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**III. PLAINTIFFS’ PARADISE LOST:  
DIVERSITY OF CITIZENSHIP AND AMOUNT  
IN CONTROVERSY UNDER THE CLASS  
ACTION FAIRNESS ACT OF 2005**

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### A. Introduction

Last year, Congress passed the Class Action Fairness Act of 2005 (CAFA),<sup>1</sup> a grant of federal jurisdiction for class actions. CAFA provides parties seeking a federal forum with an alternative to the traditional diversity-jurisdiction route.<sup>2</sup> Specifically, parties no longer must establish complete diversity of citizenship, nor show that an individual class member satisfies the amount-in-controversy<sup>3</sup> threshold.<sup>4</sup> Instead, CAFA substitutes a citizenship analysis premised on proportions of diverse citizens and an amount-in-

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

2. See *infra* Part III.B (describing the traditional diversity-of-citizenship analysis); *infra* Part III.C.1 (describing the traditional amount-in-controversy analysis). In addition, CAFA abandons the requirements that all defendants join in a notice of removal and are not citizens of the state from which removal is sought. See *supra* Part II.

3. For convenience, this Article uses the phrase “*amount* in controversy” in place of “*matter* in controversy.” Although the latter conforms to the statutory text and is perhaps more accurate—in that it includes injunctive relief—the phrase “amount in controversy” remains more commonly used by courts and commentators.

4. Cf. *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973) (requiring each plaintiff to have a separate and distinct claim that satisfies the jurisdictional amount), *overruled by* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2615 (2005) (interpreting the supplemental jurisdiction statute to permit jurisdiction over claims for less than the jurisdictional minimum when those claims are supplemental to a claim that satisfies the amount in controversy); see *infra* Part III.C.1 (discussing the impact of *Exxon Mobil*); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939) (requiring each plaintiff to independently meet 28 U.S.C. § 1332's amount-in-controversy requirement); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) (requiring complete diversity for federal jurisdiction when a suit does not involve a federal question).

controversy total formed by aggregating plaintiffs' claims.<sup>5</sup> This analysis is unfortunately not simple. CAFA's provisions contain a seemingly "endless number of nuances and ambiguities"<sup>6</sup> that add several pages to 28 U.S.C. § 1332.<sup>7</sup> The difficult task of defining CAFA's metes and bounds has fallen upon federal courts. This Article invites the reader to walk, provision by provision, into CAFA's murky depths, to admire its many ambiguities and, where possible, to speculate on their possible resolutions.

Before beginning this trek, consider the underlying principles of diversity jurisdiction. Federal courts are courts of limited, not general, jurisdiction.<sup>8</sup> Article III of the Constitution cabins their jurisdiction into specific categories, including cases and controversies between citizens of different states.<sup>9</sup> Dubbed "minimal diversity," this clause requires the existence of at least one party who is diverse in citizenship from a party on the other side of the case.<sup>10</sup> The traditional rationale for diversity jurisdiction, made famous by Chief Justice Marshall in *Bank of United States v. Deveaux*,<sup>11</sup> is to reduce "the possible fears and apprehensions" of out-of-state litigants that the tribunal will harbor local prejudice.<sup>12</sup>

At issue in *Deveaux* was whether a Pennsylvania bank, in a suit against citizens of Georgia, could invoke diversity jurisdiction in a Georgia federal court.<sup>13</sup> Historical evidence suggests that proponents of diversity jurisdiction at the Constitutional Convention and in the First Congress were more concerned with hostility among classes rather than among the States.<sup>14</sup> Under this theory, federal courts

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5. 28 U.S.C. § 1332 (2006).

6. Anthony Rollo et al., *Resorting to CAFA's Legislative History Resolves Some Ambiguities*, CONSUMER FIN. SERVICES L. REP., Nov. 2, 2005, at 3, 3.

7. § 1332.

8. See U.S. CONST. art. III, § 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–80 (1803).

9. U.S. CONST. art. III, § 2, cl. 1.

10. See *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 577 n.6 (2004); *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967).

11. 9 U.S. (5 Cranch) 61 (1809).

12. *Id.* at 87; see *Jerguson v. Blue Dot Inv., Inc.*, 659 F.2d 31, 33 (5th Cir. 1981); CHARLES ALAN WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 85–86 (3d ed. 1976); John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22–28 (1948).

13. *Deveaux*, 9 U.S. at 84–85.

14. See generally Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928) (discussing the historic context and

could offer a safe haven from state courts pressured by legislatures into decisions hostile to commercial, manufacturing, and speculative land interests.<sup>15</sup> Thus, no sooner had the Framers articulated a “fear of unfair bias” rationale, than the courts imputed it to “[t]hat invisible, intangible, and artificial being, that mere legal entity, a corporation.”<sup>16</sup>

CAFA’s proponents echoed these fears. Corporate defendants complained of “judicial hellholes,” where state judges and juries were particularly unsympathetic to corporations, and hence, where plaintiffs’ lawyers sought refuge.<sup>17</sup> By many accounts, the greatest offender was Madison County, Illinois,<sup>18</sup> where a court acknowledged “that it applies ‘kind of a loose’ and ‘liberal’ policy in allowing out-of-state asbestos claimants to remain in the county[,] . . . routinely refus[ing] to dismiss or transfer such cases.”<sup>19</sup> For example, Madison County courts have been accused of allowing

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reasoning behind the creation of federal diversity jurisdiction).

15. Frank, *supra* note 12, at 22–28; *see also* Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 520–22 (1928).

16. *Deveaux*, 9 U.S. at 86; *cf.* *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 329 (1853) (noting that the purpose of diversity jurisdiction is to protect distant plaintiffs from the power and influence wielded by corporations).

17. *See* Victor E. Schwartz et al., *Taking a Stand Against Lawlessness in American Courts: How Trial Court Judges and Appellate Justices Can Protect Their Courts from Becoming Judicial Hellholes*, 27 AM. J. TRIAL ADVOC. 215, 216 (2003) (“Madison County, Illinois, is regarded as a judicial hellhole due in large part to the fact that class actions are certified there which would not be certified elsewhere.”); AM. TORT REFORM FOUND., BRINGING JUSTICE TO JUDICIAL HELLHOLES 2004 (2004), <http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf>.

18. The American Tort Reform Foundation (ATRF) annually selects a group of judicial districts as “judicial hellholes,” i.e., districts that “systematically apply the law and court procedures in an unfair and unbalanced manner, generally against defendants.” AM. TORT REFORM FOUND., *supra* note 17, at 4. Madison County, Illinois has topped the list for 2004 and 2003. Sherman Joyce, *Judicial Hellholes*, WALL ST. J., Dec. 15, 2004, at A20. According to ATRF, this county’s problems are so cancerous that they “worsened and metastasized” into neighboring St. Clair County, which for the first time appears on the group’s list. *Id.*

19. Victor E. Schwartz et al., *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J.L. & POL’Y 235, 245 (2004) (quoting Transcript of Record at 16, 22, *Union Carbide Corp. v. Hon. Nicholas G. Byron* (Ill. May 6, 2004) (No. 03-L-1294)).

“claims to proceed to trial [even though] the plaintiff and defendant [were] located out-of-state, the plaintiff’s exposure occurred outside the state, medical treatment was provided outside the state, no witnesses live[d] in Illinois, and no evidence relate[d] to the state.”<sup>20</sup>

Admittedly, the accounts of “judicial hellholes” smack of hyperbole. Madison County has yet to hang a sign reading “Abandon every hope, ye that enter” above the courthouse door.<sup>21</sup> Arguably, corporate defendants have substantial visibility within the community that may reduce or even swing unfair bias in their favor.<sup>22</sup> Yet, whether these corporate fears are founded is really beside the point. In the words of Chief Justice Marshall, “[h]owever true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself . . . entertains apprehensions on this subject.”<sup>23</sup>

This Article examines whether the reprieve from “judicial hellholes” is more purgatory than paradise. Part B addresses CAFA’s complicated diversity-of-citizenship analysis, which involves tallying the proportions of in-state and out-of-state citizens of a proposed plaintiff class. Part B then discusses the complicated tests a district court must apply once the proportions of citizens have been identified, including a six-factor balancing test and determination of which defendants should rightfully bear the mantle of “primary,” a term CAFA does not define.

Part C describes the amount-in-controversy threshold in three steps. First, it reviews the traditional \$75,000 requirement in light of *Exxon Mobil Corp. v. Allapattah Services*,<sup>24</sup> a recent Supreme Court decision involving supplemental jurisdiction. It then reviews CAFA’s new \$5 million amount-in-controversy threshold and addresses issues surrounding CAFA’s aggregation of plaintiffs’ claims. Finally, Part C highlights ambiguities arising from the amount-in-controversy calculation when plaintiffs seek injunctive,

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20. *Id.*

21. DANTE ALIGHIERI, *THE DIVINE COMEDY, INFERNO* canto III, at 47 (John D. Sinclair trans., 1939) (1314) (describing the gate to Hell).

22. *See* J.A. Olson Co. v. City of Winona, 818 F.2d 401, 411 (5th Cir. 1987) (acknowledging the importance of a corporation’s public contact with the community).

23. *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809).

24. 125 S. Ct. 2611 (2005).

declaratory, or equitable relief.

*B. Diversity of Citizenship*

Article III of the Constitution extends the outer bounds of permissible diversity jurisdiction to cases involving at least one party diverse in citizenship from one opposing party.<sup>25</sup> Since the dawn of federal jurisdiction, however, district courts have never had broad authority to adjudicate *any* case satisfying such “minimal diversity” because the Constitution further provides that federal appellate jurisdiction is “with such Exceptions, and under such Regulations as the Congress shall make.”<sup>26</sup> In *Strawbridge v. Curtiss*,<sup>27</sup> Chief Justice Marshall construed § 1332’s predecessor as conferring *less* than the full scope of constitutionally-permissible diversity.<sup>28</sup> Under his interpretation, all plaintiffs must be diverse from all defendants.<sup>29</sup> The *Strawbridge* decision is subject to the criticism that the statute at issue employed language similar to Article III of the Constitution.<sup>30</sup> But, were the decision one of constitutional rather than statutory interpretation, statutes like CAFA would be impermissible as contravening *complete* diversity.<sup>31</sup>

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25. See *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 577 n.6 (2004); *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967) (“Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.”).

26. U.S. CONST. art. III, § 2, cl. 2.

27. 7 U.S. (3 Cranch) 267 (1806).

28. *Id.* at 267.

29. See, e.g., *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). In class actions, the Supreme Court has held that only named or representative parties—not unnamed class members—count for the purposes of determining diversity jurisdiction. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 365 (1921).

