APPLYING THE JURISDICTIONAL PROVISIONS OF THE CLASS ACTION FAIRNESS ACT OF 2005: IN SEARCH OF A SENSIBLE JUDICIAL APPROACH

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I. INTRODUCTION

On February 18, 2005, President Bush signed the Class Action Fairness Act of 2005 (CAFA), which had been passed by the 109th Congress.[1] The stated purpose of the legislation was "[t]o amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes."[2]

The Republican-controlled Congress was concerned that class actions were creating a drag on the economy by forcing corporate defendants to settle unwarranted suits in order to avoid the risk of exposure to possibly ruinous judgments.[3] In many cases, such settlements provided nothing more than coupons of little or no value to the class members, while awarding excessively large attorneys' fees to class council.[4] To make matters worse, plaintiffs' attorneys had been able to "game" the system by manipulating the named plaintiffs and defendants in order to avoid federal diversity jurisdiction.[5] They then could bring a large number of such class

[1] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

[2] *Id.*

[3] S. REP. NO. 109-14, at 20–21 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 21. The Senate Report provides:

> A second common abuse in state court class actions is the use of the class device as "judicial blackmail" in cases that border on frivolous. . . . As Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has explained, "certification of a class action, even one lacking merit, forces defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability. . . . [Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."

Id. (quoting *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995)).

[4] *Id.* at 14, *as reprinted in* 2005 U.S.C.C.A.N. at 15 ("The first such abuse involves settlements in which the attorneys receive excessive attorneys' fees with little or no recovery for the class members themselves.").

[5] *Id.* at 4, *as reprinted in* 2005 U.S.C.C.A.N. at 5 ("To make matters worse, current law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in

actions in a handful of state court jurisdictions, where judges were known for providing inadequate supervision of class certification and approval of settlements.[6]

Opponents of the Act argued that class actions were an effective and necessary method of enforcing corporate responsibility.[7] If plaintiffs could not band together when large numbers of consumers or other persons were harmed by the actions of businesses, there might be no other practical option for redress. In many cases, because the amount of harm to each potential plaintiff is small enough that it would not make sense for any individual to bring suit for only their own damages, corporations could wrongfully profit from harm to others with impunity.[8] Even those cases in which coupon settlements did not create a significant tangible benefit to plaintiffs were important for their deterrent effect on business practices. Opponents further argued that although there had been some abuses of the system, these constituted a small number of isolated instances, and that overall, class actions did considerably more good than harm.[9]

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state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests.").

[6] *Id.* at 14, *as reprinted in* 2005 U.S.C.C.A.N. at 14 ("The Committee finds, however, that one reason for the dramatic explosion of class actions in state courts is that some state judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions. In particular, many state judges are lax about following the strict requirements of Rule 23 (or that state's parallel governing rule), which are intended to protect the due process rights of both unnamed class members and defendants. In contrast, federal courts generally scrutinize proposed settlements much more carefully and pay closer attention to the procedural requirements for certifying a matter for class treatment.").

[7] *Id.* at 54, *as reprinted in* 2005 U.S.C.C.A.N. at 50 ("To date, the only mechanism that has been successful in imposing liability on some industries . . . has been class action lawsuits. Allowing removal of state class actions to federal court will destroy the impact that class actions are having on these socially irresponsible businesses.").

[8] *Id.* at 83, *as reprinted in* 2005 U.S.C.C.A.N. at 76 (minority views). "By providing plaintiffs access to the courts in cases where a defendant may have caused small injuries to a large number of persons, class action procedures have traditionally offered a valuable mechanism for aggregating small claims that otherwise might not warrant individual litigation." *Id.*

[9] *Id.* at 85, *as reprinted in* 2005 U.S.C.C.A.N. at 77 ("We recognize that there are some genuine problems with some class action litigation that should be addressed by federal legislation for the benefit of both defendants and plaintiffs. This legislation, however, is heavily biased in favor of defendants. Rather than address the systems' real failings, S. 5 will make it more difficult for the vast majority of legitimate, well-intentioned class actions to move forward, by placing cumbersome restrictions on citizens' rights to seek redress for their injuries."). *See also* Anna

The Act contained both substantive provisions (a consumers' bill of rights) designed to prohibit settlements that benefited named plaintiffs and class counsel to the detriment of other class members,[10] and jurisdictional provisions which greatly expanded the ability of defendants to remove class actions from state to federal court.[11]

According to the sponsors of the Class Action Fairness Act, the purpose of the sections expanding federal subject matter jurisdiction was to prevent the practice used by some lawyers of manipulating the citizenship of the named parties and/or the amount in controversy, which made it impossible for the defendants to remove the cases from state to federal court.[12] This

Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. MIAMI L. REV. 385, 386 (2005) ("[D]espite extensive opportunities for abuse of the class action device, the courts have many mechanisms they can utilize to minimize the risks of its misuse. The Act, on the other hand, while incapable of resolving the existing issues with class action litigation, can potentially create even more problems.").

[10] The "Consumer Class Action Bill of Rights," codified at 28 U.S.C.A. §§ 1711–1715 (West 2006) provides for:

§ 1712: Restrictions of attorneys' fees in coupon settlement cases;

§ 1713: Protection against monetary loss by class members;

§ 1714: Protection against discrimination based on geographic location;

§ 1715: Notification to federal and state officials before settlements may be approved.

The "Consumer Class Action Bill of Rights" is outside of the scope of this Article and will not be discussed further. For an excellent description of this part of the Act, see 5 GEORGENE M. VAIRO, *The Class Action Fairness Act of 2005: A Review and Preliminary Analysis*, MOORE'S FEDERAL PRACTICE (3d ed. Supp. 2006).

[11] The provisions expanding federal jurisdiction are codified at 28 U.S.C.A. § 1332(d) (West 2006) and those provisions facilitating removal of class actions to federal court are codified at 28 U.S.C. § 1453 (2000). They are the main topic of this Article and will be discussed throughout.

[12] S. REP. NO. 109-14, at 26–27 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 26–27. The Senate Report provides:

> Under current law, however, plaintiffs' lawyers can easily manipulate their pleadings to ensure that their cases remain at the state level. As noted above, the two most common tactics employed by plaintiffs' attorneys in order to guarantee a state court tribunal are: adding parties to destroy diversity and shaving off parties with claims for more than $75,000. . . .
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> . . . By enabling federal courts to hear more class actions, this bill will help minimize the class action abuses taking place in state courts and ensure that these cases can be litigated in a proper forum.

Id.

was facilitated by several long-standing interpretations of the diversity statutes by the Supreme Court.[13]

The Court has consistently required "complete diversity" in cases brought under the general diversity statute, 28 U.S.C. § 1332.[14] In class actions, this means that if any named plaintiff was a citizen of the same state as any named defendant, then the case could not be brought in or removed to federal court.[15] As to the amount in controversy, the Court held that the claims of class members could not be aggregated to satisfy the $75,000 requirement[16] and that the claim of each and every class member must exceed this amount.[17] Therefore, by adding one named plaintiff with the same citizenship as any defendant, or defining the class so that some members had a claim of less than $75,000, plaintiffs could ensure that defendants would not be able to remove a state-court class action to federal court.

The sponsors argued that "interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit" and therefore that "such cases properly belong in federal court."[18] Class actions based on federal law could already be brought in or removed to federal court using the existing federal question and removal statutes.[19] In order to open the federal courts to large interstate class actions which were based on state law, diversity jurisdiction in class action cases was expanded, so that only minimal, rather than the normal complete diversity was required.[20] Under CAFA, as long as any member of

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[13] *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806); Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113-14 (codified at 28 U.S.C. § 1367), *as recognized in* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005); Snyder v. Harris, 394 U.S. 332, 337–38 (1969).

[14] *See Strawbridge*, 7 U.S. at 267.

[15] *See infra* Part III.B.

[16] *See Snyder*, 394 U.S. at 337–38.

[17] *See Zahn*, 414 U.S. at 301.

[18] S. REP. NO. 109-14, at 5 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 6. At least one commentator has challenged the propriety of Congress' using their power to regulate interstate commerce to expand the diversity jurisdiction. *See generally* C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487 (2006).

[19] *See* 28 U.S.C. §§ 1331, 1441 (2000).

[20] *See infra* Part II.A.1.

the plaintiff class was a citizen of a different state than any defendant, then any defendant could remove the case from state to federal court.[21] The amount in controversy requirement was also changed, so that rather than requiring that each and every class member have more than $75,000 in controversy, plaintiffs claims could be aggregated and removal was allowed if the total amount in controversy for all class members exceeded five million dollars.[22] The Act also facilitated removal by: (1) dispensing with the normal one-year time limit on removal, (2) allowing removal of the entire case by any single defendant without requiring consent of all defendants, and (3) making inapplicable the restriction that in diversity cases a defendant who is a citizen of the state in which suit is brought may not remove.[23]

Because most class actions involve at least one plaintiff who is a citizen of a different state from one of the defendants and also involve more than five million dollars in potential damages, the overwhelming majority of such lawsuits will fit within the jurisdictional provision and be subject to

[21] This basic jurisdictional provision, currently codified at 28 U.S.C. § 1332(d)(2), provides that in class action cases:

> (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—
>
> > (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
> >
> > (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
> >
> > (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

28 U.S.C.A. § 1332(d)(2) (West 2006).

[22] *Id.*

[23] 28 U.S.C. § 1453(b) (2000) provides:

> In General.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

removal to federal court.[24] Whether this is good or bad as a matter of policy and whether it will result in a great reduction in the number of class actions has yet to be seen, and is beyond the scope of this Article.[25]

Not all class actions were supposed to fall under the federal jurisdictional provisions. Because of the amount in controversy requirement, smaller class actions with less than five million dollars in controversy should still be able to be heard in state court.[26] The same goes for cases in which all plaintiffs and all defendants are citizens of the same state, although this will be a rare occurrence.[27] There are also some exceptions to federal jurisdiction, some of which apply to cases involving specific subject matters or defendants.[28] In addition, there are several

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[24] *See* VAIRO, *supra* note 10, at 44.

[25] *See generally* Holly Kershell, Comment, *An Approach to Certification Issues in Multi-State Diversity Class Actions in Federal Court After the Class Action Fairness Act of 2005*, 40 U.S.F. L. REV. 769 (2006).

[26] *See* 28 U.S.C.A. § 1332(d)(5)(B) (West 2006) (containing an exception from federal jurisdiction if "the number of members of all proposed plaintiff classes in the aggregate is less than 100").

[27] *See infra* Part III.B.

[28] 28 U.S.C. § 1332(d)(9) provides that the jurisdictional provisions do not apply to any class action:

> (A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (*15 U.S.C. 78p(f)(3)*) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (*15 U.S.C. 78bb(f)(5)(E)*);
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> (B) 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; or
>
> (C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (*15 U.S.C. 77b(a)(1)*) and the regulations issued thereunder).

28 U.S.C.A. § 1332(d)(9) (West 2006). Section 1332(d)(5)(A) provides that they also do not apply if "the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief." 28 U.S.C.A. § 1332(d)(5)(A) (West 2006).

These substantive exceptions are not within the scope of this Article. For an application of exemptions (B) & (C), see *In re* Textainer P'ship Sec. Litig., No. C 05-0969 MMC, 2005 WL 1791559, at *4–6 (N.D. Cal. July 27, 2005), and for an application of exemption (C), see Williams v. Tex. Commerce Trust Co. of N.Y., No. 05-1070-CV-W-GAF, 2006 WL 1696681, at *3–6 (W.D. Mo. June 15, 2006).

exceptions that were supposed to ensure that truly local actions could be heard in state court, even if minimal diversity and five million dollars in controversy existed.[29]

In order to obtain the approval of enough Democrats in the Senate, the sponsors had to support an amendment proposed by Senator Feinstein that would allow class actions which were truly local in nature to remain in state court.[30] This "home-state" controversy exception involved a three-tiered approach.[31] Cases in which more than two-thirds of all plaintiffs and the primary defendants were citizens of the state in which suit was brought would be remanded to state court;[32] cases in which between one-third and two-thirds of plaintiffs and the primary defendants were in-state citizens would be allocated between federal and state courts based on a series of factors designed to determine if the suit was more local or national in scope;[33] and suits in which fewer than one-third of the plaintiff class were

[29] *See infra* Part III.

[30] 151 CONG. REC. S999, 1006 (daily ed. Feb. 7, 2005) (statement of Sen. Hatch) ("After we fell one vote shy of invoking cloture the year before last, three Democratic Senators who voted against proceeding on the bill presented us with a detailed list of issues they wanted resolved before they could support class action reform legislation. After extensive discussions in November of 2003, we responded to each and every concern raised by these Senators and made the appropriate changes that are now embodied in S. 5.").

[31] *See* 28 U.S.C.A. § 1332(d)(3)–(4) (West 2006).

[32] 28 U.S.C.A. § 1332(d)(4)(B) (West 2006) provides that a district court "shall decline 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."

[33] 28 U.S.C.A. § 1332(d)(3) (West 2006) provides:

> A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which 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—
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> > (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;

in-state citizens were to remain in federal court.[34] There is a similar "local controversy" exception which requires that two-thirds of the members of the plaintiff class and at least one defendant from whom significant relief is sought be in-state citizens, and in addition that the principal injuries related to the conduct of all defendants occurred within the state and that no similar lawsuits had been filed against the same defendants during the preceding three years.[35]

Even if one accepts the proposition that large interstate class actions belong in federal court, truly local class actions (those where most plaintiffs and defendants are from the forum state, the harm occurred in the forum

> (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.

[34] *Id.*

[35] 28 U.S.C.A. § 1332(d)(4) (West 2006) provides, in part:

> (4) A district court shall decline to exercise jurisdiction . . . (i) over a class action in which—
>
> (I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;
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> (II) at least 1 defendant is a defendant— (aa) from whom significant relief is sought by members of the plaintiff class; (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and (cc) who is a citizen of the State in which the action was originally filed; and
>
> (III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and
>
> (ii) 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 or other persons . . . .

state and the forum state's laws will be applied) should be able to be heard in state court.[36] Even though the exceptions seem designed to accomplish this goal, that result may prove illusory. The exceptions were drafted in a way that will make it very difficult for plaintiffs to use them, even in many cases that more properly belong in state, rather than federal court.[37] Whether or not any significant number of state-court class actions survive depends in large part on how the federal courts interpret and apply the new grant of jurisdiction and the exceptions.

Which party has the burden of proof on the jurisdictional facts and more importantly, what kind of evidence the courts will require to meet that burden, will be key in determining if state-court class actions survive at all. A split in the courts has arisen as to who has the burden of proof on the jurisdictional issues.[38] Some courts have decided that Congress left intact the rule that the party asserting federal jurisdiction (in most of these class actions, usually the removing defendant) has the burden of proving that jurisdiction exists, since Congress was aware of the well-established rule assigning the burden of proof to the party trying to establish federal jurisdiction, and nothing in the statutory language purports to change it.[39] Other courts have looked to the legislative history, especially statements inserted into the committee reports by the bill's sponsors, and have held that Congress intended to shift the burden to the plaintiff to show that the jurisdictional standards of minimal diversity and amount in controversy had not been met.[40] Which party has the burden of proof on these issues may determine, especially in some close cases where the amount in controversy is in question, whether a case remains in federal court or is remanded to state court. This Article takes the position that the burden on showing that the general jurisdictional provisions have been met should remain on the party seeking federal jurisdiction.[41]

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[36] 151 CONG. REC. S999, 1006 (daily ed. Feb. 7, 2005) (statement of Sen. Hatch) ("[T]he local controversy exception will enable State courts to hear local class actions alleging principal injuries confined to the forum State and where the lawsuit involved litigants who predominately reside within that State.").

[37] *See infra* Part II.

[38] *See infra* notes 53–56.

