

Chapter 2

**Class Action Fairness Act of 2005:
Federal Jurisdiction, Exceptions to the
Exercise of Jurisdiction and Burdens of Proof**

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§ 2.01. Introduction.

On February 18, 2005, following nine long years of debates, hearings, and several revisions, President George W. Bush signed into law the Class Action Fairness Act of 2005 (referred to here as CAFA or the Act). President Bush commented that the Act signaled a critical step toward ending the lawsuit culture in our community.

By expanding the scope of federal jurisdiction over class actions, the proponents of CAFA hoped to ameliorate certain abuses perceived to be occurring in many of the class actions being litigated in state courts:

- class action settlements in which virtually all benefits went to the attorneys, rather than the class members themselves;
- inefficiency associated with virtually identical class actions being filed in numerous jurisdictions, as forum shopping exercises;
- routine, early certification orders being entered in class actions in certain “magnet” jurisdictions, associated with increased filings in such jurisdictions; and
- questionable application by one state court of the law of other states following certification of multi-state classes.¹

Rule 23 of the Federal Rules of Civil Procedure requires, among many other things, court approval of class action settlements. The Act heightens a court’s burden to ensure that proposed class action settlements are fair and reasonable. The Act also places more responsibility on all counsel to assist the court in that endeavor.

The scope of this chapter, however, is limited to the jurisdictional aspects of CAFA, including its statutory exceptions to the exercise of this expanded jurisdiction as well as the associated burdens of proof. Congress stated three specific purposes in enacting CAFA, and it is the second enumerated purpose – the desire to “restore the intent of the framers of the United States Constitution by providing for Federal Court consideration of interstate cases of national importance under diversity jurisdiction”² – which is the focus of this chapter.

¹ For example, in *Blackhawk Oil Co. v. Exxon Corp.*, 969 P.2d 337 (Okla. 1998), the Oklahoma Supreme Court upheld certification of a multi-state class which included 168 natural gas producers from twenty states who sold natural gas to Exxon and who were not paid for slop oil (a byproduct of the compression process) which Exxon collected and sold without any accounting to the gas producers. This class certification was upheld despite the fact that the actions sounded in breach of contract and in tort, and would require the Oklahoma court to interpret and apply the substantive laws of 20 different states.

² Class Action Fairness Act of 2005, Pub. L. No. 109-2.

§ 2.02. Definition of “Class Action” Under CAFA.

Traditional rules of federal jurisdiction – federal question and diversity jurisdiction³ – can still be used to obtain federal jurisdiction over putative class actions, where appropriate. In those instances, whether a putative class is pleaded is of no consequence to a federal court’s exercise of jurisdiction. However, CAFA established expanded diversity jurisdiction for those cases that meet the definition of “class action” and its other jurisdictional requirements.

With respect to application of CAFA’s expanded jurisdiction, “the term ‘class action’ means any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar state statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons as a class action[.]”⁴ The Act “shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.”⁵ Virtually any utterance in a pleading or an amended pleading suggesting that the plaintiff or plaintiffs may, at some point, seek class certification, is enough to trigger the potential that the action might be subject to federal jurisdiction under CAFA.

Further, “a mass action shall be deemed to be a class action removable under [CAFA].”⁶ The subsection defines what is included, and what is excluded, from those “mass actions” removable under CAFA. A removable mass action is “any civil action . . . in which monetary relief claims of one hundred or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in the mass action satisfy the jurisdictional amount requirements under subsection (a) [more than \$75,000 in controversy].”⁷ One of the more important exceptions

³ 28 U.S.C. § 1331 and diversity jurisdiction 28 U.S.C. §1332(a)–(c).

⁴ 28 U.S.C. § 1332 (d)(1)(B).

⁵ 28 U.S.C. § 1332 (d)(8).

⁶ 28 U.S.C. §1332 (d)(11)(A).

⁷ 28 U.S.C. §1332(d)(11)(B)(i).

to removal of mass actions under CAFA is that the removal provisions do not apply to mass actions which were so joined upon motion of a defendant.⁸

§2.03. The Act's Jurisdictional Provisions.

Seven circuits that have considered the issue have held that the proponent of federal jurisdiction has the burden of proof on the prerequisites under CAFA.⁹ Although there is some uncertainty, courts have identified up to four such prerequisites under the Act.¹⁰

[1] — Aggregate Amount in Controversy.

