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**VI. IN RETROSPECT:  
A FIRST YEAR REVIEW OF THE CLASS  
ACTION FAIRNESS ACT OF 2005**

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This Article examines cases applying the Class Action Fairness Act from its adoption in February 2005 through May 2006. The author expects to post further updates on CAFA caselaw, which will be accessible through the Social Science Research Network, [www.ssrn.com](http://www.ssrn.com).

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After more than a decade of prior efforts, the Class Action Fairness Act<sup>1</sup> (CAFA) was finally passed in February 2005. I take this opportunity to look at the major interpretive questions that the new law has presented to the courts to date.

Court decisions applying CAFA in its first year have addressed several issues, most of which have been procedural in nature. One of the primary issues concerns arguments advanced by defendants that CAFA applies to cases that were filed in state court before the date that CAFA was signed into law. In addition to the issues surrounding the statute's applicability, this study of CAFA case law raises other significant issues of broader impact, such as: (1)

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

reconciling textual language with arguably contradictory legislative history; and (2) assessing whether Congress intends to alter a general presumption in the law with specific statutory directives when the statute is silent as to the general presumption. This Article is organized into four Parts, with each devoted to a particular subject or issue that courts have addressed in CAFA's first full year: (A) statutory applicability questions; (B) the imposition of sanctions in CAFA removal practice; (C) burden of proof issues; and (D) finally, a discussion of several substantive issues that have arisen under the new legislation.

### A. *Statutory Applicability Questions*

One of the primary issues the courts have addressed in CAFA's first year has been determining to what cases it applies. Section 9 of CAFA provides, "[t]he amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act."<sup>2</sup> The problem is that Congress did not define what it meant by "commenced."

There are a number of possibilities, of course, as to what Congress intended by using this term. "Commenced" could refer to the date that the action was filed in state court, or some other date which, under state law, marks a suit's commencement. Alternatively, Congress could have meant to refer to some other date that application of federal law would identify. For instance, Congress might have intended to say that a suit is "commenced" when it is removed from state court into federal court. This reading has some support in CAFA's policy purposes because the legislation was passed to expand the scope of federal jurisdiction over class action suits.<sup>3</sup> Still, other readings are possible.

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2. Class Action Fairness Act § 9.

3. See Class Action Fairness Act § 2(b) ("The purpose[] of this Act [is to provide] . . . for Federal court consideration of interstate cases of national importance under diversity jurisdiction . . ."). On the other hand, that Congress sought to expand federal jurisdiction does not resolve the question of the extent to which it has done so. See *Pritchett v. Office Depot, Inc.*, 404 F.3d 1232, 1237 n.6 (10th Cir. 2005) ("[The court is] mindful of the fact that Congress' goal in passing this legislation was to increase access to federal courts . . . [b]ut these general sentiments do not provide *carte blanche* for federal jurisdiction over a state class action any time the statute is ambiguous."), *reprinted as amended*, 420 F.3d 1090 (10th Cir. 2005).

Although the term is undefined, and there may be some policy reasons for reading “commenced” as based on some date other than the date that state law marks the start of a new suit in state court, generally speaking, when Congress has used “commenced” in the past as a method of marking a new act’s reach, it usually expected federal courts to look to state law to determine the start date.<sup>4</sup> This Part focuses on how courts have interpreted CAFA’s use of the word “commenced.”<sup>5</sup>

Lower courts have roundly and unanimously rejected the argument that an action is “commenced,” within § 9’s meaning, on the date that it is removed to federal court. The first court to reject the argument was the district court in Colorado, whose decision was subsequently affirmed by Tenth Circuit in *Pritchett v. Office Depot, Inc.*<sup>6</sup> Following *Pritchett*, the First,<sup>7</sup> Seventh,<sup>8</sup> and Ninth Circuits<sup>9</sup> have also rejected the argument that a suit is commenced for purposes of CAFA when it is removed. No other circuit courts have addressed the question but every reported district court decision has

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4. See, e.g., *Herb v. Pitcairn*, 324 U.S. 117, 120 (1945); *Cannon v. Kroger Co.*, 837 F.2d 660, 664 (4th Cir. 1988) (“It is clear that a federal court must honor state court rules governing commencement of civil actions when an action is first brought in state court and then removed to federal court . . . .”); see also *Riehl v. Nat’l Mut. Ins. Co.*, 374 F.2d 739, 742 (7th Cir. 1967) (“The Federal Rules of Civil Procedure are designed to ‘govern procedure after removal.’ . . . Thus, Rule 3 is wholly irrelevant.”); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1051 n.7 (3d ed. 2002) (“All actions within the purview of the federal rules, including suits in equity, actions at law, diversity actions predicated upon state law, and actions predicated upon federal law, are commenced by the filing of a complaint”); *id.* § 1052 (“In federal actions based on diversity of citizenship jurisdiction, federal courts apply state law to decide when a lawsuit was commenced for certain purposes, such as computing limitations periods”).

5. For an in depth discussion on how courts should interpret this commencement problem, see Lonny S. Hoffman, *The “Commencement” Problem: Lessons from a Statute’s First Year* (2006) (unpublished manuscript) (on file with author), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=881779](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=881779).

6. *Pritchett v. Office Depot, Inc.*, 360 F. Supp. 2d 1176, 1181 (D. Colo. 2005), *aff’d*, 404 F.3d 1232 (10th Cir. 2005), *reprinted as amended*, 420 F.3d 1090 (10th Cir. 2005).

7. *Natale v. Pfizer, Inc.*, 424 F.3d 43, 44 (1st Cir. 2005).

8. *Pfizer, Inc. v. Lott*, 417 F.3d 725, 726 (7th Cir. 2005); *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 806 (7th Cir. 2005).