30. Compare *Strawbridge*, 7 U.S. at 267 (“The words of the act of Congress are, ‘where an alien is a party; or the suit is between a citizen of a state where the suit is brought, and a citizen of another state.’”), with U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all . . . Controversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

31. Other examples of legislation that would be impermissible include the Federal Interpleader Act of 1936, Pub. L. No. 422, 49 Stat. 1096 (codified as amended at 28 U.S.C. § 1335 (2006)), and the Multi-party, Multiforum, Trial Jurisdiction Act of 2002 (MMTJA), Pub. L. No. 107-273, § 11020, 116 Stat. 1758, 1826–29 (codified at 28 U.S.C. §§ 1369, 1391, 1441, 1697, 1785

Before CAFA, a non-federal-question class action, even one involving scores of citizens with numerous interstate commerce implications, was often non-removable because complete diversity was lacking, or the amount in controversy had not been satisfied. Plaintiffs' counsel, seeking to preclude removal on diversity grounds, would artfully structure their suits around the statute. For example, plaintiffs deliberately pled damages below the jurisdictional threshold, named non-diverse defendants who did not belong in the action,<sup>32</sup> or assigned all or part of the cause of action to a citizen of the same state as the defendant.<sup>33</sup> True, some protections against these tactics exist. For example, naming defendants not realistically subject to liability on the merits may violate Federal Rule of Civil Procedure 11.<sup>34</sup> In practice, however, jurisdiction-defeating tactics are generally effective.<sup>35</sup>

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(2006)).

32. Thomas A. Donovan, *Proposed Class Action Legislation Will Not Do Much to Improve a Lawyer's Image*, FED. LAW., Sept. 2003, at 30, 31.

33. For cases upholding jurisdiction-defeating assignment, see *Carson v. Dunham*, 121 U.S. 421, 425–26 (1887); *Oakley v. Goodnow*, 118 U.S. 43, 44–45 (1886); *Rosecrans v. William S. Lozier, Inc.*, 142 F.2d 118, 124–25 (8th Cir. 1944). For a discussion of plaintiffs' tactics to avoid federal jurisdiction, see Joel S. Feldman et al., *Consumer Fraud Act Class Actions in State Courts*, A.L.I.-A.B.A. CONTINUING LEGAL EDUC., May 2–3, 2002, at 67, 82, available at Westlaw, SG092 ALI-ABA 67.

34. FED. R. CIV. P. 11 (authorizing sanctions for making representations to the court that are not “warranted by existing law”). Another example is § 1359, which denies federal jurisdiction when a party has been collusively joined to *invoke* federal jurisdiction. 28 U.S.C. § 1359 (2006). There is no similar provision, however, barring collusive action to *defeat* federal jurisdiction. See *Gentle v. Lamb-Weston, Inc.*, 302 F. Supp. 161, 163 (D. Me. 1969); *Leshem v. Cont'l Am. Life Ins. Co.*, 219 F. Supp. 504, 506 (S.D.N.Y. 1963); *Lisenby v. Patz*, 130 F. Supp. 670, 675 (E.D.S.C. 1955). When analyzing diversity problems, district courts only ignore a party as “fraudulently joined” when the removing defendant can show that “there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant.” *Rodriguez v. Sabatino*, 120 F.3d 589, 591 (5th Cir. 1997). Despite the lack of statutory support, courts have been willing, in some situations, to “pierce the pleadings” to determine if defendants are artificially joined to defeat diversity. *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 575 (5th Cir. 2004) (“The Supreme Court thus made clear that the burden on the removing party is to prove that the joinder of the in-state parties was improper—that is, to show that sham defendants were added to defeat jurisdiction.”).

35. *Leshem*, 219 F. Supp. at 504. CAFA introduces a form of prohibition on collusive joinder to defeat jurisdiction by including as a factor, “whether the

CAFA introduces a new diversity puzzle. It explicitly grants federal jurisdiction over class actions when there is minimal diversity, one-hundred or more proposed plaintiffs, and more than \$5 million in controversy.<sup>36</sup> It requires courts to count the number of plaintiffs from the forum state and then to determine whether that number is one-third or less (§ 1332(d)(2)), between one-third and two-thirds (§ 1332(d)(3)), or greater than or equal to two-thirds (§ 1332(d)(4)) of the entire class. Based on these compositions, the court must exercise jurisdiction, apply a discretionary abstention test, or remand accordingly.<sup>37</sup>

1. A Sense of Proportion:  
The Battle of the Citizenship “Body Count”

CAFA’s command to determine the citizenship of the entire proposed plaintiff class<sup>38</sup> raises the question of whether the individual citizenship analysis can truly be applied on a mass scale. CAFA rejects the common law rule that only named parties are considered for diversity purposes,<sup>39</sup> in favor of examining members of “all *proposed* plaintiff classes.”<sup>40</sup> As one commentator forewarned, class action lawsuits could become “totally unworkable in a diversity case if the citizenship of all members of the class, many of them unknown, had to be considered.”<sup>41</sup>

*a. Mechanics of the citizenship analysis*

CAFA’s drafters did not intend to alter the tests for determining

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class action has been pleaded in a manner that seeks to avoid Federal jurisdiction.” 28 U.S.C. § 1332(d)(3)(c) (2006); *see infra* Part III.B.2.a.ii (analyzing CAFA’s six-factor balancing test).

36. § 1332(d)(2); *see infra* Part III.C (discussing the amount in controversy requirement).

37. § 1332(d)(2)–(4). In addition to the plaintiff-class composition, the latter two results, governed by sections 1332(d)(3) and 1332(d)(4), require the court to find additional conditions met before remanding. *See infra* Part III.B.2.

38. *See* § 1332(d)(3)–(4).

39. *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) (explaining that unnamed class members are not parties for purposes of determining diversity jurisdiction).

40. § 1332(d)(3)–(4) (emphasis added).

41. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 72, at 521 (5th ed. 1994).

citizenship.<sup>42</sup> The actual operation of the statute may nonetheless have that effect. To understand how, consider the basic elements of traditional citizenship analysis for an individual: to be a citizen of a state, a natural person must be both a citizen of the United States and a domiciliary of that state.<sup>43</sup> Domicile generally requires physical presence, coupled with intent to make the state a home.<sup>44</sup> To determine domicile, a court examines “the entire course of a person’s conduct,” mindful that “[n]o single factor is of overriding importance.”<sup>45</sup> Such factors include “the place where civil and political rights are exercised, taxes paid, real and personal property (such as furniture and automobiles) located, driver’s and other licenses obtained, bank accounts maintained, location of club and church membership, and places of business or employment.”<sup>46</sup>

Although it does not purport to alter this test, CAFA may substantially lower the evidentiary requirements for establishing citizenship, as a practical matter. Because CAFA requires courts to determine the entire proposed plaintiff class’ citizenship, rather than a single individual who may defeat diversity, maintaining the pre-CAFA standard of examination would require an overwhelming increase in workload. One tool that could possibly reduce this mountainous workload would be to employ customer address lists. At best, however, such lists tend to identify the residence rather than the domicile of customers, and it is a party’s domicile that controls citizenship.<sup>47</sup>

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42. S. REP. NO. 109-14, at 36 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 34. “For purposes of the citizenship element of this analysis, [Section 1332(d)] does not alter current law.” 151 CONG. REC. H723, 729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner). One exception is the treatment of unincorporated associations under § 1332(d)(10), which defines an unincorporated association as a citizen of the state where it has its principal place of business and the state where it is organized. See *infra* Part III.B.1.c.

43. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989); *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir. 1983).

44. *Palazzo v. Corio*, 232 F.3d 38, 42 (2d Cir. 2000).

45. *Duff v. Beaty*, 804 F. Supp. 332, 335 (N.D. Ga. 1992).

46. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 11–12 (1st Cir. 1991) (citing 1 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 0.74[3.-3], at 788 (2d ed. 1991)).

47. See *Mantin v. Broad. Music, Inc.*, 244 F.2d 204, 206 (9th Cir. 1957) (holding that diversity jurisdiction was not properly plead where the plaintiff only alleged the defendant’s state of residency without also alleging his state of citizenship); *Jeffcott v. Donovan*, 135 F.2d 213, 214 (9th Cir. 1943) (holding

In *Schwartz v. Comcast Corp.*,<sup>48</sup> an action arising out of allegedly intermittent internet service, the court allowed the plaintiff to engage in limited discovery to establish the citizenship of various members of the proposed class.<sup>49</sup> The court conceded that the plaintiffs' first amended complaint, filed subsequent to defendants' notice of removal, would establish that greater than two-thirds of the proposed class members were Pennsylvanians.<sup>50</sup> The court held, however, that class composition must be evaluated "on the basis of the record as it stands at the time the petition for removal is filed."<sup>51</sup> In the original complaint, the plaintiff class had not been restricted to citizens of the forum, but simply "persons and entities residing or doing business" in that state.<sup>52</sup> The court rejected the plaintiffs' argument that the term "residing" was intended as a substitute for "citizens of."<sup>53</sup> Noting that the defendant Comcast had control over information that would establish class members' citizenship, the court ordered Comcast to provide interrogatory responses, which included: the number of subscribers within the forum receiving service from Comcast; the number whose billing address matched the address where service was provided; and the number whose billing address did not match the address where service was provided.<sup>54</sup>

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that the plaintiff's allegation of the defendant's state of residency was insufficient to support diversity jurisdiction because "a resident of any one state in point of fact may be a citizen of that or any other state").

48. No. Civ.A. 05-2340, 2005 WL 1799414 (E.D. Pa. July 28, 2005).

49. *Id.* at \*7.

50. Schwartz defined the plaintiff class as "[a]ll persons and entities who are citizens of the Commonwealth of Pennsylvania, who resided or did business in the Commonwealth of Pennsylvania, and who subscribed to Comcast's high-speed internet system for service in Pennsylvania." *Id.* at \*1.

51. *Id.* at \*3 (citing *Westmoreland Hosp. Ass'n v. Blue Cross of W. Pa.*, 605 F.2d 119, 123 (3d Cir. 1979)); see also *Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939) (holding that amount in controversy is determined based on the plaintiff's complaint at the time the notice of removal is filed); *Angus v. Shiley Inc.*, 989 F.2d 142, 145 (3d Cir. 1993) (holding that a plaintiff could not destroy federal jurisdiction by amending a complaint that initially satisfied the amount-in-controversy requirement).

52. *Schwartz*, 2005 WL 1799414, at \*3.

53. *Id.* ("Hypothetically speaking, there may be numerous members of the proposed class who are citizens of different states but who resided or did business in Pennsylvania.").

54. *Id.* at \*7.

*b. Lessons learned from class notice*

As a statistical matter, parties seeking to demonstrate the general proportion of a class need not prove the citizenship of *every* member of the class. For example, a party who has shown that 100 of 150 plaintiffs are not citizens of the forum need not identify the citizenship of the remaining 50 plaintiffs to demonstrate that the class falls within the lower third of § 1332(d)(2). Similarly, when a party has demonstrated to a statistically-significant degree that a proposed class falls within a particular third, a court need not require additional proof. For example, where a plaintiff demonstrates that out of 150 total class members, 80 of 100 randomly-drawn plaintiffs are not citizens of the forum, the probability that at least 20 of the remaining 50 plaintiffs are also not forum citizens is greater than 99.99%,<sup>55</sup> and a court could fairly conclude that the class falls within the lower third of § 1332(d)(2).<sup>56</sup> This example also applies to corresponding multiples such as 800 of 1,000 randomly-drawn plaintiffs from a total class of 1,500 plaintiffs.