First, the amount in controversy must exceed \$5,000,000, exclusive of interest and costs.¹¹ The claims of individual class members should be aggregated to determine the amount in controversy.¹² The Senate Judiciary Committee has recommended that “a federal court should err in favor of exercising jurisdiction over a case under [CAFA] if it is uncertain about whether the sum or value of an aggregated class action claim reaches \$5,000,000.”¹³ The court relied on this language in holding that the amount in controversy had been met for removal in *Chavis v. Fidelity Warranty Services, Inc.*¹⁴ In that case,

Plaintiffs argue that “there is no evidence in this action that the amount in controversy will even approach the \$5 million minimum requirement, and the defendant has failed to establish this

⁸ 28 U.S.C. §1332(d)(11)(B)(ii)(II).

⁹ See, e.g., *Strawn v. AT & T Mobility, Inc.*, 530 F.3d 293 (4th Cir. 2008); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 404-05 (6th Cir. 2007); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53 (2d Cir. 2006); *Morgan v. Gay*, 471 F.3d 469, 473 (3d Cir. 2006); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685-86 (9th Cir. 2006)(*per curiam*); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1329-30 (11th Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005).

¹⁰ See *Strawn v. AT & T Mobility, Inc.*, 513 F. Supp. 2d 599, 601-02 (S.D.W. Va. 2007) *rev'd on other grounds*, 530 F.3d. 293 (4th Cir. 2008).

¹¹ 28 U.S.C. § 1332(d)(2).

¹² 28 U.S.C. § 1332(d)(6).

¹³ S. Rep. No. 109-14 at 42 (2005), 2005 U.S.C.C.A.N. 3, 40.

¹⁴ *Chavis v. Fidelity Warranty Serv., Inc.*, 415 F. Supp. 2d 620, 627 & n.6 (D.S.C. 2006).

jurisdictional amount is satisfied.” Defendant counters that Plaintiffs allege “on the face of their complaint” that the amount in controversy can be as much as “\$50,000 per class member.” Defendant also notes that because Plaintiffs purport to represent a class of greater than one hundred members, “by simply multiplying the two numbers, [Plaintiffs’] claims can exceed \$5,000,000.” The court finds that Plaintiffs allege over \$5 million in damages.

It is well established that “the plaintiff is the master of his complaint.” . . . *Because Plaintiffs allege no less than 100 members in the putative class, the court cannot say to a legal certainty that the amount in controversy would not reach CAFA’s \$5,000,000 threshold. . . . To the extent Plaintiffs allege in their motion to remand and their reply brief that the amount in controversy is less than \$5,000,000, the court notes that “post-removal events . . . do not deprive a federal court of diversity jurisdiction.”*¹⁵

Additionally, the District Court of Kansas has held that the defendant met the amount in controversy requirement in a removed putative class action alleging that the defendant failed to properly account and pay royalties to the plaintiff and the class.¹⁶ And the Western District of Oklahoma has held that the plaintiffs met the amount in controversy requirement in a class action where there were 342 putative class members with property damage claims and 242 putative class members with medical monitoring claims.¹⁷

Where no class has been certified, there should be no stipulation purporting to limit the recovery of the class.¹⁸ Further, post removal stipulations or proposed stipulations do not deprive the court of jurisdiction.

¹⁵ *Id.* at 627 (emphasis added)(citations omitted).

¹⁶ *Eatinger v. BP Am. Prod. Co.*, 524 F. Supp. 2d 1342 (D. Kan. 2007).

¹⁷ *Ponca Tribe of Indians v. Continental Carbon Co.*, 439 F. Supp. 2d 1171 (W.D. Okla. 2006).

¹⁸ *See, e.g., Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002)(observing that “it is improbable that [a plaintiff] can ethically unilaterally waive rights of putative class members to [recovery] without authorization”); *Chiartas v. Bavarian Motor Works*, 106 F. Supp. 2d 872, 873-74 (S.D.W. Va. 2000)(holding that individual plaintiff’s

For example, in *Woodward v. Newcourt Commercial Financial Corp.*, the plaintiff filed a complaint in state court.¹⁹ After the defendant removed the case to federal court, the plaintiff filed a remand motion and an accompanying stipulation.²⁰ The stipulation “clarified” that at the time of removal the plaintiff had sought less than the jurisdictional amount.²¹ The court declined to remand, reasoning:

Even if post-removal “clarification” were allowed, a plaintiff’s post-removal agreement to limit damages is not the type of clarification that could validly defeat jurisdiction. The only relevant factor is the amount in controversy at the time the case is removed.²²

[2] — Minimal Diversity.

Second, any member of the plaintiff class must be a citizen of a state different from any defendant.²³ Citizenship of the members of the proposed plaintiff classes shall be determined as of the date of the filing of the complaint or amended complaint, or if the case stated by the initial pleading is not subject to federal jurisdiction, as of the date of service by plaintiffs of an

written stipulation purporting to limit recovery of potential class members was wholly specious).