9. *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 686 (9th Cir. 2005).

also rejected it.<sup>10</sup>

*Price v. Berkeley Premium Nutraceuticals, Inc.*<sup>11</sup> is probably one of the strangest post-CAFA commencement cases. In *Price*, plaintiffs initially filed an action in state court which the defendants promptly removed to federal court on the basis of diversity jurisdiction under 28 U.S.C. § 1332(a).<sup>12</sup> After the court ordered a remand, the plaintiffs apparently had a change of heart and decided they wanted to litigate in the federal forum.<sup>13</sup> To that end, they dismissed their previous suit and re-filed a new suit in federal court, citing CAFA as the source of the court's original jurisdiction (plaintiffs filed the suit after CAFA had gone into effect).<sup>14</sup> Defendants—who also had a change of heart—now decided they preferred a state forum and argued that the action against them was commenced when the first state suit was filed; citing the Tenth Circuit's decision in *Pritchett*, they argued that CAFA did not therefore apply to the newly filed action.<sup>15</sup>

The district court distinguished *Pritchett*, observing that plaintiffs' re-filing must be treated as a new case.<sup>16</sup> It was also significant to the court that it lacked jurisdiction over the initial state action that had been removed.<sup>17</sup> The court did not indicate why the absence of jurisdiction in the first case had any bearing on when the second action was commenced for purposes of CAFA. Its relevance probably related to the defendants' argument that it would be "unfair" to preclude a defendant from removing a case that was commenced before the effective date of CAFA but allow a plaintiff

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10. See *In re Expedia Hotel Taxes & Fees Litig.*, 377 F. Supp. 2d 904, 906 (W.D. Wash. 2005); *Lander & Berkowitz, P.C. v. Transfirst Health Servs. Inc.*, 374 F. Supp. 2d 776, 776–77 (E.D. Mo. 2005); *Zuleski v. Hartford Acc. & Indem. Co.*, No. Civ.A. 2:05-0490, 2005 WL 2739076, at \*3 (S.D.W.V. Oct. 24, 2005); *Komeshak v. Concentra, Inc.*, Nos. 05-CV-261-DRH, 05-CV-349-DRH, 2005 WL 2488431, at \*3 (S.D. Ill. Oct. 7, 2005); *Yescavage v. Wyeth, Inc.*, No. 205CV294FTM33SPC, 2005 WL 2088429, at \*3 (M.D. Fla. Aug. 30, 2005); *Alsup v. 3-Day Blinds*, No. Civ. 05-287-GPM, 2005 WL 2094745, at \*2–3 (S.D. Ill. Aug. 25, 2005).

11. No. 05-73169, 2005 WL 2649205 (E.D. Mich. Oct. 17, 2005).

12. *Id.* at \*2.

13. *Id.*

14. *Id.*

15. *Id.* at \*4.

16. *Id.*

17. *Id.*

to dismiss a pending case and re-file it so as to take advantage of the statute's jurisdictional provision.<sup>18</sup> Although the plaintiffs were clearly forum shopping when they dismissed their state case and re-filed a second case in federal court, they were legally entitled to do so,<sup>19</sup> just as the defendants were legally entitled to remove the originally filed state case.

A second version of the commencement issue is whether a case commences at the filing of the lawsuit or the serving of the defendant. Defendants have argued that a state case is "commenced," within the meaning of section 9 of CAFA, on the date of service. A number of defendants have succeeded in this argument.<sup>20</sup> In the only reported appellate court decision on this issue, the Ninth Circuit rejected the argument, finding that the case was commenced when it was filed.<sup>21</sup>

Where a state law treats the date of service as relevant to the date the action is commenced, it is important to consider why the state law treats the service date as significant. If the reason the date of service is used has to do with statute of limitations issues,<sup>22</sup> then such a provision ought not to have relevance to the question of when the action is commenced for CAFA purposes. Alternatively, if the

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18. *Id.*

19. See generally Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990) (arguing that actions described as "forum shopping" further legitimate goals of the legal system).

20. The following cases use the date of service as the date of commencement: *Eufaula Drugs, Inc. v. TDI Managed Care Servs., Inc.*, No. 2:05-CV-293-F, 2005 WL 3440635 (M.D. Ala. Dec. 14, 2005); *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, No. 2:05-CV-292-F, 2005 WL 3440636 (M.D. Ala. Dec. 14, 2005); *Dinkel v. Gen. Motors Corp.*, 400 F. Supp. 2d 289 (D. Me. 2005); *Brown v. Kerkhoff*, No. 4:05 CV 00274 JEG, 2005 WL 2671529 (S.D. Iowa Oct. 19, 2005) (suggesting that failure to serve within three months of filing of suit could affect date suit "commenced"). *But see Lussier v. Dollar Tree Stores, Inc.*, No. CV 05-768-BR, 2005 WL 2211094, at \*1-2 (D. Or. Sept. 8, 2005) (holding that defendant's argument that a suit "commenced" at service, though unsuccessful, was sufficiently reasonable so as to preclude the plaintiff's request for attorneys' fees and costs resulting from removal).

21. *Bush v. Cheaptickets, Inc.*, 425 F.3d 683 (9th Cir. 2005).

22. An example would be a rule that treats as time-barred a suit filed just before the statute of limitations has run when the plaintiff waits too long to serve process. See, e.g., *Multer v. Multer*, 280 Ala. 458, 463 (1966) (denying relief due to unconscionable delay under the equitable doctrine of laches, although the action was filed within the statutory three-year period).

state uses the date of service simply as the date on which the action has commenced for most purposes,<sup>23</sup> then the date of service is the relevant date for purposes of section 9. The courts that keep these differences straight are more likely to attend to the purposes Congress had in mind when it enacted CAFA. Problems arise when the courts fail to distinguish these different kinds of date of service provisions.<sup>24</sup>

The final commencement issue before courts concerns amendments, which is to say situations in which a complaint was filed prior to February 18, 2005 and amended subsequent to the effective date of CAFA. Courts have generally looked to the relation-back doctrine in this circumstance to determine whether the post-statutory amendment relates back to the original filing.<sup>25</sup> If it does, then the case does not fall within CAFA; alternatively, if it does not relate back, then the action is within CAFA's reach. The leading case on this issue is *Knudsen v. Liberty Mutual Insurance Co.*<sup>26</sup> Although the *Knudsen* court did not find the amendment triggered a new suit for CAFA purposes, subsequent courts have followed the *Knudsen* analysis and reached the opposite conclusion.<sup>27</sup>

