OIL & GAS CLASS ACTIONS IN LOUISIANA AND THE CLASS ACTION FAIRNESS ACT OF 2005

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I.
THE AVAILABILITY OF CLASS ACTIONS UNDER THE LOUISIANA CODE OF CIVIL PROCEDURE

In 1997, the Louisiana Legislature enacted a comprehensive revision of the class action procedure, both expanding and contracting the availability of the device. *See* La. Acts 1997, No. 839, amending former La. Code Civ. Proc. arts. 591 to 594 and 596, and repealing former La. Code Civ. Proc. art. 593.1. The revision confirmed some of the previous requirements for maintenance of a class action, added an additional requirement, and adopted four specific types of class actions. The legislation also provided detailed rules for the prosecution and the compromise of a class action, for some of the important "side effects" of a class action such as attorney fees, and for the interruption of prescription as to the claims of members of a class or a putative class.

Under the 1997 legislation, a class action may be maintained only if:

1. the class is so numerous that joinder of all members is impracticable;

2. there are questions of law or fact common to the class;

3. the claims or defenses of the representatives of the class are typical of the claims or defenses of the class;

4. the class representatives will fairly and adequately protect the interests of the class; and

[1] The authors extend their appreciation to Kathryn S. Bloomfield for her contributions to this article.

5. the class may be defined "objectively in terms of ascertainable criteria, such that the court may determine the constituency of the class for the purposes of the conclusiveness of any judgment that may be rendered."

The 1997 legislation requires a prompt determination of whether the class action meets the requirements discussed above. The proponent of the class must file a motion to certify within ninety days after service on all adverse parties of the initial pleading seeking class action relief. If the proponent fails to do so, an adverse party may seek to have the class action stricken. The court must conduct a contradictory certification hearing "as soon as practicable;" however, the parties must be given a "reasonable opportunity to obtain discovery on class certification issues."[2]

II.
THE USE OF CLASS ACTIONS IN OIL AND GAS MATTERS IN LOUISIANA PRIOR TO THE PASSAGE OF THE CLASS ACTION FAIRNESS ACT OF 2005

One commentator has described the various uses of class actions in oilfield litigation as including: (1) fraudulent inducement in drilling fraud and partnership cases; (2) stock fraud and (3) royalty cases.[3] A brief survey of reported cases seeking class action status under the Louisiana Code of Civil Procedure reveals class actions that have been pursued involving royalty disputes, securities related to energy investments, well blow outs, and refinery explosions.[4]

However, even before the passage of the Class Action Fairness Act discussed below, the use of class actions in royalty litigation hit a major stumbling block in Louisiana. Under the Fifth Circuit decision in *Chevron USA, Inc. v. Vermillion Parish School Bd.*, 377 F.3d 459 (5th Cir. (La.) 2004), certification of a large class is unlikely in a state or federal court in Louisiana, because each class member individually has to comply with the notice requirements of La. R.S. 31:137. *Chevron*, 377 F.3d 459. La. R.S. 31: 137 provides:

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[2] La. Code Civ. Proc. art. 592A; *see also Martello v. City of Ferriday,* 2004-90 (La. App. 2 Cir. 11/3/04), 886 So.2d 645.

[3] McArthur, "The Class Action Tool in Oil Field Litigation" 45 U. Kan. L. Rev. 113 (1996).

[4] *Lailhengue v. Mobil Oil Co.,* 657 So.2d 542 (La. App. 4th Cir. 6/7/95) (class action sought relating to explosion and fire at refinery); *Duhe v. Texaco, Inc.,* 779 So.2d 1070 (La. App. 3d Cir. 2/7/01) (class certification in royalty owners' action for underpayment of royalties); *Lewis v. Texaco Exploration & Production Co., Inc.,* 698 So.2d 1001 (La. App. 1st Cir. 1997) (class action seeking royalties on gas purchaser's settlement payment to lessee on take-or-pay purchase contracts); *Andry v. Murphy Oil, USA, Inc.,* 710 So.2d 1126 (La. App. 4th Cir. 1997) (class action arising out of fire, explosion, and emissions at oil refinery); *Ford v. Murphy Oil USA, Inc.,* 703 So.2d 542 (La. 1996) (attempted class action related to continuous emissions from plant); *Rivera v. United Gas Pipeline Co.,* 613 So.2d 1152 (La. App. 5th Cir. 1993) (class action related to release of natural gas when pipeline was being worked on by pipeline company); *McCastle v. Rollins*, 456 So.2d 612 (La. 1984) (class action against operator of chemical waste disposal site for release of odors and fumes); *Wilson v. Palmer Petroleum, Inc.,* 706 So.2d 142 (La. App. 1st Cir. 1998) (class action by mineral lessors against lessees for royalties); *Singleton v. Northfield Ins. Co.*, 826 So.2d 55 (La. App. 1st Cir. 2002) (class action relating to well blowout).

> If a mineral lessor seeks relief for the failure of his lessee to make timely or proper payment of royalties, he must give his lessee written notice of such failure as a prerequisite to a judicial demand for damages or dissolution of the lease.

After the Louisiana Supreme Court refused to accept certification of the question of the efficacy of a class royalty demand under Louisiana Mineral Code article 137, the Fifth Circuit held that the written notice mineral lessors are required to give mineral lessees prior to filing a lawsuit for improper payment of royalties cannot be made on behalf of a class.

The issue certified was whether the notice given in this case by counsel for a lessor on behalf of the putative class satisfied Articles 137-141 of the Louisiana Mineral Code, which requires the lessor to give written notice of the lessee's failure to make timely or proper payment of royalties as a prerequisite to a judicial demand for damages or dissolution of the lease. The Fifth Circuit concluded that notice given by counsel for a lessor on behalf of a putative class does not satisfy the requirements of Articles 137-141. *Chevron*, 377 F.3d at 463-64. The Fifth Circuit reasoned that permitting class notice, particularly in a case such as this, upsets the careful balance established by Articles 137-141 of the Mineral Code, which provides an incentive to lessees to promptly pay royalties, while giving the lessee a reasonable way to avoid the harsh remedy of lease cancellation.

Chevron thus stands for the proposition that a class action is improper if each class member first has not sent an individual article 137 notice. What *Chevron* does not address is whether class certification would be proper were the requisite individual notices duly made. Nonetheless, under *Chevron*, class certification remains unlikely because the Fifth Circuit found that there can be no class-wide article 137 notice, thus, intimating that the class vehicle is not available due to the individualized nature of articles 137, *et seq.* In other words, if class notice is improper under the Mineral Code prior to suit, class notice should remain improper after a lawsuit is filed even if individual notices are sent. However, the Fifth Circuit did not address or resolve that issue.