¹⁹ *Woodward v. Newcourt Commercial Fin. Corp.*, 60 F. Supp. 2d 530, 531-33 (D.S.C. 1999).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* (citations omitted). See also *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293 (1938)(holding that “events occurring subsequent to removal which reduce the amount recoverable . . . do not oust the district court’s jurisdiction once it has attached.”); *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1412 (5th Cir.1995)(holding that “[l]itigants who want to prevent removal must file a binding stipulation or affidavit with their complaints; once a defendant has removed the case, *St. Paul [v. Red Cab Co., 303 U.S. 283 (1938)]* makes later filings irrelevant”); *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 872 (6th Cir. 2000), *cert. denied*, 532 U.S. 953 (2001)(holding that “a post-removal stipulation reducing the amount in controversy to below the jurisdictional limit does not require remand to state court”); *In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992)(holding that “the factual allegations of the complaint, and not empty works setting an illusory cap on damages, inform the jurisdictional inquiry”).

²³ 28 U.S.C. § 1332(d)(2)(A).

amended pleading, motion or other paper indicating the existence of federal jurisdiction.²⁴ For purposes of CAFA only, an unincorporated association shall be 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.²⁵ Courts have held that allegations of residency are insufficient to prove citizenship.²⁶ Domicile, however, has been used as a proxy for citizenship.²⁷ Although far from clear, a few courts have suggested that minimal diversity may be satisfied in any situation where one of the parties has multiple citizenship.²⁸

For example, in *Blockbuster Inc. v. Galeno*, the court held that the defendant met its burden of proving minimal diversity solely on the pleadings.²⁹ In that case, the defendant was incorporated in Delaware and maintained its principle place of business in Texas. The court held that there was a reasonable probability that either the named plaintiff, who was described in the complaint as a New York resident, or at least one of the class members, who were described as New York customers of the defendant, was a citizen of New York and thus supported minimal diversity.³⁰

In *McMorris v. TJX Companies, Inc.*, the court held that minimal diversity was met through allegations in the complaint that class members were “residents” of Massachusetts, allowing for the potential that this class of Massachusetts residents would include noncitizens of Massachusetts. The defendant was a citizen of both Massachusetts and Delaware.³¹ Further, the court discussed, but did not decide, the issue of whether a defendant corporation’s multiple citizenship could also create minimal diversity:

²⁴ 28 U.S.C. § 1332(d)(7).

²⁵ 28 U.S.C. § 1332(d)(10).

²⁶ See, e.g., *Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc.*, 485 F.3d 804 (5th Cir. 2007); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159 (11th Cir. 2006); *McMorris v. TJX Cos., Inc.*, 493 F. Supp. 2d 158, 162 (D. Mass. 2007).

²⁷ *Axel Johnson, Inc., v. Carroll Carolina Oil Co.*, 145 F.3d 660, 663 (4th Cir. 1998); *McMorris v. TJX Cos.*, 493 F. Supp. 2d 158, 162 (D. Mass. 2007).

²⁸ *McMorris v. TJX Cos.* 493 F. Supp. 2d 158, 163-64 (D. Mass. 2007); *Fuller v. Home Depot Serv., LLC*, No. 1:07-CV-1268-RLV, 2007 WL 2345257 (N.D. Ga. 2007).

²⁹ *Blockbuster Inc. v. Galeno*, 472 F.3d 53 (2d Cir. 2006).

³⁰ *Id.* at 59.

³¹ *McMorris v. TJX Companies, Inc.*, 493 F. Supp. 2d 158, 162 (D. Mass. 2007).

The Supreme Court recently noted that minimal diversity may well be satisfied in any situation where one of the parties has multiple citizenship:

We understand minimal diversity to mean the existence of at least *one* party who is diverse in citizenship from one party on the other side of the case, even though the extra constitutional “complete diversity” required by our cases is lacking. It is possible, though far from clear, that one can have opposing parties in a two party case who are co-citizens and yet have minimal Article III jurisdiction because of the multiple citizenship of one of the parties. Although the Court has previously said that minimal diversity requires “two adverse parties who are not co-citizens,” the Court did not have before it a multiple citizenship situation.³²

This court need not reach the issue left open in *Grupo Dataflux* because TJX has sufficiently alleged a “reasonable probability that at least one member of the McMorris class is domiciled in a state other than Massachusetts or Delaware, the two states in which TJX is domiciled.”³³

The court in *McMorris* held that minimal diversity was met based on the allegations of the complaint, which described the putative class as “[r]esidents of Massachusetts” who engaged in transactions at TJX during a specified time. The court reasoned that “by definition, the class may include foreign citizens who resided in Massachusetts during that period who made purchases at TJX.”³⁴ The court concluded that the class definition sufficed to support the assertion of federal jurisdiction in *McMorris*.³⁵

³² *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 577 n. 6, 124 S. Ct. 1920, 158 S.E.2.d 866 (2004).