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23. An example of this would be the old system in New York's supreme and county courts. N.Y. C.P.L.R. 203 note (Consol. 2006) (Practice Insights: Filing with the County Clerk to Commence an Action). New York abandoned the rule in favor of measuring commencement based on filing with the county clerk to avoid encouraging defendants to avoid service. *Id.*

24. Compare, e.g., *Lussier*, 2005 WL 2211094 (rejecting defendant's argument that the case was not commenced until it was served), with *Eufaula Drugs*, 2005 WL 3440635, at \*3 (holding that the state's bona fide intention standard for effecting service "should also be applied when determining the meaning of 'commenced' in Section 9 of CAFA").

25. See, e.g., *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310, 1315 (E.D. Okla. 2005); *supra* Part II.D.1.b (discussing the application of the relation-back doctrine to commencement issues).

26. 411 F.3d 805 (7th Cir. 2005) (holding that removal did not "commence" the action). After the addition of defendants and novel claims, a second removal followed, which was upheld by the Seventh Circuit. *Knudsen*, 435 F.3d 755, 758 (7th Cir. 2006).

27. For example, in *Adams v. Federal Materials Co.*, No. Civ.A. 5:05CV-90-R, 2005 WL 1862378 (W.D. Ky. July 28, 2005), the court found, citing *Knudsen*, that a defendant joined after CAFA's enactment commenced a new suit. See *id.* at \*4 ("Plaintiffs' decision to add Rogers Group as a defendant presents precisely the situation in which it can and should be said that a new action has 'commenced' for purposes of removal pursuant to the CAFA.").

Since *Knudsen*, the courts have been inconsistent in their use of relation back law.<sup>28</sup> A few courts that have found that reliance on the relation-back doctrine is misplaced; however several have lost precedential value due to subsequent higher court decisions.<sup>29</sup>

After *Pritchett*, courts have readily rejected the argument that would have given the broadest effect to when a suit is “commenced” under CAFA (that is, a case is “commenced” when it is removed). Similarly, after *Knudsen*, courts have also rejected the slight variation on the argument that a suit is “commenced” when the plaintiffs broaden the class definition, though, as we have seen, *Knudsen*’s legacy in referencing relation-back law has been significant. Not all courts have found post-CAFA amendments to constitute the commencement of a new suit for CAFA purposes, but nearly all have followed *Knudsen* in turning to relation-back law to analyze the problem.

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28. The following cases applied the relation-back doctrine to hold that an amended complaint did not commence a new action for the purposes of CAFA: *Phillips v. Ford Motor Co.*, 435 F.3d 785, 787–88 (7th Cir. 2006); *Plubell v. Merck & Co., Inc.*, 434 F.3d 1070, 1071–74 (8th Cir. 2006) (relying on Missouri relation-back law); *Brown v. Kerkhoff*, No. 4:05 CV 00274 JEG, 2005 WL 2671529, at \*12–16 (S.D. Iowa Oct. 19, 2005); *Eufaula Drugs, Inc. v. Scipsolutions*, No. 2:05CV370-A, 2005 WL 2465746, at \*4 (M.D. Ala. Oct. 6, 2005); *Siew Hian Lee v. CitiMortgage, Inc.*, No. 4:05CV1216JCH, 2005 WL 2456955, at \*2 (E.D. Mo. Oct. 5, 2005); *Judy v. Pfizer, Inc.*, No. 4:05CV1208RWS, 2005 WL 2240088, at \*3 (E.D. Mo. Sept. 14, 2005); *New Century Health Quality Alliance, Inc. v. Blue Cross & Blue Shield of Kan. City*, No. 05-0555-CVWSOW, 2005 WL 2219827, at \*3 (W.D. Mo. Sept. 13, 2005); *Morgan v. Am. Int’l. Group, Inc.*, No. C-05-2798 MMC, 2005 WL 2172001, at \*2–3 (N.D. Cal. Sept. 8, 2005) (relying on California relation-back law).

By contrast, the following cases applied the relation-back doctrine to hold that an amended complaint *did* commence a new action for the purposes of CAFA: *Plummer*, 388 F. Supp. 2d at 1316–17; *Senterfitt v. SunTrust Mortgage, Inc.*, 385 F. Supp. 2d 1377, 1379–80 (S.D. Ga. 2005). *See generally* Hoffman, *supra* note 5 (arguing that the turn to relation-back law is, in most cases, unnecessary and mistaken).

29. *See, e.g.*, *Comes v. Microsoft*, 403 F. Supp. 2d 897, 903–04 (S.D. Iowa 2005); *Weekley v. Guidant Corp.*, 392 F. Supp. 2d 1066, 1068 (E.D. Ark. 2005) (“Those claims may or may not ‘relate back’ to the original complaint for limitations purposes. Nevertheless, a civil action . . . commenced when the initial complaint was filed.”); *Smith v. Collingsworth*, No. 4:05CV01382-WRW, 2005 WL 3533133, at \*2 (E.D. Ark. Dec. 21, 2005) (“[I]n view of the simple directive in § 9 of CAFA, whether an amended complaint relates back is irrelevant.”).

