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REPORT

CLASS ACTION FAIRNESS ACT

The Class Action Fairness Act went into effect just over two years ago and has been the subject of more than 240 federal court rulings. Attorneys Fern P. O'Brian and Joshua I. Kaplan review these opinions in this article, providing a thorough overview of the current state of class action practice.

However, as O'Brian and Kaplan point out, the federal diversity statute (28 U.S.C. § 1332) has been the subject of more than 10,000 rulings. It will be a long time before CAFA is as well-interpreted as the law it amended, the authors suggest.

The Class Action Fairness Act of 2005: Where Have We Been and Where Do We Go From Here?

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The efficacy of legislation must be judged by its results. Pundits may prognosticate, politicians may predict, but the proof is in the pudding. New laws—especially complex ones that alter an entrenched framework—are utilized or challenged by numerous parties in multiple courts. Like love, law takes time.

This is the situation of the Class Action Fairness Act of 2005 (CAFA),[1] which took effect on February 18, 2005,[2] a mere two years ago, with great expectations that it would significantly alter the landscape of class action litigation. CAFA primarily amended § 1332 of Title 28 of the United States Code, which confers diver-

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

[2] *Id.* § 9.

sity jurisdiction on federal courts.[3] As of October 2006, CAFA had been addressed 243 times by federal courts since its enactment,[4] while § 1332 has been cited, discussed, and/or analyzed by federal courts over 10,000 times since its inception in 1948.[5] The case law under CAFA has a long way to go to catch up.

Most judicial analysis of CAFA has centered around one of three issues: (1) when does a case ''commence'' for purposes of CAFA; (2) who has the burden of proof under CAFA and the exceptions to CAFA; and (3) what is the scope of appellate court authority over CAFA. Entire sections of CAFA have not yet been considered by the courts, including the Consumer Bill of Rights, which sponsoring legislators deemed an especially critical part of CAFA.[6] So, we must examine the scant evidence in our possession to determine whether, and how, CAFA is working to change class action litigation.

It is apparent, even at this early point, that CAFA has allowed more class action defendants to secure federal jurisdiction.[7] One way to determine a law's efficacy is to examine how parties are attempting to get around it.[8] Does CAFA contain intentional or unintentional exceptions that allow either party to ignore or undermine CAFA's goals? So far, it appears that most attempts by plaintiffs and defendants to circumvent or undermine CAFA have been unsuccessful.

Certain attempts to circumvent or undermine CAFA's provisions have been rendered practically futile. First, only in limited circumstances is it wise for a defendant to attempt to remove a class action filed pre-CAFA; imprudent removal can even lead to sanctions and costs.[9] Second, for the purposes of appeals under CAFA, courts agree that the time for appeal begins to run at the time the appellate court accepts the notice of appeal, and not at the time that the appellant files a petition for leave to appeal. Finally, most courts agree that the burden of proof for removal still lies with the proponent of removal (usually the defendant), legislative history to the contrary notwithstanding.

This semi-settled law, however, is relatively insignificant compared to CAFA's built-in exceptions that remain to be litigated. CAFA includes numerous carve-outs, which, if applicable, require federal courts to deny subject matter jurisdiction under CAFA. Three such carve-outs—the securities, fiduciary duty, and state actor exceptions—have been interpreted literally by courts and are narrow in their terms. Debate over these exceptions is largely factual; there is little room in these exceptions for legal wrangling.

However, three other carve-outs—the local controversy, home-state controversy, and interest of justice exceptions—are vague enough, either in their actual language or in practical application, that the few courts that have considered these exceptions are thoroughly confused on their application. Currently, courts are interpreting the local and home-state exceptions narrowly and placing a high burden on plaintiffs to prove the applicability of the exceptions. Thus, although only a handful of federal courts have considered these exceptions, it appears unlikely that CAFA's carve-outs will swallow the law.

Finally, the CAFA debate to date has centered mostly on defendants using CAFA as a sword to achieve federal jurisdiction. Some of CAFA's proponents might view the use of CAFA as a sword by class action plaintiffs as an unintended, and perhaps undesirable, effect of the law.[10] But regardless of personal leanings, both plaintiff and defense counsel should be aware of the possibility that CAFA can be used by plaintiffs to gain federal jurisdiction—nothing in CAFA explicitly limits its application to use by defendants.[11] Therefore, plaintiffs should consider the possible benefits of invoking federal jurisdiction under CAFA, while defendants should be prepared to challenge CAFA jurisdiction.

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[3] *See* 28 U.S.C. §§ 1332(d), (e), 1453.

[4] According to an Oct. 24, 2006, Westlaw search for ''Class Action Fairness Act.''

[5] According to an Oct. 17, 2006, Westlaw search.

[6] *Cf.* 151 Cong. Rec. H723, H754 (daily ed. Feb. 17, 2005) (statement of Rep. Goodlatte) (''[The Consumer Bill of Rights] protects American consumers and makes sure that they get justice . . . .'').

[7] *See, e.g.*, *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Servs.*, 448 F.3d 1092 (9th Cir. 2006); *Evans v. Walter Indus. Inc.*, 449 F.3d 1159 (11th Cir. 2006); *Frazier v. Pioneer Americas LLC*, 455 F.3d 542 (5th Cir. 2006); *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675 (7th Cir. 2006); *Knudsen v. Liberty Mut. Ins. Co.*, 435 F.3d 755 (7th Cir. 2006) [hereinafter *Knudsen II*]. On the other hand, courts have not hesitated to remand cases back to state court under certain circumstances. *See, e.g.*, *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006) (per curiam); *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006); *Patterson v. Dean Morris LLP*, 444 F.3d 365 (5th Cir. 2006); *Natale v. Pfizer Inc.*, 424 F.3d 43 (1st Cir. 2005) (per curiam); Pfizer Inc. v. Lott, 417 F.3d 725 (7th Cir. 2005); *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748 (7th Cir. 2005).