III.
INTRODUCTION TO THE CLASS ACTION FAIRNESS ACT OF 2005

On February 18, 2005, after years of Congressional efforts to overhaul the treatment of class action lawsuits, President George W. Bush signed into law the Class Action Fairness Act of 2005 ("CAFA"). CAFA accomplishes three sweeping changes: (1) expands federal diversity jurisdiction over class action lawsuits through an amendment to 28 U.S.C. § 1332(d), (2) relaxes restrictions on the removal to federal court of class action lawsuits through the enactment of 28 U.S.C. § 1453, and (3) establishes a set of guidelines to protect class members, including a "consumer class action bill of rights," through the enactment of 28 U.S.C. §§ 1711-1715.

To the dismay of courts and practitioners, CAFA has proven difficult to interpret and apply in its two-year life. One court has described CAFA as "a statute in which some major terms are left undefined, certain of the provisions of which have been aptly characterized as 'bewildering' or 'clumsily crafted,' and whose legislative history is, in part, of questionable interpretative value. In short, it is a statute that is a headache to construe."[5]

Nonetheless, the courts have begun to fill in the gaps left by CAFA and have reached a consensus on some issues. While CAFA has not yet been applied to an oil and gas class action in a published decision, CAFA would apply to such a class action as it would to any other class action.[6] This paper discusses the specific provisions of CAFA, their effect on class action litigation, and the peculiar interpretative difficulties CAFA presents to courts and practitioners.[7]

IV.
CAFA EXPANDS FEDERAL DIVERSITY JURISDICTION OVER CLASS ACTION LAWSUITS.

CAFA's first, and most noteworthy, effect is its expansion of federal diversity jurisdiction. Under CAFA, federal courts now have jurisdiction over class actions (1) with 100 or more class members[8] (2) in which more than $5 million is in controversy, after all class members' claims are aggregated,[9] and (3) in which any member of the plaintiff class is a citizen of a state different from that of any defendant or in which any member of the plaintiff class (or any defendant) is a foreign state or a citizen or subject of a foreign state.[10]

CAFA's scheme for diversity jurisdiction in the class action context introduces two dramatic changes. First, CAFA does not require "complete diversity" (i.e., no defendant can be a citizen of the same state as any plaintiff), as is the norm in federal law.[11] In place of "complete diversity," CAFA requires only "balanced diversity," which is satisfied as long as any member of the class is a citizen of a state different from any

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[5] *Lao v. Wickes Furniture Co.*, 455 F. Supp. 2d 1045, 1047 (C.D. Cal. 2006).

[6] The applicability of CAFA did arise in at least one oil and gas lawsuit, but the district court determined that the lawsuit in question commenced prior to the effective date of CAFA, rendering CAFA inapplicable. *See Weber v. Mobil Oil Co.*, 2006 WL 2045875, at *3 (W.D. Okla. July 20, 2006). Several cases analyzing CAFA have been litigated in Louisiana, most of which are related to the flurry of litigation generated by Hurricane Katrina.

[7] For additional analysis of CAFA, see Howard S. Suskin, et al., *Class Action Fairness Act*, 750 PLI/LIT 229 (Nov. 2006); Elizabeth J. Cabraser, *The Class Action Fairness Act: One Year Later*, 744 PLI/LIT 67 (July 2006); Ronnie M. Schmelz, *The Class Action Fairness Act of 2005: An Overview of CAFA and the Early Decisions*, 744 PLI/LIT 33 (July 2006); Robin Miller, *Construction and Application of Class Action Fairness Act of 2005*, 2005 A.L.R. Fed. 2d 2 (2005). Each of these articles provide excellent analysis of CAFA and each was an important source for this paper.

[8] 28 U.S.C.A. § 1332(d)(5)(B).

[9] *Id.* § 1332(d)(2), (d)(6).

[10] *Id.* § 1332(d)(2).

[11] *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990).

defendant.[12] Second, CAFA does not require any individual plaintiff to meet the federal amount-in-controversy requirement of $75,000 and, instead, provides that the amount-in-controversy requirement is met if the claims of all members of the proposed class, when aggregated, exceeds $5 million.[13]

A. Amount in controversy.

Of the basic jurisdictional requirements under CAFA, only the amount in controversy requirement has generated significant litigation. The plaintiff has the right to plead its claim in any manner that avoids federal subject matter jurisdiction, subject to a broad good faith requirement with respect to the amount in controversy.[14] "Good faith in this context is entwined with the 'legal certainty' test, so that a defendant will be able to remove the case to federal court by 'show[ing] to a legal certainty that the amount in controversy exceeds the statutory minimum[.]"[15]

"The process of determining the amount in controversy is relatively straightforward: 'The question is not what damages the plaintiff will recover, but what amount is "in controversy" between the parties. That the plaintiff may fail in its proof, and the judgment be less than the threshold (indeed, a good chance that the plaintiff will fail and the judgment will be zero) does not prevent removal. . . .'"[16] Thus, "[w]hen considering the amount in controversy, the Court is to look to the face of the complaint as those asserted allegations control the amount in controversy unless it appears 'to a legal certainty the claim is really for less than the jurisdictional amount.'"[17] The amount in controversy is measured as of the date of removal.[18]

The Third Circuit has summarized the law of amount in controversy and found that there are "three main instructions" with respect to determining amount in controversy in the CAFA context:

> 1) The party wishing to establish subject matter jurisdiction has the burden to prove to a legal certainty that the amount in controversy exceeds the statutory threshold; 2) A plaintiff, if permitted by state laws, may limit her monetary claims to avoid the amount in controversy threshold; and 3)

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[12] 28 U.S.C.A. § 1332(d)(2)(A). "Balanced diversity" also occurs where (1) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a state or (2) any member of a class of plaintiffs is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state. *Id.* § 1332(d)(2)(B), (C).

[13] *Id.* § 1332(d)(2).

[14] *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006).

[15] *Morgan*, 471 F.3d at 474 (quoting *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 398 (3d Cir. 2004)).

[16] *Lao*, 455 F. Supp. 2d at 1049 (quoting *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448-49) (7th Cir. 2005).

[17] *Morgan v. Gay*, 2006 WL 2265302, at *4 (Aug. 7, 2006), *aff'd*, 471 F.3d 469 (3d Cir. 2006) (quoting *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 353 (1961)); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938); *Clean Air Council v. Dragon Int'l Group*, 2006 WL 2136246, at *3 (M.D. Pa. July 28, 2006).

