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Two Years Later

# The Class Action Fairness Act of 2005

By Bradley C. Nahrstadt and Brian Y. Boyd

Perhaps the biggest story about the first two years of the Class Action Fairness Act (“the Act”) is that it *wasn’t* such a big story. Like the demise of Mark Twain, rumors of the death of class actions appear to have been greatly exaggerated, and considering the touted significance of the legislation, its enactment marked a relatively smooth legal transition. Neverthe-

less, there have been significant areas of uncertainty and disagreement among the judiciary on important aspects of the Act’s application.

The most immediate concern facing district court judges was determining whether the Act applied to cases pending at the time of the Act’s passage. A more fundamental question that arose following the passage of the Act was determining which party shoulders the burden of proof in establishing federal jurisdiction under the Act. Although interpretation of the Act’s subject-matter carve-outs has not, thus far, been a source of major confusion, the “Mass Action” provision has been branded “bewildering” by the Ninth Circuit Court of Appeals.

The purpose of this article is to survey, briefly, the impact of the Class Action Fairness Act during its first two years of ex-

istence, to describe controversial areas of its interpretation, and to highlight the most important issues relating to the Act’s application in the future.

## The Impact of the Class Action Fairness Act

Judging the efficacy of the Class Action Fairness Act based on its first two years of existence depends largely on one’s perspective of what the Act was intended to accomplish. For those who considered the Act a raw exercise of lobbying power by big business designed to eliminate or sharply curtail class action liability, the Act has failed to live up to expectations. For those who had hoped that the Act would result in more class action lawsuits being filed or transferred into the federal courts, the Act has largely been a success. Perhaps the most unexpected development concerning the Act is the fact that some corporate defendants are reluctant to invoke it.

During the public debate about the Class Action Fairness Act, many placed specific emphasis on the mechanisms that would limit plaintiffs’ choice of venue and potentially make it more difficult for class plaintiffs to seek relief from the courts. Ignored to some degree were less controversial, but equally important, portions of the Act that sought to reign in non-monetary settlements that offered questionable value to class plaintiffs. So-called “coupon settlements” that had little or no cash value were routinely assessed at full or near full value for purposes of computing the prevailing attorney’s contingency fee, creating what some saw as a conflict of interests for the plaintiffs’ attorney and an incentive to pursue frivolous litigation. The Act charged federal courts with the responsibility to review such settlements critically to determine whether they are in the best interest of the class plaintiffs before approving them.

Whatever truth there was to the supposition that plaintiffs’ attorneys had a pecuniary interest in favoring coupon settlements, it is equally, if not more, true that defendant corporations favored such settlements for their own bottom line. For the same reason that coupon settlements had little or no cash value to the prevailing plaintiffs, they often had little or no cash *cost* to the settling corporate defendants. Since most coupons re-



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quired some purchase of goods or services in order to realize any benefit, each coupon that was redeemed meant additional business for the defendant that, but for the settlement, it might not have received. In some cases it was suspected that the settling defendant would ultimately break even, if not profit, from the settlement. S. REP. NO. 108-123 at 16, 2003 WL 21321526 (2003) (citing *American Airlines Settles Lawsuits Over Frequent Flier Program*, Fort Worth Star-Telegram, June 22, 2000). This suspicion could garner support from the fact that since its enactment, class action defendants have not automatically sought removal of cases when the Act provides a jurisdictional basis to do so. As one commentator has noted, “For cases filed after the [Act], the issue of ‘Can we remove a case?’ is generally yes, but the issue of ‘whether to remove’ is much more cloudy.” Peter Geier, *CAFA a Year Later? Not so Bad*, THE NATIONAL LAW JOURNAL, March 6, 2006 (quoting class action defense attorney Wilson F. Green of Battle Fleenor Green Winn & Clemmer of Birmingham, Ala.).