[8] Even if a party does not invoke or object to federal jurisdiction under CAFA, courts have the authority to consider or challenge their own subject matter jurisdiction *sua sponte*. *See Duruaku v. BB&T Bank*, 2006 WL 1805887, at *4 (D.N.J. June 29, 2006).

[9] *See Schorsch*, 417 F.3d at 751-52 (''[W]e also invite the plaintiffs to file . . . an appropriate request for reimbursement of the additional legal expenses to which they have been put by HP's efforts to move this litigation from state to federal court.'').

[10] *See, e.g.*, Sarah S. Vance, ''A Primer on the Class Action Fairness Act of 2005,'' 80 TUL. L. REV. 1617, 1643 (2006) (''CAFA's proponents apparently expected that fewer class actions would be certified once more of these cases were handled by the federal courts.''). However, plaintiffs' use of CAFA actually may advance CAFA's goals ''by providing for Federal court consideration of . . . cases of national importance under diversity jurisdiction.'' Pub.L. No. 109-2, § 2(b), 119 Stat. 4, 5.

[11] One appellate court pushed back against the idea that one of CAFA's goals is to benefit class action defendants:

> [The defendant] claims that it is prejudiced because CAFA confers a right to be in federal court. However, nothing in CAFA grants such a right. According to CAFA, its purposes are to: ''1) assure fair and prompt recoveries for class members with legitimate claims; 2) 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; and 3) benefit society by encouraging innovation and lowering consumer prices.'' The first purpose relates only to plaintiffs, while the second and third purposes speak to society-at-large's benefits, not to defendants'. While some defendants may benefit by having their cases in federal instead of state court, this is not a stated purpose of the Act.

Plubell v. Merck & Co. Inc., 434 F.3d 1070, 1073-74 (8th Cir. 2006).

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I. The (Semi-)Settled Law

Class action plaintiffs and defendants both have attempted to make use of certain ambiguous language in CAFA to achieve their ends—defendants, to secure federal jurisdiction, and plaintiffs, to avoid it. However, some attempts to circumvent or undermine CAFA through statutory interpretation have been rendered practically futile by a line of judicial opinions issued by various courts since CAFA's enactment. Although courts are not unanimous on these issues, the following discussion tracks the general trend of the federal courts.

A. Commencement Under CAFA[12]

CAFA applies only to civil actions ''commenced on or after the date of enactment of this Act,'' on Feb. 18, 2005.[13] Therefore, any cases commenced before Feb. 18, 2005, are not subject to CAFA. But exactly what does ''commenced'' mean?

Courts agreed early on in CAFA's history that removal is not synonymous with commencement. ''Had Congress wished to permit the removal of state suits removed after February 18, 2005, it could have provided that 'the amendments made by this Act shall apply to any court action removed on or after the date of enactment of this Act.' ''[14] Commencement is synonymous with filing of the complaint, not filing of the removal petition.[15]

However, pleadings are often amended to include new parties or claims after litigation has been filed.[16] Do such amendments constitute ''commencement,'' or technically, recommencement, of a suit for the purposes of CAFA?

Only under limited circumstances. These cases can be divided into three categories: (1) amendments adding or substituting class action plaintiffs; (2) amendments adding or substituting class action defendants; and (3) amendments adding new claims to the litigation.[17] The issue common to each of these categories is whether amendments to the pleadings relate back to the original complaint such that the defendant should have been on notice that it would be haled into court regarding plaintiffs' claims.[18] If the amendments relate back, then the amended pleadings do not recommence the case for the purposes of CAFA.[19] However, if defendants could not have anticipated being haled into court on ''the same transaction or occurrence'' that gave rise to the original complaint,[20] then the court will find that the amended pleadings do not relate back to the original filing. In such a situation, the case has been recommenced, thereby allowing defendants to invoke CAFA and to secure federal jurisdiction over the case.[21]

Courts have uniformly held that the first category of amendments, adding or substituting class action plaintiffs, is insufficient to invoke federal jurisdiction under CAFA. ''[T]he workaday changes routine in class suits do not [commence new suits].''[22] Since adding or substituting class representatives are ''workaday changes'' in class action litigation, such amendments relate back to the original claims and therefore do not constitute commencement under CAFA.[23]

The second category—amendments to the pleadings adding or substituting class action defendants—may or may not recommence an action under CAFA. This determination is contingent on whether the particular defendant added by the amended complaint knew or had reason to know that it would be or should have been named as a defendant in the case.[24] Courts generally have been hesitant to interpret pleadings that have been amended to include new defendants as recommencing an action for the purposes of CAFA, but if the court finds that the new defendant was not on notice of the

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[12] It is important to note that, unlike the other issues discussed herein, the commencement issue is a temporary one. *See Bush v. Cheaptickets Inc.*, 425 F.3d 683, 689 (9th Cir. 2005) (''[A]ctions that were filed before [the Act's effective date] will shortly phase themselves out.'').

[13] Pub.L. No. 109-2, § 9, 119 Stat. 4, 14.

[14] See *Bush*, 425 F.3d at 687.

[15] State law determines whether plaintiff's filing of the complaint was successful for purposes of commencing suit. *See Bush*, 425 F.3d at 686 (''A state's own laws and rules of procedure determine when a dispute may be deemed a cognizable legal action in state court.'').

[16] *See Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 806 (7th Cir. 2005) [hereinafter Knudsen I] (''Plaintiffs routinely amend their complaints, and proposed class definitions, without any suggestion that they have restarted the suit—for a restart (like a genuinely new claim) would enable the defendant to assert the statute of limitations.'').