³³ *Id.* at 163-64 (citations omitted)(emphasis in original).

³⁴ *Id.* at 162.

³⁵ *Id.* at 163.

In *Fuller v. Home Depot Services, LLC*,³⁶ the court held that minimal diversity was met, relying on the pleadings, which alleged that a defendant corporation had multiple citizenship, and alternatively on evidence of minimal diversity as follows:

As the plaintiff admits, Home Depot is incorporated in Delaware and has its principal place of business in Georgia, and is therefore a citizen of both states. The plaintiff's argument is that there is no diversity because all of the class members and Home Depot are citizens of Georgia. However, that does not complete the citizenship analysis. Home Depot is also a citizen of Delaware because that is its state of incorporation. Consequently, even assuming that the plaintiff and all potential class members are citizens of only Georgia, the minimal diversity requirement is met here because Home Depot is a citizen of a different state – Delaware. In other words, although Home Depot is a Citizen of Georgia, it is also a citizen of Delaware and therefore, is diverse from at least one member of the class. Thus, minimal diversity has been established.

There is also evidence that one or more members of the plaintiff's class is not a Georgia citizen, which would in itself create minimal diversity according to § 1332(d)(2). Home Depot has proffered evidence of at least nine customers who rented tools and listed an out-of-state address and driver's license on their rental agreements. The plaintiff argues that this evidence of "residence" is insufficient to show "citizenship" and thus establish that there are proposed class members diverse from Home Depot, but he does not dispute that those nine customers reside outside of Georgia. However, absent any contradictory evidence, their place of residence is their "domicile." For purposes of diversity, a party's "domicile" is the equivalent of his "citizenship." Therefore, the court concludes that Home Depot's

³⁶ *Fuller v. Home Depot Services, LLC*, No. 1:07-CV-1268-RLV, 2007 WL 2345257 (N.D. Ga. 2007).

evidence of putative class members' out-of-state driver's licenses and billing addresses is sufficient evidence to show that there are class members domiciled outside Georgia and, consequently, have citizenship diverse from Home Depot.³⁷

In *Larson v. Pioneer Hi-Breed International, Inc.*,³⁸ the court held that minimal diversity existed where the defendant presented evidence that it sold seed in Iowa to out-of-state corporations registered in other states:

The proposed class definition includes “[a]ll persons and entities in the state of Iowa” who purchased the seed in question. It does not limit itself to only *citizens* of the state of Iowa. Thus, a putative class member does not need to be domiciled in Iowa to qualify as a member of the class. Pioneer has submitted evidence that these out-of-state corporations purchased from Pioneer in Iowa. The court is satisfied that this is enough.³⁹

[3] — Primary Defendants May Not Be States.

Third, the primary defendants must not be states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief.⁴⁰

³⁷ *Id.* at *3 (citations omitted). In *Fuller*, the court noted that the plaintiff had filed a Motion to Amend its Complaint to redefine the putative class to include “Georgia citizens and consumers who leased tools or equipment from Home Depot during the past ten (10) years and were damaged thereby[.]” The court observed that it doubted that the proposed amendment would omit from the putative class Home Depot customers with out-of-state citizenship who rented tools during the relevant time period, but concluded that in any event because Home Depot was also a citizen of Delaware minimal diversity would still be met.

³⁸ *Larson v. Pioneer Hi-Breed Int’l, Inc.*, No. 4:06-cv-0077-JAJ, 2007 WL 3341698 (S.D. Iowa Nov. 9, 2007).

³⁹ *Id.* at *5 (citations omitted)(emphasis in original).

⁴⁰ 28 U.S.C. § 1332(d)(5)(A). *See Frazier v. Pioneer Ams. LLC*, 455 F.3d 542 (5th Cir. 2006)(holding that for the primary defendant exception to jurisdiction to apply, all primary defendants should be state entities in a removed putative class action against a Canadian company and the Louisiana Department of Environmental Quality).

[4] — Size of Class Must Be 100 or More.

Fourth, the number of putative plaintiffs must be 100 or more.⁴¹ Courts that have considered the question of class size under 28 U.S.C. § 1332(d)(5)(B) are divided on which party bears the burden of proof. Some courts have held that class size is a prerequisite under CAFA, requiring the proponent of federal jurisdiction to bear the burden of proof.⁴² Other courts have held that class size is an exception to jurisdiction under CAFA, requiring the party opposing jurisdiction to bear the burden of proof.⁴³

§2.04. Exceptions to the Exercise of Jurisdiction.