[39] *See infra* Part II.A, note 53.

[40] *See infra* Part II.A, note 54.

[41] *See infra* Part II.

A perhaps even more important issue involves the procedures to be used after a court determines that the minimal diversity and amount in controversy are met, if the plaintiffs assert that the action meets one of the exceptions for home-state or local controversies. Here, the rule will probably be applied that once the proponent of federal jurisdiction has established the basic requirements of the statute, a party relying on an exception to have the case remanded to state court has the burden of proving that the case fits within the exception.[42]

Thus, to assert either exception, plaintiffs will probably have the burden of showing, among other things, that more than two-thirds of the members of the plaintiff class are "citizens" of the forum state.[43] Depending on the evidence required by the court, this may turn out to be very difficult, even in those cases where the plaintiff class is composed mainly of "residents" of the state. This is because citizenship for diversity purposes is determined not by residence but by domicile, which is often more difficult to determine than residence. It involves knowing such matters as whether a person intends to remain indefinitely in a particular state or intends to return to his previous domicile.[44] In a lawsuit with just a few parties, making this determination is usually not a problem. But in a class action involving thousands of class members, requiring plaintiffs to prove that two-thirds of them are "citizens" of the state may make the showing virtually impossible. The results may turn on the amount of proof required by the court, what discovery is allowed to establish jurisdictional facts, and whether the plaintiffs will be allowed the benefit of some reasonable presumptions.

Congress precipitated this problem by basing the home-state and local controversy exceptions on the citizenship, rather than the residence of the parties.[45] When defining the basic requirements for jurisdiction, Congress was required to use citizenship, because that is how the Constitution defines federal diversity.[46] However, in defining the exceptions, which Congress designed to weed out those cases that had a local impact, Congress could and should have used residence, or some similar measure indicating a

[42] *See infra* Part II.B.

[43] *See infra* Part III.D.

[44] *See infra* Part III.B.

[45] *See infra* Part III.

[46] U.S. CONST. art. III, § 2.

strong relationship to the state, rather than citizenship.[47] An injury to a large number of people who live (or work or conduct business or own land) in a particular state concerns that state most directly and might belong in state court, even if more than one-third of them are not "permanent" domiciliaries.[48] Except in unusual cases (perhaps where plaintiffs are students at a large university or soldiers at a large military facility), if the overwhelming majority of the plaintiffs are state residents, then, surely almost more than two-thirds of them are also state citizens.[49] But even in those cases, it might be difficult or impossible for the plaintiff to actually prove that fact, because it will either be impossible or impractical to gather that information.

In addition to the question of how plaintiffs must prove the citizenship of the class members, other issues which will affect whether the home-state and local controversy exceptions have any effect will be the following: how the courts define "primary" or "significant" defendant and what proof they require of this; what kind of leeway the courts grant to plaintiffs in defining the class members; and how the courts apply the factors in the intermediate tier (when between one-third and two-thirds of plaintiffs are in-state citizens).[50]

This Article will examine these procedural issues involved in making the determination of whether a class action should be remanded to state court or remain in federal court. It will argue that in order to accomplish Congress's stated goal of allocating cases of an interstate nature to federal courts and truly local cases to state courts, the federal courts must not impose unreasonable or impossible standards of proof for plaintiffs to meet.

II. ASSIGNING THE BURDEN OF PROOF ON JURISDICTIONAL ISSUES

One of the first legal issues faced by the federal courts in cases which have been removed by defendants pursuant to CAFA, and in which plaintiffs have filed a motion to remand, is how to allocate the burden of proof on the jurisdictional facts. This issue has arisen in two contexts: first, whether the basic jurisdictional requirements of minimal diversity and five

[47] *See infra* Part III.B.

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

[49] *See infra* Part II.B.

[50] 28 U.S.C.A. § 1332(d)(3), (d)(4) (West 2006). *See supra* note 33. As of yet, there have been no cases that have applied these factors.

million dollars amount in controversy have been met,[51] and second, if the basic requirements have been met, whether the case falls into one of the exceptions for home-state or local controversies.[52]

The party who has the burden of establishing the general requirements for jurisdiction is not necessarily the same as the one who has the burden of establishing one of the exceptions. And even as to the burden of establishing the general requirements, the same burden may not apply to proving minimal diversity as opposed to establishing the required amount in controversy. Some courts have not been careful about separating these different issues for different analyses. This Article will attempt to analyze each of these separately.

A. Basic Jurisdictional Requirements

On the question of who has the burden of proof on the basic jurisdictional questions, the courts (at least the district courts) have been split, with some retaining the general rule that the party seeking federal court jurisdiction has the burden to show that it exists,[53] while others have held that Congress intended to switch the burden to plaintiffs to show that jurisdiction does not exist.[54] The better position, which has been adopted

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[51] 28 U.S.C.A. § 1332(d)(2) (West 2006); *see supra* note 21.

[52] *See supra* notes 31–35.

[53] *See* DiTolla v. Doral Dental IPA of N.Y., LLC, 469 F.3d 271, 275 (2d Cir. 2006); Miedema v. Maytag Corp., 450 F.3d 1322, 1328 (11th Cir. 2006); Evans v. Walter Indus., Inc., 449 F.3d 1159, 1164 (11th Cir. 2006); Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 685–86 (9th Cir 2006); Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 447 (7th Cir. 2005); Werner v. KPMG LLP, 415 F. Supp. 2d 688, 694–95 (S.D. Tex. 2006); Ongstad v. Piper Jaffray & Co., 407 F. Supp. 2d 1085, 1088–90 (D.N.D. 2006); Plummer v. Farmers Group, Inc., 388 F. Supp. 2d 1310, 1317 (E.D. Okla. 2005); Judy v. Pfizer, Inc., No. 4:05CV1208RWS, 2005 WL 2240088, at *1–2 (E.D. Mo. Sept. 14, 2005); Moll v. Allstate Floridian Ins. Co., No. 3:05CV160RVMD, 2005 WL 2007104, at *2 (N.D. Fla. Aug. 16, 2005) (holding that "the defendant need only prove that its principal place of business is in a state other than Florida"); Schwartz v. Comcast Corp., No. Civ. A. 05-2340, 2005 WL 1799414, at *4 (E.D. Pa. July 28, 2005).

[54] *See* Natale v. Pfizer Inc., 379 F. Supp. 2d 161, 168 (D. Mass. 2005), *aff'd*, 424 F.3d 43 (1st Cir. 2005); Dinkel v. Gen. Motors Corp., 400 F. Supp. 2d 289, 295 (D. Me. 2005); Lussier v. Dollar Tree Stores, Inc., No. CV 05-768-BR, 2005 WL 2211094, at *1 (D. Or. Sept. 8, 2005); *In re* Textainer P'ship Sec. Litig., No. C 05-0969 MMC, 2005 WL 1791559, at *3 (N.D. Cal. July 27, 2005); Waitt v. Merck & Co., No. C05-0759L, 2005 WL 1799740, at *1–2 (W.D. Wash. July 27, 2005); Yeroushalmi v. Blockbuster, Inc., No. CV 05-225-AHM(RCX), 2005 WL 2083008, at

by all of the courts of appeals that have decided this issue,[55] is that Congress did not change the well-established rule placing the burden on the party seeking jurisdiction.[56]

1. Minimal Diversity

None of the courts have distinguished the requirement for proving minimal diversity (that at least one plaintiff is a citizen of a different state from at least one defendant) from the requirement of showing the amount in controversy, lumping them together and assigning the burden of proof on both to either the plaintiff or the defendant. In fact, they should be analyzed separately.

The amount in controversy is a purely statutory requirement, since Article III of the Constitution, in defining the scope diversity jurisdiction, does not mention any required amount in controversy.[57] As a statutory requirement, it is subject to congressional control over how to prove the requirement, and courts are correct in looking at the statutory language or legislative history, or both, to determine congressional intent.[58] However,

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*3 (C.D. Cal. July 11, 2005); Berry v. Am. Express Publ'g, Corp., 381 F. Supp. 2d 1118, 1122 (C.D. Cal. 2005), *abrogated by Abrego Abrego*, 443 F.3d at 685, *as recognized in* Moniz v. Bayer A.G., 447 F. Supp. 2d 31 (D. Mass. 2006).

[55] *See DiTolla*, 469 F.3d at 275; *Miedema*, 450 F.3d at 1328; *Evans*, 449 F.3d at 1164; *Abrego Abrego*, 443 F.3d. at 685–86; *Brill*, 427 F.3d at 447.

[56] *See infra* Part II.A.2. For the opposing view, see generally H. Hunter Twiford III, Anthony Rollo, & John T. Rouse, *CAFA's New "Minimal Diversity" Standard for Interstate Class Actions Creates a Presumption That Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 MISS. C. L. REV. 7 (2005).

[57] *See* U.S. CONST. art. III, §2, cl. 1 ("The judicial power shall extend . . . to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or Citizens thereof, and foreign States, Citizens or Subjects.").

[58] *See* Newman-Green, Inc. v. Alfonzo-Larrin, 490 U.S. 826, 830–31 (1989); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373–74 & n.16 (1978). *See also* S. REP. NO. 109-14, at 9 & n.19 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 9 (citing *Newman-Green, Inc.*, 490 U.S. at 829 n.1; *Owen Equip. & Erection Co.*, 437 U.S. at 373 n.13) ("It is important to recognize that these procedural limitations [complete diversity and $75,000 amount in controversy for each plaintiff] regarding interstate class actions were policy decisions, not constitutional ones. In fact, the U.S. Supreme Court has repeatedly acknowledged that the complete diversity and minimum amount-in-controversy requirements are political decisions not mandated by the Constitution. . . . It is therefore the prerogative of Congress to modify these technical requirements as it deems appropriate.").

the requirement of minimal diversity, although a statutory requirement of CAFA, is also a constitutional requirement under Article III for federal court jurisdiction in diversity cases.[59] It would be unconstitutional for a federal court to hear a case based entirely on state law when all plaintiffs and all defendants were citizens of the same state.

This makes a big difference in congressional power to determine who has the burden of proof and what presumptions can be made by the courts. The Supreme Court has held that Congress has great leeway when restricting the jurisdiction of the federal courts but does not have the power to increase the jurisdiction beyond that specified as within "the Judicial Power of the United States" in Article III.[60] When a jurisdictional statute imposes an amount in controversy or complete diversity requirement, Congress imposes this additional requirement, and Congress is free to tell the courts how strictly to enforce it.[61] Although the diversity statute, 28 U.S.C. § 1332, does not explicitly refer to burden of proof, the Court has long held that the burden of proof falls on the party asserting jurisdiction, with the presumption that jurisdiction does not exist.[62] Congress, however, could clearly change that result as it applies to the amount in controversy by amending the statute.[63]

However, because the minimal diversity requirement is constitutionally required, Congress does not have the power to ask the courts to presume jurisdiction unless the plaintiff proves otherwise or to resolve all questions in favor of jurisdiction.[64] To do so might result in federal courts hearing cases which the Constitution does not authorize them to hear under the

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[59] U.S. CONST. art. III, § 2, cl. 1.

[60] This basic principle was established in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and applied to a diversity situation in *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809), where the Supreme Court held that a federal statute could not authorize a suit between aliens, because Article III extends the judicial power only to suits between Aliens and American citizens.

[61] *See* Berry v. Am. Express Publ'g, Corp., 381 F. Supp. 2d 1118, 1122 (C.D. Cal. 2005), *abrogated by* Abrego Abrego v. Dow Chem. Co., 443 F.3d 676 (9th Cir. 2006), *as recognized in* Moniz v. Bayer A.G., 447 F. Supp. 2d 31 (D. Mass. 2006) ("Where the source of legal authority is statutory and not constitutional, such as with the diversity statute, Congress retains the ability to create and direct the law, so long as it is consistent with constitutional principles, and it is particularly important for the Court to follow that directive.").

[62] *See* Thomson v. Gaskill, 315 U.S. 442, 445–46 (1942).

[63] *See supra* note 61.

[64] *See* U.S. CONST. art. III, §2, cl. 1 (constitutional diversity jurisdiction requirement).

Constitution. Congress should not be able to accomplish procedurally what it cannot do directly.[65]

If the courts eventually determine that Congress has not reallocated the burden of proof on establishing jurisdiction (and that it remains on the removing defendant both for establishing diversity and amount in controversy), then the question of whether Congress has the constitutional power to change the burden of showing minimal diversity will become moot.[66] If, however, the courts determine that Congress has intended to change the burden of proof to plaintiffs to show that it does not exist, then they will have to face the question of whether it had the power to do so on the issue of proving that at least one plaintiff is from a different state than at least one defendant.[67]

Which party has the burden of proving minimal diversity (as opposed to amount in controversy) may not have much practical effect, because it will only apply in those cases in which plaintiffs assert that every single member of the class and every single defendant are citizens of the same state, and the defendants challenge one or the other of these facts. As will be discussed later, plaintiffs may or may not be able to defeat removal in some cases by restricting the class to "citizens" of a certain state (as opposed to residency or some other connection).[68] If plaintiffs cannot define their class based on state citizenship, then it will almost always be possible for defendants to show that at least one member of the plaintiff class is a citizen of some other state. Moreover, in most cases, defendants will be able to do this easily (because only one is required), regardless of who has the burden of proof.[69] And even if plaintiffs may define the class as all citizens of one

[65] United States v. LeBeouf Bros. Towing Co., 377 F. Supp. 558, 566 (E.D. La. 1974), *rev'd on other grounds*, 537 F.2d 149 (5th Cir. 1976) ("Otherwise, Congress would be able to accomplish indirectly what it cannot do directly.").

[66] *See infra* note 68.

[67] No court has yet had to address this question. It obviously would not arise in those cases where the courts had held that the burden remains on the defendant. *See supra* note 53. In addition, in those cases where the courts held that Congress had intended to switch the burden to the plaintiff to show that jurisdiction did not exist, the real dispute was about amount in controversy and not whether minimum diversity existed. *See supra* note 54. Therefore, although the courts spoke in terms of changing the burden for both issues, they never really got around to applying it to the minimum diversity requirement. *See supra* note 54.

[68] *See* discussion *infra* Part III.B.

[69] *See* discussion *infra* Part III.B.

state, then the only possible diversity issue would be whether the principal place of business of one of the defendants is in that same state or not. Although parties sometime dispute the principal place of business of a corporation, the citizenship of one corporation is not the kind of issue (unlike citizenship of thousands of plaintiffs) which will be greatly affected by who has the burden of proof by a preponderance of the evidence. [70]

2. Amount in Controversy

A factual question somewhat more likely to be litigated when determining whether the basic jurisdictional requirements of CAFA are met is whether the amount in controversy exceeds five million dollars. Even so, in most large, multi-state class actions with thousands of members of the plaintiff class, the amount in controversy will so greatly and clearly exceed five million dollars that it is of no real, practical import whether courts assign the burden to plaintiffs or defendants.

In some cases, however, especially those involving smaller numbers of plaintiffs or hard to value injunctive relief, the question of whether the amount in controversy exceeds the statutory minimum might be a closer or more difficult factual issue, meaning that the assignment of the burden of proof could have an effect on the result.[71] In fact, several such cases have already been decided by the federal courts, and if future plaintiffs try to narrow the scope of their class actions in order to try to remain in state court, then the number of such cases may increase.[72]

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[70] Of all the CAFA cases decided so far, in only one, *Moll v. Allstate Floridian Insurance Co*., was the principal place of business of the defendant in dispute. *See* No. 3:05CV160RVMD, 2005 WL 2007104, at *1–8 (N.D. Fla. Aug. 16, 2005). Although the court assigned the burden of proof to the defendant, which party had the burden appeared to play no role in the decision. *Id.*

[71] *See, e.g.*, Hooks v. Am. Med. Sec. Life Ins. Co., No. 3:06-CV-00071 (W.D.N.C. Aug. 29, 2006) (holding that injunctive relief could be included to satisfy the amount in controversy requirement, but that there was no guidance on how to measure its value); DiTolla v. Doral Dental IPA of N.Y., 469 F.3d 271, 275–76 (2d Cir. 2006) (holding that the amount in controversy was indeterminable and that, therefore, the case was not removable under CAFA, and that the burden of proof remained with the party asserting federal jurisdiction, meaning that removal failed due to that allocation). *Id. See also* Wood v. Teris, LLC, No. 05-1011 (W.D. Ark. July 26, 2006) (holding that "whether the injunctive relief is valued at [the amount in controversy requirement] is a matter of perspective").