[17] A minority of courts reject the idea that *any* amendments to pleadings may constitute recommencement. *See Comes v. Microsoft Corp.*, 403 F. Supp.2d 897, 903 (S.D. Iowa 2005) (citing *Weekley v. Guidant Corp.*, 392 F. Supp. 2d 1066, 1067-68 (E.D. Ark. 2005)).

[18] Courts split on whether state or federal law should apply to determine whether an amendment relates back to the original claim, but since state relation back principles often track closely to federal law, this is usually a distinction without a difference. *See Prime Care of Northeast Kan. LLC v. Humana Ins. Co.*, 447 F.3d 1284, 1288 (10th Cir. 2006) (''We note that, as the Kansas rule applied in this case reflects, state relation-back doctrines have largely tracked the federal rule.'').

[19] See *Knudsen I*, 411 F.3d at 807 (''[W]hen [a claim] is sufficiently independent of the original contentions[,] . . . it must be treated as fresh litigation.'').

[20] *See Braud v. Transp. Serv. Co. of Ill.*, 445 F.3d 801, 807 (5th Cir. 2006).

[21] An amendment to pleadings does not have to affect every class action defendant to render the entire action removable. If the pleadings have been amended so that the claims with respect to just one defendant do not relate back to the original claims, then that single defendant may remove the entire action to federal court. *See* 28 U.S.C. § 1453(b).

[22] *Schorsch*, 417 F.3d at 751.

[23] *See, e.g.*, *Adams v. Ins. Co. of N. Am.*, 426 F. Supp. 2d 356, 380-81 (S.D. W.Va. 2006) (rejecting defendant's removal on the basis of plaintiff's substitution of class representatives post-CAFA because ''[t]he *core* of operative facts in the amended complaints remain the same as that in the initial pleadings''); *In re Sears, Roebuck & Co.*, No. MDL-1703, 05 C 4742, 05 C 4743, 2006 WL 1517779 (N.D. Ill. May 24, 2006), *aff'd sub nom*; *Garcia Santamarina v. Sears Roebuck & Co.*, No. 06-3054, 2006 WL 2979396 (7th Cir. Oct. 19, 2006) (same).

[24] There are at least two reasons why a defendant should have known that it would be haled into court although it was not named in the original complaint: (1) where an amendment substitutes the '' 'true name of a fictitiously named defendant' '' (the ''fictitious name'' exception); and (2) where an amendment '' 'merely corrects a misnomer' '' (the ''misnomer'' exception). *See Tiffany v. Hometown Buffet Inc.*, No. C 06-2524 SBA, 2006 WL 1749557, at *6-*8 (N.D. Cal. June 22, 2006) (discussing the fictitious name and misnomer exceptions) (quoting 5 Witkin Cal. Proc. Plead. § 1151).

plaintiff's claims, then the court will retain jurisdiction.[25]

Finally, the third category—amendments that add new claims to the litigation—represents a defendant's best chance at invoking CAFA under the commencement argument.[26] If plaintiff's amendment adds a ''novel claim to [an] existing case,'' then the ''amendments are not 'workaday changes.' ''[27] Instead, such claims are ''distinct'' from those set forth in the original pleadings.[28] However, if the new claims can be interpreted to ''arise[ ] out of the same transaction or occurrence,'' then the amendment will relate back to the original complaint and the case will not be subject to federal jurisdiction under CAFA.[29]

B. CAFA Appeals

One provision of CAFA has confounded courts with its illogical stance. CAFA amends 28 U.S.C. § 1453(c)(1) to state: ''[A] court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals *not less than 7 days* after entry of the order'' (emphasis supplied). The provision makes little sense—if read literally, an appeal from a remand decision cannot be taken within the first week of the lower court's decision, but can be taken a week later and permanently thereafter. One of the goals of CAFA is to ''assure fair and *prompt* recoveries for class members with legitimate claims''[30]—extending the deadline for an appeal from a remand order for an indeterminate amount of time undermines this goal by keeping open the constant possibility that a party will decide to appeal the remand order, whether it be eight days or eight hundred days later. Because there does not appear to be a conceivably logical reason for the language of this provision, every court that has considered the issue has decided that this to be an unintended, technical error.[31] Therefore, § 1453(c)(1) is read to require appeals from remand orders within, and not after, seven days.[32]

CAFA also contains ambiguous language concerning how long an appellate court has to consider an appeal from a district court's removal determination. CAFA provides that, if the appellate court accepts an appeal from a lower court's remand order, ''the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed,'' unless for good cause shown and in the interests of justice an extension is granted, not to exceed 10 days.[33] Class action litigants have debated whether the time for the appellate court to consider an appeal under CAFA begins to run at the time that the appellate court accepts the petitioner's notice of appeal, or whether it begins at the time the appellant files the petition for leave to appeal.[34]

Courts have found that the correct analysis of this issue depends upon the application of Federal Rule of Appellate Procedure 5, which governs appeals by permission.[35] FRAP Rule 5(d)(2) provides that ''[a] notice of appeal need not be filed.'' Instead, ''[t]he date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.''[36] Thus, under CAFA, ''the sixty-day period . . . in which the court of appeals must render judgment runs from the date of entry by the court of appeals of an order granting permission to appeal.''[37] Therefore, courts generally agree that the time for appeal begins to run when the appellate court accepts the notice of appeal, and not when the appellant files the petition for leave to appeal.[38]

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[25] *Compare Schillinger v. Union Pac. R.R. Co.*, 425 F.3d 330, 333 (7th Cir. 2005) (scrivener's error as to defendant's identity not sufficient to warrant removal); *Werner v. KPMG LLP*, 415 F. Supp. 2d 688, 709-10 (S.D. Tex. 2006), and *Miller v. Hypoguard USA Inc.*, No. 05-CV-0186-DRH, 2006 WL 1285343, at *7 (S.D. Ill. May 8, 2006) (''[T]he Court finds that the amendment of Fox Med-Equip changed the name of the correct party, that the allegations are the same and that Fox Med-Equip had notice of the suit and knew that but for the mistake concerning its identity, the suit would have been originally filed against it.''), with *Braud*, 445 F.3d at 806 (holding that the addition of a new defendant in this case ''change[d] the character of the litigation so as to make it substantially a new suit'') (internal quotation marks and citation omitted), and *Tiffany*, 2006 WL 1749557, at *8 (rejecting plaintiff's argument that the misnomer exception should apply). Cf. *Braud*, 445 F.3d at 808 (rejecting plaintiff's voluntary dismissal of new defendant as sufficient to eliminate federal jurisdiction).