The party opposing federal jurisdiction has the burden of proof on the exceptions under CAFA.⁴⁴ There are several exceptions to the exercise of jurisdiction under CAFA.⁴⁵ The local controversy and home state exceptions require a district court to abstain from exercising jurisdiction under certain circumstances where at least two-thirds of all proposed plaintiff classes are citizens of the forum state.⁴⁶

[1] — The Local Controversy Exception.

The local controversy exception contained in 28 U.S.C. § 1332(d)(4)(A) requires a district court to abstain from the exercise of jurisdiction under the following circumstances:

⁴¹ 28 U.S.C. § 1332(d)(5)(B).

⁴² *See, e.g.,* Serrano v. 180 Connect, Inc., 478 F.3d 1018, 1020 & n.3 (9th Cir. 2007); Strawn v. AT & T Mobility, Inc., 513 F. Supp. 2d 599, 601-02, 604 (S.D.W. Va. 2007)(*dicta*) *rev'd on other grounds*, 530 F.3d. 293 (4th Cir. 2008).

⁴³ *See, e.g.,* Frazier v. Pioneer Ams, LLC, 455 F.3d 542, 546 (5th Cir. 2006); Garcia v. Boyar & Miller, P.C., No. 3:06-CV-1936-D (Lead Case), 2007 WL 1556961 (N.D. Tex. May 30, 2007).

⁴⁴ *See, e.g.,* Serrano v. 180 Connect, Inc., 478 F.3d 1018 (9th Cir. 2007); Hart v. FedEx Ground Package Sys., Inc., 457 F.3d 675 (7th Cir. 2006); Frazier v. Pioneer Ams, LLC, 455 F.3d 542, 546 (5th Cir. 2006); Evans v. Walter Indus., Inc., 449 F.3d 1159 (11th Cir. 2006); Musgrave v. Aluminum Co. of Am., Inc., No. 3:06-cv-0029-RLY-WGH, 2006 WL 1994840, **2-3 (S.D. Ind. July 14, 2006).

⁴⁵ Since they are not jurisdictional, exceptions under CAFA should be waived if not properly waived. *See, e.g.,* Braud v. Transport Serv. Co., 445 F.3d 801, 809 n.17 (5th Cir. 2006).

⁴⁶ 28 U.S.C. § 1332(d)(4).

- More than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action was filed;⁴⁷
- At least one defendant who is a citizen of the state in which the action was filed is also a defendant “whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class” and from whom “significant relief is sought by members of the plaintiff class;”⁴⁸ and
- During the three-year period preceding the filing of the class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants.⁴⁹

It is well established that the party opposing federal jurisdiction bears the burden of proof with respect to the local controversy rule.⁵⁰ In *Hart v. FedEx Ground Package*, the Seventh Circuit relied on the Senate Judiciary Committee report which reads in part:

It is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court (*e.g.* the burden of demonstrating that more than two-thirds of the proposed class members are citizens of the forum state). Allocating the burden in this manner is important to ensure that the named plaintiffs will not be able to evade federal jurisdiction with vague class definitions or other efforts to obscure the citizenship of class members. The law is clear that, once a federal court properly has jurisdiction over a case removed to federal court, subsequent

⁴⁷ 28 U.S.C. § 1332(d)(4)(A)(i)(I).

⁴⁸ 28 U.S.C. § 1332(d)(4)(A)(i)(II).

⁴⁹ 28 U.S.C. § 1332(d)(4)(A)(i)(III).

⁵⁰ *See, e.g.,* *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003)(holding that burden is on plaintiff to find exception to removal); *Hart v. FedEx Ground Package Sys., Inc.*, 457 F.3d 675 (7th Cir. 2006)(holding that the plaintiff has the burden of persuasion on the local controversy rule); *Frazier v. Pioneer Ams, LLC*, 455 F.3d 542 (5th Cir. 2006)(holding that plaintiffs had burden to show applicability of CAFA exceptions); and *Evans v. Walter Indus., Inc.*, 449 F.3d 1159 (11th Cir. 2006)(plaintiffs have to establish local controversy).

events cannot ‘oust’ the federal court of jurisdiction. While plaintiffs undoubtedly possess power to seek to avoid jurisdiction by defining a proposed class in particular ways, they lose that power once a defendant has properly removed a class action to federal court.⁵¹

Some courts have construed the term “significant” under the local controversy exception relative to the whole of the claims asserted and relief sought.⁵² In *Evans*, the Eleventh Circuit reversed the district court’s holding that the plaintiffs proved the significant defendant prong of the local controversy rule, writing:

[W]hether a putative class seeks significant relief from an in-state defendant includes 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.⁵³

At least one court has held that the fact that the plaintiffs did not execute service of process on an in-state defendant was evidence that they did not seek significant relief from him.⁵⁴ Another court has distinguished between “significant” and the term “primary,” which is used in the home state exception below.⁵⁵

[2] — The Home State Exception.