[72] *See, e.g., DiTolla*, 469 F.3d at 275–76 (holding that the amount in controversy was indeterminable and that, therefore, the case was not removable under CAFA, and that the burden

Courts that have placed the burden on the removing defendant to prove that the jurisdictional requirements of minimum diversity and amount in controversy are met have used the following reasoning: First, there is a "longstanding" rule of law that the party asserting jurisdiction (whether as an original matter or on removal) has the burden of proof on the issue of jurisdiction, and "all doubts must be resolved" against jurisdiction.[73]

As one court has held, "That the proponent of jurisdiction bears the risk of non-persuasion is well established."[74] Whichever side chooses federal court must establish jurisdiction; it is not enough to file a pleading and leave it to the court or the adverse party to negate jurisdiction.[75]

Second, because courts presume Congress is and clearly was in this case aware of the existing rule, if they had wanted to change it, they should have made that desire explicit in the statute.[76] Since CAFA does not speak to the burden of proof on jurisdiction, most federal courts and all of the courts of appeals that have decided the issue have held that Congress did not intend to change the burden of proof, which remains with the defendant on removal.[77] As stated by one court: "Had Congress intended to make a change in the law with respect to the burden of proof, it would have done so expressly in the statute."[78]

Those district courts which have held that CAFA did shift to the party seeking remand the burden that jurisdiction does not exist have relied on the legislative history, especially the Senate Judiciary Committee Report.[79]

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of proof remained with the party asserting federal jurisdiction, meaning that removal failed due to that allocation).

[73] *See, e.g.*, Schwartz v. Comcast Corp., No. Civ. A. 05-2340, 2005 WL 1799414, at *4–6 (E.D. Pa. July 28, 2005).

[74] Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 447 (7th Cir. 2005); *see, e.g.*, Smith v. Am. Gen. Life & Accident Ins. Co., 337 F.3d 888, 892 (7th Cir. 2003); *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 607 (7th Cir. 1997).

[75] *Brill*, 427 F.3d at 447; *see* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

[76] *See* Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988) (presumption that Congress is knowledgeable about existing law).

[77] *See supra* notes 53, 55.

[78] *Schwartz*, 2005 WL 1799414, at *7.

[79] *See* Berry v. Am. Express Publ'g, Corp., 381 F. Supp. 2d 1118, 1122 (C.D. Cal. 2005), *abrogated by* Abrego Abrego v. Dow Chem. Co., 443 F.3d 676 (9th Cir. 2006), *as recognized in* Moniz v. Bayer A.G., 447 F. Supp. 2d 31 (D. Mass. 2006); *In re* Textainer P'ship Sec. Litig., No. C 05-0969 MMC, 2005 WL 1791559, at *3 (N.D. Cal. July 27, 2005); Natale v. Pfizer, Inc., 379

These courts first determined that resort to legislative history is appropriate, since the statute itself does not address the burden of proof issue:

> First, a statute cannot address all possible outcomes and situations, and language inevitably contains some imprecision: where the text does not provide a clear answer, a faithful interpretation of the statute necessarily involves more than the text itself. Second, if legislative intent is clearly expressed in Committee Reports and other materials, judicial disregard for the explicit and uncontradicted statements contained therein may result in an interpretation that is wholly inconsistent with the statute that the legislature envisioned. . ..In these circumstances, the legislative history is a proper tool of statutory interpretation.[80]

The Senate Report does, in fact, make clear that the majority of the judiciary committee intended that the burden of proof be shifted to the plaintiffs:

> Pursuant to new subsection 1332(d)(6), the claims of the individual class members in any class action shall be aggregated to determine whether the amount in controversy exceeds the sum or value of $5,000,000 (exclusive of interests and costs). The Committee intends this subsection to be interpreted expansively. If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied). And if a federal court is uncertain about whether "all matters in controversy" in a purported class action "do not in the aggregate exceed the sum or value of $5,000,000," the court should err in favor of exercising jurisdiction over the case.[81]

F. Supp. 2d 161, 168 (D. Mass. 2005). *See generally* S. REP. NO. 109-14 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3.

[80] *Berry*, 381 F. Supp. 2d at 1122.

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

In the House of Representatives, Representative Sensenbrenner, one of the sponsors of the legislation, inserted similar language into the House record.[82]

The point of departure between the two lines of cases is whether the lack of any mention of burden of proof means that the act is ambiguous on this point or not. Those courts that have refused to look to the legislative history, did so on the basis that although the act is silent, it is not ambiguous and "[r]esort to legislative history is only justified where the face of the [a]ct is inescapably ambiguous."[83]

In *Brill v. Countrywide Home Loans, Inc.*, the Seventh Circuit stated:

> But naked legislative history has no legal effect, as the Supreme Court held in *Pierce v. Underwood*. A Committee of Congress attempted to alter an established legal rule by a forceful declaration in a report; the Justices concluded, however, that because the declaration did not correspond to any new statutory language that would change the rule, it was ineffectual. Just so here. The rule that the proponent of federal jurisdiction bears the risk of non-persuasion has been around for a long time. To change such a rule, Congress must enact a statute with the President's signature (or by a two-thirds majority to override a veto). A declaration by 13 Senators will not serve.[84]

An alternative view of Congress's failure to address the burden of proof in the statute was taken by another court which held that it was more likely due to an oversight or to the sense that the statements in the legislative history would suffice.[85] In *Berry v. American Express Publishing, Corp.*, the district court stated:

> Although the lack of burden-shifting provisions may be an opaque means of preserving the status quo, as defendants

[82] 151 CONG. REC. H723, 727 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

[83] *Schwartz*, 2005 WL 1799414, at *6 (citing Garcia v. United States, 469 U.S. 70, 76 n.3 (1984)).

[84] Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (citations omitted).

[85] *See Berry*, 381 F. Supp. 2d at 1122–23.

> suggest, it is equally possible that it was due to legislative oversight, the inability of the Legislature to foresee, or for statutes to address all circumstances.
>
> Alternatively, and more plausibly, the failure to address the burden of proof in the statute reflects the Legislature's expectation that the clear statements in the Senate Report would be sufficient to shift the burden of proof. The Court notes with some irony, that the original diversity statute does not contain any reference to the burden of proof. Plaintiff fails to explain how the failure to incorporate the burden of proof in Section 1332(d) should be assigned more or less meaning than the failure to incorporate any burden of proof into the original text. In these circumstances, the Court finds that the failure to explicitly legislate changes on the burden of proof in interstate class actions has little interpretive value.[86]

This argument is undercut by congressional action on two other jurisdictional issues where Congress did insert statutory language into CAFA meant to reverse longstanding judicial interpretations of the diversity statutes.[87] Congress expressly abrogated in class actions the rule against aggregation of amount in controversy and the rule requiring complete diversity (both of which, like the burden of proof, had not previously been explicitly addressed in the diversity statute, but were glosses put on the statute by the courts).[88] One federal judge took that as a strong indication of a lack of intent to change the existing rule as to burden of proof by stating:

> I can draw only one conclusion from this omission: by making substantive changes with respect to the aggregation rule, but failing to express a concomitant change in the burden of proof, Congress implicitly acknowledged and adopted the longstanding rule that a removing defendant

[86] *Id.*

[87] *See Schwartz*, 2005 WL 1799414, at *7.

[88] *Id.*

> bears the burden of proof for establishing diversity jurisdiction.[89]

Although it is a close question, those courts taking the position that Congress did not change the burden of proof are probably correct, and all of the courts of appeals that have decided the issue are in agreement.[90] The reasoning underlying these decisions, however, that Congress is presumed to know the existing law and by not inserting language in the statute to change it shows an intention to leave it as is, is probably a useful fiction.[91] It is much more likely that, other than some of the sponsors of the legislation, most members of Congress did not even consider the question. Who has the burden of proof has never been something handled explicitly by statute. In fact, there are no jurisdictional statutes that contain an explicit allocation of this burden.[92]

Therefore, it is very difficult to determine congressional intent on this point. It is clear that the sponsors and the Senate Committee intended to change the burden of proof. It is also clear that a majority of Congress wanted to remove many procedural and substantive hurdles to federal jurisdiction. On the one hand, this could mean that they probably would have agreed to change the burden of proof if they had considered the subject, which they most likely did not. On the other hand, the sponsors of the bill had to make some compromises on other jurisdictional sections of the bill in order to get agreement of enough Democrats to win a cloture vote in the Senate. This shows that the sponsors were not able to get their way on all jurisdictional issues, and might have had to compromise on the

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[89] *Id.*

[90] *See* Evans v. Walter Indus., Inc., 449 F.3d 1159, 1164 (11th Cir. 2006); Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 678 (9th Cir. 2006); Miedema v. Maytag Corp., 450 F.3d 1322, 1328 (11th Cir. 2005); Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 447 (7th Cir. 2005). Although one additional court of appeals case addressed the burden of proof issue, it did so not in the context of who has the burden to prove prima facie jurisdiction, but who had the burden of proving the exceptions. *See* Frazier v. Pioneer Ams. LLC, 455 F.3d 542, 545–46 (5th Cir. 2006). The court of appeals assigned this burden to plaintiffs, while specifically noting that it did not have to decide the issue under discussion here. *Id.* at 546.

[91] *Abrego Abrego*, 443 F.3d at 683–84.

[92] *See, e.g.*, 28 U.S.C. §§ 1331 (federal question), 1333 (admiralty), 1337 (commerce and antitrust), 1338 (patents), 1343 (civil rights), 1346 (United States as defendant), 1367 (supplemental jurisdiction), 1441 (removal) (2000); 28 U.S.C.A. §§ 1332 (diversity jurisdiction), 1334 (bankruptcy), 1335 (interpleader), 1335 (United States as plaintiff) (West 2006).

burden of proof, if it had been explicitly considered. So it may not be possible to truly determine congressional intent on this point, and therefore, the existing rule should remain in force. As aptly stated by one court: "If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result."[93]

B. The Home-State and Local Controversy Exceptions

Even though defendants should bear the burden of proof on establishing minimal diversity and amount in controversy, that does not necessarily mean that they bear the burden of proof on all jurisdictional issues. Once defendant has made the required showing and the court determines that jurisdiction exists under § 1332(d)(2), it must be decided who has the burden of proof on the issue of whether it is one of those actions which would be remanded under the home-state or local controversy provisions. All three courts of appeals that have explicitly addressed this question have determined that it should be analyzed differently from the question of who has the burden of establishing the basic jurisdictional requirements.[94] These courts have held that the general rule that the party seeking federal jurisdiction has the burden of establishing the necessary facts does not apply when a party is trying to show that the case falls within the home-state or local controversy provision.[95] In that situation the burden of proof shifts to the plaintiff to show that one of the provisions applies.[96]

Evans v. Walter Industries, Inc. was the first court of appeals case to address this issue.[97] The court reviewed a federal district court case which plaintiffs argued should be remanded to state court under the local controversy exception because more than two-thirds of the plaintiff class

[93] *Schwartz*, 2005 WL 1799414, at *7 (quoting Lamie v. U.S. Tr., 540 U.S. 526, 542 (2004)).

[94] *See* Hart v. FedEx Ground Package Sys. Inc., 457 F.3d 675, 680–81 (7th Cir. 2006); *Frazier*, 455 F.3d at 546; *Evans*, 449 F.3d at 1164–65.

[95] *See Hart*, 457 F.3d at 680; *Frazier*, 455 F.3d at 546; *Evans*, 449 F.3d at 1164.

[96] *See Hart*, 457 F.3d at 680; *Frazier*, 455 F.3d at 546; *Evans*, 449 F.3d at 1164.

[97] *See Evans*, 449 F.3d at 1164 (noting "[n]o other Circuit appears to have addressed the specific question of which party should bear the burden of proof on CAFA's local controversy exception").

and at least one "significant" defendant were Alabama citizens.[98] The *Evans* court recognized that two other circuits had held that CAFA did not change the "well-established rule that the removing party bears the burden of proof."[99] But the court noted that both of these cases dealt with whether the defendant had established the basic jurisdictional requirements of CAFA.[100] Although the court stated that it agreed with these decisions, neither concerned the issue of who bore the burden of proof on the exceptions, which the *Evans* court treated as a question of first impression.[101]

The *Evans* court cited the Supreme Court case of *Breuer v. Jim's Concrete of Brevard, Inc.* for the proposition that the general rule assigning the burden for establishing jurisdiction did not apply when the question was one of whether "an express statutory exception" applies.[102] In *Breuer*, plaintiff had filed a Fair Labor Standards Act [FLSA] action in state court, and defendant had removed it to federal court pursuant to the general removal statute, 28 U.S.C. § 1441(a).[103] This statute allows removal of certain actions "except as otherwise expressly provided by Act of Congress."[104] The plaintiff in *Breuer*, citing the general rule that removal jurisdiction should be narrowly construed, asked to have the removal of the FLSA case barred by a federal statute that allowed FLSA cases to be maintained in state court.[105] In *Breuer*, the Court refused to apply the general rule disfavoring removal, stating that, "Since 1948, therefore, there has been no question that whenever the subject matter of an action qualifies it for removal, the burden is on the plaintiff to find an express exception."[106]

The Eleventh Circuit in *Evans* then applied the *Breuer* decision to the local-action provision in CAFA, stating, "[W]hen a party seeks to avail itself of an express statutory exception to federal jurisdiction granted under

[98] *See id.* at 1161.

[99] *Id.* at 1165 (citing Abrego Abrego v. Dow Chem. Co., 443 F.3d 676 (9th Cir. 2006) and Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005)).

[100] *See id.*

[101] *See id.*

[102] *Id.* at 1164 (citing *Breuer*, 538 U.S. at 697–98).

[103] *See Breuer*, 538 U.S. at 693–94.

[104] 28 U.S.C. § 1441(a) (2000).

[105] *See Breuer*, 538 U.S. at 694; *see also* 29 U.S.C. § 216(b) (2000).

[106] *Breuer*, 538 U.S. at 697–98.

CAFA, as in this case, we hold that the party seeking remand bears the burden of proof with regard to that exception."[107]

The Supreme Court's holding in *Breuer* is not one hundred percent on point here. It was interpreting what was explicitly delineated as an exception, since the language of the removal statute states, "[e]xcept as otherwise provided."[108] It is not so clear whether the home-state and local controversy provisions of CAFA should be treated as exceptions. Although some courts have referred to them as "exceptions,"[109] the actual language used is that the court "shall decline" or "may. . .decline" jurisdiction, not that jurisdiction does not exist.[110] This would seem to make them more similar to abstention, rather than an exception to jurisdiction.[111] Treating it as a kind of abstention would not, however, change the result of who has the burden of proof, since the general rule is that the party requesting abstention bears the burden of showing that the requirements have been met.[112]

It is also possible, however, to interpret these provisions as part of the conditions required for jurisdiction, which would leave the burden of proof to show that the conditions did not exist on the defendant. It may not always be so easy to determine whether a provision is a condition of jurisdiction or an exception. For example, should it matter if a statute gives jurisdiction to all cases in which the amount in controversy is greater than five million dollars, versus whether it said that jurisdiction was given to all cases except those under five million dollars? The Seventh Circuit looked

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[107] *Evans*, 449 F.3d at 1164. The court gave, as a secondary reason, the fact that placing the burden on the plaintiff puts it on "the party most capable of bearing it." *Id.* at 1164 n.3. "The local controversy exception will require evidence about the composition of the plaintiff class. The plaintiffs have defined the class and have better access to information about the scope and composition of that class." *Id.* The proposition is probably not true for many plaintiff classes which are composed of consumers, or customers or employees of a corporate defendant. *Id.* In such cases, the defendant will most likely have better access to information about the plaintiff class than the representative plaintiffs. *Id.*

[108] 28 U.S.C. § 1441(a) (2000).