[18] *Clean Air Council*, 2006 WL 2136246, at *3.

> Even if a plaintiff states that her claims fall below the threshold, this Court must look to see if the plaintiff's actual monetary demands in the aggregate exceed the threshold, irrespective of whether the plaintiff states that the demands do not.[19]

Additionally, the Eleventh Circuit has examined the "standard of proof" for establishing the amount in controversy in those cases in which the plaintiff has failed to plead a specific amount of damages. In such instances, a defendant need not prove that the amount in controversy exceeds $5 million "with certainty."[20] Instead, where "the plaintiff has not pled a specific amount of damages, the removing defendant must prove by a *preponderance of the evidence* that the amount in controversy exceeds the jurisdictional requirement."[21] In order to determine whether this standard has been satisfied "a court first examines whether 'it is facially apparent from the complaint that the amount in controversy exceeds the jurisdictional requirement.'"[22] If the amount in controversy is not facially apparent from the complaint, "the court should look to the notice of removal and may require evidence relevant to the amount in controversy at the time the case was removed."[23]

An additional issue regarding the amount in controversy is which categories of damages should be considered in determining whether the amount in controversy threshold has been met. At least one court has held that punitive damages may be considered in determining the amount in controversy.[24] A few courts have held that attorney's fees may not be included in an amount-in-controversy calculation.[25]

B. Exceptions to jurisdiction under CAFA.

Although CAFA's primary purpose is the expansion of federal diversity jurisdiction over class action lawsuits, that expansion is not absolute. CAFA provides four mandatory exceptions to its grant of jurisdiction and one discretionary exception. Each of these exceptions may require extensive discovery to determine removal or remand before the court determines whether the proposed class should be certified.[26]

1. The "local controversy" exception.

The first mandatory exception is known as the "local controversy" exception. It requires a federal district court to decline jurisdiction if:

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[19] *Morgan*, 471 F.3d at 474-75 (citing *Brill*, 427 F.3d at 449; *Samuel Bassett*, 357 F.3d at 398).
[20] *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1330 (11th Cir. 2006).
[21] *Id.* at 1330 (quoting *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001)); *see also Morgan*, 2006 WL 2265302, at *4 (holding that defendants must support their assertions of federal subject matter jurisdiction by a preponderance of the evidence).
[22] *Miedema*, 450 F.3d at 1330 (quoting *Williams*, 269 F.3d at 1319).
[23] *Id.* at 1330 (quoting Williams, 269 F.3d at 1319).
[24] *Ongstad v. Piper Jaffray & Co.*, 407 F. Supp. 2d 1085, 1091 (D.N.D. 2006).
[25] *In re Intel Corp. Microprocessor Antitrust Litig.*, 436 F. Supp. 2d 687, 690 (D. Del. 2006); *Berry v. Volkswagen of Am., Inc.*, 2006 WL 344774, at *2 (W.D. Mo. Feb. 15, 2006).
[26] Suskin, 750 PLI/LIT 229 at 232.

(1) greater than two-thirds of the proposed class members are citizens of the state in which the action was originally filed;
(2) at least one defendant is a citizen of the state in which the action was originally filed and is a defendant (a) from whom "significant relief" is sought by members of the class, and (b) whose alleged conduct forms a "significant basis" for the claims asserted by the proposed plaintiff class;
(3) "principal injuries" resulting from the alleged conduct of each defendant were incurred in the State in which the action was originally filed; and
(4) during the three-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same putative class.[27]

The applicability of the local controversy exception tends to turn on the issues of "significant relief" and/or "significant basis." CAFA is silent as to the meaning of both terms. The Western District of Louisiana has concluded that a determination of whether "significant relief" has been requested from an in-state defendant must include "not only an assessment of how many members of the class were harmed by the defendant's actions, but also a comparison of the relief sought between all defendants and each defendant's ability to pay a potential judgment."[28] The Eastern District of Louisiana and the Eleventh Circuit have adopted this standard and have each noted that a class seeks "significant relief" from a defendant "when the relief sought against that defendant is a significant portion of the entire relief sought by the class."[29]

The Eastern District of Louisiana has also analyzed the issue of "significant basis." The court noted that "the few courts that have addressed this provision in CAFA have evaluated whether a defendant's conduct forms a 'significant basis' for plaintiffs' claims based on a comparison of the alleged role played by that defendant with that played by the other defendants."[30]

Another court has identified three factors that it deemed "important to a determination of whether the local controversy exception warrants remand: (1) whether the product was sold outside of the locality; (2) whether the injury incurred was specific to the locality; [and] (3) whether the class as a whole seeks relief against the local defendant."[31] These factors build upon the foundation that the local controversy exception was designed to permit state courts to continue to retain jurisdiction over class action lawsuits that are truly local in nature and effect.

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[27] 28 U.S.C.A. § 1332(d)(4)(A)
[28] *Robinson v. Cheetah Transp.*, 2006 WL 468820, at *3 (W.D. La. Feb. 27, 2006).
[29] *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1167 (11th Cir. 2006); *Gauntt v. Louisiana Citizens Prop. Ins. Corp.*, 2007 WL 128801, at *2 (E.D. La. Jan. 16, 2007); *Caruso v. Allstate Ins. Co.*, 2007 WL 64162, at *3 (E.D. La. Jan. 8, 2007).
[30] *Caruso*, 2007 WL 64162, at *3.
[31] *Eakins v. Pella Corp.*, 455 F. Supp. 2d 450, 453 (E.D.N.C. 2006).