Still other creative attempts have been ventured to come within CAFA's terms. One argument advanced has been that where the suit was filed just before February 18, 2005, CAFA's enactment date, but the defendant promptly removed the action within thirty days, but after February 18, then the case was commenced within the meaning of CAFA. Pfizer actually made this argument in two cases: *Pfizer, Inc. v. Lott*,<sup>30</sup> and *Natale v. Pfizer, Inc.*<sup>31</sup> In both cases, the trial court rejected the defendants' argument and, after virtually simultaneous appeal, the respective appellate courts did the same.<sup>32</sup>

The timing of these cases may have caused particular frustration for the defendant, Pfizer. Both cases were filed shortly before CAFA was passed. In particular, *Pfizer, Inc. v. Lott* was filed on February 17, only one day before CAFA went into effect.<sup>33</sup> Pfizer knew, of course, that the jurisdictional arguments in *Pritchett*<sup>34</sup> and *Knudsen*<sup>35</sup> had failed, and they needed to develop a different argument for sustaining federal jurisdiction under CAFA. To that end, Pfizer argued that removal first became possible when CAFA was passed and that jurisdiction was proper because the removal was taken within thirty days of filing of the state suit—quite unlike *Pritchett* and *Knudsen*. Both the Seventh and First Circuits rejected the attempt to extend CAFA to cover a state case filed before CAFA's effective date, albeit just in advance of CAFA's passage.<sup>36</sup>

Writing in *Lott*, Judge Posner noted that Congress could have written into the federal statute a specific standard for determining when a state suit "commenced."<sup>37</sup> CAFA could have provided that an action may be removed if it is commenced after CAFA's effective date but that a state action commenced before the effective date was also removable under CAFA if it is removed within a certain time

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30. 417 F.3d 725 (7th Cir. 2005).

31. 424 F.3d 43 (1st Cir. 2005).

32. *Natale v. Pfizer*, 379 F. Supp. 2d 161, 163 (D. Mass. 2005), *aff'd*, 424 F.3d 43 (1st Cir. 2005); *Lott v. Pfizer, Inc.*, No. 05-CV-0230-MJR, 2005 WL 3618027 (S.D. Ill. May 26, 2005), *aff'd*, 417 F.3d 725 (7th Cir. 2005).

33. *Lott*, 417 F.3d at 726 ("The rub is that the suit was filed in the state court the day before the Act was enacted . . .").

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

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

36. *Lott*, 417 F.3d at 726 ("But as Pfizer points out, there is a difference between the present case on the one hand and *Knudsen* and *Pritchett* on the other."); *Natale*, 424 F.3d at 44.

37. *Lott*, 417 F.3d at 727.

period.<sup>38</sup> The problem, as Posner pointed out in *Lott*, is that this is exactly what Congress did not do.<sup>39</sup>

Posner could have also rejected Pfizer's argument on another ground. Pfizer's attempt to bring the state suit—filed prior to the effective date of the act—within CAFA's reach by citing its compliance with the thirty day removal window of § 1446(b)<sup>40</sup> misconstrues the statutory language's purpose and effect.<sup>41</sup> To understand § 1446(b), it is necessary to distinguish two circumstances. Assume a case involves parties not of diverse citizenship and plaintiffs' claims are based exclusively on state law. If at some later point in time the plaintiffs amend their complaint to add a claim for relief arising under federal law, that claim may be removed by itself under the authority of § 1441(c),<sup>42</sup> or the entire case may be removed under the authority of § 1441(a),<sup>43</sup> through the particular grant of original jurisdiction in § 1331<sup>44</sup> and by virtue of the separate grant of supplemental jurisdiction over all claims within § 1367(a).<sup>45</sup> In this circumstance, § 1446(b) merely provides that the right to remove must be exercised within 30 days after the defendant is notified of the amended suit with the federal claim added to it.<sup>46</sup>

Contrast this to the argument made in *Lott* and *Natale* for allowing removal of a suit previously pending before the date the statute went into effect.<sup>47</sup> The problem with the argument is that § 1446(b) is not a grant of original jurisdiction to the district courts.<sup>48</sup> Where it applies, it is merely one constraint on the statutory right of

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38. *Id.*

39. *Id.*

40. 28 U.S.C. § 1446(b) (2006).

41. See, e.g., *Rashid v. Schenck Constr. Co. Inc.*, 843 F. Supp. 1081, 1088 (S.D.W. Va. 1993) (stating that “the one-year limitation for the removal of cases on the basis of diversity operates to divest the court of jurisdiction”); *Perez v. Gen. Packer, Inc.*, 790 F. Supp. 1464, 1470 (C.D. Cal. 1992), *overruled by* *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998); *Foiles v. Merrell Nat'l Labs.*, 730 F. Supp. 108, 110 (N.D. Ill. 1989); *Smith v. MBL Life Assurance Corp.*, 727 F. Supp. 601, 604 (N.D. Ala. 1989).

42. 28 U.S.C. § 1441(c) (2006).

43. *Id.* § 1441(a).

44. § 1331.

45. § 1367(a).

46. § 1446(b).

47. *Pfizer, Inc. v. Lott*, 417 F.3d 725, 726 (7th Cir. 2005); *Natale v. Pfizer, Inc.*, 424 F.3d 43, 43 (1st Cir. 2005).

48. § 1446(b).

removal. Section 1446(b) cannot transform a case otherwise outside of the original jurisdiction of the district courts into one inside of it.<sup>49</sup>

*B. Imposition of Sanctions for Improvident Removals*

In *Schorsch v. Hewlett-Packard Co.*,<sup>50</sup> the Seventh Circuit had opportunity to revisit its dicta in *Knudsen* regarding whether a subsequent amendment that attempts to assert a new claim might cause a case filed prior to CAFA to be deemed commenced at the time of the amendment, thus triggering CAFA's application.<sup>51</sup> In *Schorsch*, the named plaintiff brought suit in Illinois in 2003 proposing to represent a class of persons who purchased printer components from Hewlett-Packard.<sup>52</sup> Plaintiff alleged that Hewlett-Packard manufactured the part in such a way that it prevented purchasers from using the product's entire useful life.<sup>53</sup> After CAFA's effectuation, Plaintiff amended the suit to add a new claim that would expand the class to include those who had purchased parts other than the one component at issue.<sup>54</sup> On this basis, Hewlett-Packard removed the entire case, claiming that the amendment commenced a new suit against it for purposes of CAFA.<sup>55</sup> The Seventh Circuit again was unpersuaded:

From its outset, this suit has been about HP's use of EEPROM chips to shut down its printers until a component has been replaced. Identity of the consumable is a detail. . . . This is still just one suit, between the original litigants. Litigants and judges regularly modify class definitions; *Knudsen* holds that such changes do not

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49. *Accord* *Yescavage v. Wyeth, Inc.*, No. 205CV294FTM33SPC, 2005 WL 2088429, at \*3-4 (M.D. Fla. Aug. 30, 2005) ("The procedure for removal, including the time limitations set forth above, applies only when removal is proper. In this case, where no federal question has been pled, where Defendants have not alleged that diversity of citizenship exists in the absence of CAFA's relaxed standards for diversity, and where CAFA does not apply because the case was 'commenced' prior to CAFA's enactment, removal was improper regardless of when the notice of removal was filed.").