[109] *Evans*, 449 F.3d at 1164.

[110] *See* 28 U.S.C.A. § 1332(d)(4)(A) (West 2006).

[111] *See* Anthony Rollo, Hunter Twiford, & Gabriel Crowson, *Practitioners Review "Abstention" Procedure Under Sections 1332(d)(3) and (4)*, CONSUMER FIN. SERV. L. REP., June 15, 2005, at 3, 3, *available at* http://www.mcglinchey.com/images/pdf/int73.pdf.

[112] *See, e.g.*, Klohr v. Martin & Bailey, Inc., No. 05-456-GPM, 2006 WL 1207141, at *2 (S.D. Ill. May 4, 2006).

more closely than did the Eleventh Circuit in *Evans* at whether the home-state and local action provisions should be treated as exceptions and determined that they should be so treated:

> CAFA expressly states that the district court "shall decline to exercise jurisdiction" in two particular situations. It is reasonable to understand these as two "express exceptions" to CAFA's normal jurisdictional rule, as the Supreme Court used that term in *Breuer*. The case might be different if Congress had put the home-state and local controversy rules directly into the jurisdictional section of the statute, § 1332(d)(2), but it did not. We acknowledge that the language of § 1332(d)(4) is mandatory, in contrast with the permissive language of § 1332(d)(3), but that alone proves little. Nothing indicates that the kinds of exceptions to which the Supreme Court referred in *Breuer* were permissive only.[113]

One district court, while acknowledging that several courts of appeals have found the home-state and local controversy provisions to be "exceptions" changing the burden of proof to plaintiffs, took the opposite approach. The court in Lao v. Wickes Furniture Company, Inc. held that these provisions were not exceptions to the grant of jurisdiction but rather formed part of the jurisdictional criteria; therefore, the burden of showing that the provisions did not apply was on the defendants.[114] The court relied heavily on the fact that in other sections of the Act making exceptions for specific kinds of claims, Congress used language stating that the jurisdiction "shall not apply to" those cases,[115] whereas the home-state and local controversy provisions state that "[a] district court shall decline to exercise jurisdiction" in such cases.[116]

The court may be making too much of the linguistic difference, which was just as likely caused by the fact that the provisions were drafted at a different time, and probably by different persons, in response to the

[113] Hart v. FedEx Ground Package Sys., Inc., 457 F.3d 675, 681 (7th Cir. 2006).

[114] 455 F. Supp. 2d 1045, 1056, 1059 (C.D. Cal. 2006).

[115] *Id.* at 1056 (referring to 28 U.S.C. § 1332 (d)(5) and (9), providing exceptions for certain cases involving securities and corporate governance and certain cases against state and local officials). *See supra* note 28 for the text of these provisions.

[116] *Lao*, 455 F. Supp. 2d at 1056 (quoting 28 U.S.C. § 1332 (d)(4)).

concerns of some Democrats that such cases should not be removable to federal court. While the language of these provisions is different than the language used for the other exceptions, there is nothing inherent in that language to indicate that the provisions were meant to be something other than exceptions to the general grant of jurisdiction. When a statute grants a very broad jurisdiction to the federal courts and then carves out a very small subsection of such cases which cannot be heard by such courts, whatever the language used, it is difficult to view it in any way other than an exception. Therefore, even though the *Breuer* decision is not exactly on point, it does lead to the conclusion that once the defendant has met its burden that the jurisdictional requirements of CAFA have been met, the burden shifts to the plaintiff to show that the home-state or local controversy provisions apply.[117]

C. Allocation of Burdens

As the previous discussion has suggested, the Constitution requires that the burden of proof for establishing that at least one plaintiff is a citizen of a different state than at least one defendant should fall on the defendant. The burden of proof for establishing that the five million dollar amount in controversy is met also probably falls on the defendant as a matter of statutory interpretation. The burden of establishing that the case falls within one of the exceptions, however, probably rests on the plaintiff.

Allocating the burden of proof may have an effect on the results in close cases. However, just as important as who has the burden of proof is how the courts evaluate the evidence in determining whether the burden has been met. Do courts really apply the burden of proof or just give it lip

[117] *See* Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 694–99 (2003). There are two other district court opinions that also seem to go the other way and leave the burden of proof for all jurisdictional issues (including the home-state and local controversy provisions) on the defendant. *See* Moll v. Allstate Floridian Ins. Co., No. 3:05CV160RVMD, 2005 WL 2007104, at *1 (N.D. Fla. Aug. 16, 2005); Schwartz v. Comcast Corp.., No. 05-2340, 2005 WL 1799414, at *4 (E.D. Pa. July 28 2005). However, in both cases, the court first determined that CAFA did not relieve the defendant of the burden of proving that jurisdiction existed. *See Moll*, 2005 WL 2007104, at *1; *Schwartz*, 2005 WL 1799414, at *4. They then went on to apply this holding to the issue of whether the case fell within the home-state or local controversy provisions. *See Moll*, 2005 WL 2007104, at *1; *Schwartz*, 2005 WL 1799414, at *5–6. Because they did not, however, explicitly address the issue of whether the burden of proof for these provisions should be treated differently than for the basic requirements, they are of limited value on this point.

service? Do they use it only as a tie-breaker in very close cases or do they use it to decide cases when the evidence is unclear or hard to evaluate? What presumptions will they allow the parties to use to help satisfy the burdens? The next section of this Article will address those issues.

III. APPLYING THE STANDARDS TO DETERMINE IF JURISDICTION EXISTS

A. Deciding Which Class Actions Belong in Federal Court

The goal of the jurisdictional provisions of CAFA was to make most large, multi-state class actions removable by any of the defendants to federal court. Congress intended to stop what it perceived was an abuse by plaintiffs of the old jurisdictional rules, which allowed plaintiffs to manipulate the named parties to allow suits in state courts, which were chosen not for any connection to the controversy, but because they were viewed as overly friendly to class actions. This resulted in huge, unmanageable class actions, which could be used to "blackmail" defendants who could not risk the possible ruin of a jury verdict into agreeing to settlements which benefited mostly the plaintiffs' counsel.[118]

Even after passage of CAFA, however, not all class actions were to be heard in federal court. A requirement of five million dollars in controversy is designed to allow smaller suits to stay in state courts. Also, several exceptions are supposed to exempt truly local actions (where most of the plaintiffs and some or all of the important defendants were from the forum state) from federal court jurisdiction, allowing them to be heard in the state courts of the state with the greatest interest in the outcome and whose state laws would most likely be applied.[119]

However, because the general requirements for jurisdiction were written so broadly and the exceptions written so narrowly, there is a danger that virtually all class-action lawsuits, including the smaller or localized ones,

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[118] *See infra* text accompanying notes 3–8.

[119] "This [home-state] exception keeps in the State courts those class actions that are prosecuted by a locally dominated plaintiffs' class with grievances against local defendants." 151 CONG. REC. S999, 1006 (daily ed. Feb. 7, 2005) (statement of Sen. Hatch). "The second point I was making is that States' interests in adjudicating local disputes on behalf of their citizens are further preserved through a newly created exception to Federal jurisdiction for truly local controversies." *Id.*

might end up in federal court. This would burden an already overworked federal judiciary,[120] usurp legitimate state power,[121] and depending on the reception given these class actions in federal court, could sound the death knell for consumer class actions in the United States.[122]

Whether or not state courts remain able to hear any class action cases at all depends first, on whether plaintiffs are willing to, and second, how carefully they are able to, limit the parties and claims in the class actions they bring. It also depends on how the courts interpret and apply the requirements and exceptions to federal jurisdiction under CAFA.

A plaintiff can try to tailor a class action so that it can be brought in state court in three ways. First, a plaintiff can try to avoid minimal diversity by limiting the parties, so that all plaintiffs and all defendants are citizens of the same state.[123] Because of the definition of citizenship, this will be all but impossible, even if the defendant has the burden of proof to show that minimal diversity exists.[124]

Second, the plaintiff can try to limit the claims so that the aggregate relief sought by the plaintiffs does not exceed five million dollars.[125] Even in smaller class actions, this may require plaintiffs to forego certain kinds of relief, which may make avoiding federal jurisdiction not worth the cost,[126] and plaintiffs will have to plead very carefully, to make it quite clear that the relief does not exceed the required amount.[127] Even if the plaintiff is willing and able to define his or her relief to keep it under the five million

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[120] "Federalizing all class actions would strain an already congested federal docket." Thomas Merton Woods, Note, *Wielding the Sledgehammer: Legislative Solutions for Class Action Jurisdictional Reform*, 75 N.Y.U. L. REV. 507, 529 (2000).

[121] "The question to ask now, however, is whether legislation essentially ousting the state courts from resolving mass tort and other complex state claim-based class action litigation violates the spirit or letter of the Supreme Court's federalism decisions." VAIRO, *supra* note 10, at 44.

[122] "The expectation is that defendants will remove class actions filed in state court to federal court, where federal judges will routinely deny class certification, thereby removing the cannon aimed at the head of the defendant. But will the federal courts act as defendants expect? After *Amchem*, federal courts continued to certify settlement classes. Additionally, federal courts recently have certified the type of sprawling national classes that one might have thought were inappropriate for class certification after *Amchem*." *Id.*

[123] *See infra* Part III.B.

[124] *See infra* Part III.B.

[125] *See infra* Part III.C.

[126] *See infra* Part III.C.3.

[127] *See infra* Part III.C.3.

dollar amount, whether the plaintiffs will be successful depends on whether and how the courts allow them voluntarily to limit the relief they seek, and what kind of burden the courts assign to defendants who want to show that the amount does, in fact, top five million dollars.[128]

The third way for plaintiffs to try to keep defendants from removing to federal court will be to try to show that the case fits within one of the exceptions for home-state or local controversies.[129] Here again, this may require plaintiffs first, to be willing to limit the scope of the lawsuit and second, to choose and define the parties very carefully.[130] It will also depend, however, on what kind of burden the courts impose upon plaintiffs to show that greater than two-thirds of the plaintiff class are citizens of the forum state, and either that "the primary defendants" or at least one "significant" defendant is also an in-state citizen.[131]

B. Avoiding Minimal Diversity

In order for plaintiffs to avoid minimal diversity, they will have to first define the plaintiff class so that all members are citizens of the same state, and second, sue only those defendants who are citizens (incorporated in or have their principal place of business) in that same state.[132] Even if plaintiffs are willing to so limit their lawsuits, this will be exceedingly difficult to accomplish.

Although the defendant should bear the burden of making this showing, this will not normally be difficult and will usually be conceded by the plaintiffs.[133] The requirement of minimal diversity will have been met if the lawsuit includes either multiple defendants from different states or if plaintiff class members are from more than one state.[134] Even if the plaintiff will narrow the scope of the action to a case which appears to be truly local (where all plaintiffs are residents of the same state and any defendant has its principal place of business in the same state), the

[128] *See infra* Part III.C.1., III.C.3.

[129] *See infra* Part III.D.

[130] *See infra* Part III.D.

[131] *See infra* Parts III.D.2, III.D.4.

[132] CAFA did not change the existing definition of citizenship for corporations. 28 U.S.C. § 1332(c) (2000).

[133] *See supra* Part II.A.1.

[134] 28 U.S.C. § 1332(a) (2000).

defendants will still almost always be able to show that one of the plaintiffs is a citizen of a different state.

This result is because of the difference between residence and citizenship for purposes of diversity. Citizenship for diversity purposes is equated with domicile, that is, simply put, a person's permanent residence.[135] In order to establish a domicile in a state, a person must reside there with the intention of remaining indefinitely.[136] If the person resides in the state temporarily, even for an extended period of time, then he or she is not a citizen of that state.[137] It seems likely, therefore, that in any very large class (hundreds or thousands) of residents (or business owners, or homeowners, or workers) in a state, there will usually be at least one person who is a citizen of another state. And given appropriate discovery, the defendant should be able to make this showing.

It is not surprising, therefore, that none of the dozen or so cases in which the courts made factual findings about jurisdiction involved determination of the citizenship of the parties to decide whether minimal diversity existed.[138] Either the plaintiffs conceded the citizenship or it was so obvious that the court did not discuss it.[139] This is not to say that the issue of the citizenship of the parties was not in dispute in several cases, but it is much more likely to arise, and did arise, as part of the determination of whether one of the exceptions applied: That is, were more than two-thirds of the plaintiffs and either the "principal" defendants or a "significant" defendant citizens of the state in which suit was brought?[140] This is a

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[135] CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 163 (6th ed. 2002) ("[I]t is quite settled that mere residence in a state is not enough for purposes of diversity, and that the more elusive concept of 'domicile' is controlling. A person's domicile is that place where the person has a true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom." (footnotes omitted)).

[136] *Id.* at 164.

[137] *See id.*

[138] *See supra* Part II.A.1.

[139] *See, e.g.*, Frazier v. Pioneer Ams. LLC, 455 F.3d 542, 544 (5th Cir. 2006). "[Plaintiffs] did not challenge defendants' allegation of prima facie CAFA jurisdiction—minimal diversity and at least $5 million in controversy—aside from implicitly challenging the amount in controversy under § 1332(a)." *Id.*

[140] *See generally* Musgrave v. Aluminum Co. of Am., Inc., No. 3:06-cv-0029-RLY-WGH, 2006 WL 1994840 (S.D. Ind. July 14, 2006) (citizenship of plaintiffs); Schwartz v. Comcast Corp., No. Civ. A. 05-2340, 2006 WL 487915 (E.D. Pa. Feb. 28, 2006) (citizenship of plaintiffs); Moll v. Allstate Floridian Ins. Co., No. 3:05CV160RVMD, 2005 WL 2007104 (N.D. Fla. Aug.

separate issue, probably involving a different burden of proof, and will be discussed later.

Just about the only way that a plaintiff could try to avoid bringing a case with minimal diversity would be (in addition to limiting the defendant or defendants only to corporations which were in-state citizens) to define the class as all "citizens" of that state who had been harmed by the defendants. It is not at all clear, however, whether they should be allowed to define a class in such a way.

Class action plaintiffs generally receive great leeway in defining the geographic contours of the class, either statewide or nationwide.[141] When plaintiffs in the past have geographically limited a class, they have usually defined the class in terms of residency (or perhaps owning property, or working, or doing business) in a particular state.[142] Plaintiffs chose these characteristics rather than citizenship probably because they were easier to determine and broader characteristics than citizens (or property owners who were citizens, for example), making for larger, easier to define groups. Because until CAFA only the citizenship of the representative parties mattered in determining whether diversity existed,[143] plaintiffs could manipulate whether diversity existed without worrying about the citizenship of all members of the class. Classes in diversity actions were defined sometimes as "citizens,"[144] sometimes as "residents,"[145] sometimes "resident citizens"[146] and sometimes as "citizens and residents,"[147] without

16, 2005).

[141] Nancy Morawetz, *The Institute of Judicial Administration Research Conference on Class Action Problems of Representation in Class Action: Underinclusive Class Actions*, 71 N.Y.U. L. Rev. 402, 406–07 (1996). "As a result, those defining the class exercise considerable discretion in choosing who will and will not be included in the class. . . . Depending on the choices made by class counsel, the classes had different types of geographic limitations. Some were limited by state, some by regions used by the agency, and some by circuit." *Id.*

[142] *See, e.g.*, Stenson v. Blum, 476 F. Supp. 1331, 1335 (S.D.N.Y. 1979).

