
SEVENTH CIRCUIT MOVES TO THE HEAD OF THE CLASS: RECENT DECISIONS PROVIDE A BROAD INTERPRETATION OF FEDERAL JURISDICTION UNDER CAFA

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INTRODUCTION

On February 18, 2005, Congress passed the Class Action Fairness Act (“CAFA”).¹ CAFA makes major changes to class action procedure in federal courts, and expands federal courts’ diversity jurisdiction over class action cases.² In light of this new legislation, circuit and district courts face the task of interpreting some of CAFA’s more ambiguous provisions. In particular, courts must determine to which cases CAFA applies. Section 9 of CAFA provides that the “[a]ct shall apply to any civil action commenced on or after the date of enactment of this Act.”³ Although seemingly straightforward, CAFA does not define the term “commenced”, leaving courts to interpret the term in light of existing state and federal law. CAFA clearly applies to

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¹ Pub. L. 109-2, 119 Stat. 4 (2005).

² 28 U.S.C. 1332 (d)(2), as amended by the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005).

³ Pub. L. 109-2, 119 Stat. 4 § 9 (2005).

cases which were filed after its enactment⁴, but defendants seeking removal have argued that CAFA provides diversity jurisdiction over cases which were already pending in state court in February 18, 2005, in some circumstances.

Only a handful of circuit courts have addressed when a civil action has “commenced” for purposes of jurisdiction under CAFA.⁵ The Seventh Circuit, however, decided a series of cases regarding CAFA’s applicability to pending state court suits in the past year.⁶ The Seventh Circuit broadly interpreted the term “commenced”, holding that CAFA provides jurisdiction over class action suits that were initially filed in state court pre-CAFA, but where plaintiffs amend the complaint, post-CAFA, to either: 1) add new defendants, or 2) add new claims which do not relate back to the original pleadings.⁷ The two circuit courts subsequently addressing the issue have adopted the Seventh Circuit’s analysis.⁸

However, some district courts have voiced concern that the Seventh Circuit’s interpretation is contrary to congressional intent and the plain language of CAFA, because it retroactively applies the statute.⁹ How courts ultimately decide to define “commenced” will implicate all state class action suits that were filed before CAFA’s enactment that meet the new requirements for diversity jurisdiction.

⁴ See generally *Pfizer v. Lott*, 417 F.3d 725 (7th Cir. 2005); *Bush v. Cheaptickets*, 425 F.3d 683 (9th Cir. 2005).

⁵ The Fifth, Seventh, and Eighth Circuits have all held that a civil action filed in state court pre-CAFA may be subject to federal jurisdiction if plaintiffs add a new defendant or new claim post-CAFA. See *Braud v. Transport Service Co. of Illinois*, 445 F.3d 801 (5th Cir. 2006); *Knudsen v. Liberty Mutual Ins. Co. (“Knudsen I”)*, 435 F.3d 755 (7th Cir. 2006); *Plubell v. Merck & Co.*, 434 F.3d 1070 (8th Cir. 2006).

⁶ *Knudsen v. Liberty Mutual Ins. Co. (“Knudsen I”)*, 411 F.3d 805 (7th Cir. 2005); *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748 (7th Cir. 2005); *Knudsen II*, 435 F.3d 755 (7th Cir. 2006).

⁷ *Id.*

⁸ *Braud*, 445 F.3d at 806; *Plubell*, 434 F.3d at 1072-74.

⁹ *Weekly v. Guidant*, 392 F. Supp. 2d 1066, 1068 (E.D. Ark. 2005); *Brown v. Kerkhoff*, No. 4:05 CV 00274 JEG, 2005 WL 2671529 (S.D. Iowa October 19, 2005); *Comes v. Microsoft*, 403 F.Supp.2d 897, 903 (S.D. Iowa 2005).