2. The "home state controversy" exception.

The second mandatory exception is the "home state controversy" exception, which requires a district court to decline jurisdiction over a class action in which (1) two-thirds or more of the members of the plaintiff class and (2) the "primary defendants" are citizens of the state in which the lawsuit was originally filed.[32] All of the primary defendants must be residents of the state in which the lawsuit is filed for the "home state controversy" exception to apply.[33]

As with the local controversy exception, the home state exception tends to hinge on a term that is not defined by CAFA, specifically the term "primary defendants." The Eastern District of Louisiana has examined the issue. "Clearly, CAFA intended there to be a substantive difference between 'primary defendants' and 'significant defendants' as contemplated by the two exceptions to the exercise of jurisdiction under the statute."[34] Left without guidance from CAFA, the Court turned to the dictionary: "The dictionary definition of 'primary' includes 'first in importance; chief; principal; main.' By contrast the dictionary definition of 'significant' includes 'important.' These definitions appear particularly apt in the context of CAFA, meaning that a significant defendant is of less importance than a primary defendant. Additionally, a significant defendant is obviously one who is something more than 'insignificant,' which is defined as 'having little or no importance' or 'trivial.'"[35]

3. The "state-action" exception.

The third mandatory exception is the "state-action" exception which applies to all class actions in which the "primary defendants" are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.[36] The Fifth Circuit has held that, reading the plain language of the statute, all of the primary defendants must be states or other government entities in order for the "state-action exception to apply.[37]

4. The "covered security" and corporate governance exceptions.

The fourth mandatory exception is really a category of related exceptions for certain claims based on securities and corporate governance. CAFA does not apply to any class action that "solely" involves (1) a claim "concerning a covered security," as defined by the Securities Act of 1933 and the Securities Exchange Act of 1934,[38] (2) a claim "that relates to the internal affairs or governance of a corporation or other form of

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[32] 28 U.S.C.A. § 1332(d)(4)(B).
[33] *Robinson v. Cheetah Transp.*, 2006 WL 3322580, at *3 (W.D. La. Nov. 14, 2006).
[34] *Caruso*, 2007 WL 64162, at *4.
[35] *Caruso*, 2007 WL 64162, at *4 (citations omitted) (quoting WEBSTER'S NEW WORLD COLLEGE DICTIONARY 739, 1140, 1334 (4th ed. 1999).
[36] 28 U.S.C.A. § 1332(d)(5).
[37] *Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 546 (5th Cir. 2006).
[38] 28 U.S.C.A. § 1332(d)(9)(A).

business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized,"[39] or (3) a claim "that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security" as defined by the Securities Act and associated regulations.[40] The term "security" under the third category is broader than the term "covered security" under the first category and "encompasses securities that are not traded nationally or listed on a regulated national exchange."[41]

These exceptions "carve out a substantial exception for state law securities and business-related claims. This is the only category of claims that CAFA exempts based on the specific subject-matter of the litigation."[42] "The three subparagraphs of subdivision (d)(9), read together, evince an overall legislative intention to maintain federal protection of 'the integrity and efficient operation' of the market for nationally traded securities, while preserving the significant role played by states in the regulation of business entities and securities that are not nationally traded."[43]

The first excepted category of claims (the "covered security" exception) "exempts from CAFA those class actions solely involving claims concerning securities which are traded nationally or listed on a regulated national exchange."[44] Those types of claims are, instead, governed by Securities Litigation Uniform Standards Act ("SLUSA"),[45] which precludes both federal and state class actions asserting certain state-law claims involving nationally traded securities. The effect of the "covered security" exception "is to prevent CAFA from disturbing the impact of SLUSA on state and federal law affecting nationally traded securities."[46]

One court has determined that the "covered security" exception does not depend on whether the plaintiff asserts claims against the issuer of the securities or some other fiduciary: "[B]ecause Congress did not limit the class of fiduciaries, the Court finds that the identity of the fiduciary is irrelevant."[47]

The second category of excepted claims (the "internal affairs" exception) exempts class actions solely involving claims relating to the internal affairs or governance of a business entity and arising under state laws applicable to that entity, "thus preserving the long-established rule that the law of the state of incorporation normally determines issues relating to the internal affairs of a corporation. The rule meets 'the need for certainty and

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[39] *Id.* § 1332(d)(9)(B).
[40] *Id.* § 1332(d)(9)(C).
[41] *Estate of Pew v. Cardarelli*, 2006 WL 3524488, at *5 (N.D.N.Y. Dec. 6, 2006).
[42] *Id.* at *6.
[43] *Id.* at *6 (citations omitted).
[44] *Id.* at *6 n.9 (citations omitted).
[45] 15 U.S.C.A. §§ 77p; 78bb.
[46] *Estate of Pew*, 2006 WL 3524488, at *6 n.9 (citations omitted).
[47] *Williams v. Texas Commerce Trust Co. of N.Y.*, 2006 WL 1696681, at *5 (W.D. Mo. June 15, 2006).

predictability of result while generally protecting the justified expectations of parties with interests in the corporation.'"[48]

The third category of excepted claims (the "security exception") "covers not only rights, duties and obligations conferred by the terms of security itself, such as voting rights, but also those rights, duties and obligations that are connected with the security."[49] Accordingly, claims involving "deceptive acts and practices by misrepresenting and concealing the true nature of the investment" fall within the exception.[50]

5. The "interest of justice" exception.

The one discretionary exception is the highly subjective "interest of justice" exception, which permits district courts to decline jurisdiction "in the interests of justice and looking to the totality of circumstances."[51] This exception applies only to class actions in which more than one-third but less than two-thirds of the members of the proposed class and the "primary defendants" are citizens of the state in which the action was originally filed.[52] To evaluate whether the interests of justices and totality of the circumstances dictate the exercise of jurisdiction over a particular class action, district courts are to consider several factors:

> (A) whether the claims asserted involve matters of national or interstate interest;
> (B) 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;
> (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
> (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
> (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
> (F) whether, during the three-year period preceding the filing of that class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.[53]

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[48] *Estate of Pew*, 2006 WL 3524488, at *6 n.10 (quoting *First Nat. City Bank v. Banco Para El Comercio*, 462 U.S. 611, 621 (1983)).
[49] *Estate of Pew*, 2006 WL 3524488, at *5.
[50] *Id.* at *5. One court has determined that the exception applies to claims related to trust indentures. *Williams*, 2006 WL 1696681, at *5.
[51] 28 U.S.C.A. § 1332(d)(3).
[52] *Id.* § 1332(d)(3).
[53] *Id.* § 1332(d)(3).

As one commentator has noted, the discretionary nature of this exception will enable judges to employ it as a gatekeeping mechanism.[54] Further, "[i]nstead of applying bright line rules that typically govern jurisdictional decisions, now courts will be able to make many subjective determinations regarding, for example, whether claims involve matters of national or interstate interest or whether the case has been pled to avoid federal jurisdiction."[55] In practice, this exception rarely has been litigated.[56]

V.
CAFA RELAXES RESTRICTIONS ON THE REMOVAL TO FEDERAL COURT OF CLASS ACTION LAWSUITS.

Although the most important and most litigated aspect of CAFA is its expansion of federal diversity jurisdiction, CAFA also relaxes and simplifies the requirements for removal of class actions to federal district courts. Generally, subject to certain exceptions, any civil action brought in a state court over which federal courts have original jurisdiction may be removed within 30 days of the defendant receiving the pleading from which it may be determined that the case is removable.[57] CAFA, through the enactment of 28 U.S.C. § 1453, liberalizes removal of class actions in several respects.