The home state exception requires a district court to abstain from the exercise of jurisdiction where two-thirds or more of the members of all

⁵¹ *Hart v. FedEx Ground Package Sys., Inc.*, 457 F.3d 675.

⁵² *See, e.g., Evans v. Walter Indus.*, 449 F.3d 1159, 1167 (11th Cir. 2006).

⁵³ *Evans v. Walter Indus.*, 449 F.3d 1159, 1167 (quoting *Robinson v. Cheetah Transp.*, 2006 WL 468820, *3 (W.D. La. Feb 27, 2006).

⁵⁴ *See, e.g., Robinson v. Cheetah Transp.*, No. Civ. A: 06-0005, 2006 WL 468820, *3 (W.D. La. Feb. 27, 2006).

⁵⁵ *See Caruso v. Allstate Ins. Co.*, 469 F. Supp. 2d 364, 369-70 (E.D. La. 2007)(holding that third largest homeowner’s insurer in state was a significant defendant, but that local controversy exception did not apply because other similar class actions had been filed against two defendants in past three years).

proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the state in which the action was filed.⁵⁶ The Senate Committee Report defines the term “primary defendant” as any defendant “who has substantial exposure to significant portions of the proposed class in the action, particularly any defendant that is allegedly liable to the vast majority of the members of the proposed classes.”⁵⁷

Several courts have denied motions to remand under Section 1332(d)(4) where the plaintiff failed to prove that two-thirds or more of the members of the plaintiff class are citizens of the state where the action was originally filed.⁵⁸ For example, in *Evans v. Walter Industries, Inc.*,⁵⁹ the Eleventh Circuit reversed the district court’s holding that the plaintiffs had adduced sufficient evidence that more than two-thirds of the plaintiff class were Alabama citizens. The court held that the plaintiffs did not carry their burden with respect to this requirement:

Plaintiffs have offered little proof that Alabama citizens comprise at least two-thirds of the plaintiff class. In order to prove that two-thirds of the plaintiff class are Alabama citizens, the plaintiffs submitted an affidavit by attorney Jennifer Smith. Smith avers that she interviewed 10,118 potential plaintiffs. Of these, Smith determined that 5200 are members of the class. Of the 5200 class members, 4876 (93.8%) are Alabama residents. The plaintiffs argue that if 93.8% of the known plaintiffs are Alabama residents, then surely two-thirds of the entire plaintiff class are Alabama citizens.

⁵⁶ 28 U.S.C. §1332(d)(4)(B).

⁵⁷ S. Rep. No. 109-14 at 43 (2005), 2005 U.S.C.C.A.N. 3, 41; *see* Caruso v. Allstate Ins. Co., 469 F. Supp. 2d 364, 369-70 (E.D. La. 2007).

⁵⁸ *Evans v. Walter Indus.*, 449 F.3d 1159, 1167 (11th Cir. 2006); *McMorris v. TJX Cos., Inc.*, 493 F. Supp. 2d 158, 162 (D. Mass. 2007); *Fuller v. Home Depot Servs., LLC*, No. 1:07-CV-1268-RLV, 2007 WL 2345257 (N.D.Ga. 2007); *Nichols v. Progressive Direct Ins. Co.*, 06-146-DLB, 2007 WL 1035014, *3 (E.D. Ky. Mar. 31, 2007) and *Musgrave v. Aluminum Co. of Am., Inc.*, No. 3:06-cv-0029-RLY-WGH, 2006 WL 1994840, **2-3 (S.D. Ind. July 14, 2006).

⁵⁹ *Evans v. Walter Indus., Inc.*, 449 F.3d 1159 (11th Cir. 2006).