[26] Compare *Knudsen I*, 411 F.3d at 807 (rejecting defendant's attempt to remove the case because of substitution of defendant in complaint), with *Knudsen II*, 435 F.3d at 758 (accepting defendant's removal of case as a result of plaintiff's ''tack[ing]'' on of a ''novel'' claim to the original complaint).

[27] *Moniz v. Bayer AG*, No. 06-10259-NMG, 2006 WL 2356008, at *7 (D. Mass. Aug. 14, 2006).

[28] *Id.*

[29] See *Schorsch*, 417 F.3d at 751. *See, e.g.*, *Weber v. Mobil Oil Corp.*, No. CIV-05-1175-L, 2006 WL 2045875, at *4 (W.D. Okla. July 20, 2006) (finding defendants had been ''on notice'' of pre-CAFA claims); *In re Audi*, No. 05-CV-4698, 2006 WL 1543752, at *4 (N.D. Ill. June 1, 2006) (''[T]he plaintiffs' strict liability claim relates back to the earlier pleading and does not commence a new litigation under CAFA.''). *Cf. Lally v. Country Mut. Ins. Co.*, No. 06-cv-00531-WYD-MEH, 2006 WL 2092610, at *3 (D. Colo. July 27, 2006) (severance of claims does not constitute commencement of new suit under CAFA).

[30] Pub. L. No. 109-2, § 2(b)(1), 119 Stat. 4, 5 (emphasis supplied).

[31] *See Laidlaw Transit*, 448 F.3d at 1094 (''[T]he primary purpose of statutory interpretation [is] to ascertain and to effectuate the intent of Congress.''); *Miedema*, 450 F.3d at 1326 (''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.'') (internal quotation marks and citation omitted). But see *Laidlaw Transit*, 448 F.3d at 1099 (Bybee, J., dissenting) (decrying the en banc court's ''rescuing'' of Congress from its mistake).

[32] *See Morgan v. Gay*, No. 06-8045, 2006 WL 2938309, at *3 (3d Cir. Oct. 16, 2006) (''This Court does not need to step into a statutory interpretation debate over the role of legislative history and congressional intent to conclude that § 1453(c)(1) needs common sense revision that accurately reflects the *uncontested* intent of Congress.'') (emphasis in original).

[33] 28 U.S.C. § 1453(c)(2), (c)(3)(B).

[34] *Patterson*, 444 F.3d 365.

[35] *Id.* at 368.

[36] FRAP Rule 5(d)(2).

[37] *Id.* at 370; *See Laidlaw*, 435 F.3d at 1145 (''[W]e hold that a party seeking to appeal under § 1453(c)(1) must comply with the requirements of FRAP 5''); *Evans*, 449 F.3d at 1162-63.

[38] The counter-argument to this position is that it allows a court to delay its decision and ''extend its 'consideration' of the case indefinitely.'' *Patterson*, 444 F.3d at 369. However, as the Patterson court found, ''abuse can occur under either interpretation of the sixty-day limit.'' *See id.* (''If the period begins with

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C. Burden of Proof Under CAFA

By its terms, CAFA does not explicitly alter the burden of proof for removal. Traditionally, the burden of proof for removal lies with the proponent of removal.[39] However, during the legislative debate over CAFA, one of CAFA's sponsors in the House stated: ''If a purported class action is removed pursuant to these jurisdictional provisions, *the named plaintiff(s)* should bear the burden of demonstrating that the removal was improvident . . . .''[40] This shift would put the burden of proof on the opponent of removal, usually the class action plaintiff. The proponent of removal, usually the class action defendant, would have no obligation to prove the legitimacy of removal. This potential shift has engendered heated debate among class action plaintiffs and defendants as to whether CAFA actually did alter the burden of proof, regardless of the intentions of CAFA's sponsors.

Although statements by legislators are accorded some evidentiary weight by courts in determining the scope of a law, courts are not easily persuaded by such statements, especially when they run contrary to already established case law: ''[C]ourts have no authority to *enforce* principles gleaned *solely* from legislative history that has no statutory reference point.''[41] Therefore, courts '' 'presume that Congress legislates against the backdrop of established principles of state and federal common law, and that when it wishes to deviate from deeply rooted principles, it will say so.' ''[42] CAFA's legislative history is not sufficiently persuasive, standing alone, to support a shift in the longstanding placement of the burden of proving federal jurisdiction on the proponent of removal. Thus, legislative history notwithstanding, courts have almost uniformly rejected attempts by class action defendants to shift the burden of proof to opponents of removal.[43] Proponents of removal—usually defendants in class actions—retain the burden of proving federal jurisdiction under CAFA.