Class members' settled expectations of staying in state court are likely to be upset if defendants are able to remove these pending cases to federal court.¹⁰

This article analyzes the Seventh Circuit's decisions interpreting CAFA's commencement provision. Part I provides background information on CAFA's provisions and purpose. Part II outlines both the Seventh Circuit's decisions interpreting § 9 of CAFA and the arguments against the Seventh Circuit approach, and concludes that the Seventh Circuit has reached the correct result in light of CAFA's purpose, legislative history, and existing law.

I. BACKGROUND

Members of Congress have attempted to pass some version of class action reform for years.¹¹ Proponents of class action reform cite to numerous abuses in the pre-CAFA system, many of which stem from the fact that most class actions are adjudicated in state court.¹² Proponents claim that state court judges have a reputation for certifying classes and approving settlements too hastily, the impact being that class members end up recovering little, costs get passed on to the consumer, and class counsel ends up the big winner.¹³ To remedy this situation, CAFA has three major provisions: first, CAFA includes a "consumer class action bill of rights" which provides

¹⁰ Although there are situations where plaintiffs may prefer to have their suit litigated in federal court, this article focuses on removal by defendants under the assumption that plaintiffs would prefer to litigate their claim in state court.

¹¹ See Class Action Fairness Act of 1997, 143 CONG. REC. S. 897 (daily ed, Jan. 30, 1997) (Statement of Sen. Kohl); The Class Action Fairness Act of 2000, 146 CONG. REC. S. 7812 (daily ed, July 27, 2000) (Statement of Sen. Grams), The Class Action Fairness Act of 2001, 147 CONG. REC. S. 11946 (daily ed, Nov. 15, 2001) (Statement of Sen. Grassley); Class Action Fairness Act of 2003, 149 CONG. REC. e. 405 (daily ed, March 7, 2003) (Statement of Sen. Goodlatte); Class Action Fairness Act of 2005, 150 CONG. REC. S. 450 (daily ed, Jan 25, 2005) (Statement of Sen. Kohl).

¹² Pub. L. 109-14, 119 Stat. 324 (2005).

¹³ Pub. L. 109-14, 119 Stat. 324 (2005).

safeguards for coupon settlements¹⁴; second, CAFA directs the Judicial Conference of the United States to review settlements and attorneys' fees in class actions, and present Congress with recommendations for determining fees' in a more fair and reasonable manner¹⁵; third, and most relevant to this article, CAFA expands federal diversity jurisdiction over interstate class actions suits.¹⁶

Pre-CAFA, defendants faced several obstacles to removing interstate class action suits to federal court. Defendants could remove class action suits if the federal court would have had original jurisdiction over the suit—meaning that there was a federal claim or the requirements of diversity jurisdiction were met. Federal courts generally have diversity jurisdiction over a suit where the plaintiff and defendant are citizens of different states and the amount in controversy exceeds \$75,000.¹⁷ Because of the sheer number of parties to class action suits, these requirements can pose a problem.

The Supreme Court interpreted the diversity requirement of §1332 to mean that all named class representatives must be diverse from all named defendants. In other words, plaintiffs could prevent defendants from removing class actions to federal court by including one non-diverse class representative or defendant. This complete diversity requirement had the effect of keeping many interstate suits in state court.

The amount in controversy requirement also posed an obstacle to defendants seeking to remove class actions to federal court. An early Supreme Court case, *Zahn v. International Paper Co.*, interpreted the statute to require that each individual class member have a claim which exceeded \$75,000.¹⁸ The Supreme Court recently overturned *Zahn*, in *Exxon Corp. v. Allapattah Services*, holding that 28 U.S.C. § 1367, would allow the court to exercise supplemental jurisdiction over class members who did not have claims exceeding

¹⁴ Pub. L. 109-2 119 Stat. 4 § 3(2005).

¹⁵ *Id.* at § 6.

¹⁶ *Id.* at §§ 4-5.

¹⁷ 28 U.S.C. § 1332 (2005).