Despite these criticisms, class action lawsuits are on the rise in federal courts, whether measured by original filings or by removals. Thomas E. Willging and Emery G. Lee III, *The Impact of the Class Action Fairness Act of 2005—Third Interim Report to the Judicial Conference Advisory Committee on Civil Rules* (“Third Interim Report”), Federal Judicial Center, April 2007, at [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0407.pdf/\\$file/cafa0407.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0407.pdf/$file/cafa0407.pdf), p. 2. Early data from the Federal Judicial Center suggests that the Act has reversed a long-term downward trend in diversity cases in federal court. Third Interim Report, at 14. The same report found a 46 percent increase in class action litigation before the federal courts. *Id.* At the same time, the drop in class action filings in so-called “judicial hell holes” has been nothing short of precipitous. Madison County, Illinois, which served as the initiating court for 106 class action lawsuits in 2003 and 84 in 2004, saw just 49 class action suits filed in its courts in 2005 and 2006 combined, only 10 of which postdated the Act becoming law in early 2005. Amy Knef, *Class Action Fairness Act: Is It Working?*, THE RECORD, March 21, 2006 (noting the number of class actions filed in from 2003 to 2005); Adam Jad-

hav, *Lawsuit Filings Continue to Fall in the Metro East*, St. Louis Post-Dispatch, January 4, 2007 (noting the number of class actions filed in Madison County in 2006). The cases that are no longer being filed in Madison County appear to have found their way into federal, or alternatively Delaware, courts. Shruti Daté Singh, *‘Judicial hellhole’ freezes over*, Chicago Business (Crain’s),

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There is a split of authority  
regarding whether the relation-  
back test should be applied  
to amendments that add  
new defendants to a case.

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September 9, 2006, at <http://chicagobusiness.com/cgi-bin/news.pl?id=21997>.

### When Does a Case “Commence” for Purposes of the Act?

The Class Action Fairness Act of 2005 applies to any civil action commenced on or after the date of its enactment, February 18, 2005. In anticipation of the Act becoming law, there was a flurry of class action cases filed in plaintiff-favored venues, such as Madison County, Illinois. Brian Brueggeman, *Study Expects Sharp Dip in County’s Class Actions*, Belleville News-Democrat (February 20, 2005). Although it is clear that the Act does not apply retroactively to such cases, questions soon arose when cases that were filed before the Act took effect were amended to include new parties or new claims after the Act was in place. Plaintiffs, naturally, argued that such amendments related back to the original filing date, while defendants likened the amendments to brand new claims that should make them subject to removal under the Act.

A minority of courts, seizing on the language: “commencement of a civil action,” held that because the act of amending a complaint does not commence a civil action, an amendment cannot invoke the application of the Act. *See, e.g., McAtee v. Capital One*, 479 F.3d 1143, 1146–

47 (9th Cir. 2007) (substitution of named defendant for Doe defendant does not commence civil action for purposes of CAFA); *Progressive West Ins. Co. v. Preciado*, 479 F.3d 1014, 1016–17 (9th Cir. 2007) (amendment to cross-complaint in state court does not commence civil action for purposes of CAFA); *see also Lowery v. Honeywell Int’l, Inc.*, 460 F. Supp. 2d 1288, 1292 (N.D. Ala. 2006); *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310, 1315–16 (E.D. Okla. 2005); *Weekley v. Guidant Corp.*, 392 F. Supp. 2d 1066, 1068 (E.D. Ark. 2005); *Comes v. Microsoft Corp.*, 403 F. Supp. 2d 897, 903 (S.D. Iowa 2005); *In re Expedia Hotel Taxes & Fees Litigation*, 377 F. Supp. 2d 904, 906 (W.D. Wash. 2005).

In explaining this reasoning, the Ninth Circuit Court of Appeals stated:

Because of the difference in stakes in statute of limitations and CAFA cases, the considerations that have gone into the formulation of the relation back doctrine have relatively little bearing on whether CAFA should apply to a class action filed in state court. In a CAFA case, we need be less concerned about avoiding unfair surprise of a defendant, and more concerned about having a clear and easy-to-follow rule. We therefore held in *Preciado* that, in the absence of any clear indication in state law to the contrary, relation back doctrine should not be imported into the determination of when an action is commenced in state court for purposes of CAFA. Instead, at least in California, we simply look to the date on which the original complaint was filed.

*McAtee*, 479 F.3d at 1147 (citations omitted). Thus, according to the courts that follow the *McAtee* line of reasoning, any amendment—whether adding or replacing plaintiffs or defendants or adding new causes of action—does not change the date of commencement.