Defendants' burden under CAFA is further exacerbated by the fact most courts have placed the burden of proving that the amount in controversy has been met on the proponents of removal. In addition to minimal diversity of citizenship, CAFA requires the aggregate amount in controversy among all plaintiffs to exceed $5,000,000, exclusive of interest and costs.[44] Although a few courts have placed this burden on opponents of removal, i.e., class action plaintiffs, the general trend is to place the burden of proving the amount in controversy on the proponents of removal, i.e., class action defendants.[45] The amount in controversy must be proven by a preponderance of the evidence, and failure to meet this standard has been a repeated basis for federal courts to refuse jurisdiction over class actions.[46]

However, it also should be noted that plaintiffs bear the burden of proving CAFA's exceptions.[47] In addition, as discussed below, courts have strictly interpreted CAFA's exceptions; thus, once defendants meet the requirements for federal jurisdiction under CAFA, the resulting removal generally withstands attack by plaintiffs.[48]

II. CAFA'S Exceptions

CAFA includes numerous carve-outs that require a federal court to deny subject matter jurisdiction over certain cases. Plaintiffs generally bear the burden of proof with respect to CAFA's carve-outs.[49] Three such

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the filing of the motion for permission to appeal, a court of appeals might choose just to 'sit' on the motion without ever ruling, content in the knowledge that after sixty days, the appeal will disappear by operation of law, and the court will never have to consider the merits.''). Instead, ''[t]he better view,'' according to the Patterson court, ''is to trust the integrity of the courts of appeals to recognize the Congressional directive to handle CAFA appeals expeditiously and in good faith.'' *Id*.

[39] *See Ongstad v. Piper Jaffray & Co.*, 407 F. Supp. 2d 1085, 1090 (D.N.D. 2006). *See also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998) (''[T]he party invoking federal jurisdiction bears the burden of establishing its existence.'').

[40] S. Rep. No. 109-14, at 42 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 40 (emphasis supplied); *see* 151 Cong. Rec. H723, H727 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) (''If a purported class action is removed under these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that removal was improper. And if a Federal court is uncertain about whether the $5 million threshold is satisfied, the court should err in favor of exercising jurisdiction over the case.'').

[41] *United States v. Thigpen*, 4 F.3d 1573, 1577 (11th Cir. 1993) (en banc) (emphasis in original) (quoting *Int'l Bhd. of Elec. Workers Local Union No. 474 v. NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987)). Cf. *Rural Electrification Admin. v. Cent. La. Elec. Co.*, 354 F.2d 859, 865 (5th Cir. 1966) (''Certainly, the demands of Congressional Committees do not have the force of law.'').

[42] *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1329 (11th Cir. 2006) (quoting *United States v. Baxter Int'l Inc.*, 345 F.3d 866, 900 (11th Cir.2003)); *see White v. Mercury Marine, Div. of Brunswick Inc.*, 129 F.3d 1428, 1434 (11th Cir. 1997) (''Congress is assumed to act with the knowledge of existing law and interpretations when it passes new legislation.'').

[43] *See Brill v. Countrywide Home Loans Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (holding that CAFA's ''naked legislative history'' does not alter the well established rule that a proponent of subject matter jurisdiction bears the burden of persuasion on the amount in controversy); *Abrego*, 443 F.3d at 686 (''CAFA's silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction.''). *But see Berry v. Am. Express Publ'g, Corp.*, 381 F. Supp. 2d 1118, 1121-23 (C.D. Cal. 2005); *Natale v. Pfizer Inc.*, 379 F. Supp. 2d 161 (D. Mass. 2005), *affirmed on other grounds*, 424 F.3d 43 (1st Cir. 2005).

[44] 28 U.S.C. § 1332(d)(2).

[45] *See Moore v. Genesco Inc.*, No. C 06-3897 SBA, 2006 WL 2691390 (N.D. Cal. Sept. 20, 2006); *Morgan v. Gay*, No. 06-1371 (GEB), 2006 WL 2265302, at *3-4 (D.N.J. 2006), *leave to appeal granted*, 2006 WL 2949353 (3d Cir. Oct. 16, 2006); *Ongstad*, 407 F. Supp. 2d at 1092. *But see Yeroushalmi v. Blockbuster Inc.*, No. CV 05- 225-AHM(RCX), 2005 WL 2083008, at *3 (C.D. Cal. July 11, 2005) (placing burden of proving amount in controversy on class action plaintiffs).

[46] See *Moore*, 2006 WL 2691390, at *5-6 (remanding case due to defendant's failure to meet the amount in controversy); *Morgan*, 2006 WL 2265302, at *4-5 (same); *Ongstad*, 407 F. Supp. 2d at 1092 (same).

[47] *See*, *e.g.*, *Hart*, 457 F.3d at 681 (holding that the placement of the burden of proving CAFA's exceptions is ''consistent with the legislative history of CAFA''); *Frazier*, 455 F.3d at 546 (''This result is supported by the reality that plaintiffs are better positioned than defendants to carry this burden.'').

[48] *See* Part III, *infra*.

[49] *See* note 48, *supra*, and accompanying discussion. *But see Serrano v. 180 Connect Inc.*, No. C 06-1363 TEH, 2006 WL 2348888 (N.D. Cal. Aug. 11, 2006) (placing burden of proving exceptions on defendant).

carve-outs—the securities,[50] fiduciary duty,[51] and state party exceptions[52]—are statutorily unambiguous. The few times they have been considered by federal courts, these exceptions have been interpreted by courts in a straightforward (and often narrow) manner to apply only under the circumstances laid out under CAFA.[53]

On the other hand, three other CAFA carve-outs—the local controversy, home state controversy, and interests of justice exceptions—contain significantly ambiguous language that could be interpreted in a manner that could threaten to swallow CAFA whole. However, to date, courts have tended to err on the side of strict application and have consistently rejected attempts by class action plaintiffs to invoke the exceptions and avoid federal jurisdiction.