¹⁸ 414 U.S. 291 (1973).

\$75,000.¹⁹ Therefore, so long as one plaintiff had a claim exceeding \$75,000, a federal court could exercise supplemental jurisdiction over other claims.²⁰

However, even with a relaxed amount in controversy requirement, many class action suits would stay in state court. The purpose of class actions is to make it economically feasible for large groups of people with small individual claims to pursue litigation to recover damages.²¹ It's possible that many state class action suits will not have a class member with a claim over \$75,000. Therefore, in order to prevent a defendant from removing a class action to federal court, a plaintiff would need only avoid pleading a federal question, and either include a non-diverse named plaintiff or defendant *or* allege less than \$75,000 in damages for each party. This creates the absurd result that federal courts can easily hear cases where two parties from different states have been in a car accident, and one party alleges damages of \$75,001; however, where a nationwide class of plaintiffs are bringing a \$25 million dollar suit against a major corporation and a local defendant, and no class member has a claim above \$75,000, defendants will be unable to remove that case to federal court.

Because plaintiffs' lawyers were able to easily evade federal diversity jurisdiction, the number of state court class actions suits has increased dramatically in recent years. Moreover, many of these suits were brought in improbable jurisdictions where judges had a reputation for certifying most classes or approving crazy settlements. The Circuit Court of Madison County, Illinois, for example, saw a huge rise in class actions suits. Madison County is home to less than one percent of the U.S. population, yet in 2003, 106 class action suits were filed there. That is an increase of more than 5,000 percent between 1998 and 2003. Studies have shown that the most of the suits filed in these "hotbeds" have little, if nothing, to do with the venues in which they were brought.

¹⁹ 125 S.Ct. 2611 (2005).

²⁰ *Id.*

²¹ S. Rep. No. 109-14. February 28, 2005.

The Senate Report on CAFA notes that the increase in state class actions suits cannot be attributed to differences in the rules governing class action. Rules regarding whether a suit can proceed as a class are basically the same in state and federal courts—thirty-six states have adopted Rule 23, which governs federal class actions. Furthermore, rules in the hotbed state courts are the same as all other courts in the state. The logical explanation for the popularity of some courts of others, therefore, is that some state court judges are more lax about applying the procedural requirements of class action rules.

CAFA, by amending both 28 U.S.C. § 1332 and 28 U.S.C. § 1441, broadens federal jurisdiction over diversity class action suits and eliminates many of the barriers to removal that have caused concern to reform proponents. CAFA has three major requirements: (1) any one plaintiff (named or unnamed) must be diverse from any one defendant; (2) the aggregate amount in controversy of all plaintiffs must exceed \$5,000,000; and (3) there must be at least 100 members in the proposed class.²² CAFA, therefore, has eliminated the two major barriers to removing state class action suits to federal court, complete diversity and the \$75,000 minimal amount in controversy for at least one class member. Furthermore, CAFA provides that cases may be removed by a single defendant, changing the rule that all defendants must consent to removal.²³ Finally, CAFA eliminates the one-year limit on removing diversity cases.²⁴ The effect of CAFA will likely be a shift in the concentration of class action litigation from state courts to federal courts. Because of these relaxed removal requirements, many plaintiffs' attorneys rushed to file class action suits in state court before CAFA's enactment.

Section 9 of CAFA states that it applies “to any civil action commenced on or after the date of enactment of this Act.”²⁵ However, CAFA does not define the term “commence”, and defendants have

²² Pub. L. 109-2, 119 Stat. 4 § 3 (2005).

²³ *Id.* at § 5.

²⁴ *Id.*

²⁵ *Id.* at § 9.

offered several interpretations in an attempt to remove pending state suits.