These hypothetical scenarios represent uncontroversial, easy cases. Suppose instead that the statistical certainty is seventy

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$$n := 50$$

$$x := 20$$

$$p := 0.80$$

$$f := \frac{n!}{x!(n-x)!} \cdot p^x \cdot (1-p)^{n-x}$$

$$f = 5.834 \times 10^{-10}$$

$$f(y) := \frac{n!}{y!(n-y)!} \cdot p^y \cdot (1-p)^{n-y}$$

$$F := \sum_{y=20}^{50} f(y)$$

$$F = 0.999999999890$$

56. To put it differently than the preceding footnote, “you don’t have to eat the whole ox to know the hide is tough.” This adage, often attributed to Samuel Johnson, *e.g.*, JOHN W. STRONG, MCCORMICK ON EVIDENCE § 208 (5th ed. 1999), apparently does not appear in his works, letters, or contemporary biographies. See SamuelJohnson.com, The Samuel Johnson Sound Bite Page, Apocrypha, <http://www.samueljohnson.com/apocryph.html> (last visited Mar. 31, 2006).

percent, sixty percent, or less. Here, a court is without explicit guidance because CAFA fails to provide the applicable standard of proof for determining class proportions. A court might nonetheless analogize the situation to traditional diversity cases, where the law requires a preponderance of the evidence standard,<sup>57</sup> a greater-than-fifty percent probability.<sup>58</sup>

Another question is what evidence will satisfy that standard. Here, the difficulty of tallying citizenship resembles the problem of providing notice to unknown class members. In such circumstances, courts often turn to communications experts to provide courts with demographic data.<sup>59</sup> For example, in *In re Domestic Air Transportation Antitrust Litigation*,<sup>60</sup> a district court examined whether newspaper advertisements would provide adequate notice to the class.<sup>61</sup> The court turned to a media expert to provide statistics on the newspapers' readership and concluded that publication provided "the only notice program suitable for this unique and massive consumer class action."<sup>62</sup>

Commentators have already argued that CAFA will increase the use of media experts and market research data to reveal class composition.<sup>63</sup> Advertising and media firms have long relied on

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57. 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3611, at 521 n.34 (2d ed. 1984).

58. See *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) ("The burden of showing something by a 'preponderance of the evidence,' . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." (internal quotations omitted)).

59. See, e.g., *Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co.*, 591 S.E.2d 611, 619–21 (S.C. 2004) (finding that notice requirements had been met through the use of demographic data provided by communications experts); *Cox v. Shell Oil*, Civ. A. No. 18844, 1995 WL 775363, at \*6–8 (Tenn. Ch. Nov. 17, 1995) (finding that the use of an experienced class action notice consultant led to a notice program of "unprecedented reach, scope, and effectiveness"). See generally Todd B. Hilsee et al., *Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language: A Desire to Actually Inform*, 18 GEO. J. LEGAL ETHICS 1359, 1374 ("This type of expert analyses provides valuable information that courts need in order to determine whether absent class members will be afforded due process.").

60. 141 F.R.D. 534, 548 (N.D. Ga. 1992).

61. *Id.*

62. *Id.* at 555.

63. See Gina M. Intrepido, *Notice Expertise May Help Resolve CAFA*

such data, but some question its adequacy for determining federal jurisdiction.<sup>64</sup> One approach that may allay these fears is for courts to vary the degree of scrutiny for citizenship analysis based on how squarely the class falls within a proportional bracket. For example, if preliminary marketing data, corroborated by customer-address lists, suggests that a proposed plaintiff class is comprised of roughly fifty percent forum-state citizens, the court's confidence that the class falls within the two-thirds to three-thirds bracket can be relatively high. On the other hand, if marketing data suggests that the proposed plaintiff class is near the border between thirds, a court may require additional proof and apply closer scrutiny. In a sense, this situation requires a "counting of chads."<sup>65</sup> Also, CAFA's text suggests that a court must determine class composition before it applies the middle-third discretionary abstention test.<sup>66</sup> Under this new approach, a court in a borderline situation might first balance the factors of § 1332(d)(3)(C) to determine whether, if the class fell in the middle third, it should exercise jurisdiction.<sup>67</sup> In such a case, the precise side of the balance may be irrelevant.

*c. Impact of § 1332(d)(10) on unincorporated associations*

Prior to CAFA, unincorporated associations were deemed citizens of the states of their members.<sup>68</sup> Corporations, by contrast,

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*Removal Issues*, 6 CLASS ACTION LITIG. REP. 759 (2005).

64. See generally Peggy J. Kreshel et al., *How Leading Advertising Agencies Perceive Effective Reach and Frequency*, 14 J. ADVERTISING 32 (1985) (reporting on a study examining the use and effects of effective reach and advertising frequency on media planning by leading advertising agencies); Peter B. Turk, *Effective Frequency Report: Its Use and Evaluation by Major Agency Media Department Executives*, 28 J. ADVERTISING RES. 55 (1988) (reporting on a survey examining the status of effective frequency advertising and its contribution to media planning).

65. See *Bush v. Gore*, 531 U.S. 98, 105 (2000) (discussing the Florida Supreme Court's order that the intent of voters in the 2000 presidential election be determined by manually recounting chads—pieces of the ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, had not been perforated with sufficient precision for a machine count to count them).

66. See 28 U.S.C. § 1332(d)(2)–(3) (2006).

67. See *infra* Part III.B.2.a.ii (discussing CAFA's discretionary abstention test).

68. See *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998); *China Nuclear Energy Indus. Corp. v. Arthur Andersen, LLP*, 11 F. Supp. 2d 1256,

were citizens of the states in which they were incorporated and the states in which they had their “principal place of business.”<sup>69</sup> Federal circuits have split on the applicable test to determine principal place of business: (1) the “nerve center” test, which focuses on the locus of managerial and policymaking functions of the corporation;<sup>70</sup> (2) the “place of activities” test, which focuses on production or sales activities;<sup>71</sup> and (3) the “total activities” test, which incorporates elements of both.<sup>72</sup>

Under CAFA, both corporations and unincorporated associations are deemed citizens of the states in which they are incorporated and the states in which they have their “principal place of business.”<sup>73</sup> Essentially, unincorporated associations were brought in line with the pre-CAFA rule for corporations and the rule for corporations remained the same.<sup>74</sup> In most cases, § 1332(d)(10) reduces the number of states of citizenship for unincorporated associations. While a corporation’s citizenship may include at most two fora (its incorporation state and its principal place of business), an unincorporated association, outside the CAFA context, may have citizenship in as many fora as there are members. By decreasing the number of states of citizenship, CAFA increases the likelihood of diversity jurisdiction, regardless of whether the organization is a

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1257–58 (D. Colo. 1998); *see also* *Carden v. Arkoma Assocs.*, 494 U.S. 185, 197 (1990) (opining that arguments for the extension of the treatment of corporations to unincorporated entities are best left to the legislature).

69. § 1332(c)(1).

70. *See, e.g.*, *Metro. Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991); *Topp v. CompAir Inc.*, 814 F.2d 830, 834 (1st Cir. 1987); *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959).

71. *See, e.g.*, *Harris v. Black Clawson Co.*, 961 F.2d 547, 549 n.4 (5th Cir. 1992); *Kelly v. U.S. Steel Corp.*, 284 F.2d 850, 854 (3d Cir. 1960).

72. *Sweat Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242, 1247 (11th Cir. 2005) (citing *Vareka Invs., N.V. v. Am. Inv. Props., Inc.*, 724 F.2d 907, 910 (11th Cir. 1984)).

73. § 1332(c)(1).

74. *Compare* *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998) (holding that citizenship of an LLC for purposes of diversity jurisdiction is determined by the citizenship of its members), *and* *China Nuclear Energy Indus. Corp. v. Arthur Anderson, LLP*, 11 F. Supp. 2d 1256 1257–58 (D. Colo. 1998) (stating that a partnership’s citizenship is determined by the state of citizenship of its individual partners), *with* § 1332(d)(10) (deeming an unincorporated association “to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized”).

plaintiff or a defendant. For plaintiffs, fewer states of citizenship may reduce the likelihood of a two-thirds or three-thirds proportional count, and hence, may increase the likelihood a federal court will exercise jurisdiction under § 1332(d)(2).<sup>75</sup> For defendants, fewer states of citizenship may decrease the likelihood that the “primary defendants” will be forum citizens, and hence may also increase the likelihood a federal court will exercise jurisdiction under § 1332(d)(2).<sup>76</sup>

Still, there are potential situations where this change has the opposite effect, decreasing rather than expanding federal jurisdiction. Consider, for example, an unincorporated association whose members are citizens of States *X* and *Y* and whose principle place of business is State *Z*. Prior to CAFA, removal would have been proper in an action filed by citizens of State *Z* against the unincorporated association in a court of State *Z* because the unincorporated association would have been a citizen only of States *X* and *Y* (the states of its members).<sup>77</sup> Under CAFA, however, a court must deny removal because the suit lacks diversity of citizenship: both the plaintiffs and defendants are citizens of State *Z*.<sup>78</sup>

One open question is whether CAFA also alters the citizenship of unincorporated associations for non-CAFA diversity actions. By its terms, CAFA’s change to unincorporated-association citizenship is only “[f]or purposes of *this subsection* and section 1453.”<sup>79</sup> Presumably, “this subsection” refers only to § 1332(d) and not more broadly to the whole of § 1332.<sup>80</sup> The traditional citizenship analysis

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75. § 1332(d)(2)–(4).

76. *See id.*; *see also infra* Part III.B.2.a.i (discussing identification of primary defendants).

77. For convenience, this hypothetical assumes other jurisdictional matters, such as amount in controversy, are satisfied.

78. Here, jurisdiction would be declined under the local-controversy and home-state exceptions of § 1332(d)(4). *See infra* Part III.B.2.b.

79. § 1332(d)(10) (emphasis added).

80. A more narrow reading, that “this subsection” refers specifically to § 1332(d)(10) as opposed to § 1332(d), would render it meaningless, as § 1332(d)(10) does nothing but redefine the citizenship of unincorporated associations. A broader reading, that “this subsection” refers to the entirety of § 1332, is unlikely because: (1) “section” would present a more accurate term; (2) section 1332(d)(1) defines terms for “this subsection” (e.g., “class,” “class action,” “class certification order,” and “class members”) that have little or no bearing on § 1332 as a whole; and (3) section 1332(c), which defines the citizenship of corporations and *does* apply to § 1332(a), defines its scope as

for unincorporated associations, however, is a matter of federal common law, not statute.<sup>81</sup> CAFA's definition of unincorporated associations, which marks the first effort by Congress to define the citizenship of such organizations, could arguably be read as a command to revise that approach.<sup>82</sup>

## 2. Aftermath of the Count:

### 1/3 Shall, 2/3 May, 3/3 Shall Not Exercise Jurisdiction

CAFA's jurisdictional analysis begins with the question of whether the class action satisfies the threshold requirements of amount in controversy<sup>83</sup> and minimal diversity.<sup>84</sup> If it does, jurisdiction is established under § 1332(d)(2).<sup>85</sup> Then, sections 1332(d)(3) and 1332(d)(4) either allow or mandate jurisdiction, depending on the number of forum citizens in the proposed plaintiff class.<sup>86</sup>

Before turning to the substance of these provisions, note that they can be viewed in one of two ways: either as limitations on the grant of jurisdiction, or as mandatory abstention doctrines. The difference is subtle. If viewed as limitations on the grant of jurisdiction, these provisions operate as an element of the initial question: Does the class action meet the amount-in-controversy requirement, satisfy minimal diversity, and avoid satisfying the

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"[f]or the purposes of this *section*," not "subsection." § 1332(c) (emphasis added).