A. The Home-State and Local Controversy Exceptions

Under the ''home state controversy'' exception, a district court must decline to exercise jurisdiction over a class action in which ''two-thirds or more of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed.''[54] Similarly, under the ''local controversy'' exception, a district court must decline jurisdiction if the following circumstances are met: (1) greater than two-thirds of the putative 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 (i) from whom significant relief is sought by members of the class, and (ii) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; (3) the 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 3-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.[55]

Not surprisingly, the few courts that have considered the home-state and local controversy exceptions have wrestled with their complicated requirements.[56] Both exceptions contain significantly ambiguous language. For example, what is a ''primary defendant'' under the home state controversy exception?[57] Moreover, what is a ''significant'' defendant[58] and what constitutes a ''principal injury''[59] under the local controversy exception? In addition, both exceptions require the proponent of remand to provide evidence as to the citizenship of the class—how can a class action plaintiff go about proving domicile of *the entire class*, which can be very large, for diversity purposes?

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[50] CAFA does not apply to any class action that solely involves a claim concerning a covered security, as defined under the Securities Act of 1933 and the Securities Exchange Act of 1934. 28 U.S.C. § 1332(d)(9)(A). Class actions that involve securities are subject to the Securities Litigation Uniform Standards Act of 1998 (SLUSA). *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 126 S. Ct. 1503 (2006).

[51] Federal jurisdiction under CAFA does not apply to a claim 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 corporation or business enterprise is incorporated or organized, 28 U.S.C. § 1332(d)(9)(B); or 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 the regulations issued thereunder). 28 U.S.C. § 1332(d)(9)(C).

[52] Section 1332(d)(5)(a) exempts from CAFA jurisdiction ''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.''

[53] For the state party exception, see *Frazier*, 455 F.3d at 547 (rejecting remand and finding that ''all primary defendants must be states'' for the state party exception to apply''), and *Hangarter v. Paul Revere Life Ins. Co.*, No. C 05-04558 WHA, 2006 WL 213834, at *3 (N.D. Cal. Jan. 26, 2006) (''[T]he Commissioner is a primary defendant because the relief sought from him is substantial in its own light, because he is the only defendant potentially liable on the eighth cause of action and because he would be liable to the entire class. The state-action exception therefore applies.''). For the securities exception, see *Davis v. Chase Bank U.S.A. NA*, No. CV 06 04804 DDP PJWX, 2006 WL 2812343, at *4 (C.D. Cal. Sept. 20, 2006) (rejecting remand and defining ''security'' narrowly to limit application of CAFA's securities exception), and *In re Textainer P'ship Sec. Litig.*, No. C 05-0969 MMC, 2005 WL 1791559, at *6-8 (N.D. Cal. July 27, 2005) (remanding due to fiduciary duty and securities exception). For the fiduciary duty exception, see *Carmona v. Bryant*, No. CV-06-78-S-BLW, 2006 WL 1043987 (D. Idaho Apr. 19, 2006) (applying fiduciary duty exception and remanding to state court), and *Ind. State Dist. Council of Laborers and Hod Carriers Pension Fund v. Renal Care Group Inc.*, No. Civ. 3:05-0451, 2005 WL 2000658, at *1 (M.D. Tenn. Aug. 18, 2005) (''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.'').

In addition, at least one court has addressed an implicit carve-out under CAFA—cases brought under a state's *parens patriae* authority. *See Harvey v. Blockbuster Inc.*, 384 F. Supp. 2d 749, 753-54 (D.N.J. 2005) (''A proposed amendment to explicitly exempt an action brought by an attorney general from the reach of Section 1332(d) was defeated in the Senate . . . the amendment [was] not necessary . . . because almost all civil suits brought by State attorneys general are *parens patriae* suits, similar representative suits or direct enforcement actions, [and] it is clear they do not fall within th[e] definition [of 'class action' under CAFA].'') (internal quotation marks and citations omitted) (first alteration in original).

[54] 28 U.S.C. § 1332(d)(4)(B).

[55] *See* 28 U.S.C. § 1332(d)(4)(A).

[56] As of October 17, 2006, it appears that only two federal appellate courts have considered (and rejected application of) the home-state and local controversy exceptions. Cf. *Frazier*, 455 F.3d at 547; *Evans*, 449 F.3d 1159.

[57] *See Frazier*, 455 F.3d at 546 (rejecting remand); *Serrano*, 2006 WL 2348888, at *1 (''[A] 'primary defendant' is one who either (1) is directly liable for a 'main' or 'principal' portion of the relief sought or (2) plays a 'main' or 'principal' role in the underlying dispute (i.e. based on its alleged conduct).''); *Kearns v. Ford Motor Co.*, No. CV 05-5644 GAF (JTLX), 2005 WL 3967998, at *7 (C.D. Cal. Nov. 21, 2005) (''The term 'primary defendants' has no clear, unambiguous meaning and is not an established term of art. Congress has used the term in only one other statute . . . .'').

[58] *See, e.g., Robinson v. Cheetah Transp.*, No. Civ. A. 06-0005, 2006 WL 468820, at *4 (W.D. La. Feb. 27, 2006) (rejecting remand due to plaintiff's failure ''to provide any evidence that significant relief'' was sought from a local defendant); *Kearns*, 2005 WL 3967998, at *9-10 (finding the definition of ''significant relief'' to be ''[a]mbiguous'').

[59] *Kearns*, 2005 WL 3967998, at *11 (' '[P]rincipal injuries' is not used in any statute aside from CAFA.'').

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Currently it appears that courts are interpreting the local and home-state exceptions narrowly and placing a high burden on class action plaintiffs to prove the applicability of the exceptions.[60] The majority of courts that have considered the local and home-state controversy exceptions have rejected their application.[61] For example, although courts have concluded that class action plaintiffs are ''better positioned than defendants to carry'' the burden of proving citizenship,[62] this conclusion does not acknowledge the difficulty of obtaining such proof. Indeed, the most consistent basis for rejecting application of these exceptions has been the proponent's failure to carry its burden as to the citizenship requirements.[63] However, it must be kept in mind that only a handful of district courts have considered these exceptions, and only two federal appellate courts have considered appeals arising under these carve-outs.[64] Therefore, the scope of these exceptions is far from certain, and requires constant monitoring to determine the trend of the law.