Defendants have attempted to remove suits that were filed in state court pre-CAFA on the theory that removal to federal court constitutes commencement of a new civil action.²⁶ The circuits have unanimously rejected this argument, holding that state law defines when a suit is commenced and that removal to federal court does not re-commence a civil action.²⁷ Most states' laws mirror Federal Rule of Civil Procedure 3, which provides that a suit is commenced at the time it is properly filed in an appropriate court.²⁸

A real concern for practitioners is whether post-CAFA amendments to complaints, which add new claims or defendants, can commence a new civil action--and thus allow defendants to remove pending cases that were filed in state court before CAFA's enactment.

II. INTERPRETING § 9 OF CAFA: WHEN DOES A CIVIL ACTION "COMMENCE"?

Although most circuit courts have not yet addressed CAFA's applicability to cases filed in state court before February 18, 2005, the Seventh Circuit was presented with a series of cases in the past year that have enabled it to develop a working definition of CAFA's commencement provision.

A. *The Seventh Circuit's Approach*

In *Knudsen v. Liberty Mutual Insurance Co.*, the Seventh Circuit concluded that CAFA did not provide jurisdiction over a case which had been filed in state court prior to the Act, but where plaintiffs changed the class definition post-CAFA.²⁹ The class

²⁶ *Pfizer v. Lott*, 417 F.3d 725, 728 (7th Cir. 2005); *Bush v. Cheaptickets*, 425 F.3d 683, 686 (9th Cir. 2005).

²⁷ *Pfizer*, 417 F.3d at 728; *Bush*, 425 F.3d at 686

²⁸ Fed. R. Civ. P. 3

²⁹ 411 F.3d 805, 807-808 (7th Cir. 2005).

representatives in *Knudsen* originally filed their complaint listing Liberty Mutual Insurance Company (“Liberty Mutual”) as the sole defendant.³⁰ Liberty Mutual responded that the representatives’ claims derived from policies issued by a separate entity, Liberty Mutual Fire Insurance Company (“Liberty Mutual Fire”), and thus they did not belong to a class that had a claim against Liberty.³¹ Plaintiffs then proposed to amend the class to include all insureds of both Liberty Mutual and “Liberty Fire Insurance Company”, their beneficiaries, and their assignees who submitted medical bills and whose claims were paid for less than the medical charge.³² Although the proposed amendment added class members who had claims against another party, the plaintiff class did not purport to add that party as a defendant.³³ Liberty Mutual removed to federal district court before the state court judge could address the plaintiffs’ proposal.³⁴ The district court remanded the case on the grounds that CAFA did not provide jurisdiction over suits which were filed in state court before its effective date, and the Seventh Circuit heard the case on interlocutory appeal.³⁵

The Seventh Circuit noted that there were several problems with plaintiffs’ proposed change in class definition. First, “Liberty Fire Insurance Company” did not exist; presumably plaintiffs had intended to include the insureds of “Liberty Mutual Fire”, but made an error in their proposal.³⁶ Moreover, plaintiffs never added “Liberty Mutual Fire” as a party to the suit.³⁷ The court granted plaintiffs’ motion to remand, noting that Liberty Mutual could not remove the

³⁰ *Id.* at 807.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 806.

³⁶ *Id.* at 807.

³⁷ *Id.*

case “just because a non-party corporate sibling has been *mentioned* in plaintiffs’ latest papers(emphasis added).”³⁸

Although the court found that federal jurisdiction under CAFA was not present in these circumstances, it hinted at other scenarios where CAFA might confer jurisdiction. First, if the plaintiff class in *Knudsen* added Liberty Mutual Fire as a defendant, Liberty Mutual Fire would be able to remove because suit against it would have been commenced after February 18, 2005.³⁹ Second, the court asserted that “any new claim for relief...or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes.”⁴⁰ The court, citing to 28 U.S.C. §1446(b), explained that amending pleadings to add a federal claim or adding a new defendant opens a new window of removal.⁴¹ The court then posited that a similar approach may apply under CAFA, relying upon Federal Rule of Civil Procedure 15(c), which defines whether a claim either relates back to the original suit, or when it is sufficiently independent of the original suit that it must be treated as new litigation.⁴² The court did not have occasion to apply the theory in this stage of *Knudsen*, but forthcoming cases presented an opportunity.