First, CAFA removes the one-year time limit under the general removal statute and, instead, leaves open-ended the time within which class actions can be removed under CAFA.[58] Second, CAFA removes the requirement that all defendants consent to removal and authorizes any defendant to request removal without the consent of the other defendants.[59] Third, CAFA does not preclude removal of a class action merely because a defendant is a citizen of the state in which the action was filed.[60]

CAFA also fosters removal by expanding appellate review of remand orders.[61] Ordinarily, a remand order is not reviewable,[62] but CAFA authorizes remand orders in class actions to be immediately appealed, subject to the court of appeals' agreement to accept the case.[63] CAFA also expedites the appellate timetable for remand orders. An appellant must file its notice of appeal within seven days,[64] and the court of appeals must

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[54] Suskin, 750 PLI/LIT at 233.
[55] *Id.*
[56] *Preston v. Tenet Healthsystem Mem'l Med. Ctr, Inc.*, 463 F. Supp. 2d 583, 594 (E.D. La. 2006) (holding that the interests of justice required remand to Louisiana state court); *Berthelot v. BOH Bros. Constr. Co., L.L.C.*, 2006 WL 2256995, at *5 (E.D. La. July 19, 2006).
[57] 28 U.S.C.A. §§ 1441, et seq.
[58] *Id.* § 1453(b).
[59] *Id.* § 1453(b); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 56 (2d Cir. 2006); *Miedema*, 450 F.3d at 1329.
[60] 28 U.S.C.A. § 1453(b).
[61] The portions of CAFA pertaining to appellate review apply only to the review of class actions brought under CAFA and not to any other class actions. *Saab v. Home Depot U.S.A., Inc.*, 469 F.3d 758, 759-60 (8th Cir. 2006); *Patterson v. Morris*, 448 F.3d 736, 742 (5th Cir. 2006); *Wallace v. Louisiana Citizens Prop. Ins. Corp.*, 444 F.3d 697, 700 (5th Cir. 2006).
[62] 28 U.S.C.A. § 1447(d).
[63] *Id.* § 1453(c).
[64] *Id.* § 1453(c)(1).

complete all action on the appeal, including rendering judgment, within 60 days (unless either by agreement of the parties or for good cause shown and in the interests of justice the court of appeals grants itself an extension).[65] The Second, Fifth, Seventh, Ninth, and Eleventh Circuits have all determined that 60-day time limit begins to run at the time the order granting leave to appeal is entered, not the date the petition for permission to appeal is initially filed.[66]

VI.
CAFA ESTABLISHES GUIDELINES TO PROTECT CLASS MEMBERS, INCLUDING A "CONSUMER CLASS ACTION BILL OF RIGHTS."

Another addition to the law of class actions introduced by CAFA is its so-called "consumer class action bill of rights," which is a collection of provisions designed to protect class members from settlements that benefit the attorneys for the class while providing little or no benefit to the class members. CAFA's "bill of rights":

(1) regulates "coupon settlements" (i.e., settlements in which the class members receive coupons rather than or in addition to monetary relief);[67]
(2) provides that a court may not approve a proposed settlement that requires any class member to pay sums to class counsel that would result in a net loss to the class member unless the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss;[68]
(3) prohibits judicial approval of a proposed settlement that provides greater awards to some class members on the basis that the better-paid class members are located in closer geographic proximity to the court;[69] and
(4) requires that specified state and federal officials be notified of all proposed class action settlements.[70]

The provisions of the "bill of rights" that regulate coupon settlements: (1) impose various restrictions on attorney's fees, (2) permit judicial approval of coupon settlements only if the court finds that the settlement is "fair, reasonable, and adequate for class members," and (3) authorize courts to require a settlement agreement to provide for a portion of the value of any unclaimed coupons to be donated to one or more charitable or

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[65] *Id.* § 1453(c)(2), (3).
[66] *DiTolla v. Doral Dental IPA of N.Y., LLC*, 469 F.3d 271, 274 (2d Cir. 2006); *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 678 (7th Cir. 2006); *Evans*, 449 F.3d at 1163-63; *Patterson*, 444 F.3d 365, 368 (5th Cir. 2006); *Amalgamated Transit Union Local 1309, AFL-CIO, v. Laidlaw Transit Serv., Inc.*, 435 F.3d 1140, 1144 (9th Cir. 2006).
[67] 28 U.S.C.A. § 1712.
[68] *Id.* § 1713.
[69] *Id.* § 1714.
[70] *Id.* § 1715.

governmental organizations, as agreed to by the parties (although this value cannot be included in the calculation of attorney's fees).[71]

If a coupon settlement awards contingent attorney's fees, those fees are based on the value to the class members of the redeemed coupons.[72] Attorney's fees that are not contingent on the recovery of the coupons (including fees attributable to obtaining equitable relief, such as injunctions) are to be based on "the amount of time class counsel reasonably expended working on the action."[73] The court has discretion, upon a party's motion, to receive expert testimony regarding the actual value to class members of the redeemed coupons.[74]

The notification provisions require notice to the appropriate state official in each state in which a class member resides, as well as to the appropriate federal official, within 10 days of when a proposed settlement of a class action is filed in court.[75] Courts are not permitted to give final approval to a proposed settlement until 90 days after all officials have been notified,[76] and any class member may choose not to be bound by a settlement agreement if that class member establishes that the required notifications were not provided.[77]

VII.
ADDITIONAL INTERPRETATION ISSUES

In addition to the provisions and issues discussed above, CAFA litigation has involved a variety of other issues, created in many instances by CAFA's silence on several topics.

A. Citizenship determined as of the date of filing.

In evaluating diversity under CAFA, the citizenship of proposed class members is determined as of the date of filing of the complaint or amended complaint, or, if the case started by the initial pleading is not subject to federal jurisdiction, as of the date of service by the plaintiffs of an amended pleading, motion, or other paper, indicating the existence of federal jurisdiction.[78]

CAFA refers to citizenship, rather than residency.[79] "The Eleventh Circuit has made clear that citizenship, not residency, is the focus of the court's inquiry. 'An

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[71] *Id.* § 1712.
[72] *Id.* § 1712(a).
[73] *Id.* § 1712(b)(1), (c).
[74] *Id.* § 1712(d).
[75] *Id.* § 1715(b).
[76] *Id.* § 1715(d).
[77] *Id.* § 1715(e).
[78] *Id.* § 1332(d)(7).
[79] *Id.* § 1332(d)(2)(A).

allegation of residence is insufficient to establish diversity jurisdiction. The plaintiff must allege citizenship.'"[80]

"A corporation is 'deemed . . . a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.'"[81] An unincorporated association is deemed to be a citizen of the state where it has its principal place of business and the state under whose laws it is organized.[82]

B. Commencement.

The most litigated issue related to CAFA is the question of when a lawsuit has "commenced." CAFA provides that it "shall apply to any civil action commenced on or after the date of enactment of this Act," which is February 18, 2005.[83] The issue of when a lawsuit is "commenced" for purposes of removal under CAFA is governed by state law, not federal law.[84] Although, in most cases, it is fairly clear whether a lawsuit has been commenced before or after February 18, 2005, there has been considerable litigation over situations in which a lawsuit that was filed prior to February 18, 2005, is amended after that date.