[143] *See, e.g.*, Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 366 (1921); *In re* Sch. Asbestos Litig., 921 F.2d 1310, 1317 (3d Cir. 1990), *cert. denied*, 499 U.S. 976 (1991).

[144] *See, e.g.*, Gallagher v. Cont'l Ins. Co., 502 F.2d 827, 830 (10th Cir. 1974).

[145] *See, e.g.*, Samuel-Bassett v. Kia Motors Am., Inc., 357 F.3d 392, 394–95 (3d Cir. 2004) ("The complaint asks for certification of a class consisting of Pennsylvania residents who purchased or leased KIA Sephia model automobiles . . . .").

[146] *See, e.g.*, Leonard v. Enter. Rent a Car, 279 F.3d 967, 970 n.2 (11th Cir. 2002) ("In the complaint, the plaintiffs described themselves as 'resident citizens' of Alabama. For purposes of establishing diversity jurisdiction, we will treat the class members as Alabama citizens.").

any discussion in the case law as to whether the nomenclature made any practical difference. Most litigation about the size of classes involved whether they were defined too broadly, not too narrowly.[148] So, not surprisingly, there is no law discussing whether plaintiffs could restrict a class to only "citizens" of one state.[149]

The problem with defining classes in consumer lawsuits by state citizenship is that the characteristic of state citizenship usually has virtually no relationship to any real distinctions as to whether someone should be a member of the class or not.[150] For example, if a local Pennsylvania phone company is sued for overcharging for phone service, it makes no sense that the class would include a sophomore at a Philadelphia college whose parents lived in Pittsburgh (and therefore was a Pennsylvania citizen) and not the student in the adjoining dorm room whose family lived in New Jersey (who, although a Pennsylvania resident for four years, would probably be a New Jersey citizen).[151] Although no court decisions directly discuss this point, at least one author has argued that defining a class arbitrarily and too narrowly should not be allowed, because it may harm those persons who are excluded.[152]

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[147] *See, e.g.*, Grant v. Chevron Phillips Chem. Co., 309 F.3d 864, 866 n.1 (5th Cir. 2002) ("Chevron is a Delaware partnership with its principal place of business in Texas, and the class representatives are residents and citizens of Louisiana. As only the named class representatives in a class action are required to be diverse from the defendants, diversity is indeed complete in this case." (citing Snyder v. Harris, 394 U.S. 332, 340 (1969); Aetna Cas. & Surety Co. v. Iso-Tex, Inc., 75 F.3d 216, 218 (5th Cir. 1996))).

[148] Morawetz, *supra* note 141, at 402–403 ("Much case law and scholarly writing have been devoted to the questions of whether and when a broadly defined class action is a disservice to absent class members. . . . Much less attention has been given to the plight of those who are excluded from the definition of a class.").

[149] *Id*. at 403. "The lack of attention to who is excluded makes some sense in class action contexts where attorney fee incentives can be counted on to encourage attorneys to plead class actions broadly." *Id.*

[150] There might be some kinds of cases involving the rights of state citizens, such as the right to vote, where it might make sense to define the class as state citizens, rather than residents, but that would not apply to the overwhelming majority of diversity class actions.

[151] College students from one state who go to another state to study and intend to remain only as long as their studies continue do not generally acquire citizenship in the state where they are attending school. *See, e.g.*, Holmes v. Sopuch, 639 F.2d 431, 434 (8th Cir. 1981).

[152] "The principal harm caused by defining a class narrowly is the potential of denying similarly situated persons the same opportunity for relief for similar claims." Morawetz, *supra* note 141, at 420.

Defining classes by citizenship would also make sending notice or distributing a monetary judgment to class members problematic, because it would be very difficult to determine who was or was not a state citizen without having each possible class member fill out a detailed questionnaire.

In one case that could have tested this issue, plaintiff, after removal, filed an amended complaint changing the class from "all persons who resided or did business in the Commonwealth of Pennsylvania" and who subscribed to a local internet service, to all "citizens of the Commonwealth of Pennsylvania, who resided or did business in the Commonwealth of Pennsylvania" and who subscribed to the service.[153] The court did not consider the amended complaint in deciding whether diversity existed, because it held that the remand petition must be decided "on the basis of the record as it stands at the time the petition for removal is filed."[154] Therefore the court did not discuss whether the plaintiff could have limited his suit to citizens of Pennsylvania.[155] If plaintiffs become more savvy and try to limit the class to state citizens, either in an effort to destroy minimal diversity or to ensure the two-thirds state-citizenship requirement of the home-state and local controversy exceptions, courts will have to address this question.

C. Limiting the Amount in Controversy

Plaintiffs can also try to destroy basic jurisdiction under CAFA by limiting the aggregate amount in controversy to no more than five million dollars.[156] Although most nationwide consumer class actions involve an amount in controversy considerably higher than this jurisdictional minimum,[157] fairly large disputes might still arise with less money than that at stake (for example: five thousand claims of one thousand dollars each, or fifty thousand claims of one hundred dollars each would both constitute cases with exactly five million dollars in controversy). This might be another way for plaintiffs to bring state-wide, rather than national, class

[153] Schwartz v. Comcast Corp., No. Civ. A. 05-2340, 2005 WL 1799414, at *1 (E.D. Pa. July 28, 2005).

[154] *Id.* at *3 (citing Westmoreland Hosp. Ass'n v. Blue Cross of W. Pa., 605 F.2d 119, 123 (3d Cir. 1979); Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939)).

[155] *See id.*

[156] *See* 28 U.S.C.A. § 1332(d)(2) (West 2006).

[157] "Most observers believe that nationwide consumer class actions will take the biggest hit." VAIRO, *supra* note 10, at 43.

actions if avoiding minimal diversity or using the home-state and local controversy exceptions turns out to be too onerous.

Unlike whether minimal diversity exists, this is an issue where placing the burden of proof might have an effect on the outcome, especially in close cases. Although the district courts have split on assigning the burden as to amount in controversy, all of the courts of appeals that have addressed the issue agree with the conclusion reached in this Article that the burden rests with the defendant to show that the amount in controversy does not exceed five million dollars.[158] The rest of this section, therefore, will proceed under the assumption that the defendant has the burden.

Merely assigning the burden, however, leaves many questions still unanswered as to how the courts should proceed in determining the amount in controversy, including what standard the defendant has to meet (for example, preponderance, legal certainty, or reasonable probability), how to treat punitive damages, how to value injunctive relief, and whether the plaintiff can voluntarily agree to limit relief to no more than five million dollars, even when more might be at stake.

1. The Extent of the Defendant's Burden

Where the plaintiff, rather than the defendant, tries to show the requisite amount in controversy in order to establish diversity jurisdiction, the law is quite clear. Although the plaintiff has the burden of proof, the courts do not usually require any actual proof in order to avoid trying the claim while deciding jurisdiction.[159]

> The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.[160]

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[158] *See, e.g.*, Miedema v. Maytag Corp., 450 F.3d 1322, 1328 (11th Cir. 2006); Evans v. Walter Indus. Inc., 449 F.3d 1159, 1164 (11th Cir. 2006); Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 685 (9th Cir. 2006); Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 447 (7th Cir. 2005).

[159] *See* St. Paul Mercury Indem. Co. v. Red Cab. Co., 303 U.S. 283, 289–90 (1938).

[160] *Id.* at 288–89 (citations omitted).

For example, a defendant could not defeat jurisdiction in a personal injury case by showing that a plaintiff's injuries should be valued at only fifty thousand dollars if the plaintiff claimed damages were one hundred thousand. Unless wildly inflated, the plaintiff's claims are generally accepted. A defendant cannot merely show that it is very unlikely that the plaintiff will actually receive that amount, but must prove that it is legally impossible. An example of such a case might be if a plaintiff claimed $50,000 in compensatory damages and $50,000 in consequential damages. The defendant could defeat removal by showing that the law clearly prohibited consequential damages in such a situation, thereby limiting the plaintiff's damages to less than the required $75,000.[161]

Things are more complicated when a plaintiff files in state court and it is the removing defendant who tries to establish that the amount in controversy exists, as has been the situation with most of the post-CAFA cases. Here, the parties are in the rather unusual and awkward situation in which the defendants are trying to maximize the amount of the plaintiffs' possible recovery, while the plaintiffs are trying to minimize it. While it may be reasonable to use the "legal certainty" standard when a defendant is trying to prove that the plaintiffs' damages do not meet the amount in controversy, it does not make much sense to apply it in the other direction.[162] It would rarely seem possible that a defendant could prove that the amount of damages would, as a matter of law, have to exceed a certain amount, because few, if any, rules of law require damages of a certain amount to be awarded, such as those limiting amount or kinds of damages in certain situations.[163]

In several post-CAFA cases, federal courts have struggled with how to evaluate the amount in controversy when the plaintiff has claimed less than the required five million dollars in controversy.[164] The most reasonable

[161] *See, e.g.*, Vance v. W.A. Vandercook Co., 170 U.S. 468, 480 (1898).

[162] *See Brill*, 427 F.3d at 449 (discussing the difficulties of applying the amount in controversy requirement where the defendant seeks to establish federal jurisdiction and the application of the reasonable probability standard rather than that of legal certainty).

[163] *See, e.g.*, 5 U.S.C. § 552a(g)(4)(A) (2000).

[164] *See, e.g.*, Miedema v. Maytag Corp., 450 F.3d 1322, 1330 (11th Cir. 2006) (approving of a standard requiring defendant to "prove by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional requirement" (citing Williams v. Best Buy Co., Inc., 269 F.3d 1316, 1319 (11th Cir. 2001))); *Brill*, 427 F.3d at 449; Waitt v. Merck & Co., Inc., No. C05-0759L, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005) (putting the burden wrongly, as

approach seems to be to require the defendant to show a "reasonable probability" that the amount in controversy is actually more than the jurisdictional minimum.[165] Then, once the defendant has made this showing, the burden shifts back to the plaintiff to make the normal showing to establish to a legal certainty that the amount was less than the required amount.[166]

Although the courts may not be required to accept the plaintiffs' valuation of their claims if the defendant can prove otherwise, the courts should base any valuation on what the plaintiffs are actually claiming, not what they might have claimed.

> [A] removing defendant can't make the plaintiff's claim for him; as master of the case, the plaintiff may limit his claims (either substantive or financial) to keep the amount in controversy below the threshold. Thus part of the removing party's burden is to show not only what the stakes of the litigation could be, but also what they are given the plaintiff's actual demands.[167]

Therefore, a plaintiff trying to keep the aggregate claims under the jurisdictional limit must strategically consider what relief to demand, including compensatory damages, restitution, punitive damages, injunctive relief and attorneys' fees, all of which count toward the amount in controversy.[168] A plaintiff will need to balance the importance of each kind of relief and the likelihood of its success on the one hand, with the chances

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argued herein, on plaintiff to show that the amount did not exceed the required amount); Musgrave v. Aluminum Co. of Am., Inc., No. 3:06-cv-0029-RLY-WGH, 2006 WL 1994840, at *2 (S.D. Ind. July 14, 2006) (citing Rising-Moore v. Red Roof Inns, Inc., 435 F.3d 813, 815 (7th Cir. 2006)) (following the 7th Circuit rule for non-class actions).

[165] *Cf. Rising-Moore*, 435 F.3d at 815 ("A defendant [in a non-class action suit] . . . must establish a 'reasonable probability' that the amount in controversy exceeds $75,000." (citing Smith v. Am. Gen. Life & Accident Ins. Co., 337 F.3d 888, 892 (7th Cir. 2003))).

[166] St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

[167] *Brill*, 427 F.3d at 449 (emphasis omitted).

[168] CAFA, as do other jurisdictional statutes, provides that the matter in controversy must exceed a certain sum, "exclusive of interest and costs." 28 U.S.C.A. §1332(d)(2) (West 2006). It clearly includes all kinds of damages and injunctive relief. Attorneys' fees are included if they are provided for by contract or by law. Springstead v. Crawfordsville State Bank, 231 U.S. 541, 541–42 (1913) (by contract); Miss. State Life Ins. Co. v. Jones, 290 U.S. 199, 202 (1933) (by law).

that it could put the amount in controversy over the limit and the importance of keeping the case in state court on the other.

2. Value of Injunctive Relief

Claims for injunctive relief present special problems of valuation. Since the value of the relief to the plaintiffs can be significantly more or less than the cost to the defendant, it may make a difference which perspective is used.[169] In non-class action cases, the modern rule appears to be that federal jurisdiction exists if either the cost to the defendant or the value to the plaintiff exceeds the jurisdictional minimum.[170] In class action cases before CAFA, however, courts had generally looked only at the value to the plaintiffs, requiring that the value to each plaintiff of all relief, including injunctive relief, exceeded the jurisdictional threshold.[171] They refused to consider the cost of the injunctive relief to the defendant because that would have had the effect of aggregating claims for the purpose of satisfying the amount in controversy, which was not allowed under *Zahn v. International Paper Co.*[172]

Now that CAFA specifically allows aggregation of plaintiffs' claims for the purpose of satisfying the amount in controversy, the reasoning

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[169] *See* McCarty v. Amoco Pipeline Co., 595 F.2d 389, 391–95 (7th Cir. 1979) (detailing the often cryptic Supreme Court cases on point, the interpretations of the lower courts, and the impact of perspective); *see also* Snow v. Ford Motor Co., 561 F.2d 787, 788–89 (9th Cir. 1977) (noting the potential disparity between the cost to the defendant and the benefit to the plaintiff regarding equitable relief).

[170] *See, e.g.*, *McCarty*, 595 F.2d at 393–95; Gov't Employees Ins. Co. v. Lally, 327 F.2d 568, 569 (4th Cir. 1964); Ridder Bros. v. Blethen, 142 F.2d 395, 399 (9th Cir. 1944), *overruled by Snow*, 561 F.2d at 791; Ronzio v. Denver & Rio Grande W. R.R. Co., 116 F.2d 604, 606 (10th Cir. 1940); *accord* Justice v. Atchison, Topeka & Santa Fe. Ry. Co., 927 F.2d 503, 505 (10th Cir. 1991); William Schober, *The Jurisdictional Amount in Controversy Requirement: The Seventh Circuit Rejects the Plaintiff Viewpoint Rule*—McCarty v. Amoco Pipeline Company, 29 DEPAUL L. REV. 933, 934 (1980); Karen L. Williams, *Selected Developments in Civil Procedure in the Ninth Circuit: The Jurisdictional Amount Requirement—Valuation from the Defendant's Perspective*, 11 LOY. L.A. L. REV. 637, 643 (1978).

[171] *See, e.g.*, Cent. Mex. Light & Power Co. v. Munch, 116 F.2d 85, 87 (2d Cir. 1940).