The majority of courts have applied the standard “relation back” test, under either FEDERAL RULE OF CIVIL PROCEDURE 15(c) (*see, e.g., New Century Health Quality Alliance, Inc. v. Blue Cross and Blue Shield of Kansas City, Inc.*, No. 05-0555-CVWSOW, 2005 WL 2219827 (W.D. Mo. Sept. 13, 2005); *Judy v. Pfizer, Inc.*, No. 4:05CV1208RWS, 2005 WL 2240088 (E.D. Mo. Sept. 14, 2005); *see also Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805,

806 (7th Cir. 2005); *Plubell v. Merck & Co., Inc.*, 434 F.3d 1070 (8th Cir. 2006) (applying the two-prong approach of Rule 15(c)(3), the court found that the amendment of a petition to substitute a new class representative related back to the date of the original petition) or the law of the forum state [see, e.g., *Prime Care of Northeast KS, LLC v. Humana Ins. Co.*, 447 F.3d 1284, 1286 (10th Cir. 2006) (“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”)]; *Braud v. Trans. Serv. Co. of Ill.*, 445 F.3d 801 (5th Cir. 2006) (relation-back analysis controls for all amendments except those adding new defendants, which are always treated as commencing a new action for purposes of CAFA); *Hall v. State Farm Mut. Auto. Ins. Co.*, No. 05-2530, 2007 WL 215662, at \*3, n.1 (6th Cir. Jan. 29, 2007) (“This rule has apparently been adopted by every court that has addressed the question.”), to determine if a post-Act amendment is minor enough to relate back to the original complaint or substantial enough to be considered a new action that should be subject to the Act. Under this analysis, “[I]f a post-CAFA amended complaint relate[s] back to a pre-CAFA original complaint, a federal court will not have jurisdiction under CAFA.” Lianne S. Pinchuk, *The Class Action Fairness Act—The Meaning of ‘Commenced’ After One Year*, PRODUCT LIABILITY LAW & STRATEGY, at 5 (August 2006).

Among courts that generally apply the relation-back test, there is a split of authority regarding whether the relation-back test should be applied to amendments that add new defendants to a case. Some courts have found that such amendments are *de facto* commencements of new actions. See, e.g., *Braud*, 445 F.3d at 804–09. Other courts have held that the relation-back test should be dispositive of any amendment, whether it adds new defendants or not. See, e.g., *Prime Care*, 447 F.3d at 1289.

Where the relation-back test is applied, the courts engage in a fact-specific determination from which few generalities can be made. In at least one case, for example, the court found that an amendment to a class action complaint did not relate back to the originally filed complaint where the class definition was dramatically expanded. See *Sen-*

*terfitt v. Suntrust Mortg., Inc.*, 385 F. Supp. 2d 1377, 1380 (S.D. Ga. 2005). Nor did the court find that the relation back doctrine applied in a class action case where a new plaintiff and new claims were added to the original complaint. See *Heaphy v. State Farm Mutual Automobile Ins. Co.*, No. C05 5404RBL, 2005 WL 1950244 (W.D. Wash. Aug. 15, 2005). Other courts, however, have found that amendments expanding a class definition did relate back to the original complaint, thereby precluding the application of the Class Action Fairness Act. See *Schillinger v. Union Pacific Railroad Co.*, 425 F.3d 330, 334 (7th Cir. 2005); *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748 (7th Cir. 2005).

Despite some of the uncertainties of the relation-back test, it is a familiar paradigm that gives plaintiffs some level of predictability when weighing the risks and benefits of amending a pre-Act complaint.

### Jurisdictional Burden of Proof

The question of which party bears the burden of proving that federal jurisdiction exists under the Act was, at first, hotly contested. Under the Act, there are several prerequisites to the invocation of federal jurisdiction. According to the Act, the district courts shall have original jurisdiction over any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000. If this monetary threshold is satisfied, the case can be filed in federal court, or removed to federal court, so long as the citizenship of at least one member of the plaintiff class is diverse from at least one defendant. If one-third or fewer of the proposed class members are citizens of the original forum state, the federal court must retain jurisdiction and hear the case.

According to the Act, the federal courts must decline to exercise jurisdiction over a class action in which (1) greater than two-thirds of the members of all proposed plaintiff classes are citizens of the state in which the action was originally filed, (2) at least one defendant is a defendant from whom significant relief is sought, whose conduct forms a significant basis for the claims asserted and who is a citizen of the

state in which the action was originally filed, (3) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the state where 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 same defendants. In addition, under the Act, a district court shall decline to exercise jurisdiction over a class action in which two-thirds or more of the plaintiffs and the primary defendants are citizens of the state in which the action was originally filed.