There is some disagreement as to whether a post-CAFA amendment to a lawsuit that was filed prior to CAFA creates, in effect, a new commencement of the lawsuit. The effect of the amendment to the lawsuit is often important. For example, there is agreement that routine changes in class definitions and claims allegations and the correction of scrivener's errors do not constitute a new commencement.[85] However, other categories of pleading amendments have proven more controversial.

The Tenth Circuit has investigated the courts' analyses of pleading amendments and has identified three distinct views on the effect of post-CAFA amendments on pre-CAFA lawsuits. The first view is "that a 'civil action' can 'commence' only once and, thus, [courts following this view] take the absolute position that if an action was commenced prior to CAFA's effective date, no post-CAFA amendment of the pleadings

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[80] *Scott v. ING Clarion Partners, LLC*, 2006 WL 3191184, at *3 (N.D. Ga. Oct. 31, 2006) (quoting *Kerney v. Fort Griffin Fandangle Assoc., Inc.*, 624 F.2d 717, 719 (5th Cir. 1980).

[81] *Blockbuster*, 472 F.3d at 59 (quoting 28 U.S.C.A. § 1332(c)(1)); *Lao*, 455 F. Supp. 2d at 1061 (quoting *Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990)).

[82] 28 U.S.C.A. § 1332(d)(10).

[83] S. 5, 109th Cong. § 9.

[84] *See, e.g., Braud v. Transport Serv. Co. of Ill.*, 445 F.3d 801, 803 (5th Cir. 2006); *Plubell v. Merck & Co.*, 434 F.3d 1070, 1071-72 (8th Cir. 2006); *Buller Trucking Co. v. Owner Operator Ind. Driver Risk Retention Group, Inc.*, 461 F. Supp. 2d 768, 775 (S.D. Ill. 2006); *Werner v. KPMG LLP*, 415 F. Supp. 2d 688, 695 (S.D. Tex. 2006).

[85] *Patterson*, 448 F.3d at 739-40 (holding that, under Louisiana law, commencement was unaffected by clerk's error that resulted in plaintiff filing additional filing fees after CAFA's effective date for lawsuit filed prior to CAFA's effective date); *Phillips v. Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2006) (holding that addition and substitution of plaintiffs was "routine" and not a commencement); *Bemis v. Allied Prop. & Cas. Ins. Co.*, 2006 WL 1064067, at *6 (S.D. Ill. Apr. 20, 2006) (holding that addition of class representative was not a commencement); *Schillinger v. Union Pac. R.R. Co.*, 425 F.3d 330, 333 (7th Cir. 2005) (holding that scrivener's error could not create jurisdiction); *Werner*, 415 F. Supp. 2d at 700.

can bring the Act into play."[86] The second view with respect to post-CAFA amendments, which was ultimately adopted by the Tenth Circuit, is that "the relation-back analysis controls the commencement question for all amendments, no distinction being made for amendments adding new defendants."[87] The third view, which is followed by the Fifth Circuit, holds that "the relation-back analysis controls for all amendments except those adding defendants, which are categorically treated as commencing a new case as to the added defendants."[88]

The first view appears to be the minority position, and most courts hold that, at least in some circumstances, a post-CAFA amendment can create a new commencement. The majority of courts "also generally agree that whether an amendment is distinct enough to give rise to a new commencement date is properly gauged by the forum state's law governing the relation-back of pleading amendments."[89] If the amendment "relates back" to the filing date of the original complaint, "then the case is not removable, but if it does not, the case is subject to removal under CAFA."[90]

Regarding specific categories of amendments, some courts have held that an amendment that enlarges the size of the class without adding a new named party constitutes a new commencement,[91] and some courts have held that a new commencement occurs when a plaintiff is added who asserts claims that are different from the prior named plaintiff.[92] However, other courts have held that amendments to class definitions and the addition of new plaintiffs do not create a new commencement.[93]

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[86] *Prime Care of Northeast Kan., LLC v. Humana Ins. Co.*, 447 F.3d 1284, 1285 (10th Cir. 2006); *see also Comes v. Mircosoft Corp.*, 403 F. Supp. 2d 897, 903 (S.D. Iowa 2005); *Weekley v. Guidant Corp.*, 392 F. Supp. 2d 1066, 1067-68 (E.D. Ark. 2005).

[87] *Prime Care*, 447 F.3d at 1286; *see also Plubell*, 434 F.3d at 1071-72.

[88] *Prime Care*, 447 F.3d at 1286; *Braud*, 445 F.3d at 804-09.

[89] *Prime Care*, 447 F.3d at 1286; *Eufaula Drugs, Inc. v. TMESYS, Inc.*, 432 F. Supp. 2d 1240, 1245 (M.D. Ala. 2006) ("Whether an action has commenced in state court is generally controlled by state law."); *In re General Motors Corp. Dex-Cool Prods. Liab. Litig.*, 2006 WL 2818773, *3 (S.D. Ill. Sept. 27, 2006) ("In general courts apply the law of the state where a class action was filed to determine whether an amendment of a class-action complaint after the effective date of CAFA has commenced the action for purposes of removal under the statute."). However, some courts have suggested that the federal relation-back rule rather than the corresponding state rules should be used in determining the effects of pleading amendments under CAFA. *See Werner*, 415 F. Supp. 2d at 701 ("It is less clear whether state or federal law governs the 'relation back' analysis under CAFA.").

[90] *Buller*, 461 F. Supp. 2d at 772.

[91] *Senterfitt v. Suntrust Mortgage, Inc.*, 385 F. Supp. 2d 1377, 1379-81 (S.D. Ga. 2005); *see also Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310, 1315-17 (E.D. Okla. 2005) (holding that amendment that transformed lawsuit from individual action to class action constituted a new commencement).