B. The Interest of Justice Exception

Finally, the ''interest of justice'' exception provides that a district court may, ''in the interests of justice and looking at the totality of circumstances,'' decline to exercise jurisdiction over class actions if 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.[65] A federal court is directed to consider a list of enumerated factors in its determination of whether the interest of justice exception applies.[66]

To date, no court has even discussed the interest of justice test in much detail; other than to recognize its existence.[67] It is unclear why plaintiffs have made almost no use of the interest of justice exception thus far, except for the same reason why plaintiffs have been largely unsuccessful in invoking the local and home-state controversy exceptions — the difficulty of proving class citizenship.[68] However, as with any ''discretionary'' test, the interest of justice exception is certain to engender much debate over how courts should interpret ambiguous language within the exception, and the weight courts should give to each factor.

III. CAFA'S Use by Plaintiffs

Members of the plaintiffs' bar have widely decried the impact of CAFA on class actions.[69] According to CAFA's opponents, as a result of the more stringent class certification procedures applied by the federal courts,[70] the removal of class actions to federal court is tantamount to complete dismissal.[71] However, although the vast majority of CAFA claims are brought by class

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[60] *See* Elizabeth J. Cabraser, ''The Class Action Fairness Act: One Year Later,'' 744 PLI/Lit 67, 84 (2006) [hereinafter Cabraser, ''One Year Later''] (finding that ''[p]roving the truly local nature of a controversy[] may not be as simple as it'' first appeared to class action plaintiffs).

[61] See *Evans*, 449 F.3d 1159; *Frazier*, 455 F.3d at 547; *Robinson*, 2006 WL 468820, at *3-4; *Schwartz v. Comcast Corp.*, No. Civ. A. 05-2340, 2006 WL 487915, at *6 (E.D. Pa. Feb. 28, 2006). But see *Serrano*, 2006 WL 2348888, at *1; *Moll v. Allstate Floridian Ins. Co.*, No. 3:05CV160RvMD, 2005 WL 2007104 (N.D. Fla. Aug. 16, 2005).

[62] *Frazier*, 455 F.3d at 546 (citing *Evans*, 449 F.3d at 1164 n.3).

[63] *Evans*, 449 F.3d at 1165-66; *Serrano*, 2006 WL 2348888, at *6; *Musgrave v. Aluminum Co. of Am. Inc.*, No. 3:06-cv-0029-RLY-WGH, 2006 WL 1994840 (S.D. Ind. July 14, 2006); Schwartz, 2006 WL 487915, at *6. *But see Moll v. Allstate Floridian Ins. Co.*, 2005 WL 2007104 (N.D. Fla. Aug. 16, 2005) (rejecting CAFA jurisdiction and remanding to state court because primary defendant was citizen of same state as majority of plaintiffs).

[64] *Frazier*, 455 F.3d 542; *Evans*, 449 F.3d 1159.

[65] *See* 28 U.S.C. § 1332(d)(3).

[66] In determining whether the interests of justice and totality of circumstances warrant exercise of this discretionary exception, district courts are to consider the following 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 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

Id. § 1332(d)(3)(A)-(F).

[67] *Cf. Berthelot v. Boh Bros. Constr. Co.*, No. Civ A. 05-4182, 2006 WL 2256995, at *5 (E.D. La. July 19, 2006). *But see Kearns*, 2005 WL 3967998, at *8 (rejecting application of interest of justice exception because of failure to prove primary defendant prong).

[68] *See, e.g.*, *Schwartz*, 2006 WL 487915, at *6 (noting the existence of the interest of justice exception, but declining to consider it because plaintiff had not met citizenship requirement).

Another possible reason plaintiffs do not appear to be making use of the interest of justice exception may be because several of the factors in the test are biased towards defendants. For example, subsection (c) requires a court to consider ''whether the class action has been pleaded in a manner that *seeks to avoid* Federal jurisdiction.'' 28 U.S.C. § 1332(d)(3)(c) (emphasis supplied). This factor shifts the court's attention towards possible wrongdoing by the plaintiff, and not by defendant. *Cf.* Edward F. Sherman, ''Class Actions After The Class Action Fairness Act,'' 80 TUL. L. REV. 1593, 1608 (2006) [hereinafter Sherman, ''Class Actions''] (''It thus appears that in many situations CAFA has shifted bargaining power to defendants.'').

[69] *See* Arthur H. Bryant, ''Fighting to End the 'Ban Litigation' Crisis,'' 42 TRIAL 50, 51 (2006) (''Corporate defendants now say that the new federal class action legislation—misnamed the Class Action Fairness Act—bars many cases against them.'') (citation omitted).

[70] *See* Fed. R. Civ. P. 23.

[71] *See, e.g.*, Gary L. Sasso, et al., ''Defense Against Class Certification,'' 744 PLI/Lit 389, 402 (2006) (summarizing the federal courts' ''general skepticism toward the certification of non-federal question class actions''). This heuristic is somewhat belied by the fact that the application of Federal Rule of Civil Procedure 23 differs between courts. *See* Sherman, ''Class Actions,'' at 1609-10 (discussing the varied approaches of federal courts to class certification under Federal Rule of

action defendants, nothing in CAFA so limits its application. Instead, plaintiffs should consider the (albeit rare) situations in which invoking federal jurisdiction under CAFA would be beneficial to a class action, and defense counsel should be prepared to argue against federal jurisdiction when necessary.