50. 417 F.3d 748 (7th Cir. 2005).

51. *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 807 (7th Cir. 2005).

52. *Id.* at 749.

53. *Id.*

54. *Id.* at 749-50.

55. *Id.* at 750.

“commence” new suits.<sup>56</sup>

Judge Easterbrook thus concluded, “[w]e can imagine amendments that kick off wholly distinct claims, but the workaday changes routine in class suits do not.”<sup>57</sup>

It got worse—much worse—for Hewlett-Packard. Not only did the court reject Hewlett-Packard’s attempt to treat the amendment as a new action for CAFA purposes, but it also signaled to the plaintiff and the district court that an award of attorneys fees for improper removal under 28 U.S.C. § 1447(c) may be warranted.<sup>58</sup> No doubt the panel was motivated, following its decisions in *Knudsen* and *Lott*, to send the message that defense lawyers had better think twice before removing another case under CAFA filed prior to February 18, 2005.<sup>59</sup>

Other courts, more willing to treat attempts to come within CAFA as based in good faith, have rejected arguments that sanctions should be imposed under § 1447(c).<sup>60</sup> In *Schorsch*, Judge Easterbrook also readdressed the choice-of-law issue.<sup>61</sup> As discussed previously, *Knudsen* mentioned the possible relevance of Federal Rule of Civil Procedure 15(c) to a case where a plaintiff did attempt to bring another claim or name a new party.<sup>62</sup> Thus, *Knudsen* left the impression that resort to the federal relation-back rule was proper to determine when a state action that has been amended is “commenced” for purposes of CAFA, even though the statute is

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56. *Id.*

57. *Id.* at 751.

58. *See id.* (“Defendants should recognize that 28 U.S.C. § 1447(c) makes an award of attorneys’ fees the norm for improper removal.”).

59. *See id.* (“[W]e reiterate[] that creative lawyering will not be allowed to smudge the line drawn by the 2005 Act: class actions ‘commenced’ in state court on or before February 18, 2005, remain in state court.”).

60. *See, e.g.,* *Lussier v. Dollar Tree Stores, Inc.*, No. CV 05-768-BR, 2006 WL 44191 (D. Or. Jan. 6, 2006) (remanding suit, but concluding that since the commencement question was matter of first impression in the circuit at the time the defendant removed the suit, attorneys’ fees and costs should not be awarded); *Phillips v. Ford Motor Co.*, No. 05-CV-503-DRH, 2005 WL 3263905 (S.D. Ill. Nov. 30, 2005) (rejecting request for attorneys fees and further chastising class counsel for the excessiveness of the sanctions sought), *aff’d*, 435 F.3d 785 (7th Cir. 2006).

61. *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 750–51 (7th Cir. 2005).

62. *Knudsen*, 411 F.3d at 807.

silent on the question.<sup>63</sup>

In *Schorsch*, Judge Easterbrook observed, without explanation, that although *Knudsen* had referenced Federal Rule of Civil Procedure 15(c) as bearing relevance on the date of commencement question, “state rather than federal practice must supply the rule of decision” for determining when an action is commenced for purposes of deciding whether CAFA applies to the state action after amendment.<sup>64</sup> He continued to insist, though, that relation-back rules bore relevance for deciding the scope of CAFA’s applicability under section 9.<sup>65</sup>

Apparently undaunted by the *Schorsch* court’s recommendation to the district court to consider sanctioning Hewlett-Packard for its improper removal in *Schorsch*, the defendants in *Schillinger v. Union Pacific Railroad Co.*<sup>66</sup> argued that CAFA applied to a state case filed prior to February 18, 2005.<sup>67</sup> In *Schillinger*, the Seventh Circuit again rejected the attempt to expand the statute’s reach.<sup>68</sup>

The Schillingers sued Union Pacific Railroad Corporation (UPC) and Union Pacific Railroad Company (UPRR) alleging that the two companies illegally leased plaintiff’s land to a third party.<sup>69</sup> An initial attempt at removing the case on traditional diversity grounds was unsuccessful because the amount in controversy was found insufficient.<sup>70</sup> After remand, the plaintiffs dismissed UPC after they realized that this entity did not own any right of way.<sup>71</sup> They thereafter sought to amend their complaint, seeking certification of a nationwide class.<sup>72</sup> The amended complaint also inadvertently included UPC as a defendant in the case’s caption and in a number of the allegations, even though they had dismissed UPC and had made no attempt at service on UPC.<sup>73</sup>

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63. *Id.*

64. *Schorsch*, 417 F.3d at 750.

65. *See id.*

66. 425 F.3d 330 (7th Cir. 2005).

67. *Id.* at 331, 333–34.

68. *Id.* at 332, 335.