81. See *Carden v. Arkoma Assocs.*, 494 U.S. 185, 190 (1990); see also *supra* Part III.A (discussing the shift from a matter of federal common law to a statutory matter).

82. One class action has already presented this argument. See Ann W. Parks, *Using CAFA as a Sword: Plaintiffs Hope the New Class-Action Law Will Actually Send Them Back to State Court*, DAILY REC. (Md.), Oct. 21, 2005, [http://www.mddailyrecord.com/pub/5\\_398\\_law/legalnews/172894-1.html](http://www.mddailyrecord.com/pub/5_398_law/legalnews/172894-1.html). However, in *Alsup v. 3-Day Blinds*, No. Civ. 05-287-GPM, 2005 WL 2094745 (S.D. Ill. 2005), the district court impliedly rejected the argument. *Id.* at \*3. After concluding that CAFA was inapplicable, the district court stated that "unincorporated business entities, *i.e.*, limited liability companies, are treated as citizens of every state of which any partner or member is a citizen." *Id.* Given the court's silence as to § 1332(d)(10), however, the possibility remains that the court failed to take the provision into account.

83. See *infra* Part III.C.2.

84. See *supra* Part III.B.1.

85. § 1332(d)(2).

86. § 1332(d)(3)–(4).

elements of sections 1332(d)(3) and 1332(d)(4)?<sup>87</sup> If a court views these provisions as mandatory abstention doctrines, however, the analysis is bifurcated: first, whether the basic diversity requirements are satisfied; and second, even if they are satisfied, whether these sections create an affirmative duty to remand the case to state court.<sup>88</sup>

Why should this characterization matter? After all, if a class action satisfies the elements for remand, a court will not exercise jurisdiction either way. The difference is procedural. If sections 1332(d)(3) and 1332(d)(4) operate as limitations on the grant of jurisdiction, a court should consider them as part of the initial remand motion. But, if these provisions act as abstention doctrines, a court should consider their terms only after denying remand under § 1332(d)(2). Because of CAFA's lack of guidance and the sheer complexity of these sections, the better solution is to treat these provisions as abstention doctrines, to be pursued only when necessary. If a case fails to satisfy the initial grant of jurisdiction under § 1332(d)(2), the number of forum citizens in the proposed class and other matters under sections 1332(d)(3) and 1332(d)(4) become irrelevant.

*a. Greater than one-third  
but less than two-thirds: discretionary abstention*

Before Congress enacted CAFA, the Task Force on Class Action Legislation recommended that “some concerns over class action practice could be addressed with federal legislation providing for expanded federal court jurisdiction.”<sup>89</sup> The American Bar Association approved this recommendation, but cautioned that any such expansion should “preserve a balance between the benefits of greater federal court jurisdiction and legitimate state court

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87. The Senate Judiciary Committee Report on CAFA uses the terms “Local controversy exception” and “Home state exception” to suggest a limitation on the grant of authority (an exception) rather than an independent abstention doctrine. S. REP. NO. 109-14, at 28 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 28. These terms do not, however, appear in CAFA's text.

88. The phrasing of § 1332(d)(4) that “[a] district court shall decline to exercise jurisdiction” supports this view.

89. Martha Neil, *New Route for Class Actions: Proposals Raise Questions About Whether Giving Federal Courts More Power over Cases Will Cure the System's Ills*, 89 A.B.A. J. 48, 53, 64 (2003) (discussing the conclusions of the ABA's Task Force on Class Action Litigation).

interests.”<sup>90</sup>

Section 1332(d)(3)(C) represents the core effort to preserve that balance. It permits a court to decline jurisdiction when two elements are satisfied: first, between one-third and two-thirds of all class members must be citizens of the state in which the action was originally filed;<sup>91</sup> and second, the “primary defendants” must be citizens of the forum state.<sup>92</sup> When these elements are met, a district court applies a six-factor test to determine whether, “in the interests of justice and looking at the totality of the circumstances,” it should decline jurisdiction.<sup>93</sup>

i. Primary defendants and the Station nightclub fire

CAFA does not define the term “primary defendants.”<sup>94</sup> The Oxford English Dictionary defines “primary” as “[o]f the first or highest rank or importance.”<sup>95</sup> That suggests that among multiple defendants, only one is “primary” because “first” and “highest” describe singularities. But “defendants” is plural, even in the context of the singular term “class action.”<sup>96</sup> Thus, CAFA’s plain language suggests that among a group of defendants, some are primary and some are not. In practice, this distinction creates further ambiguity.

To understand this ambiguity, consider the tragic facts of a pre-CAFA case, *Passa v. Derderian*.<sup>97</sup> On February 20, 2003, in the mill town of West Warwick, Rhode Island, at a packed nightclub known as “The Station,” the rock band Great White took the stage and ignited fireworks as part of their performance.<sup>98</sup> The pyrotechnics

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90. *Id.* at 64.

91. § 1332(d)(3).

92. *Id.*

93. *Id.*

94. *See* § 1332.

95. 12 OXFORD ENGLISH DICTIONARY 472 (2d ed. 1989).

96. § 1332(d)(3) (“A district court may . . . decline to exercise jurisdiction . . . over a class action in which . . . the primary defendants are citizens of the State . . . .” (emphasis added)).

97. 308 F. Supp. 2d 43 (D.R.I. 2004). Because this section uses *Passa* to illustrate problems of primary defendant identification, the facts have been greatly simplified.

98. *Id.* at 46; *see also* Peter Wilkinson, *The Station Fire One Year Later: Facing Government Apathy, the Survivors of the Rhode Island Club Disaster Struggle to Regain Their Lives*, ROLLING STONE, Mar. 4, 2004, at 50, available at [http://www.rollingstone.com/news/story/5940025/the\\_station\\_fire/](http://www.rollingstone.com/news/story/5940025/the_station_fire/).

set off a fire that, within minutes, engulfed the room in flames.<sup>99</sup> The fire took the lives of one hundred people and injured more than two hundred others, becoming the fourth-worst nightclub fire in American history.<sup>100</sup> The victims brought suit against the surviving band members and their management company.<sup>101</sup>

This case sheds light on CAFA because it addressed an analogous legal issue. *Passa* was the first case to qualify for federal jurisdiction and consolidation under the Multiparty, Multiforum, Trial Jurisdiction Act (the MMTJA).<sup>102</sup> The MMTJA provides for minimal diversity jurisdiction and removal of mass-tort actions that arise out of a single accident, occur in a discrete location, and result in the death of at least seventy-five natural persons.<sup>103</sup> Like CAFA, the MMTJA includes an abstention provision, which requires a federal court to remand where: “(1) the substantial majority of all plaintiffs are citizens of a single State of which the *primary defendants* are also citizens; and (2) the claims asserted will be governed primarily by the laws of that State.”<sup>104</sup> Also like CAFA, the term “‘primary defendants’ is not defined within the text of [the statute].”<sup>105</sup>

If the nightclub fire case had been filed as a class action subject to removal under CAFA, who would have been the primary defendants—the band members, the management company, both, or neither? The answer would lie in one of four potential definitions of “primary defendant”: (1) a defendant against whom significant relief is sought; (2) a defendant whose alleged conduct forms a significant

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99. *Passa*, 308 F. Supp. 2d at 46.

100. *Id.*

101. *Id.* at 47. In the actual case, plaintiffs sued over fifty defendants in an eighty-one-count complaint. *Gray v. Derderian*, 365 F. Supp. 2d 218, 224 (D.R.I. 2005).

102. Multiparty, Multiforum, Trial Jurisdiction Act of 2002 (MMTJA), Pub. L. No. 107-273, § 11,020, 116 Stat. 1758, 1826–29 (codified at 28 U.S.C. §§ 1369, 1391, 1441, 1697, 1785 (2006)).

103. § 1369.

104. § 1369(b)(1)–(2) (emphasis added).

105. *Passa*, 308 F. Supp. 2d at 61. CAFA is the third Act in recent years to employ the ambiguous phrase “primary defendants.” For example, in 1999, Congress passed the Y2K Act which included an abstention provision for “a Y2K action brought as a class action if . . . the *primary defendants* are citizens of that State.” Pub. L. No. 106-37, § 15(c)(2), 113 Stat. 185, 201 (1999) (codified at 15 U.S.C. §§ 6601–17 (2006)) (emphasis added).

basis for the claims asserted; (3) a defendant characterized by both significant relief *and* significant culpable conduct (i.e., the first two definitions combined); or (4) a defendant characterized by either significant relief *or* significant culpable conduct.<sup>106</sup>

The first definition assigns primacy based on the relative networth and solvency of the defendants. The Senate Judiciary Committee advocated this approach, stating that it “intend[ed] that ‘primary defendants’ be interpreted to reach those defendants who are the real ‘targets’ of the lawsuit—i.e., the defendants that would be expected to incur most of the loss if liability is found.”<sup>107</sup> For example, in the case of the nightclub fire, the wealthy management company might be deemed primary defendants and the insolvent band members secondary defendants.<sup>108</sup>

The ability to collect a judgment often plays an important role in a plaintiff’s decision to name a defendant,<sup>109</sup> but basing federal jurisdiction on this deep-pocket approach potentially raises equal protection concerns. In the nightclub fire case, Judge Lagueux opined that “the measure of a particular defendant’s ability to pay a

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106. The language of these options comes from the local controversy exception, § 1332(d)(4)(A), which requires that “at least 1 defendant is a defendant—(aa) from whom significant relief is sought by members of the plaintiff class; (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and (cc) who is a citizen of the State in which the action was originally filed.” 28 U.S.C. § 1332(d)(4)(A)(i)(II)(aa)–(cc) (2006). The statute does not, by the inclusion of these elements, provide a working definition for “primary defendant” generally. Moreover, there are several indications that Congress did not intend it to do so. For example, the third element, “who is a citizen of the State in which the action was originally filed,” in § 1332(d)(4)(A)(i)(II)(cc), would be redundant as a definition in the context of § 1332(d)(3), which requires that “primary defendants are citizens of the State in which the action was originally filed.” Moreover, the elements of the local-controversy exception, codified in § 1332(d)(4)(A), are set in juxtaposition to the elements of the home-state exception of § 1332(d)(4)(B), which uses the term “primary defendants.”

107. See S. REP. NO. 109-14, at 43 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 41.

108. These financial-status characterizations of the band members and their management company (“wealthy” and “insolvent”) are fictitious and are included only to illustrate the application of a definition of primacy.

109. William A. Lovett, *Exxon Valdez, Punitive Damages, and Tort Reform*, 38 TORT TRIAL & INS. PRAC. L.J. 1071, 1097 n.95 (“Among many plaintiffs lawyers, the hunt for ‘deep pocket’ targets is simply the ‘bottom line’ of tort practice.”).

judgment should have no bearing” on the court’s jurisdiction.<sup>110</sup> His quick dismissal of this approach might have been a nod to the Fourteenth Amendment’s equal protection guarantee.<sup>111</sup> So read, his logic runs into the stumbling block of the Supreme Court’s refusal to recognize wealth-based distinctions for equal protection purposes.<sup>112</sup>

To pass constitutional muster, the government need only identify a rational basis for disparate treatment based on economic class.<sup>113</sup> For example, in the context of punitive damages, the Supreme Court has stated that a jury may consider a defendant’s wealth when setting the amount of the award because wealth is relevant and rationally related to the legitimate state interest of penalizing egregious conduct.<sup>114</sup> If CAFA expands federal jurisdiction to protect against bias, and if the defendant’s wealth plays a role in that bias, then whether wealth triggers the defendant’s primacy appears rationally related, and hence, constitutionally permissible.