We are not persuaded by plaintiffs' argument. Smith's affidavit tells us nothing about how she selected the 10,118 people who were considered "potential plaintiffs." We do not know if these 10,118 people represent both the property damage and personal injury classes. We do not know if Smith's method favored people currently living in Anniston over people who have left the area. In short, we know nothing about the percentage of the total class represented by the 10,118 people on which plaintiffs' evidence depends. Moreover, the class, as defined in the complaint is extremely broad, extending over an 85-year period. We do not know if Smith made any effort to estimate the number of people with claims who no longer live in Alabama.⁶⁰

In *McMorris v. TJX Companies, Inc.*,⁶¹ the court held that the plaintiffs failed to satisfy their burden of showing that two-thirds of the putative class members were Massachusetts citizens:

In this case, the McMorris class simply asserts that all the named plaintiffs are citizens of Massachusetts and 'it is clear that at least two-thirds . . . of the members of the putative class are citizens of Massachusetts.' This court rules that such a bare assertion cannot sustain the burden of proof. Indeed, other courts have held that even supplying a list of the home addresses of the putative class members does not suffice to establish citizenship.⁶²

In addition, in *Fuller v. Home Depot Services, LLC*,⁶³ the court denied a motion to remand based in part on Section 1332(d)(4)(B) because the plaintiff had proffered no evidence whatsoever in support of the assertion that over two-thirds of the class members were in-state citizens. The court

⁶⁰ *Id.* at 1166.

⁶¹ *McMorris v. TJX Cos, Inc.*, 493 F. Supp. 2d 158 (D. Mass. 2007).

⁶² *Id.* at 166 (citations omitted).

⁶³ *Fuller v. Home Depot Serv., LLC*, No. 1:07-CV-1268-RLV 2007 WL 2345257 (N.D. Ga. 2007).

emphasized that the plaintiff must meet a heavy burden to prove this CAFA exception:

While it may seem an onerous task for the plaintiff to prove the citizenship of at least two-thirds of the approximately 1.5 million member class, it is nevertheless the plaintiff's burden to bear. Because the plaintiff has proffered no evidence whatsoever in support of his assertion that over two-thirds of the class members are Georgia citizens, the burden of proof with respect to the first element in both subsections of the "local controversy" exception has not been met. Having thus concluded that the plaintiff has failed to meet his burden with respect to the two-thirds requirement, the court finds that the "local controversy" exception to CAFA is not applicable and Home Depot has properly removed this case.⁶⁴

[3] — The Interests of Justice Exception.

The interests of justice exception⁶⁵ permits, but does not require, a district court to abstain from the exercise of jurisdiction under the totality of the circumstances where greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state in which the action was originally filed based on consideration of the following:

Whether the claims asserted involve matters of national or interstate interest;⁶⁶

⁶⁴ *Id.* at *5 (citations omitted). *See also, e.g.*, Nichols v. Progressive Direct Ins. Co., No. 06-146-DLB, 2007 WL 1035014, *3 (E.D. Ky. Mar. 31, 2007)(denying motion to remand under home-state exception, noting that when proposed class period spans several years, it is "sheer speculation" to conclude putative class members remained citizens of state); Musgrave v. Aluminum Co. of Am., Inc., No. 3:06-cv-0029-RLY-WGH, 2006 WL 1994840, **2-3 (S.D. Ind. July 14, 2006)(holding that mere allegation that potential class members lived in forum state was insufficient to meet exception).

⁶⁵ 28 U.S.C. § 1332(d)(3).

⁶⁶ 28 U.S.C. § 1332(d)(3)(A).

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;⁶⁷

Whether the class action has been pleaded in a manner that seeks to avoid federal jurisdiction.⁶⁸

Whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;⁶⁹

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;⁷⁰ and

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.⁷¹

Courts have denied motions to remand based on Section 1332(d)(3) for the same reason that they deny motions based on Section 1332(d)(4) — because the plaintiff has failed to meet the burden of proof regarding the citizenship of the putative class. For example, in *Fuller* after the court held that the plaintiff could not prove the exception of Section 1332(d)(4)(B) it noted:

Lastly, the plaintiff argues that this court should use its discretion not to exercise jurisdiction pursuant to section 1332(d)(3). That exception to CAFA is discretionary, in cases where, among other thing, less than

⁶⁷ 28 U.S.C. § 1332(d)(3)(B).

⁶⁸ 28 U.S.C. § 1332(d)(3)(C).

⁶⁹ 28 U.S.C. § 1332(d)(3)(D).

⁷⁰ 28 U.S.C. § 1332(d)(3)(E).

⁷¹ 28 U.S.C. § 1332(d)(3)(F).

two-thirds of the class, but greater than one-third, are citizens of the same state as the primary defendant. However, because the plaintiff has proffered no evidence with respect to the citizenship of any class member, even this discretionary exception is not applicable.⁷²

§2.05. Special Rules for Appellate Review of Remand Orders.