69. *Id.* at 332. The issue appeared to turn on whether the companies leased the right-of-way, which they possessed, or encroached on land owned by the plaintiffs. *See id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

Although the state case predated CAFA, the defendants argued that the two post-statute developments—the request for certification of a nationwide class and the (albeit mistaken) re-joinder of UPC—“changed the case so profoundly” that it now was removable.<sup>74</sup> The district court again ordered remand, and defendants sought leave to appeal to the Seventh Circuit.<sup>75</sup> For the fourth time in as many tries, a defendant’s attempt to get the Seventh Circuit to find CAFA applicable to a state case filed before the CAFA’s enactment was unsuccessful.<sup>76</sup> The court quickly dispatched the defendants’ first argument. Because UPC was rejoined in the case and, thus, a new action was commenced against it after February 18, 2005, the district court found that “UPC was never really brought back into the case,” concluding that it was merely “a scrivener’s error” on plaintiffs’ part that could be corrected by subsequent amendment.<sup>77</sup>

The defendants’ second basis for removal was that when the plaintiffs went from seeking only a statewide class to certification of a nationwide class, that amendment was a “step sufficiently distinct that courts would treat it as independent for limitations purposes,” borrowing language from *Knudsen*.<sup>78</sup> Writing for the panel in *Schorsch*, Judge Wood recognized that the expanded class would have been far more onerous to defend against, but, following *Knudsen* and *Schorsch*, concluded that “the potential for a larger amount of legal research and discovery in and of itself is not a significant enough step to create new litigation.”<sup>79</sup> Judge Wood then discussed a second possible reason for rejecting defendants’ argument, though she did not base the decision on this ground.<sup>80</sup> She noted that for purposes of deciding whether an amended complaint meets the statute of limitations deadline, Illinois courts consider the date the motion to amend is filed, and not the date that the motion is

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74. *Id.*

75. *Id.* at 331–32.

76. *Id.* at 335.

77. *Id.* at 333.

78. *Id.* at 334 (quoting *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 807 (7th Cir. 2005)).

79. *Id.*

80. *Id.* at 334–35 (“It is not clear whether [the state] practice [of using the filing date of a motion to amend to determine if the statute-of-limitations deadline has been met] would govern federal procedure in the circumstances presented here.”).

granted.<sup>81</sup> If the Illinois rule were the governing rule, then it would have been dispositive in *Schillinger* because the motion to expand the proposed class was filed before CAFA's enactment but had not yet been ruled upon when the new statute went into effect.<sup>82</sup> Having already concluded that the nature of the amendment sought was not significant enough to treat the amended suit as the commencement of a new lawsuit for CAFA purposes, the court decided not to reach whether state law governed, or whether the outcome would be different under the federal rules of procedure.<sup>83</sup>

*C. Appellate Piggybacking  
and the Shifting Sands of Burden of Proof*

The last major circuit court decision handed down as of this writing to construe CAFA was *Brill v. Countrywide*,<sup>84</sup> a case in which the defendant removed a state suit both on the basis of CAFA and on the basis of the Telephone Consumer Protection Act (TCPA).<sup>85</sup> The district court remanded the case, finding that the amount in controversy was inadequate under CAFA and that TCPA conferred exclusive jurisdiction on the state court.<sup>86</sup>

The Seventh Circuit began its analysis in *Brill* by addressing the question of who bears the burden of proving the existence of subject matter jurisdiction.<sup>87</sup> Defendant conceded the long standing general rule that the party seeking to maintain federal jurisdiction bears the burden of proof, but argued that the burden of demonstrating lack of federal jurisdiction is on the plaintiff in a CAFA case.<sup>88</sup>

At the time the defendant in *Brill* advanced this argument, the lower courts were split on whether CAFA shifts the burden of proof to the party seeking remand. Some had held—and several more have

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81. *Id.*

82. *Id.* at 335.

83. *Id.*

84. 427 F.3d 446 (7th Cir. 2005).

85. *Id.* at 447; Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended principally at 47 U.S.C. § 227 (2006)). See generally Robert R. Biggerstaff, *State Courts and the Telephone Consumer Protection Act of 1991: Must States Opt-In? Can States Opt-Out?*, 33 CONN. L. REV. 407 (2001) (discussing jurisdictional issues under the Telephone Consumer Protection Act).

86. *Brill*, 427 F.3d at 447.

87. *Id.* at 447–48.

88. *Id.* at 448.

since held—that CAFA shifts the burden of proving the nonexistence of subject matter jurisdiction to the plaintiffs.<sup>89</sup> Others have refused to find CAFA alters the traditional burden of demonstrating subject matter jurisdiction.<sup>90</sup>

The argument that CAFA does shift the burden of proof cannot be made on the basis of the text alone: it is a rather inconvenient fact for burden-shifters that CAFA is silent about who bears the burden of proving or disproving the existence of jurisdiction under CAFA. The argument for the shift in the traditional burden of proof is instead usually made on the basis of a portion of CAFA's legislative history, namely part of one Senate Judiciary Committee report that provides: "If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied)."<sup>91</sup> This was, of course, exactly the language the defendant in *Brill* referenced.<sup>92</sup>

Reliance on the statute's legislative history certainly seems misplaced. To begin with, it is not at all clear that reference to the

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89. *Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749, 752 (D.N.J. 2005); *Berry v. Am. Express Publ'g, Corp.*, 381 F. Supp. 2d 1118, 1122–23 (C.D. Cal. 2005); *Natale v. Pfizer*, 379 F. Supp. 2d 161, 168 (D. Mass. 2005) (observing that "the burden of removal is on the party opposing removal to prove that remand is appropriate"); *Lussier v. Dollar Tree Stores, Inc.*, No. CV 05-768-BR, 2005 WL 2211094, at \*1 (D. Or. Sept. 8, 2005) (CAFA shifts burden of proof on jurisdiction to plaintiff); *In re Textainer P'ship Sec. Litig.*, No. C 05-0969 MMC, 2005 WL 1791559, at \*3 (N.D. Cal. July 27, 2005); *Waite v. Merck & Co., Inc.*, No. C05-0759L, 2005 WL 1799740, at \*2 (W.D. Wash. July 27, 2005); *Yeroushalmi v. Blockbuster, Inc.*, No. CV 05-225-AHM(RCX), 2005 WL 2083008, at \*3 (C.D. Cal. July 11, 2005).