The second definition ties primacy to the defendant’s alleged conduct. This approach raises the tougher question of where to draw the line. In other words, what conduct qualifies a defendant as “primary”? Again, because the “defendants” in “primary defendants” is plural, the problem cannot be resolved by simply weighing allegations to identify the *most* culpable conduct among defendants. The *Passa* court adopted this approach and defined the relevant conduct as follows:

[A]ll defendants sued directly in a cause of action maintain a dominant relationship to the subject matter of the controversy, while those parties sued under theories of vicarious liability, or joined for purposes of indemnification

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110. *Passa v. Derderian*, 308 F. Supp. 2d 43, 61 (D.R.I. 2004).

111. *See* U.S. CONST. amend. XIV, § 1.

112. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1972) (“[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny.”).

113. *See, e.g., id.*

114. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 492 (1993) (O’Connor, J., dissenting) (“As a historical matter, the wealth of the perpetrator long has been thought relevant.”); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300 (1989) (O’Connor, J., concurring in part and dissenting in part) (citing Blackstone’s Commentaries and the Magna Carta).

or contribution, maintain an indirect or “secondary” relationship to the litigation. Thus . . . the most appropriate definition of “primary defendants” . . . must include those parties facing direct liability in the instant litigation.<sup>115</sup>

The band members whose negligence started the fire would be primary, whereas the management company, sued under a theory of vicarious liability, would be secondary.<sup>116</sup> This assignment has the attractive feature of consolidating two uses of the term “primary” in tort law: (1) vicarious liability<sup>117</sup> and (2) indemnification and contribution.<sup>118</sup> However, it also suffers from a degree of arbitrariness because the primary and secondary divisions are cherry-picked from the available nomenclatures of tort law.<sup>119</sup> For example, in securities fraud litigation, courts distinguish parties alleged to have improperly purchased and sold securities (primary) from those who have only a “legally cognizable relationship” to the plaintiff (secondary).<sup>120</sup> Likewise, in RICO claims, courts distinguish between defendants who participated in the racketeering activity (primary) and defendants who aided and abetted (secondary).<sup>121</sup>

In the CAFA context, at least one district court has denoted primary based on defendants’ alleged conduct, rather than wealth or solvency. In *Adams v. Federal Materials Co, Inc.*,<sup>122</sup> a district court was confronted with whether a party joined by a defendant for

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115. *Passa*, 308 F. Supp. 2d at 62–63.

116. Again, this description of the theories of liability is fictitious and illustrative only.

117. *See, e.g.*, *Halberstam v. Welch*, 705 F.2d 472, 476 (D.C. Cir. 1983) (describing secondary defendants as those vicariously liable).

118. *See, e.g.*, *Sims v. Chesapeake & Ohio Ry. Co.*, 520 F.2d 556, 559 (6th Cir. 1975) (using the terms “primary defendant” and “secondary defendant” in the context of indemnification); RESTATEMENT (SECOND) OF TORTS § 886B cmt. c (1979) (describing the terms “primary” and “secondary” responsibility in the context of indemnification).

119. In arriving at its definition for “primary,” the *Passa* court noted other uses of the term. *Passa*, 308 F. Supp. 2d at 62.

120. *E.g.*, *Marrero v. Banco di Roma*, 487 F. Supp. 568, 572 (E.D. La. 1980) (citing *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 94 (5th Cir. 1975)).

121. *E.g.*, *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 650 (3d Cir. 1998) (“The defendants must also be divided into two additional categories, the primary and secondary defendants.”).

122. No. CIV. A. 5:05CV-90-R, 2005 WL 1862378 (W.D. Ky. July 28, 2005).

indemnity purposes, Rogers Group, was a primary defendant.<sup>123</sup> The plaintiffs argued the direct-liability theory of primacy, under which, according to the plaintiffs, the joined party should be deemed secondary.<sup>124</sup> The court concluded that Rogers Group was in fact a primary defendant, but did so without directly confronting the definition, because the plaintiffs' amended complaint included allegations of direct liability against *all* defendants, including Rogers Group. Thus, "[i]n light of the lack of a principled distinction between the positions of [the other defendants] and Rogers Group, and the fact that one count of Plaintiffs' complaint is directed against . . . Rogers explicitly, there is simply no basis for treating Rogers Group as a secondary defendant in this case."<sup>125</sup> Although the court did not define "primary defendants," its analysis, which focused on direct liability rather than capacity to pay a judgment, impliedly embraced the second definition.

The third definition combines the two preceding definitions: the defendant must be someone against whom significant relief is sought and whose alleged conduct involves *direct* liability. This definition may create a scenario where *no* defendant is primary. For example, under the facts of the nightclub fire case, the insolvent band members would fail the significant relief element, and the management company would not be directly responsible under a vicarious liability theory. If there are no primary defendants, should a court nevertheless decline to exercise jurisdiction under § 1332(d)(3)(C)?<sup>126</sup> CAFA's requirement that all primary defendants be citizens of the forum arguably assumes the existence of at least one primary defendant. This definition hence seems impracticable.

Finally, the fourth definition renders a defendant "primary" if either test is satisfied: significant relief *or* direct liability. Under the

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123. *Id.* at \*5.

124. *Id.* ("Plaintiffs rely upon a distinction between 'parties that are allegedly directly liable to the plaintiffs' and 'those parties joined for purposes of contribution or indemnification.'").

125. *Id.*

126. The question resembles a Zen koan: "two hands clap and there is a sound; what is the sound of one hand?" YABU KOJI, *THE ZEN MASTER HAKUIN: SELECTED WRITINGS* 164 (Philip B. Yampolsky trans., Columbia Univ. Press 1971). Section 1332(d)(3)(C) permits a court to decline jurisdiction in the interest of justice considering "whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction."

facts of the nightclub fire case, the band members would be primary defendants under a direct liability theory, and the management company would also be a primary defendant under a significant relief theory. Because there are legitimate arguments for either interpretation of primacy, this definition presents a compelling compromise.

ii. A six-factor balancing test  
tipped in favor of the exercise of jurisdiction

Where primary defendants and greater than one-third but less than two-thirds of proposed class members are citizens of the forum state, a court must balance six factors set forth in § 1332(d)(3) to determine whether it should decline jurisdiction.<sup>127</sup> A court must consider each of the factors, with an eye toward “the interests of justice” and “the totality of the circumstances.”<sup>128</sup> At first blush, these words sound as though they might be chiseled below lady justice, to evoke notions of a perfect balance. Closer examination of each factor however, raises doubts as to whether, collectively, they form a balanced test. For instance, compare these words with a discretionary abstention statute from the bankruptcy context, § 1334, which instructs consideration “in the interest of justice, *or in the interest of comity with State courts or respect for State law.*”<sup>129</sup> Perhaps CAFA’s omission of the later part of this phrase was inadvertent; surely, the totality of circumstances *includes* the interest of comity with state courts.

The first of the six factors is “whether the claims asserted involve matters of national or interstate interest.”<sup>130</sup> Where such interests exist, this factor favors the exercise of jurisdiction, reflecting CAFA’s fundamental finding that “State and local courts are . . . keeping cases of national importance out of Federal court.”<sup>131</sup> It also reflects Congress’ desire to create a federal forum for cases with “nationwide ramifications,”<sup>132</sup> particularly those that might

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127. 28 U.S.C. § 1332(d)(3) (2006).

128. *Id.*

129. § 1334(c)(1) (emphasis added).

130. § 1332(d)(3)(A).

131. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4)(A), 119 Stat. 4, 5 (codified at 28 U.S.C. § 1711 (2006)).

132. *See* S. REP. NO. 109-14, at 36 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 35.

interface with federal laws, such as suits involving nationally distributed pharmaceuticals.<sup>133</sup> Because this factor omits any reference to matters of local interest, it leans heavily in favor of federal jurisdiction. Furthermore, *any* lawsuit involving more than one hundred plaintiffs, at least a third of whom are citizens of the forum state and at least another third of whom are citizens of a *different* state, arguably involves a matter of interstate interest.

Second, a court must consider “whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States.”<sup>134</sup> When the law governing an action is either wholly in-state or out-of-state, this factor appears straightforward.<sup>135</sup> Many states now follow modern non-territorial approaches to choice-of-law problems, however, involving individualized handling of each claim and issue.<sup>136</sup> The result is that, for multi-state class actions, courts often follow the doctrine of *dépeçage* and apply the laws of different states in the same case.<sup>137</sup> CAFA does not specify how to apply this second factor when various states’ laws apply, but the Senate Judiciary Committee suggested that such cases weigh in favor of federal jurisdiction because federal

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133. *Id.*

134. § 1332(d)(3)(B).

135. Technically, no diversity cases are governed *entirely* by out-of-state law because courts apply the choice-of-law rules of their own state. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that federal courts sitting in diversity apply the choice-of-law principles of the forum state).

136. *See SYMEON C. SYMEONIDES ET AL., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* 128 (1998).

137. *See, e.g., In re Disaster at Detroit Metro. Airport on August 16, 1987*, 750 F. Supp. 793, 795 (E.D. Mich. 1989) (applying California law to product liability claims and Michigan law to punitive and exemplary damages claims); *In re Air Crash Disaster at Wash., D.C. on Jan. 13, 1982*, 559 F. Supp. 333, 342, 351–52, 362 (D.D.C. 1983) (applying D.C. law to issues of negligence and products liability and the choice-of-law provisions of the state of filing to apportionment of liability among defendants); *In re Air Crash Disaster at Boston, Mass. on July 31, 1973*, 399 F. Supp. 1106, 1108 (D. Mass. 1975) (applying a Massachusetts damages limitation to actions brought in Massachusetts, but not to actions brought in New York, New Hampshire, Vermont, or Florida). *See generally* Simon v. Philip Morris, Inc., 124 F. Supp. 2d 46, 53–69 (E.D.N.Y. 2000) (offering a mini treatise on choice-of-law developments); Christopher G. Stevenson, *Depeçage: Embracing Complexity to Solve Choice-of-Law Issues*, 37 IND. L. REV. 303 (2003) (discussing the application of *dépeçage* to complex litigation).

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courts have “a record of being more respectful of the laws of the various states in the class action context.”<sup>138</sup>

Third, a court must consider “whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction.”<sup>139</sup> A district court should take jurisdiction where, for example, a class has been “gerrymandered solely to avoid federal jurisdiction by leaving out certain potential class members or claims.”<sup>140</sup> For plaintiffs, this factor presents a catch-22. That is, plaintiffs who artfully plead to avoid federal jurisdiction may help create it. Yet, plaintiffs who do *not* plead to avoid jurisdiction may also help create it, and a federal court is unlikely to give much weight to their restraint. This result departs from the well-understood maxim “that the plaintiff is the master of the complaint,” and “the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.”<sup>141</sup> Moreover, the requirements for discretionary abstention (i.e., primary defendants and greater than two-thirds of proposed plaintiffs are citizens of the forum) are specific enough that, more often than not, defendants will have a colorable argument that the plaintiff has artfully pled.