As a practical matter, the focus of these inquiries is on the plaintiff, and therefore, the plaintiff is in the best position to provide the information necessary to determine if the Act can be invoked to allow a case to be filed in or removed to federal court. And indeed, the legislative history of the Act states:

[T]he named plaintiffs should bear the burden of demonstrating that the removal was improvident (*i.e.*, that the applicable jurisdictional requirements were not satisfied.) And if a federal court is uncertain about whether [the amount in controversy requirement is met], the court should err in favor of exercising jurisdiction over the case.

S. REP. NO. 109-14, at 42 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3. On that basis, several courts that initially addressed this issue concluded that where the defendants invoked the Act for removal jurisdiction, the Act placed the burden on the plaintiffs to disprove the defendants’ assertion that the jurisdictional requirements were met. See, e.g., *Berry v. American Express Publishing Corp.*, 381 F. Supp. 2d 1118 (C.D. Cal. 2005); *Harvey v. Blockbuster Inc.*, 384 F. Supp. 2d 749 (D.N.J. 2005); *Yeroushalmi v. Blockbuster Inc.*, No. CV 05-225-AHM(RCX), 2005 WL 2083008 (C.D. Cal. July 11, 2005).

However, despite the aforementioned legislative history and early decisions, most removing defendants these days have found little success in shifting the burden of proof from themselves to the plaintiffs who are seeking remand. See, e.g., *Blockbuster, Inc. v. Galeno*, 472 F.3d 53 (2d Cir. 2006); *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005). As

the Ninth Circuit Court of Appeals stated in *Abrego Abrego v. The Dow Chemical Co.*, “The legal context in which the 109th Congress passed CAFA into law features a longstanding, near-canonical rule that the burden on removal rests with the removing defendant.” 443 F.3d at 684. The *Abrego* court followed the reasoning of the Seventh Circuit Court of Appeals in *Brill*, 427 F.3d 446, which warned against relying on the legislative history of the Act: “Thirteen Senators signed this report and five voted not to send the proposal to the floor. Another 82 Senators did not express themselves on the question; likewise 435 Members of the House and one President kept their silence.” *Brill*, 427 F.3d at 448. In *Blockbuster, Inc. v. Galeno*, 472 F.3d at 58, the Second Circuit Court of Appeals further noted: “[T]he Senate report was issued ten days after the enactment of the CAFA statute, which suggests that its probative value for divining legislative intent is minimal.” Although the *Brill*, *Abrego* and *Galeno* courts acknowledged that legislative history may be used to clarify any ambiguity that exists in a law, these courts did not find that any such ambiguity existed in the Act’s silence on the jurisdictional issue.

This lack of ambiguity was highlighted in a recent opinion issued by the United States District Court for the Eastern District of Missouri. In *Judy v. Pfizer, Inc.*, 2005 WL 2240088, the court had the following to say about the jurisdictional burden of proof:

At the time of the enactment of the CAFA, Congress was presumed to be aware of the well settled case law regarding the burden of proof in removed actions. A court may resort to legislative history to interpret a statute when it contains an ambiguity. Absent some ambiguity in the statute, there is no occasion to look to legislative history. The 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. By 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 CAFA it could have explicitly done so.

*Judy*, 2005 WL 2240088, at \*2 (citations omitted). See also *Lowery v. Al. Power Co.*, 483 F.3d 1184 (11th Cir. 2007).

Though nearly all courts are now in agreement that the defendants bear the burden of proving federal jurisdiction, the quantum of proof necessary to prove jurisdiction in the federal courts is still subject to interpretation. In *Brill*, the amount in controversy was relatively easy to ascertain. The defendant allegedly sent unsolicited faxes to a class of over 100 plaintiffs in violation of the Telephone Consumer Protection Act, 47 U.S.C. §227, which allowed for damages of \$500 per fax—an amount that could be trebled if the defendant acted in knowing disregard for the law. The defendant admitted to sending at least 3,800 faxes to the plaintiff class. Based on the number of faxes, and the treble damages provision, simple multiplication showed that the plaintiffs’ award could reach \$5.7 million. The Seventh Circuit held:

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. Once the proponent of jurisdiction has set out the amount in controversy, only a ‘legal certainty’ that the judgment will be less forecloses federal jurisdiction.