90. *See Fiore v. First Am. Title Ins. Co.*, No. 05-CV-474-DRH, 2005 WL 3434074 (S.D. Ill. Dec. 13, 2005); *Fisher v. Beverly Enters., Inc.*, No. 5:05CV00316SWW, 2005 WL 3409589 (E.D. Ark. Dec. 12, 2005); *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310, 1317–18 (E.D. Okla. 2005); *Judy v. Pfizer, Inc.*, No. 4:05CV1208RWS, 2005 WL 2240088, at \*2 (E.D. Mo. Sept. 14, 2005); *Schwartz v. Comcast, Corp.*, No. Civ.A. 05-2340, 2005 WL 1799414, at \*4 (E.D. Pa. July 28, 2005); *In re Expedia Hotel Taxes & Fees Litig.*, 377 F. Supp. 2d 904, 905 (W.D. Wash. 2005); *Sneddon v. Hotwire, Inc.*, Nos. C 05-0951 SI, C 05-0952 SI, C 05-0953 SI, 2005 WL 1593593, at \*1 (N.D. Cal. June 29, 2005).

91. S. REP. NO. 109-14, at 42 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 40.

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

legislative history is warranted in the first instance. As one district court sagely observed: “[t]he omission of a burden of proof standard in the CAFA does not create an ambiguity inviting courts to scour its legislative history to decide the point.”<sup>93</sup> Moreover, although none of the courts have made reference to it, the U.S. Supreme Court’s decision in *Exxon Mobil Corp. v. Allapattah Services*<sup>94</sup> and its treatment of the value of legislative history in the context of the supplemental jurisdiction statute, certainly should give pause to purveyors of the CAFA burden-shifting argument.<sup>95</sup>

The better argument would seem to be that,

[b]y failing to specifically address the burden of proof in the Act, especially in light of discussing the issue in a Committee Report, Congress is deemed to have not intended to change the settled case law on that issue. Had Congress wished to change which party bears the burden of proof in a removal action under the CAFA it could have explicitly done so.<sup>96</sup>

In *Brill*, the Seventh Circuit was unimpressed with the defendant’s citation to CAFA’s legislative history.<sup>97</sup> It reaffirmed that the burden of demonstrating the existence of federal subject matter jurisdiction in a CAFA removal rests with the party seeking the federal forum.<sup>98</sup> Nothing in CAFA expressly alters the traditional placement of the burden, Easterbrook noted, and the views of some congressmen (that are nowhere reflected in the engrossed bill), are not controlling.<sup>99</sup>

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93. *Ongstad v. Piper Jaffray & Co.*, 407 F. Supp. 2d 1085, 1089 (D.N.D. 2006).

94. 125 S. Ct. 2611 (2005).

95. *Id.* at 2625–26. In *Exxon*, the Supreme Court found that resort to legislative history was inappropriate when the statute itself is unambiguous. *Id.* at 2626. Like the supplemental jurisdiction statute at issue in *Exxon*, CAFA is unambiguous: There is no provision on burden of proof, and, under *Exxon*, a Senate Report cannot imply such a provision into the act. Congress is presumed to be aware of existing law when it passes legislation. *See, e.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689, 700–01 (1992). As such, the pre-existing rule, of which Congress was aware, should remain in effect until Congress explicitly changes it. *See id.* at 701.

96. *Ongstad*, 407 F. Supp. 2d at 1089.

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

98. *Id.*

99. *Id.*

The last interesting procedural issue that arose in *Brill* concerned the right to an interlocutory appeal.<sup>100</sup> As we have seen, CAFA contains a provision, § 1453(c), that allows a party to seek leave to appeal a remand order, a privilege usually unavailable as a consequence of the remand review bar in § 1447(d).<sup>101</sup> On the basis of § 1453(c), the defendant successfully petitioned for appellate review of the district court's remand order.<sup>102</sup> What was different about *Brill* was that the defendant argued that a separate federal statute provided another basis for original federal question jurisdiction, beyond CAFA.<sup>103</sup> The Seventh Circuit found that it could review the remand order as to the separate federal statute, even though § 1447(d) would otherwise preclude appellate review of the remand order had the case been removed solely under the other federal statute and not also under CAFA.<sup>104</sup> "Because § 1453(c)(1) permits appellate review of remand orders 'notwithstanding section 1447(d),'" the court in *Brill* concluded, "we are free to consider any potential error in the district court's decision, not just a mistake in application of the Class Action Fairness Act."<sup>105</sup>

#### D. Substantive Interpretations of CAFA

As we have seen, most of the cases addressing CAFA in its first year have dealt with procedural issues, primarily, to what cases does CAFA apply? A few courts have begun to address some substantive questions under CAFA, however, and they merit brief discussion.

The substantive issue in *Brill* turned on whether the amount in controversy in the case exceeded \$5 million because, under CAFA, the district court would have then had jurisdiction.<sup>106</sup> The defendant easily met its burden, the Seventh Circuit found, because the defendant conceded that it had done enough of the things about

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100. *Id.* at 451–52.

101. 28 U.S.C. § 1453(c)(1) (2006) ("[N]otwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.").

102. *Brill*, 427 F.3d at 447, 451–52.

103. *See id.* at 451.

104. *Id.* at 451–52.

105. *Id.* at 451.