[172] *See generally* 414 U.S. 291 (1973), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104. Stat. 5089, 5113–14 (codified at 28 U.S.C. § 1367), *as recognized in* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005); *see, e.g.*, Kanter v. Warner-Lambert Co., 265 F.3d. 853, 858–61 (9th Cir. 2001); Ferris v. Gen. Dynamics Corp., 645 F. Supp. 1354, 1362 (D.R.I. 1986).

previously used to prevent using cost to the defendant no longer applies, and the value of injunctive relief should probably be considered from either the plaintiffs' or the defendant's point of view.[173] At least one district court has specifically so held.[174]

> Given the explicit statutory change allowing aggregation of claims in class actions, it appears as though the justifications previously advanced for considering only the value to individual plaintiffs in a class action are no longer relevant. Since plaintiffs can now aggregate their claims to invoke diversity jurisdiction, finding the amount of controversy from the aggregate cost to defendants does not circumvent any non-aggregation principles and is consistent with the principle that only cases that could have been originally brought in federal court may be removed. Accordingly, the Court concludes that the amount in controversy may be satisfied either from the view of the aggregate value to the class members or defendants.[175]

Another problem in cases involving injunctive relief is that often the value or cost of such relief is speculative or difficult to assign a monetary value, or both.[176] When faced with uncertainty in the value of requested

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[173] Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118, 1123 (C.D. Cal. 2005), *abrogated by* Abrego Abrego v. Dow Chem. Co., 443 F.3d 676 (9th Cir. 2006), *as recognized in* Moniz v. Bayer A.G., 447 F. Supp. 2d 31 (D. Mass. 2006). *But see* VAIRO, *supra* note 10, at CAFA–25:

> Section 1332(d)(6) arguably overrules Zahn to that extent. The new provision expressly contemplates aggregation of the plaintiffs' claims in determining whether the $5 million "value" requirement has been met, and clearly is what Congress intended. However, Congress' failure to add an express provision on how to value claims for injunctive relief means that it is debatable whether §1332(d)(6) permits aggregation in cases for injunctive relief. In summary, although it is clearly Congress' intent—given its desire to facilitate the assertion of federal jurisdiction over class action cases—to look either at the total benefit to the plaintiff class or the total cost to the defendant to meet the jurisdictional amount, the language or the new provision does not necessarily lead to that conclusion.

[174] *Berry*, 381 F. Supp. 2d at 1123.

[175] *Id.*

[176] *See, e.g.*, Miller-Bradford & Risberg, Inc., v. FMC Corp., 414 F. Supp. 1147, 1149 (E.D. Wis. 1955).

relief, one would expect courts to rely on the burden of proof and hold against the party with the burden. That is what one district court did when finding that there was "great uncertainty" about the amount in controversy.[177] That court noted, "In summary, there is great uncertainty about the amount in controversy in this case. The Eighth Circuit demands that all doubts concerning federal court jurisdiction be resolved in favor of remand."[178]

Somewhat surprisingly, however, in one post-CAFA case, a district court, after explicitly assigning the burden of proof on the issue of amount in controversy to the plaintiff to show that jurisdiction did not exist, held that in a case where the value of injunctive relief was "speculative," jurisdiction did not exist.[179]

> Although the Court is aware that the burden is on plaintiffs to demonstrate that the amount in controversy does not exceed $5,000,000, the claims in this dispute are so difficult to value that any monetary valuation could only be wholly speculative. Accordingly, the Court finds that the amount in controversy, from either the perspective of the class members or the defendants, is less that the requisite $5,000,000.[180]

Another court, however, allowed removal, based only on a statement by the defendant, which was not contradicted by the plaintiff, that the cost of injunctive relief would be "substantial."[181]

> On this point, defendant argues that the injunctive relief sought by plaintiff will cost a "substantial" amount. ("[I]f Blockbuster is ordered to change its policy, advertising, or practices. . .Blockbuster would incur substantial business costs in making such changes.") Plaintiff makes no effort to

[177] Ongstad v. Piper Jaffray & Co., 407 F. Supp. 2d 1085, 1092 (D.N.D. 2006).

[178] *Id.*

[179] Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118, 1124–25 (C.D. Cal. 2005), *abrogated by* Abrego Abrego v. Dow Chem. Co., 443 F.3d 676 (9th Cir. 2006), *as recognized in* Moniz v. Bayer A.G., 447 F. Supp. 2d 31 (D. Mass. 2006).

[180] *Id.*

[181] Yeroushalmi v. Blockbuster, Inc., No. CV 05-2550 AHM (RCx), 2005 WL 2083008, at *16–17 (C.D. Cal. July 11, 2005).

> show that the injunctive relief will not be substantial or that it will be limited in a manner that ensures that it is certain or even likely that the jurisdictional amount is not met.[182]

In line with the conclusion reached earlier in this Article that the burden of proof as to amount in controversy should remain on the defendant, it should be incumbent upon the defendant, in cases of hard-to-value injunctive relief, to show that there is a substantial likelihood that either the value to the plaintiffs or cost to defendants exceeds five million dollars. A claim by defendant that its costs will be "substantial" should not suffice.

3. Voluntary Limitation of Damages

In computing the amount in controversy, the amount includes all recovery, except for "interest and costs," an amount which includes damages, restitution, injunctive relief, and attorneys' fees.[183] It seems clear that plaintiffs, if they so choose, can limit the amount in controversy by deciding not to bring certain claims for relief, for example by asking for compensatory damages, but not claiming either punitive damages or injunctive relief.[184] However, as discussed above, for whatever claims they do bring, the courts will not necessarily accept their valuation, and defendants might be able to remove by showing that the actual amount of the claim is higher. One question that the courts have not yet clearly answered is whether or not plaintiffs could limit the amount in controversy by stipulating that they would not accept any more than five million dollars in total recovery for the class. This will probably not be an attractive option for plaintiffs when the actual relief that could be claimed greatly exceeds the jurisdictional amount, since remaining in state, rather than federal court will generally not be worth giving up a majority of the potential recovery. It might, however, be useful when the potential recovery is near the five million dollar limit and plaintiff fears that the defendant might be able to convince the court that it is actually slightly higher.

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[182] *Id.*

[183] *See supra* note 21.

[184] Brill v. Countrywide Home Loans, Inc. 427 F.3d 446, 449 (7th Cir. 2005) ("Thus part of the removing party's burden is to show not only what the stakes of the litigation *could be*, but also what they *are* given the plaintiff's actual demands.").

For example, in *Meidema v. Maytag Corporation*, plaintiffs brought a class action against Maytag seeking compensatory damages on behalf of thousands of consumers who had purchased a certain model of oven with a faulty door latch.[185] Maytag tried to convince the court that the five million dollar amount in controversy was met by showing that 6,729 of such ovens had been sold at a total retail value of $5,931,971.[186] Although both the district court and court of appeals held that Maytag's estimation of the damages was too speculative and ordered remand to the state court,[187] the plaintiff, if necessary, could have tried to make use of a damage limitation in this case.[188] Since not all of the ovens might have been defective, and since the total number sold probably included some where the statute of limitations had run, and since the damages awarded were unlikely to equal the full price of the ovens, the plaintiff would not have been conceding too much by agreeing to limit the damages to $5,000,000, or about eighty percent of the absolute maximum possible.

A few post-CAFA courts have seemingly approved of the practice of allowing plaintiffs to avoid the amount in controversy problem by voluntarily agreeing not to accept more than the jurisdictional amount, but did so without any real discussion of whether this should be allowed. One district court relied on a plaintiff's statement that the class did not seek to recover more than $5,000,000 and did not investigate any further the actual amount of potential damages,[189] and also specifically stated:

> Although plaintiff also states in the general prayer for relief the he also seeks statutory damages, plaintiff specifically states that he and the class do not seek to recover more than $5,000,000. The Court has no reason to assume that plaintiff has misstated the value of the claim to defeat jurisdiction. Given plaintiff's representations to the Court, it would appear that defendants would be in a strong position to estop plaintiffs from asserting a harm and

[185] 450 F.3d 1322, 1324–25 (11th Cir. 2006).

[186] *Id.* at 1325.

[187] *Id.* at 1332. *See infra* Part III.C.3 for discussion of limitation agreements.

[188] *See infra* text accompanying notes 157–159 for a discussion of limitation agreements.

[189] *See, e.g.*, Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118, 1124–25 (C.D. Cal. 2005), *abrogated by* Abrego Abrego v. Dow Chem. Co., 443 F.3d 676 (9th Cir. 2006), *as recognized in* Moniz v. Bayer A.G., 447 F. Supp. 2d 31 (D. Mass. 2006).

> recovering damages in excess of $5,000,000. Plaintiff has met his burden to show that he and the class members will not recover more than $5,000,000 in damages.[190]

The Court of Appeals for the Seventh Circuit (in dicta, since the plaintiff had not actually suggested any limitation) seemed to approve of allowing plaintiff to voluntarily limit damages. "The complaint did not set a cap on recovery—as it might have done if the plaintiff had represented that the class would neither seek nor accept more than $5 million in aggregate."[191] Another district court merely noted that "Plaintiff has nowhere stipulated that the ultimate amount sought is less than $5,000,000."[192]

There were a number of pre-CAFA class-action cases (in which defendants, in order to remove, had to show that each member of the plaintiff class had damages exceeding the amount in controversy limit) where courts addressed the issue of voluntary limitation of damages. Some allowed plaintiffs to stipulate to a binding limitation of no more than $75,000 in damages per class member.[193] Courts that did so have relied on dicta in the Supreme Court case *St. Paul Mercury Indemnity Co. v. Red Cab Co.*[194] The Court in that case did not allow plaintiff to amend his complaint after removal to allege damages below the jurisdictional requirement, holding that the jurisdictional amount is determined from the face of the complaint at the time of removal, not afterwards.[195] The Court went on to say, however, "If [plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional

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[190] *Id.* at 1124 (citation omitted).

[191] Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 449 (7th Cir. 2005) ("The complaint did not set a cap on recovery—as it might have done if the plaintiff had represented that the class would neither seek nor accept more than $5 million in aggregate.").

[192] Plummer v. Farmers Group, Inc., 388 F. Supp. 2d 1310, 1318 (E.D. Okla. 2005).

[193] *See, e.g.*, Tovar v. Target Corp., No. SA04CA0557XR, 2004 WL 2283536, at *1–2 (W.D. Tex. Oct. 7, 2004); Clark v. Pfizer, Inc., No. 04-3354, 2004 WL 1970138, at *3 (E.D. Pa. Sept. 7, 2004); Spann v. Style Crest Prods., Inc., 171 F. Supp. 2d 605, 611 (D.S.C. 2001).

[194] 303 U.S. 283, 290–92 (1938), *superseded by statute*, Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (codified as amended in scattered sections of 28 U.S.C.).

[195] *Id.* at 292.

amount, and though he would be justly entitled to more, the defendant cannot remove."[196]

Some lower courts, however, have more recently refused to allow plaintiffs to destroy jurisdiction by pleading an amount less than the jurisdictional requirement in state court, noting that plaintiff might not be bound by his damage claim in state court, because the amount claimed might later be raised by amendment, since "most states now have rules of civil procedure that permit a plaintiff to amend his pleadings as to damages at any time in the litigation, or receive whatever damages a jury determines regardless of the amount claimed."[197]

These courts distinguish *St. Paul Mercury* on the grounds that the Supreme Court's opinion was made when the law did not allow for such amendment, and as one court explained:

> This is because the *St. Paul Mercury* Court spoke at a time when few or no state courts permitted amendment of pleadings to conform with a final judgment, and a plaintiff who voluntarily limited the amount in controversy would have been limited in fact to the amount plead. . ..As noted above, however, most states. . .now have procedural rules that permit a plaintiff to receive whatever amount of damages justice requires, rendering such self-limitation a mere formality of pleading. . ..This change in the law entirely undercuts the sacrifice that the *St. Paul Mercury* Court assumed a plaintiff would need to make if he wished to defeat defendant's right of removal.[198]

Other courts did not find the fact that state court rules might allow amendment would give plaintiffs an opportunity to go back on his promise to limit damages, and one stated: "In the instant case, Plaintiff's limitation of damages is not a mere formality of pleading. Plaintiff has stipulated, on

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[196] *Id.* at 294.

[197] Feldman v. N.Y. Life Ins. Co., No. 97-4684, 1998 WL 94800, at *5 (E.D. Pa. Mar. 4, 1998) (citing De Aguilar v. Boeing, 47 F.3d 1404, 1409–10 (5th Cir. 1995)). *See also* Adkins v. Gibson, 906 F. Supp. 345, 348 (S.D.W. Va. 1995), *abrogated by* McCoy v. Erie Ins. Co., 147 F. Supp. 2d 481 (S.D.W. Va. 2001); Dunn v. Pepsi-Cola Metro. Bottling Co., 850 F. Supp. 853, 855 (N.D. Cal. 1994).

[198] *Feldman*, 1998 WL 94800, at *5. *See also Adkins*, 906 F. Supp. at 348; *Dunn*, 850 F. Supp. at 855.

behalf of himself and the uncertified class, that he will voluntarily limit his recovery to under $75,000. . ..Upon remand, Plaintiff will be held to this voluntary limitation."[199]

The majority of courts and commentators, at least pre-CAFA, adopted the position that plaintiff could make a binding stipulation to limit damages below the jurisdiction limit and thereby avoid federal jurisdiction.[200] Since CAFA has removed the normal one-year limitation on removal, and any action by plaintiff at any time which produces federal jurisdiction would allow for removal,[201] plaintiffs could clearly not, as some courts feared, increase the demand after remand to state court. If they were to do so, defendants could remove at that time. It is important to note, however, that to use this procedure, plaintiff must make this stipulation at the time of defendant's removal petition or before, or the courts will not consider it, since the amount in controversy is determined at the time of removal.[202]

It might be argued that even if it was correct to allow plaintiffs to voluntarily limit their damages in class actions pre-CAFA, the rule should not survive CAFA, due to the distinction between limiting per-plaintiff versus aggregated amount in controversy requirements.[203] A per-plaintiff limitation on damages would not be hard for a court to enforce. Any plaintiff entitled to less than the jurisdictional amount would get the full amount of damages, while any plaintiff with damages over the amount would get only the jurisdictional amount. However, since any voluntary post-CAFA limitation will be on the aggregate damages for all plaintiffs, enforcement would become more complicated.[204] The court (or the parties with court approval) would have to apportion the limited allotment of relief

[199] Clark v. Pfizer Inc., No. 04-3354 , 2004 U.S. Dist. LEXIS 17813, at *10–11 (E.D. Pa. Sept. 7, 2004) ("A principal element of a judicial admission is that the fact has been admitted for the advantage of the admitting party, and consequently, a judicial admission cannot be subsequently contradicted by the party that made it." (citing Nasim v. Shamrock Welding Supply Co., 563 A.2d 1266, 1267 (Pa. Super. Ct. 1989))).

[200] WRIGHT & KANE, *supra* note 135, at 205–06.

[201] "A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply) . . . ." 28 U.S.C.A. § 1453(b) (West 2006).

[202] Coleman v. J.C. Penney Co., No. 05-1920, 2005 U.S. Dist. LEXIS 37861, at *5 (W.D. La. Dec. 19, 2005).

[203] *See* 28 U.S.C.A. §1332(d)(6) (West 2006).

[204] *Id.*

fairly among all of the plaintiffs. This might be particularly difficult to do if the court is not certain of the total number of plaintiffs who will get relief at the time distribution begins. But courts have been able to deal successfully with a similar kind of problem when a defendant has agreed to a settlement with a fixed ceiling on relief, which then has to be distributed to an uncertain number of class members.[205]

4. Supplemental Jurisdiction and *Allapattah Services*

In addition to ensuring that the aggregated amount in controversy does not exceed five million dollars, a plaintiff must also make sure that no single member of the class has an amount in controversy of more than $75,000, due to the recent Supreme Court decision in *Exxon Mobil Corp. v. Allapattah Services, Inc*.[206] This case was decided by the Court a few months after the effective date of CAFA, but the new statute did not apply, since the case had been filed before CAFA's effective date.[207]

In *Allapattah Services*, the Court held that the supplemental jurisdiction statute, 28 U.S.C. § 1367, allowed jurisdiction over all related claims in a class action, as long as one of the claims exceeded the statutory amount in controversy.[208] This overruled the Court's earlier holding, in *Zahn v. International Paper Co.*, that the claim of each and every class member had to exceed the jurisdictional minimum.[209] So, if plaintiffs are trying to avoid federal jurisdiction under CAFA by keeping the aggregate amount in controversy under $5,000,000, they must also ensure that jurisdiction does not exist under the *Allapattah Services* Court's interpretation of 28 U.S.C. §§ 1332 and 1367. [210] To do so, there must either be a lack of complete diversity between the named plaintiffs and the defendants, or no single plaintiff's claim may exceed $75,000.[211]

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[205] *See generally* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (addressing the issue of limited funds for a class action settlement).