*Brill*, 427 F.3d at 449. Interestingly, one such “legal certainty” that the *Brill* court discussed was if the plaintiffs had expressly capped their claim in the complaint at \$5 million. *Id.* According to the *Brill* court, such a cap would preclude jurisdiction under the Act. *Id.*

Such a “cap” was recently successful in precluding jurisdiction under the Act, where the plaintiff’s complaint stated, in relevant part:

The total amount in controversy as to the Plaintiff and each member of the Proposed Class does not exceed seventy-four thousand nine-hundred and ninety-nine dollars (\$74,999) each, exclusive of interest and costs. Plaintiff disclaims any compensatory damages, punitive damages, declaratory, injunctive, or equitable relief greater than (\$74,999) per individual Class member. Plain-

tiff and the Proposed Class limit their total class wide claims to less than four million-nine hundred and ninety-nine thousand nine hundred and ninety-nine dollars (\$4,999,999.00)....

*Smith v. Nationwide Property and Cas. Ins. Co.*, 2007 WL 2819875, at \*1 (6th Cir. Oct. 1, 2007). Relying on the familiar principle of law that the plaintiff is master of his or her own complaint, the Sixth Circuit Court of Appeals found that this disclaimer effectively prevented a federal court from exercising jurisdiction of the case under the Act. *Smith v. Nationwide Property and Cas. Ins. Co.*, 2007 WL 2819875, at \*5; but see *Williamson v. Aetna Life Ins. Co.*, 481 F.3d 369 (6th Cir. 2007) (finding that, despite the plaintiffs’ attempts to limit damages in its complaint, the defendant successfully invoked jurisdiction under the Act by showing that damages were nevertheless likely to exceed the jurisdictional amount.).

In *Abrego*, unlike *Brill*, there was no clear way to quantify the plaintiffs’ damages. *Abrego* was a product liability case in which the defendants attempted to remove the suit as a “mass action” under the Act. As a “mass action” the defendants had the burden of proving both the \$5 million aggregate amount in controversy as well as that one or more of the individual claims exceeded \$75,000. *Abrego*, 443 F.3d at 687. The plaintiffs in *Abrego* numbered 1,160, and in order to meet jurisdictional requirements in state court, their claims had been pled as amounting to more than \$25,000 each. The Ninth Circuit conceded that the number of plaintiffs, multiplied by the jurisdictional amount pled, clearly proved that more than \$5 million in aggregate was in controversy. The court held, however, that the defendants failed to prove that even a single plaintiff’s claim exceeded the \$75,000 threshold, and therefore, the case was not removable under the Act.

Despite the fact that the plaintiffs in *Abrego* claimed “serious injuries” including “sterility,” and sought punitive damages, attorneys’ fees, costs and interest, the Ninth Circuit rejected this as evidence that their individual claims exceeded \$75,000. According to the court, “[A]ttempting to recite some magical incantation, neither overcome[s] the strong presumption against removal jurisdiction, nor satisf[ies]

[the defendant]’s burden of setting forth, in the removal petition itself, the underlying facts supporting its assertion that the amount in controversy exceeds \$75,000.” *Abrego*, 443 F.3d at 689 (quotation marks and citations removed). The court further rejected the defendant’s request for limited jurisdictional discovery into the underlying facts regarding the plaintiffs’ injuries. The court reasoned that plaintiffs have no incentive to conceal the value of their claims—to the contrary, they have every reason to provide the defense with the information necessary to evaluate the nature and extent of the plaintiffs’ injuries and damages, chief among them the elimination of the risk that the case will be removed late in the proceedings if they fail to do so. According to the court, jurisdictional discovery on the damages issue was unnecessary since the Act allows a defendant to remove a case within 30 days of receiving documents that support removal jurisdiction. *Abrego*, 443 F.3d at 691 (citing 28 U.S.C. §1453(b)).