[92] *Heaphy v. State Farm Mut. Auto Ins. Co.*, 2005 WL 1950244, at *3-5 (W.D. Wash. Aug. 15, 2005); *Plummer*, 388 F. Supp. 2d at 1315.

[93] *See, e.g., Schillinger*, 425 F.3d at 334; *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 750 (7th Cir. 2005).

Courts likewise disagree as to whether an amendment that adds new claims constitutes a new commencement.[94] The Southern District of Texas has examined the appellate cases examining the effect of pleading amendments that add new claims and found that, while the courts have differed in their outcomes, they "have used a consistent approach."[95] "When a pending suit is amended in state court to add a new claim, courts look to relation-back rules as a way of analyzing whether the amendment so changes the action as to commence a new action rather than merely continue the previously-filed suit."[96]

Courts appear to agree that an amendment that adds a new defendant creates a new commencement, at least as to the new defendant.[97] The Fifth Circuit has held that a new lawsuit commences as to a new defendant added after the effective date of CAFA, that the newly added defendant may remove the entire lawsuit under CAFA, and that, if that defendant chooses to remove the lawsuit, the plaintiff cannot defeat removal and federal jurisdiction by subsequently dismissing the new defendant.[98] However, one district court has determined that in the context of a "mass action" under CAFA, a newly added defendant can remove only the portion of the lawsuit that relates to that defendant and cannot remove the entire lawsuit.[99]

Finally, several courts of appeals and district courts have examined whether a defendant's removal, after the effective date of CAFA, of a state court action that was pending prior to CAFA's effective date constituted the commencement of the action. The courts have rejected this notion and held that "commencement" under CAFA refers to when the lawsuit is filed in state court, not when it is removed.[100]

C. Burden of proof.

Generally, defendants have the burden of establishing federal court jurisdiction in the removal context.[101] Although CAFA is silent on the burden of proof,[102] some courts have held that CAFA's dubious legislative history suggests that it has shifted the burden of proof to plaintiffs (or the non-removing parties) to show that federal jurisdiction does

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[94] *Knudsen v. Liberty Mut. Ins. Co.*, 435 F.3d 755, 758 (7th Cir. 2006) (holding that new claims constitute a new commencement); *Moniz v. Bayer A.G.*, 447 F. Supp. 2d 31, 38 (D. Mass. 2006) (holding that "a new claim arising out of the addition of a new product . . . that was not previously part of the litigation" constituted a new commencement); *McAnaney v. Astoria Fin. Corp.*, 2005 WL 2857715, at *3 (E.D.N.Y. Nov. 1, 2005) (holding that new claim was not a commencement because claim "related back" to original claim); *Richina v. Maytag Corp.*, 2005 WL 2810100, at *3 (E.D. Cal. Oct. 26, 2005) (holding that new claims did not constitute a commencement where they were substantively similar to old claims).

[95] *Werner*, 415 F. Supp. 2d at 701.

[96] *Id.*

[97] *Id.* at 700; *Robinson v. Holiday Universal, Inc.*, 2006 WL 470592, *2 (E.D. Pa. Feb. 23, 2006).

[98] *Braud*, 445 F.3d at 804-09.

[99] *Lowery v. Honeywell Int'l, Inc.*, 460 F. Supp. 2d 1288, 1295 (N.D. Ala. 2006).

[100] *See, e.g., Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 686 (9th Cir. 2005); *Natale v. Pfizer, Inc.*, 424 F.3d 43, 44 (1st Cir. 2005); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1094 (10th Cir. 2005); *Pfizer, Inc. v. Lott*, 417 F.3d 725, 726 (7th Cir. 2005).

[101] *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 682-83 (9th Cir. 2006).

[102] *Werner*, 415 F. Supp. 2d at 694.

not exist.[103] However, the majority of courts, including the Southern District of Texas, have determined that CAFA's silence on the burden of proof indicates that no change was intended and that defendants retain the burden when a motion to remand is filed.[104] Similarly, there is disagreement as to who bears the burden of proving the amount in controversy relative to CAFA's $5 million threshold.[105]

With respect to CAFA's exceptions to jurisdiction, the Fifth, Seventh, and Eleventh Circuits have held that it is the burden of the plaintiff (or the non-removing party) to prove that the "local controversy" and "home state" exception to CAFA applies.[106] However, at least one district court has expressly rejected the holdings of these courts of appeals and determined that the burden lies on the removing party to establish that the exceptions do not apply.[107] One court, limiting its holding to situations in which CAFA arises in a class action lawsuit that is originally filed in federal court (rather than state court), has held that the burden of proof regarding the CAFA exceptions lies with "the party seeking to avail itself of [the] exception."[108]

Even where the plaintiff has the burden of proof, if the defendant has the information necessary to establish whether federal jurisdiction is appropriate, the district court may order the defendant to produce that information to the plaintiff.[109]

D. Beware of legislative history.

One of the most controversial aspects of CAFA is the use, as an interpretive tool, of a report on CAFA issued by 13 Senators on the Senate Judiciary Committee 10 days after CAFA was enacted. Although this report has been cited on several occasions by courts left with few other sources with which to interpret CAFA's many gaps, undefined terms, and confusing provisions, the report has been widely and harshly criticized and is of highly questionable value.

There are three main criticisms of the report. First, the report was issued 10 days after CAFA was enacted. "Given that the committee's report was issued nearly two weeks *after* CAFA was enacted into law, using the Senate Report's post-statutory enactment commentary arguably runs afoul of the canon that legislative history unconnected to the enactment of a specific statute is given little interpretative weight."[110] "The fact that the committee report was issued *after* CAFA had already been enacted into

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[103] *Berry v. American Express Publ'g Corp.*, 381 F. Supp. 2d 1118, 1122-23 (C.D. Cal. 2005).
[104] *See, e.g., Blockbuster, Inc.*, 472 F.3d at 57-58; *Morgan*, 471 F.3d at 473; *Abrego*, 443 F.3d at 682-85; *Brill*, 427 F.3d at 448; *Werner*, 415 F. Supp. 2d at 695; *Gladstone Florist, LLC v. TTP, Inc.*, 2006 WL 3827518, at *1 (W.D. Mo. Dec. 28, 2006); *Eufaula Drugs*, 2006 WL 986976, at *3.
[105] *Ongstad*, 407 F. Supp. 2d at 1090-91 (holding that removing party bears burden of proving amount in controversy); *Yeroushalmi v. Blockbuster, Inc.*, 2005 WL 2083008, at *2-3 (C.D. Cal. July 11, 2005) (holding that plaintiff has the burden of proving that the damages sought do not exceed $5 million).
[106] *Hart*, 457 F.3d at 680-81; *Frazier*, 455 F.3d at 546; *Evans*, 449 F.3d at 1165; *see also Gauntt*, 2007 WL 128801, at *1.
[107] *Lao*, 455 F. Supp. 2d at 1055-60.
[108] *Mattera v. Clear Channel Comm., Inc.*, 239 F.R.D. 70, 79 (S.D.N.Y. 2006).
[109] *Preston v. Tenet Healthsystem Mem'l Med. Ctr, Inc.*, 463 F. Supp. 2d 583, 592-93 (E.D. La. 2006).
[110] *Lao*, 455 F. Supp. 2d at 1051.