[206] 545 U.S. 546, 550 (2005).

[207] *Id.* at 571.

[208] *Id.* at 550.

[209] 414 U.S. 291, 294–95 (1973), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104. Stat. 5089, 5113–14 (codified at 28 U.S.C. § 1367), *as recognized in* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005).

[210] *Exxon Mobil*, 545 U.S. at 567.

[211] *Id.*

D. Applying the Home-State and Local Controversy Exceptions

In order to garner enough votes in the Senate to get the necessary two-thirds vote to end a filibuster, the sponsors of the bill agreed to add several exceptions which were supposed to allow class actions that were strongly related to one state to remain in the courts of that state.[212]

The home-state controversy exception requires the federal court to decline jurisdiction if "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."[213] If between one-third and two-thirds of the plaintiff class and the primary defendants are from the forum state, the federal court "may, in the interests of justice" decline jurisdiction, based on a number of listed factors.[214]

The "local controversy" exception requires the same two-thirds of the plaintiff class to be citizens of the state where suit is brought.[215] But rather than requiring that the primary defendants also be in-state citizens, it requires one defendant "from whom significant relief is sought. . .whose alleged conduct forms a significant basis for the claims" to be a citizen of the forum state.[216] In addition, this exception requires that "the principal injuries" resulting from the conduct of each defendant were incurred in the forum state.[217] It also requires that during the preceding three years "no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons."[218]

1. Citizenship v. Residence

Perhaps the biggest impediment to the exceptions fulfilling their promise of keeping local actions in state court is the fact that either the "primary defendants" or a "significant" defendant must be a "citizen" of the

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[212] 151 CONG. REC. S999, 1006 (daily ed. Feb. 7, 2005) (statement of Sen. Hatch) (reproduced *supra* note 119). *See also* VAIRO, *supra* note 10.

[213] 28 U.S.C.A § 1332(d)(4)(B) (West 2006).

[214] *Id.* § 1332(d)(3).

[215] *Id.* § 1332(d)(4)(A).

[216] *Id.* § 1332(d)(4)(A)(i)(II)(aa)–(cc).

[217] *Id.* § 1332(d)(4)(A)(i)(III).

[218] *Id.* § 1332(d)(4)(A)(ii) (reproduced *supra* note 35).

forum state.[219] Thus, in many cases, even if most of the plaintiffs are citizens of the forum state, and even if the harm took place in the forum state, and even if there was only one corporate defendant and that defendant maintained a significant presence in the state, the suit would not fall within the exception unless the defendant were a citizen of that state.[220] And since corporations are deemed to be citizens only of their principal place of business and any state in which they are incorporated, it is possible for a corporation to maintain a huge presence in a state yet not be a citizen there.[221]

Take as a hypothetical example a class action suit against the Disney corporation in Florida by a large group of Florida landowners whose properties had been polluted by construction work at Disney World.[222] Even though this would seem to fit the definition of a local controversy, it would not fall within the exceptions, because the Disney Corporation is not a citizen of Florida, but of California, where it has its principal place of business, and Delaware, where it is incorporated.[223] Although none of the forum-shopping abuses cited by the proponents of CAFA exist in this case, and Disney, as a large employer and taxpayer in Florida would not face the kind of discrimination against an out-of-state citizen that diversity jurisdiction was supposed to remedy, if plaintiff files in state court, Disney may remove.[224]

Now, it could be said that the problem here lies not with CAFA, but with the definition of corporate citizenship used for all diversity purposes.[225] In other words, even if this had been a suit by only one Florida citizen brought against Disney, federal jurisdiction would apply because there would be complete diversity between the Florida plaintiff and Disney, and Disney could remove the state-court suit to federal court. There is a difference, though, in the use of citizenship for purposes of defining diversity under § 1332 and the use of citizenship for the purposes of

[219] *Id.* § 1332 (d)(3), (d)(4)(A).

[220] *Id.*

[221] *Id.* § 1332 (c)(1).

[222] This example comes from H.R. REP. NO. 106-320, at 36 (1999) (dissenting views). This report was issued during the 106th Congress and concerned a failed predecessor of CAFA, the Interstate Class Action Jurisdiction Act of 1999. *See also* Woods, *supra* note 120, at 538.

[223] Woods, *supra* note 120, at 538.

[224] *Id.*

[225] 28 U.S.C.A. § 1332(c)(1) (West 2006).

defining the exceptions to CAFA.[226] Diversity statutes have always been based on citizenship, rather than some other standard, such as where the parties "reside" or "do business." This is because Article III of the United States Constitution defines diversity jurisdiction in terms of "citizens of different states."[227] Therefore, if diversity statutes were based on something other than citizenship, even though it might make sense, given the purposes of diversity, it might result in a suit between two citizens of the same state which would violate the Constitution.

Under CAFA, however, the constitutional requirement of diversity is met in the general grant of jurisdiction to all class actions in which "any member of a class of plaintiffs is a citizen of a State different from any defendant."[228] The home-state and local controversy exceptions really have nothing to do with the citizenship of the parties for diversity purposes.[229] They do not create or define diversity, but define situations where, although there is minimal diversity, federal jurisdiction is not warranted.[230] They were designed to weed out those cases where minimal diversity did exist, but the impact of the lawsuit was mostly localized in one state.[231] To satisfy this purpose, it would have made more sense to choose some other basis than citizenship, such as residence or corporate presence, to determine a party's connection to the forum state.

Congress has used "residence" in at least one other statute involving the question of which court should hear a case, where the statute was not creating diversity jurisdiction, and therefore it was not necessary to use "citizenship."[232] The general federal venue statute[233] provides for venue in "any judicial district where any defendant resides."[234] Under the statute, for purposes of venue, a corporate defendant is "deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced."[235] This makes sense for venue purposes,

[226] *Compare* 28 U.S.C.A. § 1332(c)(1) (2000) *with* § 1332(d)(3)–(4) (West 2006).

[227] U.S. CONST. art. III, § 2, cl. 1.

[228] 28 U.S.C.A. § 1332(d)(2)(A) (West 2006).

[229] *See id.*

[230] *Id.* § 1332(d).

[231] *See id.*

[232] 28 U.S.C. § 1391 (2000).

[233] *Id.*

[234] *Id.* § 1391(a).

[235] *Id.* § 1391(c).

considering the fact that determining whether personal jurisdiction exists depends on whether the corporation maintains such contacts with the forum that it would be reasonable for it to expect to be sued there.[236] Those are some of the same considerations that would make a district within a state a proper venue for an action.[237] A similar standard would seem to have been more appropriate for use in deciding whether a corporation is closely affiliated enough with a state to require it to defend a class action lawsuit brought in a state court of that state by mostly in-state plaintiffs.

In the debates leading up to the passage of CAFA, the sponsors of the bill were not very precise when describing how the exceptions would work. Sometimes they said they would apply when most of the parties were "residents" of the forum state,[238] sometimes when they were "citizens" of the forum state,[239] and sometimes when they were "from" the forum state.[240] This indicates that what was important was their affiliation with the state, not whether they were technically citizens or not. Since the wording of the statute as passed clearly requires the primary defendants be "citizens," however, this will give it a narrower scope than what might have been intended.[241]

2. The Meaning of "Primary" and "Significant"

In an individual suit against Disney, or in a pre-CAFA class action, plaintiff could have protected against removal by joining another defendant that was a Florida citizen, perhaps a local contractor that had helped cause the problem. Since complete diversity would have been destroyed, neither defendant could have removed. CAFA removes that limitation, so that plaintiffs cannot defeat removal by joining an in-state party.[242] The next

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[236] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–319 (1945).

[237] 28 U.S.C. § 1391(c) (2000).

[238] 151 CONG. REC. S999, 1006–08 (daily ed. Feb. 7, 2005) (statement of Sen. Hatch).

[239] *Id.* In his remarks just a week before passage of the Act, Senator Hatch used "citizens" and residents or claimants who "reside" in a state interchangeably. *Id.*

[240] 151 CONG. REC. S1157, 1167 (daily ed. Feb. 9, 2005) (statement of Sen. Feinstein).

[241] *See* Floyd, *supra* note 18, at 489 ("the exceptions themselves are so narrowly crafted that they rarely will apply").

[242] Since only minimal diversity is required, an additional defendant who is not diverse from the plaintiff will not destroy jurisdiction. 28 U.S.C.A. § 1332(d)(2) (West 2006). Neither will it avail plaintiff to add another defendant who might object to removal, since CAFA also allows that

question, however, is whether joining the local defendant will make either the home-state or local action controversy exceptions applicable. The home-state controversy exception will still not apply here, since it probably requires all of the primary defendants to be citizens of the state, and Disney is clearly a primary defendant which is not a citizen.[243] Adding a local defendant cannot bring the home-state controversy exception into play.[244]

Here, however, is where the local controversy exception might apply. The local controversy exception, rather than requiring the primary defendants to be state citizens, requires that (1) at least one defendant is a defendant (2) from whom significant relief is sought by members of the plaintiff class (3) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class, be a citizen of the state where the action was filed.[245] So the issue in the Disney hypo would be whether the class is seeking "significant relief" from the contractor and whether the contractor's conduct forms "a significant basis" of the claims.[246]

One court has noted that there are two "common usage" meanings to the term "significant relief."[247] One more favorable to plaintiffs would be "not inconsequential," where actual, rather than nominal damages are sought.[248] Under this definition, the local contractor, who would be liable along with Disney, would satisfy this aspect of the exception.

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any such action "may be removed by any defendant without the consent of all defendants." *Id.* § 1453(b).

[243] *Id.* § 1332(d)(3). Although CAFA only refers to "the primary defendants," this most likely means "all." As one court has stated: "The plain text . . . using the definite article before the plural nouns, requires that all primary defendants be states. Had Congress desired the opposite, it would have used 'a' and the singular, or no article." Frazier v. Pioneer Ams. LLC, 455 F.3d 542, 546 (5th Cir. 2006) (referring to the exception for certain actions brought against states (28 U.S.C. § 1332(d)(5)(A) (West 2006)), which is worded exactly the same as the home-state exception under discussion here, § 1332(d)(4)(B)).

[244] 28 U.S.C.A. § 1332(d)(4)(B) (West 2006); *Frazier*, 455 F.3d at 546.

[245] 28 U.S.C.A. § 1332(d)(4)(A) (West 2006).

[246] *See id.*

[247] Kearns v. Ford Motor Co., No. CV 05-5644 GAF (JTLX), 2005 U.S. Dist. LEXIS 41614, at *31 (C.D. Cal. Nov. 21, 2005) ("The term 'significant relief' is not used in any statute aside from CAFA. It has been used in 36 Supreme Court and Ninth Circuit (appeals and district court) cases in a generic sense. These uses seem to cluster around two similar, but subtly different, meanings.").

[248] *Id.* at *32.

The other usage would require that this relief sought from this defendant must be significant when "viewed relative to the overall relief" sought by the class.[249] If this definition is used, then Disney might try to claim that even if both defendants are held liable, plaintiffs are expecting to recover all or most of their damages from Disney, the deep pocket. One court seemed to take this approach when a class action was brought by Louisiana citizens who had been harmed when a truck hit and damaged a local bridge.[250] A class-action suit was brought against the driver, the trucking company that was his employer, the insurance company representing the trucking company, and the owner of the crane that was the truck's payload.[251] Only the driver was a Louisiana citizen and all of the other defendants were out-of-state citizens.[252]

The court held that it should look, not only at how much relief was being claimed against the in-state defendant in comparison with other defendants, but also each defendant's ability to pay a potential judgment.[253] Although a full judgment would be issued against the driver if he caused the accident, and all of the other defendants' liability would have been derivative, the court held that the driver was not a significant defendant, since what the class was seeking against him was "small change" compared to the other defendants: "With an amount in controversy of at least $5,000,000, the plaintiffs will seek most of that relief from those who are capable of paying it: the corporate defendants."[254] Although the statement may be true factually, it is debatable whether ability to pay should be taken into account when determining whether "significant relief" is sought from a defendant.[255] Using this court's reasoning, the local controversy exception could never be used if the local defendant was being indemnified by an out-of-state insurance company. When the conduct of an in-state defendant results in joint and several liability with out-of-state, deep pocket defendants, that should not negate the exception if it otherwise applies. The

[249] *Id.*

[250] *See generally* Robinson v. Cheetah Transp., No. 06-0005, 2006 U.S. Dist. LEXIS 10129, at *2 (W.D. La. Feb. 27, 2006).

[251] *Id.* at *2–3.

[252] *Id.* at *6.

[253] *Id.* at *12.

[254] *Id.* at *13.

[255] *See* 151 CONG. REC. S999 (daily ed. Feb. 7, 2005) (noting that the true concern is preventing forum shopping and ensuring the case is tried in an impartial court).

sponsors of the bill used the term "significant" in order to keep plaintiffs from adding a marginal defendant which was technically liable, but not culpable (such as a local retail drug store in a suit against a drug manufacturer) to invoke the exception.[256] This reasoning should not apply, however, to a defendant whose conduct was a significant factor in causing the damages.

Another aspect of the problem of defining whether "significant relief" is sought from a defendant, and whether conduct "forms a significant basis" for plaintiffs' claims, arises when there are multiple defendants, each of which caused part of the harm to the plaintiff class. In *Evans v. Walter Industries, Inc.*, plaintiffs were residents of a town in Alabama who brought suit against 18 defendants who operated facilities which had released various waste substances which led to widespread pollution.[257] Only one of the 18 defendants was an in-state resident.[258] Plaintiffs tried to use the local controversy exception to avoid remand to state court, but the Court of Appeals for the Eleventh Circuit held that the claims against the in-state defendant did not form a significant basis for the plaintiffs' claims.[259] The court held that plaintiffs had the burden of proof on showing that the exception applied and that they had "offer[ed] no insight into whether U.S. Pipe played a significant role in the alleged contamination, as opposed to a lesser role, or even a minimal role."[260] The court dismissed the idea that there might be joint and several liability in the case, making the in-state defendant liable, along with others, for the total amount of damages.[261] The court held that although joint liability might satisfy the "significant relief"

[256] This provision essentially precludes personal injury lawyers from evading federal jurisdiction by simply naming a local defendant such as Hilda Bankston, who was unmercifully dragged into scores of class action lawsuits simply because her small family-operated pharmacy sold the diet drug Fen-Phen and her citizenship could defeat diversity jurisdiction. *See* 151 CONG. REC. S1157, 1166–67 (daily ed. Feb. 9, 2005) (statement of Sen. Feinstein). *See also* 151 CONG. REC. S999, 1000 (daily ed. Feb. 7, 2005) (statement of Sen. Specter) (noting the purpose of the local controversy exception, and its "significant relief requirement," is to "enable[] state courts to adjudicate truly local disputes involving principal injuries concentrated within the forum state").

[257] 449 F.3d 1159, 1161 (11th Cir. 2006).

[258] *Id.*

[259] *Id.* at 1167.

[260] *Id.*

[261] *Id.* at 1167 n.7.

aspect of the exception, it did not necessarily satisfy the "significant basis" requirement.

In other words, "the mere fact that relief might be sought against U.S. Pipe for the conduct of others (via joint liability) does not convert the conduct of others into conduct of U.S. Pipe so as to also satisfy the 'significant basis' requirement."[262]

The Eleventh Circuit might be correct that merely being one of 18 defendants responsible for the total damages might not be enough to satisfy the exception.[263] However, requiring plaintiffs to show the extent of one defendant's culpability compared to the others at such an early stage of the litigation might impose an unrealistic burden on the plaintiffs, requiring more inquiry into the merits than normally necessary in deciding jurisdictional questions.