While most courts are in agreement that the party seeking removal bears the burden of proving federal jurisdiction, most courts also agree that the party resisting removal (usually the plaintiff) has the burden of proving whether one of the Act’s exceptions to jurisdiction applies. According to the Act, the federal courts must decline to exercise jurisdiction over a class action in which greater than two-thirds of the members of all proposed plaintiff classes are citizens of the state in which the action was originally filed, at least one defendant is a defendant from whom significant relief is sought, whose conduct forms a significant basis for the claims asserted and who is a citizen of the state in which the action was originally filed, principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the state where the action was originally filed and, 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 same defendants. In addition, under the Act, a district court shall decline to exercise jurisdiction over a class action in which two-thirds or more of the plaintiffs and the primary defendants are citizens of the state in which the action was originally

filed. The Class Action Fairness Act does not apply to any class action in which the primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief or the number of members of all proposed plaintiff classes is less than 100. The Act also does not apply to any class action that solely involves a claim concern-

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ing a covered security as that term is defined under Section 16(f)(3) of the Securities Act of 1933 and Section 28(f)(5)(E) of the Securities Exchange Act of 1934; that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the state in which such business or corporation is incorporated or organized; or that relates to the rights, duties and obligations relating to or created by or pursuant to any security as defined under Section 2(a)(1) of the Securities Act of 1933. *See Hart v. FedEx Ground Package System Inc.*, 457 F.3d 675, 680 (7th Cir. 2006); *Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 546 (5th Cir. 2006); *Evans v. Walter Industries, Inc.*, 449 F.3d 1159, 1165 (11th Cir. 2006).

To date, the Seventh, Fifth and Eleventh Circuit Courts of Appeals have ruled (though not all for the same reasons) that once a defendant adequately proves that federal jurisdiction exists under the Act, the burden then shifts to the plaintiff to show that a case should be remanded to state court based on, for example, the “home-state controversy” or “local controversy” exceptions in the Act. Each of these appellate courts drew support from a recent U.S. Supreme Court decision that held that an opponent to removal under 28 U.S.C. §1441(a) must prove that there is an

express exception to removability. *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691, 123 S. Ct. 1882 (2003).

### Carve-Outs under the Act

As noted above, the Class Action Fairness Act does not apply to any class action in which the primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief or the number of members of all proposed plaintiff classes is less than 100. The Act also does not apply to any class action that solely involves a claim concerning a covered security as that term is defined under Section 16(f)(3) of the Securities Act of 1933 and Section 28(f)(5)(E) of the Securities Exchange Act of 1934; that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the state in which such business or corporation is incorporated or organized; or that relates to the rights, duties and obligations relating to or created by or pursuant to any security as defined under Section 2(a)(1) of the Securities Act of 1933.

Several district courts have addressed the Act’s carve-out provisions with little difficulty in their application. In *In re Textainer Partnership Sec. Litig.*, No. C 05-0969 MMC, 2005 WL 1791559 (N.D. Cal. July 27, 2005), a California federal district court found that a breach of fiduciary duty claim brought by limited partners against general partners for the proposed sale of partnership assets fell under both the “internal affairs or governance” carve-out to the Act as well as the carve-out for “a claim relating to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security”). *Id.* As such, the case was remanded to state court. Similarly, a federal district court in Tennessee did not find the Act’s carve outs ambiguous and remanded claims for breach of fiduciary duties and self-dealing in connection with a corporate merger, stating: “It seems clear to the court that any class action solely based upon breach of fiduciary duty in connection with a security is, indeed, a ‘carve out’ from the Class Action Fairness Act. This case is such a case, and, therefore, its removal from state court based upon the Act was improper.” *Indi-*

*ana State Dist. Council of Laborers and Hod Carriers Pension Fund v. Renal Care Goup, Inc.*, No. Civ. 3:05-0451, 2005 WL 2000658, at \*1 (M.D. Tenn. Aug 18, 2005). Additionally, a federal district court in Idaho has held that a complaint against directors for breach of fiduciary duty to shareholders falls under one of the carve-outs to the Act. *Carmona v. Bryant*, 2006 WL 1043987 (D. Idaho April 19, 2006).