106. *Id.* at 447–49.

which plaintiff complained (distributing fax advertisements); thus, it was simply a math equation at this point to determine whether the minimum amount in controversy had been reached.<sup>107</sup> Plaintiffs might have avoided federal court if they had alleged they would not seek more than \$5 million, but they had not done so.<sup>108</sup>

One district court has also addressed the issue of quantifying the amount in controversy for CAFA purposes. In *Eufaula*, after finding that the case was commenced after CAFA was enacted, the court was still apparently unsure of who bore the burden of proving the existence of jurisdiction and ordered the parties to file further briefing addressing the issue.<sup>109</sup> The court failed to cite either *Brill* or any of the cases discussed above that have also addressed the question. Then, without waiting to decide who must carry the burden, the court required both sides to provide “specific evidence” to support their assertion that the amount in controversy was or was not met.<sup>110</sup>

It is not entirely clear what specific evidence the court required at this stage of the case to evaluate whether the amount in the controversy exceeded CAFA’s jurisdictional minimum of \$5 million. Plaintiffs in *Eufaula* sought certification of a nationwide class that it hoped to define as “all pharmacies and/or other similar entities who entered into a contract which provided for reimbursement of prescriptions” with defendant over the last six years, according to a formula that used the average wholesale price of the drug.<sup>111</sup> Seeking to avoid removal to federal court on the basis of § 1332, the plaintiffs also specifically limited their recovery to no more than \$74,500 per plaintiff.<sup>112</sup>

A plaintiff’s willingness to limit the amount of damages sought is typically recognized.<sup>113</sup> But because each of the class members

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107. *Id.* at 447.

108. *Id.* at 449.

109. *Eufaula Drugs, Inc. v. TDI Managed Care Servs., Inc.*, No. 2:05-CV-293-F, 2005 WL 3440635, at \*4 (M.D. Ala. Dec. 14, 2005).

110. *Id.*

111. *Id.* at \*2.

112. *Id.*

113. *See, e.g.*, *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938); *Seroyer v. Pfizer, Inc.*, 991 F. Supp. 1308, 1311 (M.D. Ala. 1997); *supra* Part III.C.2 (discussing the calculation of amount in controversy under CAFA).

claims are aggregated post-CAFA, it is also now necessary to make a showing as to how many putative members of the class there would likely be.<sup>114</sup> Still, the basic obligation is likely to remain the same: the party who seeks to establish federal jurisdiction must show by “a reasonable probability that the stakes exceed the minimum,”<sup>115</sup> provided that the allegations are made in good faith.<sup>116</sup>

Another interesting substantive issue under CAFA that courts have addressed is the question of what kind of case constitutes a “class action” within CAFA’s reach. Given that many—perhaps most—cases that qualify as “class actions” will come within CAFA, it is not surprising that there would be some debate over what kinds of cases meet this qualification. The court in *Fisher v. Beverly Enterprises, Inc.*<sup>117</sup> dealt with this problem. In *Fisher*, a nursing home resident brought suit against the nursing home for negligent care and other claims under state law.<sup>118</sup> Plaintiff did not seek certification under the state’s class action rule, filing only a direct suit on her own behalf.<sup>119</sup>

When she subsequently sought an injunction against the defendant to prevent it from merging with another company, as well as imposition of a constructive trust, the defendant argued that the relief sought by plaintiff in the suit, which was identical to relief sought in six similar patient care cases, would impact all similarly situated plaintiffs and, thus, should be treated as though it were a class action.<sup>120</sup> The district court rejected the attempt to turn the plaintiff’s single claims into representative litigation under Rule 23

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114. 28 U.S.C. § 1332(d)(6) (2006) (“[T]he 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.”); *see, e.g., Ongstad v. Piper Jaffray & Co.*, 407 F. Supp. 2d 1085, 1091–92 (D.N.D. 2006).

115. *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005) (citing *Smith v. Am. Gen. Life & Accident Ins. Co.*, 337 F.3d 888, 892 (7th Cir. 2003)); *Chase v. Shop ‘N Save Warehouse Foods, Inc.*, 110 F.3d 424, 427 (7th Cir. 1997)).

116. *St. Paul Mercury Indem. Co.*, 303 U.S. at 288–89 (“[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.” (citations omitted)).

117. No. 5:05CV00316SWW, 2005 WL 3409589 (E.D. Ark. Dec. 12, 2005).

118. *Id.* at \*1.

119. *See id.*

120. *Id.*

or a state equivalent.<sup>121</sup> Citing the new § 1332(d), the court ruled that CAFA did not apply to plaintiff's claims because it covered only "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action."<sup>122</sup>

*Adams v. Federal Materials Co.*<sup>123</sup> is also worth briefly mentioning. In *Adams*, the plaintiffs tried to argue that 28 U.S.C. § 1332(d)(4)(B)'s mandatory remand provision applied.<sup>124</sup> This CAFA subsection requires the court to decline jurisdiction where "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>125</sup> The plaintiffs' argument was that one defendant, who had been originally joined as a third-party defendant, should not have its citizenship counted for purposes of applying this subsection.<sup>126</sup> The court refused to go along with this argument, however, where the plaintiffs subsequently amended the complaint to assert claims directly against this defendant.<sup>127</sup>

#### *E. Conclusion*

Beyond these few cases addressing substantive issues under CAFA, most CAFA case law handed down in the statute's first year has addressed only procedural issues relevant under the act: what is the relevance and import of CAFA's legislative history, particularly when the statutory text is otherwise silent or neutral; whether CAFA can ever be applied to cases pending before CAFA's effective date; and whether CAFA shifts the burden of proof on demonstrating the existence of federal jurisdiction. Further discussion of CAFA's substantive content awaits.

In closing, it is perhaps worthwhile to suggest one other virtue to having undertaken this retrospective review. Studying the decisions that have come down after CAFA's enactment offers an opportunity

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121. *See id.* at \*2.

122. *Id.* at \*2 n.2 (quoting 28 U.S.C. § 1332(d) (2006)).

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

124. *Id.* at \*2, \*5.

125. 28 U.S.C. § 1332(d)(4)(B) (2006).

126. *Adams*, 2005 WL 1862378, at \*5.

127. *Id.*; *see also supra* Part III.B.2.a.i (discussing various potential definitions for CAFA's phrase, "primary defendants").

to vividly witness the kind of strategic decision-making and gamesmanship that routinely takes place after a change in the law by those most centrally involved in dealing with it; that is, lawyers representing clients in cases to which the law may or may not be applicable. Observing and exposing these strategic maneuverings in the immediate aftermath of a new law's enactment—particularly one as significant as CAFA's—offers an important reminder that forum shopping in civil litigation is, and probably always will be, a two-way street.