If an out-of-state citizen, acting in concert with only one in-state citizen, causes harm to a number of in-state citizens, like in the Disney/contractor example above, then the "significant relief" and "significant basis" requirements should both be met. What if, however, the out-of-state citizen conspires with a large number of in-state citizens, each of which causes a small part of the harm? Do any of them satisfy the "significant relief" and "significant conduct test?" At least one court has said no, even though this makes no sense given the purpose of the exception.[264]

In *Kearns v. Ford Motor Co.*, a class of California plaintiffs brought suit against Ford and a large number of California Ford dealers for fraudulently inflating the price of certified pre-owned cars.[265] The court held that although "the conduct of dealers as a group forms a significant basis for the claims, this is not true of any single dealer like Claremont Ford."[266] This reasoning might make sense in a case like *Evans*, where only one of many contributing defendants was an in-state citizen.[267] But where all but one of the defendants are in-state citizens it leads to an absurd result. If Ford conspired with three in-state dealers, then the exception might be met

[262] *Id.*

[263] *See e.g.*, *id.* at 1167–68.

[264] *See generally* Kearns v. Ford Motor Co., No. CV 05-5644 GAF(JTLX), 2005 WL 3967998 (C.D. Cal. Nov. 21, 2005).

[265] *Id.* at *2, 11.

[266] *Id.* at *11.

[267] *Evans*, 449 F.3d at 1167.

because each would have been responsible for a significant portion of the damages. But if they conspired with one hundred in-state dealers, then the exception would not apply since none were responsible for a significant portion of the damages. The purpose of the exception is to identify truly local controversies.[268] A controversy is no less local if damages are spread among one hundred local defendants than if it were spread among just a few. This case also does not fit the model of merely adding local retailers in a products liability case (where liability exists merely for selling defective goods, even though the retailers were in no way responsible for the defect).[269] In the *Kearns* case, the assertion was that the dealers actively conspired with Ford to inflate the prices of the cars in question and their liability was based, at least in part, on their own culpable actions.[270]

3. Whether Principal Injuries Occurred in the State

Although the court in *Kearns* might have been wrong to disallow use of the exception based on the fact that the conduct of the dealers did not form a significant basis for the claims, it might have been right to deny it on another ground. The court also interpreted the requirement that "principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the state."[271] The plaintiff argued that this was met, since "principal injuries" referred to injuries suffered by the plaintiff class.[272] Ford, however, argued that since the allegedly fraudulent program was a national program, any injuries were suffered throughout the United States, and therefore the "principal injuries" resulting from its conduct did not occur in California (because this part of the rule refers to each defendant, not just one).[273]

The court found the term "principal injuries" ambiguous, and therefore looked to the legislative history to determine that this exception was not

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[268] *Kearns*, 2005 WL 3967998, at *6; *see also* S. REP. NO. 109-14, at 27–28 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 27–28.

[269] *Cf. Kearns*, 2005 WL 3967998, at *11 (noting that though the actions of the group of defendant dealers constituted a "significant basis," no individual dealer's actions fulfilled this requirement).

[270] *Kearns*, 2005 WL 3967998, at *2, 8.

[271] *Id.* at *9; 28 U.S.C.A. § 1332(d)(4)(A)(III) (West 2006).

[272] *Kearns*, 2005 WL 3967998, at *9.

[273] *Id.*

supposed to apply to allow part of a larger nationwide dispute to be brought as a local action in the courts of one state by restricting the suit to injuries suffered by in-state residents.[274] The court cited the Senate Committee Report:

> [I]f the defendants engaged in conduct that could be alleged to have injured consumers throughout the country or broadly throughout several states, the case would not qualify for this exception, even if it were brought only as a single-state class action. . ..In other words, this provision looks at where the principal injuries were suffered by everyone who was affected by the alleged conduct—not just where the proposed class members were injured.[275]

The court, therefore, held that injuries in this section referred to all injuries suffered by all persons (in or outside of the state) as a result of the defendants' alleged wrongdoing.[276] Because the injuries suffered in California were only a small fraction of the injuries suffered throughout the United States, the exception was not satisfied.[277] Although this section could have been worded more clearly, the court is probably correct that Congress did not intend to exchange large nationwide class actions brought in a single state court for some larger number of separate state-court actions, each alleging the conduct by the defendant, which had acted in concert with some local defendant.[278] The exceptions were to be used for truly local controversies, not local subsets of nationwide controversies.[279] There is nothing to keep plaintiffs from dividing up what otherwise would be huge nationwide class actions into individual state actions, but they can't use the local controversy exception to keep them in state court. Although such actions will likely end up in federal court, it might be easier to convince federal judges to certify these state-wide class actions, as opposed to one larger national class action, since they may negate some of the problems raised by the Supreme Court in *Amchem Products, Inc. v.*

[274] *Id.* at *9–12.

[275] *Id.* at *12 (citation omitted).

[276] *Id.*

[277] *Id.*

[278] *See id.*

[279] *See supra* note 212.

Windsor.[280] One commentator has suggested that this result (multiple, state-by-state class actions) may leave plaintiffs with significant leverage.

Most observers believe that nationwide consumer class actions will take the biggest hit.[281] The federal courts generally have been reluctant to certify these class actions, often because they involve consumer protection laws that differ from state to state. If the federal courts refuse to certify these cases, plaintiff's lawyers will adapt and file actions state by state.

Even if defendants persuade the federal courts to retain jurisdiction over all the cases, the settlement leverage will still tilt towards the plaintiffs because, once in federal court, all the class actions filed with respect to a particular product are likely to be transferred to one district court for pretrial purposes under the Multidistrict Litigation statute.[282] That would likely mean more federal multidistrict litigation, in which a large number of similar cases are consolidated in a single federal district court. Moreover, now that some states, like Texas, have enacted legislation making it more difficult for plaintiffs, some plaintiffs' lawyers may actually prefer litigating in the federal courts.[283]

4. Proof That Two-Thirds of Plaintiffs Are In-State Citizens

In addition to showing that the principal defendants or a defendant from whom significant relief is sought are citizens of the forum state, plaintiffs must also show that more than two-thirds of the members of the plaintiff class are in-state citizens, in order to use either the home-state or local controversy exceptions.

The same arguments could be made as with defendants, that some broader, less technical term than "citizens," such as "residents" should have been used in the language of the exceptions.[284] In this case, however, the problem for plaintiffs of showing that two-thirds of the plaintiff class members are in-state citizens should not be nearly as acute as showing that all of the primary defendants are citizens of the forum state. Most plaintiffs in class action lawsuits are real persons, rather than corporations, and most

[280] 521 U.S. 591, 613–19 (1997).

[281] Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1607 (2006).

[282] *See* 28 U.S.C. § 1407 (2000).

[283] *See* VAIRO, *supra* note 10, at 43.

[284] *See supra* Part II.A.1.

persons are citizens of the same state in which they reside. This, combined with the fact that the statute requires only two-thirds of plaintiffs (as opposed to all primary defendants) to be in-state citizens, will mean that a class composed of all residents of a state will usually also be comprised of at least two-thirds citizens of the state.

This means that plaintiffs should not have to define the class in terms of state citizenship, which (as discussed above) they would have to do if trying to avoid minimal diversity.[285] This should solve the problems associated with such a definition, such as needlessly leaving out local class members, who although not citizens, are in virtually the same situation as citizen class members, or the practical difficulty of determining just who is or is not a member of the class. It would also not require the courts to decide if classes may be defined to include only citizens. This reasonable result will be dependent, however, on how much proof the courts demand before a class defined by residence or some basis other than citizenship will be accepted as meeting the requirement that two-thirds of the class members are in-state citizens.

As discussed above, plaintiffs probably have the burden of proving that the case falls within one of the exceptions, including the requirement that two-thirds of the class members are in-state citizens.[286] This should not mean, however, with a class composed of possibly thousands of people that plaintiffs should need to present individualized evidence of the citizenship of all (or at least two-thirds) of the class members. This would require having each class member fill out an intrusive questionnaire concerning such matters as where they have lived and for how long; what are their future plans, if any for relocation; where they vote; and, where they pay taxes, among others. This seems impractical, undesirable, and unfair.

Different courts have used different reasoning and come to different results in deciding whether a plaintiff class is composed of greater than two-thirds of in-state citizens. In one suit brought on behalf of all owners of residential properties in Florida who had been insured with a Florida insurance company, the court merely presumed that the class of residential property owners would consist of a large majority of Florida citizens.[287]

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[285] *See supra* Part II.A.1.

[286] *See supra* Part II.B.

[287] *See* Moll v. Allstate Floridian Ins. Co., No. 3:05CV160RVMD, 2005 WL 2007104, at *1 (N.D. Fla. Aug. 16, 2005).

The court did not discuss who had the burden of proof on this issue or on what evidence, if any, other than common sense, it based this presumption.[288]

Another court noted that both plaintiff and defendant "take it for granted" that a class of persons who had purchased certified pre-owned cars from all Ford dealerships in California would be mostly California citizens.[289] This court had placed on defendants the burden of showing that jurisdiction (including non-applicability of an exception) did not exist, and did not, as have other courts, switch the burden to plaintiffs to show that one of the exceptions existed.[290] It seemed to require Ford to produce some evidence to show that the assumption that most of the people buying certified pre-owned cars in California would be California citizens, such as that these particular cars were popular with Mexican citizens who transported them back to Mexico.[291]

Other courts have refused to presume that the majority of a class composed of in-state residents, car buyers, or landowners was composed of more than two-thirds in-state citizens. In *Schwartz v. Comcast Corp.*,[292] the court stated: "In sum, each of Schwartz's arguments is premised on the assumption that residence is an effective proxy for domicile. I decline to draw such a parallel. . . . 'Mere residency in a state is insufficient for purposes of diversity'"[293]

The court did not keep in mind, however, although plaintiff in the case at hand was trying to show in-state citizenship, that unlike the *Krasnow v. Dinan* case it cited, the plaintiff was not making that showing "for the purposes of diversity," but rather to show that the home-state exception applied.[294] Also, although the court had assigned the burden of proof to defendant to show that jurisdiction did not exist, it seemed to require plaintiff to come up with evidence that the in-state residents intended to

[288] *See id.*

[289] Kearns v. Ford Motor Co., No. CV 05-5644 GAF(JTLX), 2005 WL 3967998, at *7 (C.D. Cal. Nov. 21, 2005).

[290] *Id.* at *5–7.

[291] *Id.* at *7 & n.7.

[292] No. 05-2340, 2006 WL 487915 (E.D. Pa. Feb. 28, 2006) (citing Krasnov v. Dinan, 465 F.2d 1298, 1300 (3d Cir. 1972)).

[293] *Id.* at *6 (citing Krasnov v. Dinan, 465 F.2d 1298, 1300 (3d Cir. 1972)).

[294] *Id.*; *Krasnov*, 465 F.2d at 1300.

remain in Pennsylvania in order to show they were citizens.[295] "Absent evidence of any factor that bears on the class members' intent to remain in Pennsylvania, I am unable to determine the domicile of plaintiff's residential class members."[296]

The plaintiff had exacerbated the problem by bringing suit not only on behalf of residential customers in the state who had Comcast service, but also to all persons "doing business in the Commonwealth of Pennsylvania" who had such service.[297] Comcast successfully argued that many of their non-Pennsylvania customers were "doing business" in Pennsylvania.[298]

Some courts have made it exceedingly difficult for plaintiffs to prove the two-thirds citizenship requirement. In *Evans v. Walter Industries, Inc.*,[299] the plaintiffs brought suit on behalf of persons who had come into contact with defendants' waste products that had been deposited in and around Anniston, Alabama.[300] The court in *Evans* first determined that plaintiff bore the burden of establishing that the exceptions existed and then held that it had not met that burden.[301] The court was not impressed that one of the plaintiff's attorneys submitted an affidavit which stated that she had interviewed 10,118 potential plaintiffs, that of these 5200 are members of the class and that of the 5200 class members 4976 (93.8%) are Alabama residents.[302] The court was concerned that since plaintiff's attorneys relied mostly on "word of mouth" to attract potential class members, they might have "favored people currently living in Anniston over people who have left the area."[303]

This seems to be using the burden of proof to produce a result that fails to give a reasonable scope to the local exceptions. Clearly, a localized toxic tort is exactly the kind of controversy that should fit under one of the exceptions (assuming that the proper defendants are also state citizens). Yet if courts require plaintiffs to show how many class members might have

[295] *See Schwartz*, 2006 WL 487915, at *6.

[296] *Id.*

[297] *Id.* at *3, 6.

[298] *Id.* at *4, 6.

[299] *See generally* Evans v. Walter Indus., Inc., 449 F.3d 1159 (11th Cir. 2006).

[300] *Id.* at 1161.

[301] *Id.* at 1164–66.

[302] *Id.* at 1166.

[303] *Id.* at 1166 & n.6.

moved out of state after a localized incident has taken place, they will almost never be able to make this showing, even when virtually all of the class members had been state citizens at the time of the harm.

If courts assign plaintiffs the burden of proving that the exceptions apply, then they should be given the benefit of a rebuttable presumption that at least two-thirds of a class of residents (or landowners, or resident consumers or employees) in a particular state are, in fact, state citizens. If there are unusual circumstances that would make the presumption inapplicable, then it should be up to defendant to prove this.

IV. CONCLUSION

One of the purposes of the Class Action Fairness Act was to end abuses by plaintiffs' attorneys who brought large nationwide class action lawsuits in a few state courts which were known to be overly favorable to class actions. By manipulating the named parties, plaintiffs were able to prevent these cases from being removed to federal courts. CAFA greatly expanded federal court jurisdiction over class actions by requiring only minimal diversity and allowing aggregation of amount in controversy. But not all cases were supposed to be removable to federal court. Smaller controversies in which less than five million dollars were at stake and controversies which were localized in one state were intended to be subject to remand to state court.

CAFA was written in such a way, however, that it will be very difficult for plaintiffs to be able to keep many cases in state court, even those cases that should be heard there, given our federal system and the purposes of the Act. Even though defendants should have the burden of proof to show that minimal diversity exists, this will almost always be possible (unless plaintiffs are allowed to define their class as state "citizens" and sue only really local defendants). Defendants should also have the burden of showing that the amount in controversy has been met. This should allow plaintiffs to keep some smaller, limited class actions in federal court, but they must be very careful and specific in framing their relief in order to keep it within the five million dollar limit.

The exceptions for home-state and local controversies could prove helpful or completely illusory, depending on how they are interpreted by the courts. By using citizenship (domicile) of both the plaintiffs and defendants as the measure of how localized a controversy is, Congress has insured that many controversies that are very closely connected to only one

state will not be able to fit the exceptions no matter how the courts interpret the statute. Since it appears that plaintiffs may have the burden of proving that the exceptions have been met, it is incumbent on the courts to make this burden reasonable. When the plaintiff class is composed of in-state residents, landowners, consumers, or workers, courts should not make plaintiffs prove the domicile of each class member. Courts should also give a reasonable interpretation to the terms "primary defendant" and a "significant" defendant. Plaintiffs, for their part, will need to be extremely careful in defining the plaintiff class and choosing which defendants to sue if they want to have any chance at keeping a case in state court.

It is certainly possible that CAFA has sounded the death knell of state-court class actions in all but a very, very small number of unusual cases. Whether this also means the demise of all or most class actions, or only those frivolous ones that should never have been brought in the first place, is not clear. This will depend on just how receptive the federal courts are to certifying properly and reasonably defined class actions.[304]

[304] *See supra* text accompanying note 281 for one commentator's suggestion that the result may be multiple, smaller class-action lawsuits in a number of federal courts, consolidated for pretrial purposes into one district court.