The fourth consideration is “whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants.”<sup>142</sup> Unlike the previous three factors, this factor gives a party seeking remand a fighting chance against the exercise of jurisdiction. The use of “or,” rather than “and,” is significant because this factor may be satisfied where one nexus exists between: (1) the forum and the class members; (2) the forum and the alleged harm; or (3) the forum and the defendants. By contrast, a conjunctive “and” would require a nexus between all four elements: the forum, plaintiffs, harm, and defendants.

Closer examination reveals that the potential for a distinct nexus may be largely illusory. First, recall that this balancing test applies when the primary defendants and greater than two-thirds of the

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138. S. REP. NO. 109-14, at 37 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 35.

139. § 1332(d)(3)(C).

140. S. REP. NO. 109-14, at 37.

141. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398–99 (1987).

142. § 1332(d)(3)(D).

proposed plaintiff class are citizens of the forum state.<sup>143</sup> A distinct nexus would likely require *something more* than citizenship of a substantial number of the parties because to require the same (or less) would render this factor superfluous, and, as a canon of construction, courts should construe statutory language so as to avoid rendering words meaningless.<sup>144</sup> Second, use of the term “distinct” limits the qualifying nexuses: where a sufficiently similar nexus exists between other forums, “the nexus is *not* distinct, and this factor would in that circumstance weigh heavily in favor of the exercise of federal jurisdiction.”<sup>145</sup>

According to the fifth factor of the balancing test, a court should decline jurisdiction where the proposed plaintiff class meets two requirements: disparity and distribution. That is, the fifth factor requires a court to consider “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 whether “the citizenship of the other members of the proposed class is dispersed among a substantial number of States.”<sup>146</sup>

To see how these two elements work, consider a plaintiff class comprised of thirty-four percent citizens of the forum, thirty-three percent citizens of a sister state, and the remaining thirty-three percent distributed among the other forty-eight states. Here, the number of citizens of the forum (thirty-four percent), is not substantially larger than the sister state (thirty-three percent), and thus, the disparity element would weigh in favor of the court’s exercise of jurisdiction. By contrast, the distribution element specifies that the proposed plaintiff class be “dispersed among a substantial number of States.”<sup>147</sup> In this example, the plaintiff class satisfies this requirement because it includes citizens of all fifty

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143. § 1332(d)(3).

144. *Marbury v. Madison*, 5 U.S. 137, 174 (1803) (“The subsequent part of the section is mere surplussage, is entirely without meaning, if such is to be the construction. . . . It cannot be presumed that any clause . . . is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.”).

145. S. REP. NO. 109-14, at 37 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 36 (emphasis added).

146. § 1332(d)(3)(E).

147. *Id.*

states.

Consider instead a situation where sixty-five percent of the proposed plaintiffs are citizens of the forum, and the remaining thirty-five percent are citizens of a single sister state. Now the disparity requirement is satisfied: sixty-five percent is “substantially larger” than thirty-five percent. But, the class fails the distribution requirement because it involves only two states. By mandating both disparity *and* distribution, this fifth consideration weighs heavily in favor of federal jurisdiction. Yet, just how stringent compliance must be will depend upon courts’ interpretation of the term “substantially” as it applies to both elements.

The sixth, and final, factor is “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.”<sup>148</sup> In other words, when another “similar” class action falls within the relevant time-frame, this factor weighs in favor of the federal court’s jurisdiction. The first important issue to be resolved is the geographic scope of the “similar” actions. For example, the court could review cases filed within the forum state, nationally, or even globally. CAFA’s purpose to provide “for Federal court consideration of interstate cases of national importance” suggests the scope should be national.<sup>149</sup> The Senate Judiciary Committee corroborated this interpretation when it described the reason behind this factor: “to determine whether a matter should be subject to federal jurisdiction so that it can be coordinated with other overlapping or parallel class actions.”<sup>150</sup>

The question of similarity is more difficult. CAFA does not describe whether the similarity at issue is legal, factual, or some amalgam, nor does it describe the degree of similarity required. In the abstract, this final factor favors the exercise of federal jurisdiction because, from the nationwide pool of cases filed within the previous three years, it is likely at least one “similar” case will exist. Further, the Senate Judiciary Committee’s position on the relevant time-frame extends beyond the statutory text of a “3-year

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148. § 1332(d)(3)(F).

149. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (codified at 28 U.S.C. § 1711 (2006)).

150. S. REP. NO. 109-14, at 38.

period preceding the filing,”<sup>151</sup> and urges district courts to consider whether claims involving the “same subject have been (or are likely to be) filed elsewhere.”<sup>152</sup> Under this interpretation, a court would prefer to exercise jurisdiction over the most novel of class actions because, assuming the case has some merit, tag-along actions will likely follow.

In short, a close inspection of § 1332(d)(3) and its six factors suggests that most courts applying the test will arrive at the same conclusion—that federal jurisdiction is proper. Because of this, and because this section involves a somewhat unrealistic comparison of incommensurate factors, CAFA’s discretionary balancing test might more aptly be described as a laundry list of alternative grounds for federal jurisdiction. For example, how will a federal court balance the advantages of remanding a state law claim against CAFA’s punitive goal of denying a state forum to a plaintiff who has “pleaded in a manner that seeks to avoid Federal jurisdiction”?<sup>153</sup> The balance, as Justice Scalia has opined, “is more like judging whether a particular line is longer than a particular rock is heavy.”<sup>154</sup>

*b. Greater than two-thirds: mandatory abstention  
under the local controversy and home state exceptions*

Section 1332(d)(4) presents two mandatory exceptions to federal jurisdiction: the “local controversy” and “home state controversy” exceptions.<sup>155</sup> The local-controversy exception<sup>156</sup> requires district courts to decline jurisdiction when four elements are satisfied: (1) greater than two-thirds<sup>157</sup> of the members of the proposed-plaintiff

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151. § 1332(d)(3)(F).

152. S. REP. NO. 109-14, at 38.

153. § 1332(d)(3)(C).

154. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (criticizing the majority’s application of a balancing test to the Commerce Clause). Some economists have taken the contrary view that all ultimate values are commensurable. *See, e.g.*, PAUL A. SAMUELSON, *FOUNDATIONS OF ECONOMIC ANALYSIS* (Harvard Univ. Press 1983) (1947).

155. *See* § 1332(d)(4); S. REP. NO. 109-14, at 28 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 28 (referring to the provisions as “Home State” and “Local Controversy” exceptions).

156. *See* § 1332(d)(4)(A).

157. Oddly enough, whereas the home-state-controversy exception applies when the plaintiff class is comprised of “two-thirds or more,”

classes are citizens of the forum; (2) at least one defendant is a defendant from whom plaintiffs seek “significant relief,” whose alleged conduct forms “a significant basis” of the claims, and who is a citizen of the forum; (3) plaintiffs incurred the “principal injuries” in the forum; and (4) no other class action asserting the same or similar factual allegations has been filed against any of the defendants within the previous three years.<sup>158</sup> CAFA does not define either “significant relief” or “principal injuries,” and the ambiguities these terms present will undoubtedly spawn considerable litigation.<sup>159</sup>

The home-state-controversy exception<sup>160</sup> directs a court to decline jurisdiction when “two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.”<sup>161</sup> Again, “primary defendants” is not expressly defined.<sup>162</sup>

### C. Amount in Controversy

Section 1332(a)(1), the traditional diversity provision, grants federal courts jurisdiction “of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States.”<sup>163</sup> CAFA’s new jurisdictional grant includes its own amount-in-controversy provision, § 1332(d)(2), which applies where “the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.”<sup>164</sup> A casual reading might yield the mistaken

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§ 1332(d)(4)(B), the local-controversy exception applies only when the class is comprised of “greater than two-thirds,” § 1332(d)(4)(A).

158. § 1332(d)(4)(A).

159. See Garth T. Yearick, *New Class Action Fairness Act Makes Sweeping Changes*, A.B.A. SEC. LITIG. REP., May 2005, at 1, 3 (quoting Gregory P. Joseph, past chair of ABA Section on Litigation, who stated that CAFA “is going to result in a lot of very carefully drafted state court class actions and a great deal of litigation about . . . what are ‘principal injuries,’ and what is ‘significant relief.’”).

160. See § 1332(d)(4)(B).

161. *Id.*

162. See *supra* Part III.B.2.a.i (discussing the first occurrence of the ambiguous phrase “primary defendants,” in § 1332(d)(3) of the statute).

163. § 1332(a)(1).

164. § 1332(d)(2).

impression that CAFA's new amount in controversy *contracts* rather than *expands* federal jurisdiction. After all, Congress has, over the years, restricted diversity jurisdiction by repeatedly raising the amount from the original \$500 to the \$75,000 it is today.<sup>165</sup> But CAFA alters the analysis in two fundamental ways: First, courts must determine whether the *aggregate* value of plaintiffs' claims exceeds \$5 million.<sup>166</sup> Second, the \$75,000 figure remains intact as an alternative amount in controversy. Because the traditional path to diversity jurisdiction remains a viable option for some class actions, a refresher on this rule is worthwhile.

#### 1. Traditional Diversity:

##### One Plaintiff Exceeds \$75,000 and the Rest Ride Her Coattails

The non-CAFA provisions of § 1332 do not specify whether plaintiffs' claims in a class action may be aggregated to meet \$75,000, or whether each plaintiff must independently satisfy the requirement. The Supreme Court addressed this issue first in *Supreme Tribe of Ben-Hur v. Cauble*<sup>167</sup> and again in *Zahn v. International Paper Co.*<sup>168</sup> For the purposes of diversity jurisdiction, courts may not aggregate plaintiffs' claims; rather, each plaintiff must independently satisfy the jurisdictional amount-in-controversy requirement.<sup>169</sup> Even if one plaintiff independently satisfies the \$75,000 threshold, a court must dismiss any plaintiff who does not plead this amount because "one plaintiff may not ride in on another's coattails."<sup>170</sup>

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165. See An Act to Establish the Judicial Courts of the United States, ch. 20, § 11, 1 Stat. 73, 78 (1789) (setting the original threshold at \$500); Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552, 552 (raising the threshold to \$2,000); Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091 (raising the threshold to \$3,000); Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415, 415 (raising the threshold to \$10,000); Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201(a), 102 Stat. 4642, 4646 (1988) (raising the threshold to \$50,000); Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205(a), 110 Stat. 3847, 3850 (raising the threshold to the current level of \$75,000).

166. § 1332(d)(6).

167. 255 U.S. 356 (1921).

168. 414 U.S. 291 (1973).

169. *Id.* at 301.