CAFA has changed certain provisions for removal of class actions and review of remand orders.⁷³ A class action may be removed under CAFA in accordance with 28 U.S.C. § 1446, except that certain general removal provisions do not apply. Those provisions are:

The one-year limitation under 28 U.S.C. § 1446(b) does not apply;⁷⁴

Any defendant may be a citizen of the state in which the action is brought;⁷⁵ and

Any defendant may remove a class action without the consent of all defendants.⁷⁶

Notwithstanding the provisions in 28 U.S.C. § 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the state court if application is made to the court of appeals “not less than 7 days” after entry of the order.⁷⁷ Five out of six circuits have construed the phrase “not less than 7 days” to mean “not more than 7 days.”⁷⁸ If the court of appeals accepts an appeal under 28 U.S.C. § 1453(c)(1), the court shall complete all action on the appeal,

⁷² *Fuller*, 2007 WL 2345257 at *5 n.3.

⁷³ 28 U.S.C. § 1453.

⁷⁴ 28 U.S.C. § 1453(b).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 28 U.S.C. § 1453(c)(1).

⁷⁸ *See* *Estate of Pew v. Cardarelli*, 527 F.3d 25, 28 (2d Cir. 2008); *Morgan v. Gay*, 466 F.3d 276, 277 (3d Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326 (11th Cir.

including rendering judgment, not later than sixty days after the date on which the appeal was filed, unless an extension is granted.⁷⁹ The court of appeals may grant an extension of the sixty-day period to complete all action on the appeal, if all parties to the proceeding agree to the extension or the extension is for good cause shown and in the interests of justice for a period not to exceed ten days.⁸⁰ If a final judgment on the appeal under 28 U.S.C. § 1453(c)(1) is not issued before the expiration of the sixty-day period in 28 U.S.C. § 1453(2), including any extension under 28 U.S.C. § 1453(c)(3), the appeal shall be denied.⁸¹

§2.06. The Act's Impact on Class Actions in Federal Courts.

Since CAFA's enactment, there has been a significant increase in the number of class actions filed as original proceedings in federal district courts based upon diversity jurisdiction. While removal of class actions based upon diversity jurisdiction increased immediately after CAFA's enactment, as of mid-2007 removal numbers were trending back to pre-CAFA levels.

Out of concern for how CAFA's expansion of federal court jurisdiction would impact the federal judiciary, the Judicial Conference's Advisory Committee on Civil Rules requested that the Federal Judicial Center study these numbers and trends, and issue interim reports. The study was divided into three phases. The first phase – the impact of CAFA on the number of class actions initiated in the federal courts – was concluded with the issuance of the *Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules* dated April 2008, which studied and reported on filings through June 30, 2007. "These findings are consistent with the hypothesis

2006); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005). *But see Spivey v. Vertrue, Inc.*, ___ F.3d ___, 2008 WL 2357099 (7th Cir. June 11, 2008)(holding that the open-ended "not less than 7 days" means that the 30-day period applicable when laws or rules do not specify the time frame for appeal apply).

⁷⁹ 28 U.S.C. § 1453(c)(2).

⁸⁰ 28 U.S.C. § 1453(c)(3).

⁸¹ 28 U.S.C. § 1453(d)(4).

that CAFA has caused an increased number of class actions based on diversity of citizenship jurisdiction to be filed in the federal courts.”⁸²

One of the perceived abuses which drove CAFA’s enactment was the filing of duplicative actions in multiple “magnet” state courts as an exercise in forum shopping. The increased number of original filings of diversity jurisdiction class actions in federal courts, with no discernable increase in removals of such actions, suggests that forum shopping for class actions, albeit among the federal circuits, is still occurring. In that regard, district courts in those circuits traditionally viewed as being more liberal have seen the largest increases in original filings.

Comparing filings from 2002-2003 with filings between July 1, 2005 and June 30, 2007, eight of the twelve circuits experienced at least a doubling of original diversity class action filings. The courts in the Third Circuit saw a five-fold increase, and those in the Ninth and Eleventh Circuits saw a four-fold increase. Inexplicably, district courts in the Fourth Circuit, typically viewed as more conservative, saw a three-fold increase in original filings of diversity class actions.

§2.07. Conclusion.

The Act expanded federal court jurisdiction for class actions in order to provide better protection for the rights of all class action litigants. This was based on the proposition that federal judicial application of the laws of the states, along with increased scrutiny by the federal courts in reviewing proposed settlements as to their fairness and reasonableness, would lead to the accomplishment of this ultimate goal. Questions remain as to how this increased caseload on the federal judiciary will impact its ability to withstand these additional burdens. For many corporate defendants, however, the ability to litigate putative class actions in federal courts, instead of state courts, has

⁸² *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Emery G. Lee III and Thomas E. Willging, Federal Judicial Center, April 2008, at 1.

provided the opportunity to at least avoid concerns that an early, improvident class certification order will be entered which, in and of itself, can drive an otherwise meritless case into settlement negotiations.