Plaintiffs have attempted to employ CAFA to gain federal jurisdiction over a class action several times since CAFA's enactment.[72] Courts have applied the same analysis to plaintiffs' claims as to those brought by defendants.[73] For example, at least one court has applied a commencement analysis to a plaintiff's pre-CAFA filed suit.[74] In these cases, class action defendants take the place of plaintiffs and argue for a narrow application of CAFA jurisdiction.[75]

One possible reason for plaintiffs to opt for federal jurisdiction is the general trend among the states towards stricter class certification procedures more in line with Federal Rule of Civil Procedure 23.[76] Thus, as class action reform spreads into the states, the impetus for plaintiffs to avoid federal jurisdiction may decline. In addition, plaintiffs' counsel may opt for federal jurisdiction in states that limit attorneys' fees in class actions.[77] Although CAFA already limits attorneys' fees in settlements, states such as Texas impose even more restrictive limits on such fees.[78]

Thus, although use of CAFA by plaintiffs to gain federal jurisdiction remains rare, both plaintiffs and defendants should recognize that federal jurisdiction is not necessarily a death knell for class actions, and plaintiffs may benefit from employing CAFA in the future.

IV. Conclusion

There is an implicit contradiction between CAFA and federal removal case law. Although '' '[s]tatutory procedures for removal are to be strictly construed' '' against removal,[79] CAFA is such a broad and sweeping law that a strict construction of the law could conflict with CAFA's goal of streamlining class actions into federal court. Thus, it might be unsurprising that, since CAFA's enactment, courts have narrowly construed CAFA's exceptions not against removal, but in favor of it, as such a construction furthers CAFA's sweeping goal.[80] Moreover, given CAFA's sweeping goal, it is similarly unsurprising that more than a few class actions that would have otherwise been litigated in state court have been successfully removed to federal court.[81]

The key words here, however, are ''since CAFA's enactment.'' The CAFA case law is constantly evolving.[82] Appellate courts have yet to consider several provisions of CAFA at all, and other provisions have been considered only cursorily. Although the commencement issue, the most common ground for remand, is time-bound,[83] other issues may develop over the coming months and years that could bolster, or undermine, CAFA's objectives.

Only time will tell.

Civil Procedure 23). *See also* Daniel R. Karon, '' 'How Do You Take Your Multi-State, Class Action Litigation? One Lump or Two?'—Infusing State Class-Action Jurisprudence Into Federal, Multi-State Class Certification Analyses in a 'CAFA-Nated' World,'' SL081 ALI-ABA 1503 (2006) (arguing that, as a result of the *Erie* doctrine, Rule 23 should not apply to class certification of CAFA suits).

[72] *See Ponca Tribe of Indians of Okla. v. Cont'l Carbon Co.*, 439 F. Supp. 2d 1171, 1177-78 (W.D. Okla. 2006); *Lake County Convention & Visitors Bureau Inc. v. Hotels.com LP*, 2006 WL 1793583 (N.D. Ind. June 27, 2006); *Steinberg v. Nationwide Mut. Ins. Co.*, 418 F. Supp. 2d 215, 222 (E.D.N.Y. 2006); *Frosini v. Bridgestone Firestone N. Am. Tire LLC*, 2005 WL 3710393 (C.D. Cal. Dec. 12, 2005); *Price v. Berkeley Premium Nutraceuticals Inc.*, No. 05-73169, 2005 WL 2649205, at *4 (E.D. Mich. Oct. 17, 2005).

[73] *See Lake County Convention & Visitors Bureau*, 2006 WL 1793583, at *2 (rejecting CAFA jurisdiction because of plaintiffs' failure to provide ''any information to assist [the court] in its jurisdictional analysis''); *Ponca Tribe*, 439 F. Supp. 2d at 1177-78 (granting CAFA jurisdiction to plaintiffs' class action).

[74] *See Price*, 2005 WL 2649205, at *4 (allowing plaintiff to dismiss original suit and re-file after the enactment of CAFA ''so as to take advantage of CAFA's jurisdictional provision'').

[75] *Id*. (rejecting defendant's characterization of allowing plaintiff to re-file class action after CAFA's enactment as ''unfair'').

[76] *See, e.g.*, GA. CODE ANN. § 9-11-23 (establishing class action procedures including initiation, dismissal, transfer of structured settlements, notice, and judgments); LA. CODE CIV. PROC. art. 591-594, 596, 611 (establishing class action procedures including certification, notice, judgment, venue, dismissal, and derivative actions); Ohio R. Civ. P. 23 (establishing class action procedures).

[77] TEX. CIV. PRAC. & REM. CODE ANN. § 26.003.

[78] *See* Sherman, ''Class Actions'', at 1614 (''In the end, the restrictions [on attorneys' fees] in [CAFA] were rather modest. Compare them, for example, to those contained in a Texas 'tort reform' statute . . . .'').

[79] *See Miedema*, 450 F.3d at 1329 (quoting *Syngenta Crop Prot. Inc. v. Henson*, 537 U.S. 28, 32 (2002)).

[80] *See* Cabraser, ''One Year Later,'' at 84 (''The 'local controversy' exception, which is just now being subjected to district court scrutiny and appellate review, does not look as promising for plaintiffs attempting to remain in state court as it may once have appeared.'').

[81] *See* note 8, *supra*, and accompanying discussion.

[82] *See* Cabraser, ''One Year Later,'' at 84 (''CAFA statutory construction and application is a volatile and dynamic jurisprudential arena. There is time for additional surprises, and new decisions change the landscape daily.'').

[83] *See* Sherman, *Class Actions*, at 1606 (''Of course, these [commencement] issues will have a limited life.''). The U.S. Supreme Court recently denied two petitions for certiorari in cases concerning the commencement issue. *Knudsen v. Liberty Mut. Ins. Co.*, No. 05-1496, —- S.Ct. ——, 2006 WL 1522539 (Oct. 2, 2006); *ScriptSolutions v. Eufaula Drugs Inc.*, No. 05-1552, —- S.Ct. ——, 2006 WL 1547030 (Oct. 2, 2006).

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