170. *Id.* This description applies where the class action involves separate and distinct claims only. See FED. R. CIV. P. 23. For example, in *Berman v. Narragansett Racing Association*, 414 F.2d 311 (1st Cir. 1969), *cert. denied*,

Some seventeen years after *Zahn*, Congress complicated the issue with § 1367, which extends supplemental jurisdiction to claims involving “the joinder or intervention of additional parties” to an action that satisfies diversity requirements.<sup>171</sup> Although the plain language of the statute expands diversity jurisdiction, Congress did not intend this effect.<sup>172</sup> Several circuits, reading the legislative history, concluded that § 1367 did not overrule *Zahn*.<sup>173</sup> Others arrived at the opposite conclusion, basing their decisions on the statute’s text.<sup>174</sup>

Last year, in *Exxon Mobil Corp. v. Allapattah Services*,<sup>175</sup> the Supreme Court squarely addressed the issue and held that § 1367 indeed overruled *Zahn*.<sup>176</sup> The *Exxon Mobil* decision came shortly after CAFA’s passage, but the Court, in reaching its conclusion, nevertheless noted the following:

[T]he Class Action Fairness Act . . . enacted this year, has no bearing on our analysis of these cases. Subject to certain limitations, the CAFA confers federal diversity jurisdiction over class actions where the aggregate amount in

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396 U.S. 1037 (1970), the plaintiffs, licensed owners of racehorses, sued defendants, racetrack owners, for nonpayment of a share of the “breakage,” the profit taken by the racetracks as a result of the practice of rounding off payments on winning tickets to the next lowest whole dime amount. *Id.* at 313. The plaintiffs alleged damages in excess of \$12 million in the aggregate, but the claims did not exceed the amount in controversy (then \$10,000) as to any one of the 5000 to 8000 individual “pursewinners.” *Id.* at 312 n.1. Aggregation of claims was nonetheless permissible because the interest of the “pursewinners” in the asserted right was “common and undivided” as to the entire fund. *Id.* at 315.

171. § 1367(a).

172. See H.R. REP. NO. 101-734, at 29 (1990), as reprinted in 1990 U.S.C.C.A.N. 6860, 6875 (“The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*.”).

173. See *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999); *Leonhardt v. W. Sugar Co.*, 160 F.3d 631 (10th Cir. 1998).

174. *Rosmer v. Pfizer, Inc.*, 263 F.3d 110, 114–19 (4th Cir. 2001); *Gibson v. Chrysler Corp.*, 261 F.3d 927, 933–40 (9th Cir. 2001); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997); *In re Abbott Labs.*, 51 F.3d 524, 529 (5th Cir. 1995), *aff’d per curiam by an equally divided Court, sub nom. Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000) (leaving open the issue of whether § 1367 overrules *Zahn*).

175. 125 S. Ct. 2611 (2005).

176. *Id.* at 2615.

controversy exceeds \$5 million. It abrogates the rule against aggregating claims, a rule this Court recognized in *Ben-Hur* and reaffirmed in *Zahn*. The CAFA, however, is not retroactive, and the views of the 2005 Congress are not relevant to our interpretation of a text enacted by Congress in 1990. The CAFA, moreover, does not moot the significance of our interpretation of § 1367, as many proposed exercises of supplemental jurisdiction, even in the class-action context, might not fall within the CAFA's ambit.<sup>177</sup>

Thus, even after CAFA's passage, traditional diversity and supplemental jurisdiction, as interpreted by the Court in *Exxon Mobil*, are still pertinent to "many proposed" jurisdictional exercises.<sup>178</sup>

Where a defendant seeking removal is unable to satisfy CAFA's requirements, federal jurisdiction is still available if the defendant presents some evidence to establish the plausibility of an inference that at least one member of the class has damages exceeding \$75,000.<sup>179</sup> When a single plaintiff satisfies this requirement, the entire class may attach under the supplemental jurisdiction statute.<sup>180</sup> Despite the Court's holding in *Exxon Mobil*, however, the traditional door to diversity jurisdiction remains a narrow one.<sup>181</sup> Parties

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177. *Id.* at 2627–28 (citation omitted).

178. *Id.* at 2628.

179. *See Exxon Mobil*, 125 S. Ct. at 2616; *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d at 607; *see also Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 375 (9th Cir. 1997) (holding that if the claim appears to be made in good faith, then the sum claimed by the plaintiff controls for removal purposes unless it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed); *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 110–12 (3d Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991) (imposing a heavy burden for removing defendant to rebut the presumption that plaintiff's stated amount in controversy controls).

180. 28 U.S.C. § 1367 (2006).

181. *Exxon Mobil* may have been influenced by the passage of CAFA and perhaps marks the beginning of the softening of the *Strawbridge* rule. *See* Transcript of Oral Argument at 24, *Exxon Mobil*, 125 S. Ct. 2611 (No. 04-79) ("JUSTICE KENNEDY: *Strawbridge* has become less hallowed in light of the new congressional enactment. What's it called? The Sunshine in Class Action? What is it? MR. LONG: I didn't bring— JUSTICE GINSBURG: Class Action Fairness Act.").

seeking federal jurisdiction must still overcome two hurdles: they must satisfy the *Strawbridge* complete diversity requirement,<sup>182</sup> and the case must involve at least one plaintiff who individually meets the \$75,000 amount-in-controversy threshold.<sup>183</sup> As discussed above, CAFA abandons the *Strawbridge* rule in favor of minimal diversity, and thereby eliminates the first hurdle.<sup>184</sup> CAFA raises the bar on the second hurdle from \$75,000 to \$5 million, but the aggregation of plaintiffs' claims offers a new means to clear it.

## 2. CAFA's Approach: \$5 Million in Controversy, Calculated in the Aggregate

Under CAFA, a federal court may exercise diversity jurisdiction after it aggregates plaintiffs' claims and finds alleged damages in excess of \$5 million.<sup>185</sup> This is a relatively straightforward proposition when plaintiffs seek a federal forum because their complaint will likely contain allegations that, if proven at trial, would establish the amount in controversy.<sup>186</sup> When plaintiffs pursue a state forum, however, "the complaint may be silent or ambiguous on one or more of the ingredients needed to calculate the amount in controversy."<sup>187</sup> Alternatively, plaintiffs may have set the *ad damnum* clause in the complaint below the \$5 million threshold (i.e., "seeking damages not to exceed \$4,999,999").<sup>188</sup> The relevant inquiry is not how much the plaintiffs *will* recover, or *are likely* to recover, but how much the plaintiffs have, by their pleadings, put "in controversy."<sup>189</sup> Where the possibility of recovery in excess of \$5

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182. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); see *supra* Part III.B (discussing the diversity of citizenship requirements).

183. *Exxon Mobil*, 125 S. Ct. at 2635–36.

184. See *supra* Part III.B.

185. Section 1332(d)(6) provides: "In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs."

186. *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448–49 (7th Cir. 2005).

187. *Id.* at 449.

188. For a brief discussion of the *ad damnum* clause, see 22 AM. JUR. 2D *Damages* § 653 (2005). Note that in addition to \$4,999,999, damages of precisely \$5 million would still fail to satisfy the jurisdictional requirement, because the amount in controversy must "exceed" the sum or value of \$5 million. 28 U.S.C. § 1332(d)(2) (2006).

189. *Brill*, 427 F.3d at 448.

million exists, CAFA's amount-in-controversy requirement is satisfied.<sup>190</sup>

Courts interpreting CAFA may, by analogy, apply the traditional requirements for removal: a defendant must either demonstrate that it is "facially apparent" that plaintiffs' claims exceed the statutory amount, or set forth facts that support a finding of the requisite amount.<sup>191</sup> Such facts may include rejected settlement offers in excess of the requisite amount in controversy.<sup>192</sup> Though a potentially expensive tactic, plaintiffs could defeat jurisdiction by simply praying for relief below the jurisdictional threshold.<sup>193</sup> Yet, whether this approach remains viable under CAFA is unclear, particularly because CAFA instructs judges to consider whether plaintiffs pleaded the class action in a manner that seeks to avoid federal jurisdiction.<sup>194</sup>

One point of difference between traditional and CAFA diversity is whether punitive damages may be added to plaintiffs' alleged compensatory damages to meet the jurisdictional minimum. Courts have held that although punitive damages may be added in non-class actions,<sup>195</sup> they may not be aggregated for class actions, in light of

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190. *Id.* at 449. In *Brill*, the plaintiff sought statutory damages of \$500 per fax for 3800 faxes sent in alleged violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (2006). *Id.* Although this would amount to only \$1.9 million in damages, the plaintiff left open the reasonable possibility of damages in excess of \$5 million, by stating in the complaint that "[i]f the evidence shows that the violation was willful, plaintiff requests trebling of the damages," which would amount to \$5.7 million. *Id.*

191. *Lockett v. Delta Airlines, Inc.*, 171 F.3d 295, 298 (5th Cir. 1999).

192. *See Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002).

193. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938) (holding that a defendant may not remove where the plaintiff has sued for less than the jurisdictional amount); *see, e.g., Seroyer v. Pfizer, Inc.*, 991 F. Supp. 1308, 1311 (M.D. Ala. 1997) (remanding an action in which plaintiffs' sought relief "not to exceed \$49,999.00 per plaintiff" and disavowed punitive or equitable relief).

194. 28 U.S.C. § 1332(d)(3)(C) (2006). This factor comes into play only when two circumstances are met: (1) greater than one-third but less than two-thirds of the proposed plaintiff class are citizens of the forum; and (2) the primary defendants are citizens of the forum. § 1332(d)(3). However, in the absence of CAFA case law, the inclusion of this factor may influence judicial recognition of the restricted-prayer plaintiff tactic. *See supra* Part III.B.2.a.ii.

195. *Bell v. Preferred Life Assurance Soc'y*, 320 U.S. 238, 240 (1943) ("Where both actual and punitive damages are recoverable under a complaint each must be considered to the extent claimed in determining jurisdictional

the Court's prior express proscription against aggregation.<sup>196</sup> Under CAFA, however, courts should revisit this rationale because the statute's command to aggregate damages is not, by its terms, restricted to compensatory damages.<sup>197</sup> A simple instruction to aggregate all damages sought—whether actual or punitive—may go a long way to simplify the analysis. Yet, it does not resolve all of CAFA's complications because not all claims come with ready price tags.

### 3. Three Views on Valuing Injunctive, Declaratory, or Equitable Relief

Under both CAFA<sup>198</sup> and traditional diversity rules,<sup>199</sup> courts may use the “sum *or value*” of individual claims to calculate the amount in controversy. This rule raises several questions in the context of injunctive, declaratory, or equitable relief. For example, what if the value of injunctive relief to the plaintiff is different from the value to the defendant? And, from a jurisdictional standpoint, whose viewpoint controls?

Where a party seeks non-monetary relief, courts have traditionally applied one of three valuations,<sup>200</sup> based on: (1) the plaintiffs' viewpoint;<sup>201</sup> (2) the viewpoint of either plaintiffs or

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amount.”); *Sharp Elecs. Corp. v. Copy Plus, Inc.*, 939 F.2d 513, 515 (7th Cir. 1991).

196. *See, e.g.*, *Ayres v. Gen. Motors Corp.*, 234 F.3d 514, 517 (11th Cir. 2000); *Lindsey v. Ala. Tel. Co.*, 576 F.2d 593, 594 (5th Cir. 1978) (citing *Snyder v. Harris*, 394 U.S. 332 (1969) and *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973)).

197. § 1332(d)(6) (“[T]he claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds . . . \$5,000,000 . . .”).

198. § 1332(d)(6).

199. § 1332(a).

