely see more frequently in the near future.

Another tactic that we will see more of from the plaintiffs’ bar is a purposeful limitation on class sizes in order to avoid CAFA’s application. In *Tedder v. Beverly Enterprises, Inc.*,<sup>79</sup> the plaintiffs filed a number of identical complaints that sought identical relief from the same defendant. In an attempt to remove the case to federal court, the defendants argued that this is the type of case that should be classified as a class action and be subject to the terms of CAFA. The court refused to grant federal jurisdiction, holding removal under CAFA was improper because none of the individual lawsuits involved 100 or more plaintiffs. This is another troubling result because it affords plaintiffs’ attorneys another mechanism to circumvent the

intended purposes of CAFA by limiting the size of a purported class.

### Conclusion

While the full impact of CAFA remains to be seen, early changes in the class action litigation environment reveal that it has been a modest attempt at resolving the problems and abuses that surround these actions. Unfortunately, CAFA leaves open the opportunity for plaintiffs to avoid its jurisdiction altogether through creative lawyering. With that said, it is important to recognize that we have seen small improvements in the manner in which class actions are being filed by plaintiffs’ attorneys, as well as being handled by judges in its first year of implementation. We can only hope that these changes will progress into strengthening our judicial system and the way in which society views it. In theory, class actions are an essential tool in our country for punishing negligent behavior. It is time to apply that theory and restore the framers’ intended uses of class action litigation.

The Manufacturers Alliance/MAPI will continue to track developments surrounding class action litigation and CAFA and report any important developments to its membership.

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<sup>78</sup> *Ibid.*

<sup>79</sup> 2005 WL 3409587 (E.D. Ark. Dec. 12, 2005).