Courts have focused on the substance, rather than the form of claims, in applying the carve-outs. For example, in *Williams v. Texas Commerce Trust Co. of New York*, the plaintiff made “state law claims for breach of fiduciary duties, breach of contract, negligence, equitable restitution, accounting for profits, imposition of constructive trust and civil conspiracy” following a corporate bankruptcy. *Williams*, No. 05-1070-CV-W-GAF, 2006 WL 1696681, at \*2 (W.D. Mo. Jun. 15, 2006). The court rejected the defendants’ argument that the claims related to a bankruptcy proceeding and instead found that all of the claims arose out of the rights and duties between the plaintiffs, as debenture holders, and the defendants, as indenture trustees. Because those duties were created by or pursuant to a security and concerned a covered security, the court found that the case fell within the Act’s carve-out provisions. See also *Estate of Pew v. Cardarelli*, No. 5:05-CV-1317, 2006 WL 3524488 (N.D.N.Y. Dec. 6, 2006) (Complaint for defendants’ alleged violation of Section 349 of New York General Business Law in connection with the sale of securities falls under carve-out to the Act).

### Mass Actions

In *Abrego v. The Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006), discussed above for its analysis of the burden of proof in establishing jurisdiction under the Act, the Ninth Circuit was the first court of appeals to interpret the Act’s “mass action” provision. Under the Act, “[T]he term ‘mass action’ means any civil action... in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact.” 28 U.S.C. 1332(d)(11)(B)(i). A mass action is removable as if it were a class action, “except that jurisdiction shall exist only over those

plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a) [for traditional diversity jurisdiction].” *Id.*

The *Abrego* court remanded the case based on the defendants’ failure to establish that any plaintiffs satisfied the \$75,000 jurisdictional amount under subsection (a). *Abrego*, 443 F.3d at 689–90. Neverthe-

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less, the court complained a great deal *in dicta* about the “bewildering language” of the Act’s mass action provision. *Id.* at 686. The crux of the problem identified by the Ninth Circuit is how the class action jurisdictional requirements are to be reconciled with the jurisdictional requirements of individual claims. For example, the court noted: “The statute does not explain the relationship between the 100 or more persons and \$5,000,000 aggregate amount in controversy requirement on the one hand, and the limitation of jurisdiction to ‘those plaintiffs whose claims in a mass action satisfy [the in excess of \$75,000] jurisdictional amount requirement,’ on the other.” *Id.* at 681.

The defendants in *Abrego* argued that the court should accept jurisdiction over the case and then remand the cases of individual plaintiffs who did not meet the individual jurisdictional requirements, such as having a claim in excess of \$75,000. The court noted that this solution only raises more questions, such as: “What happens if individual remands under the §1332(a) proviso bring the aggregate amount in controversy below \$5,000,000, or the number of plaintiffs below 100, or destroys minimal diversity?” *Id.* at 682.

The court also noted the language of the Act, stating: “a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it

otherwise meets the provisions of those paragraphs” was “clumsy” and led to nonsensical results. *Id.* at 680–81. (On the issue of nonsensical results, it is worth noting here that the Third Circuit Court of Appeals recently found what it described as a typographical error in the Act that purported to require that an appeal be filed “not less than 7 days after entry of the order.” *Morgan v. Gay*, 466 F.3d 276, 277 (3d Cir. 2006) (citing 28 U.S.C. §1453(c)(1)). The court held: “Because the uncontested legislative intent behind §1453(c) was to impose a seven-day deadline for appeals, we conclude that the statute as written contains a typographical error and should be read to mean ‘not more than 7 days.’” *Id.*) For example, paragraph 8 refers to entry of a class certification order, which, by definition, would not occur in a mass action case.

More fundamentally, the *Abrego* court pointed out that neither the Act’s mass action provisions, nor the referenced removal provisions, provide for original jurisdiction. The court explained:

Because Congress did not refer to original jurisdiction in either the mass action provision itself, or in §1453, the text does not answer the important question of when there is original federal jurisdiction over mass actions, and what the scope of that original jurisdiction might be. This gap casts into doubt the interaction between the mass action provision and a host of other statutes that assume original jurisdiction as a starting point. *Id.* at 682. The Ninth Circuit’s somewhat scathing critique leaves a very uncertain path for defendants—and courts—who are wrestling with the Act’s mass action provisions in the future.

### Conclusion

The case law interpreting the Class Action Fairness Act will undoubtedly continue to evolve. Although some issues, like the commencement issue, are fairly well settled, there are numerous other provisions of the Act that have yet to be addressed by the courts. Although it is difficult to predict which portion of the Act will serve as the next battleground between the plaintiffs bar and the defense bar, one thing is certain. Future application of the Act will keep lawyers—and judges—busy for many years to come. ■