200. *See* 15 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 102.109[1]–[5] (Matthew Bender 3d ed. 2005); GEORGENE M. VAIRO, *THE CLASS ACTION FAIRNESS ACT OF 2005: A REVIEW AND PRELIMINARY ANALYSIS* 24–25 (Matthew Bender 2005).

201. *Cowan v. Windeyer*, 795 F. Supp. 535, 537 (N.D.N.Y. 1992); *Kheel v. Port of N.Y. Auth.*, 457 F.2d 46, 48–49 (2d Cir. 1972), *cert. denied*, 409 U.S. 983 (1972); *see* *McLaughlin, Piven, Vogel, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 733 F. Supp. 694, 698 (S.D.N.Y. 1990) (declining jurisdiction because no amount fairly flowed directly and with a fair degree of probability from the outcome of the litigation).

defendants;<sup>202</sup> or (3) the viewpoint of the party invoking federal jurisdiction.<sup>203</sup> The federal circuits are split on the preferred approach,<sup>204</sup> and the Supreme Court has never resolved the issue.<sup>205</sup> Following passage of CAFA, the Senate Judiciary Committee advocated the adoption of the either-viewpoint approach.<sup>206</sup> The post-enactment status of the Committee's report may diminish its interpretive value, however.<sup>207</sup> Justice Scalia has characterized such

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202. See *In re Ford Motor Co.*, 264 F.3d 952, 958 (9th Cir. 2001), cert. dismissed, 537 U.S. 1 (2002).

203. See MOORE ET AL., *supra* note 200, § 102.109[1]–[5].

204. Some circuits have adopted the plaintiff's viewpoint. See, e.g., *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3d Cir. 1993); *Kheel*, 457 F.2d at 46; *Mass. State Pharm. Ass'n v. Fed. Prescription Serv. Inc.*, 431 F.2d 130 (8th Cir. 1970); *Alfonso v. Hillsborough County Aviation Auth.*, 308 F.2d 724 (5th Cir. 1962). Other circuits have adopted the "either party approach." See, e.g., *UHL v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 984 (7th Cir. 2002); *Ronzio v. Denver & R.G.W.R. Co.*, 116 F.2d 604, 606 (10th Cir. 1940). There is also support for adopting the viewpoint of the party seeking to invoke jurisdiction. See, e.g., *Family Motor Inn, Inc. v. L-K Enters. Div. Consol. Foods Corp.*, 369 F. Supp. 766 (E.D. Ky. 1973); *Hatridge v. Aetna Cas. & Surety Co.*, 415 F.2d 809, 815 (8th Cir. 1969). Support for the plaintiff's viewpoint approach is principally garnered from the Supreme Court's narrow opinion in *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*, 239 U.S. 121 (1915) ("[T]he rule applicable generally to suits for injunction to restrain a nuisance . . . [is] that the jurisdictional amount is to be tested by the value of the object to be gained by complainant." (emphasis added)).

205. One case came close. In *Mississippi & Missouri Railroad v. Ward*, 67 U.S. (2 Black) 485 (1862), a steamboat owner sought the removal of a bridge, which he alleged constituted a public nuisance. *Id.* at 491. The Court found the amount-in-controversy requirement satisfied, stating that "the want of a sufficient amount of damage having been sustained to give the Federal Courts jurisdiction, will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern." *Id.* at 492. The Court was unfortunately not clear as to what the phrase, "value of the object," referred—the value to the steamboat operator to have an unobstructed river or the expense of tearing down the bridge.

206. S. REP. NO. 109-14, at 42 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 40 ("[T]he Committee intends that a matter be subject to federal jurisdiction under this provision if the value of the matter in litigation exceeds \$5,000,000 either from the viewpoint of the plaintiff or the viewpoint of the defendant, and regardless of the type of relief sought (e.g., damages, injunctive relief, or declaratory relief).").

207. See *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring).

“post-legislation legislative history” as an oxymoron.<sup>208</sup>

To understand how these three approaches differ, consider the following hypothetical: In a property dispute, plaintiffs seek to put a certain tract of land to a \$4 million use, while the defendant seeks an alternative \$6 million use. The plaintiffs’ viewpoint would value the amount in controversy at \$4 million, below CAFA’s \$5 million jurisdictional threshold. Under the either-viewpoint approach, a court would look to the higher value, \$6 million, and find the requirement satisfied. The invoking-party approach conditions the court’s decision on whether the plaintiffs originally filed in federal court (in which case, the amount in controversy is \$4 million), or whether the defendant removed the action from state court (\$6 million).

In the past, the Supreme Court’s prohibition on the aggregation of claims added a unique wrinkle for class actions. That is, the defendant’s perspective could represent an aggregation of plaintiffs’ claims. Following this logic, some courts concluded they could not value class actions from defendants’ perspectives, and thus, they adopted the plaintiffs’ viewpoint.<sup>209</sup> CAFA’s explicit command to aggregate plaintiffs’ claims would seem to negate this rationale,<sup>210</sup> however, leading some courts to conclude that the value of injunctive relief under CAFA may be measured from the defendants’ perspective.<sup>211</sup>

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208. *Id.*

209. *See, e.g.,* Packard v. Provident Nat’l Bank, 994 F.2d 1039, 1050 (3d Cir. 1993), *cert. denied sub. nom.* Upp v. Mellon Bank, 510 U.S. 964 (1993) (citing Snow v. Ford Motor Co., 561 F.2d 787, 790 (9th Cir. 1977)); Snow v. Ford Motor Co., 561 F.2d 787, 790 (9th Cir. 1977); Loizon v. SMH Societe Suisse de Microelectronics Et Horlogerie SA, 950 F. Supp. 250, 252–53 (N.D. Ill. 1996) (holding that the “either viewpoint” rule did not apply to class actions, because use of the rule would permit aggregation of claims); Shelly v. S. Bell Tel. & Tel. Co., 873 F. Supp. 613, 616–17 (M.D. Ala. 1995) (refusing to “create a back door to the federal courthouse” by using the cost to the defendant of plaintiff’s requested injunctive relief as the basis for federal jurisdiction); Smiley v. Citibank (S.D.), N.A., 863 F. Supp. 1156, 1163 (C.D. Cal. 1993); Indianer v. Franklin Life Ins. Co., 113 F.R.D. 595, 603–04 (S.D. Fla. 1986); *cf. In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 609 (7th Cir. 1997) (holding that the “either viewpoint” rule permits assessment of defendant’s cost of injunction in a class action).

210. 28 U.S.C. § 1332(d)(6) (2006) (“[T]he claims of the individual class members shall be aggregated . . .”).

211. *See* Rodgers v. Cent. Locating Serv., Ltd., 412 F. Supp. 2d 1171, 1179

CAFA disrupts other viewpoint analyses as well. For example, in *McCarty v. Amoco Pipeline Co.*,<sup>212</sup> the Seventh Circuit recognized a problem with measuring the amount in controversy from the viewpoint of the party invoking jurisdiction:

Under the rule, if a case originally brought in federal court were dismissed for failure to meet the jurisdictional amount from the plaintiff's viewpoint, it could yet end up in federal court if the plaintiff reinstated the case in state court and the defendant—from whose point of view the required amount was present—then removed it. . . . 28 U.S.C. § 1441 only provides for the removal of actions “of which the district courts of the United States have original jurisdiction . . . .” Thus, it is generally true that if a case could not originally be brought in federal court it may not be removed there. But as outlined above, [this] rule could lead to a situation where the federal court would assume removal jurisdiction where it could not assert original jurisdiction.<sup>213</sup>

*McCarty*'s rationale is compelling: if a court adopts the invoking-party viewpoint for traditional diversity, it runs afoul of § 1441's original jurisdiction requirement.<sup>214</sup> This flaw may not apply to CAFA, however, because CAFA removals are not exercised under § 1441. Instead, defendants remove under CAFA's own removal statute, § 1453.<sup>215</sup> Unlike § 1441, this provision does not require the federal court to have original jurisdiction.<sup>216</sup> Thus, in addition to providing for removal procedures, § 1453 also operates to independently *enable* removal. An alternative approach reads § 1453 *in pari materia* with the general removal provision, § 1441. Under

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(W.D. Wash. 2006) (“Under CAFA, the total relief sought by all class members is aggregated . . . [a]nd the ‘value’ of injunctive relief is determined by calculating the defendant's costs of compliance . . . .”) (citing *In re Ford Motor Co.*, 264 F.3d 952, 958 (9th Cir. 2001)); *Berry v. Am. Express Publ'g, Corp.*, 381 F. Supp. 2d 1118 (C.D. Cal. 2005) (adopting the either-viewpoint approach).

212. 595 F.2d 389, 393 (7th Cir. 1979).

213. *Id.* (quoting 28 U.S.C. § 1441 (2006)).

214. § 1441(a).

215. § 1453; *see supra* Part II (discussing removal jurisdiction under CAFA).

216. *See* § 1453.

this view, the traditional statute is the proper vehicle for class action removal, subject to § 1453's modifications.<sup>217</sup>

#### D. Conclusion

CAFA's road is paved with ambiguous provisions. This Article sought to delve into that ambiguity by searching the ashes of a burnt nightclub for a workable definition of "primary defendants," probing a six-factor scale for clues of its future tilt, and estimating the price-tag of injunctive relief. CAFA, it is clear, heralds fundamental changes to class action litigation. New strategies and practices aimed at aggregation rules and proportional class citizenship will test CAFA's contours. Like it or not, class action lawyers, once the masters of "judicial hellholes," must now walk CAFA's winding path to federal court. As one writer put it, "In a time of drastic change it is the learners who inherit the future. The learned usually find themselves equipped to live in a world that no longer exists."<sup>218</sup>

Consider the jurisdictional world of the recent past. Just two years ago, in the Foreword to the *Developments in the Law* issue of this Law Review, Professor Georgene Vairo described legislative efforts in the area of federal jurisdiction that, "with some important exceptions for complex litigation, seem to be part of a continuing trend to limit diversity jurisdiction."<sup>219</sup> Other commentators have noticed this trend for some time. For example, in 1941, Justice Frankfurter characterized the "dominant note" in congressional enactments relating to diversity jurisdiction as "one of jealous restriction."<sup>220</sup> Why then did Congress buck the trend with CAFA, an expansion of federal jurisdiction? Should it be read as a vote of confidence in the federal judiciary or merely as distaste for the practices of some state courts? Time will tell whether CAFA is among the early data points in a new trend toward expanding

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217. See, e.g., *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 129 (1995) (holding that a bankruptcy removal statute could comfortably coexist with the general removal provisions); see *supra* Part II (discussing removal jurisdiction under CAFA).

218. ERIC HOFFER, REFLECTIONS ON THE HUMAN CONDITION 22 (1973).

219. Georgene Vairo, *Foreword*, 37 LOY. L.A. L. REV. 1393, 1400 (2004).

220. *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941); Thomas E. Baker, *A View to the Future of Judicial Federalism: "Neither Out Far Nor In Deep,"* 45 CASE W. RES. 705, 765 (1995) ("[T]he discernible modern trend has been to limit and reduce the scope of [diversity] jurisdiction.").

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*PLAINTIFFS' PARADISE LOST*

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diversity jurisdiction or merely an “important exception.”