law should give pause as to whether the legislative history truly reflects the views of the enacting Congress, or whether the issuance of the report was meant to declare the intent of particular members, their staff, or lobbyists seeking to achieve what they could not through passage of the statutory text itself."[111]

The second criticism of the report is that it was authored by a "small subset of the voting body of the Senate."[112] As one court has noted, this calls into question whether the report truly reflects the intent of Congress or whether it amounts to little more than "after-the-fact bolstering or 'shaping'" of CAFA.[113] Or, as the Ninth Circuit has stated, when searching for a statement of legislative intent sufficient to support changes in federal jurisdiction, "[a] declaration by 13 Senators will not serve."[114]

The third criticism of the report is that, in many areas, it is less of an interpretation of CAFA than it is an attempt to add provisions to the statute that were not contained in the statute that was actually enacted into law. "The problem is that the report speaks to nothing in the statute itself; instead, the report seeks to fill in the gaps caused by the statute's silence on the point. Such use of legislative history is ill-advised."[115]

As a result, courts have declared that the report's "probative value for divining legislative intent is minimal,"[116] that it "has limited persuasive value,"[117] that it "is entitled to exceptionally little weight,"[118] and that reliance on the report would "ignore the Constitution's requirement of bicameralism and presentment."[119] Nonetheless, several courts have continued to rely on the report to interpret CAFA's particularly mysterious provisions.

E. The typographical error: "less" means "more."

Another bizarre aspect of CAFA is that it contains a surprising and obvious typographical error. Regarding CAFA's provision for appealing a remand order, CAFA states that a court of appeals may accept an appeal from an order denying a motion to remand if it is made "not *less* than seven days" after entry of the remand order."[120] Clearly, Congress was attempting to set a seven day limit within which such appeals must be sought and meant "more" when it wrote "less." The courts have agreed that the statute was erroneously written and that the provision should be read to mean "not more than seven days."[121]

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[111] *Id.* at 1052.
[112] *Lowery*, 460 F. Supp. 2d at 1294.
[113] *Id.*
[114] *Abrego*, 443 F.3d at 685-86 (quoting Brill, 427 F.3d at 448).
[115] *Lao*, 455 F. Supp. 2d at 1051.
[116] *Blockbuster*, 472 F.3d at 58.
[117] *Lowery*, 460 F. Supp. 2d at 1294.
[118] *Abrego*, 443 F.3d at 687.
[119] *Blockbuster*, 472 F.3d at 58.
[120] 28 U.S.C.A. § 1453(c)(1) (emphasis added).
[121] *Morgan*, 466 F.3d at 277; *Amalgamated Transit Union Local 1309*, 435 F.3d at 1146; *Miedema*, 450 F.3d at 1326 (11th Cir. 2006); *Pritchett*, 420 F.3d at 1093 n.2.

The Eleventh Circuit explained the reason that the statute should be read as it was apparently intended to read (i.e., "not more than seven days"), rather than as written:

> We now reaffirm that construction of § 1453(c)(1), for to read it literally would produce an absurd result: there would be a front-end waiting period (an application filed 6 days after entry of a remand order would be premature), but there would be no back-end limit (an application filed 600 days after entry of a remand order would not be untimely). When applying the plain and ordinary meaning of statutory language "produces a result that is not just unwise but is clearly absurd, another principle comes into the picture. That principle is the venerable one that statutory language should not be applied literally if doing so would produce an absurd result."[122]

F. "Mass actions" are class actions . . . sometimes.

Another confusing aspect of CAFA are its references to "mass actions." With some exceptions, a class action under CAFA also includes "mass actions" in which the monetary claims of 100 or more persons are to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, even if the action is not certified as a class action.[123] However, a mass action is not subject to CAFA if:

(1) all of the claims in the action arise from an event or occurrence in the state in which the action was filed, and the event or occurrence allegedly resulted in injuries in that state or in states contiguous to that state;
(2) the claims are joined upon the motion of a defendant;
(3) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a state statute specifically authorizing such an action; or
(4) the claims have been consolidated or coordinated solely for pretrial proceedings.[124]

Mass actions differ from true class actions in that federal subject matter jurisdiction over mass actions extends only to those individual claims that meet the general jurisdictional amount in controversy requirement of $75,000 mandated by 28 U.S.C. § 1332(a).[125] Further, where a mass action has been removed to federal court, CAFA requires: (1) the action cannot subsequently be transferred to any other court via the federal multidistrict litigation statute[126] unless a majority of the plaintiffs request the transfer; and (2) the limitations periods governing claims asserted in the action are tolled

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[122] *Miedema*, 450 F.3d at 1326 (quoting *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1188 (11th Cir. 1997).
[123] 28 U.S.C.A. §§ 1332(d)(11)(A), (B)(i).
[124] *Id.* § 1332(d)(11)(B)(ii).
[125] *Id.* § 1332(d)(11)(B)(i).
[126] 28 U.S.C.A. § 1407.

during the period in which the action is pending in federal court.[127] There has been little examination of "mass actions" by the courts.[128]

VIII.
CONCLUSION

In light of the passage of CAFA, it is likely that most class actions involving oil and gas will be litigated in federal court. The intent of CAFA was to expand federal subject matter jurisdiction over class action lawsuits and, with some exceptions, take class actions out of state courts and place them in federal courts. Although CAFA appears to be successful in doing just that, its effectiveness has been hampered by Congress' poor drafting of the statute, including large gaps, undefined terms, and confusing provisions. That CAFA is an important statutory scheme loaded with issues of interpretation guarantees significant litigation over its applicability.

[127] *Id.* §§ 1332(d)(11)(C), (D).

[128] The Northern District of Alabama has applied the mass action provisions of CAFA. *See Lowery*, 460 F. Supp. 2d 1288.