In *Schorsch v. Hewlett-Packard Co.*, the Seventh Circuit heard an interlocutory appeal of a remand order, where defendant removed on the basis of a change to class definition that occurred post-CAFA.⁴³ Defendant argued that the change in class definition did not relate back to the original complaint because the amendment asserted a claim based on computer chips in toner and the original complaint asserted a claim based on computer chips in drum kits.⁴⁴

³⁸ *Id.* at 807-808.

³⁹ *Id.*

⁴⁰ *Id.* at 807.

⁴¹ *Id.*

⁴² *Id.*

⁴³ 417 F.3d 728, 751 (7th Cir. 2005).

⁴⁴ *Id.* at 750

Although the court ultimately concluded that there was no jurisdiction under CAFA and remanded the case, the court expanded upon its relation back theory from *Knudsen*. First, the court explained that, although it discussed relation back according to federal rules in *Knudsen*, state law determines when a suit has been commenced for diversity purposes, and thus state relation back doctrine must apply in this case.⁴⁵ In Illinois, similar to the federal rules, a claim relates back when it arises out of the same transaction or occurrence as that of the original complaint. Furthermore, an amendment relates back in Illinois “when the original complaint ‘furnished to the defendant all the information necessary...to prepare a defense to the claim subsequently asserted in the amended complaint.’”⁴⁶ Concluding that plaintiffs’ amendment did, indeed, arise out of the same transaction as the original complaint, the court noted that “[a]mendments to class definitions do not commence new suits.”⁴⁷ Amendments asserting wholly distinct claims may, but “the workaday changes routine in class suits do not.”⁴⁸

The Seventh Circuit had occasion to revisit the *Knudsen* case, in what is commonly referred to as “*Knudsen II*.” After *Knudsen* was initially remanded, the state court certified the class and defendant, once again, removed.⁴⁹ The state court determined that Liberty Mutual concealed Liberty Mutual Fire’s role in the litigation, and found this concealment so egregious that it entered a default judgment on the merits against Liberty Mutual.⁵⁰ Plaintiffs asked the state court to certify a class which would hold Liberty Mutual responsible for all policies issued by any subsidiary or affiliate, and to hold that all claims on all policies by all insureds throughout the nation be covered by the default judgment.⁵¹ The plaintiffs further asked the court to

⁴⁵ *Id.*

⁴⁶ *Id.* at 751.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Knudsen v. Liberty Mutual Ins. Co.*, 435 F.3d 755, 755-56 (7th Cir. 2006).

⁵⁰ *Id.*

⁵¹ *Id.*

name them representatives of the nationwide class and to disregard any differences in other states' laws.⁵²

The state court judge approved the changes, essentially holding Liberty Mutual liable by default for a nationwide class of insureds, many of whom held policies through Liberty Mutual's unnamed affiliates.⁵³ The district court again remanded, and the Seventh Circuit heard the case on interlocutory appeal.⁵⁴ On appeal from the district court's decision to remand, the Seventh Circuit determined that plaintiffs' changes constituted an amendment that did not relate back under Illinois law, and thus a new action had commenced for purposes of CAFA.⁵⁵ The court noted that, although a new defendant was not added, Liberty Mutual was faced with new claims for relief.⁵⁶ The court determined that the original pleading could not have afforded Liberty Mutual with notice of the new claims, because the new claims sought to hold Liberty Mutual liable for adjustments performed under a distinct system by an affiliate.⁵⁷ Finally, the court explained that *Knudsen* demonstrated exactly the type of case that prompted Congress to enact CAFA, noting that:

The conduct of plaintiffs and the state judge in this litigation, turning an arguable error in discovery into a sprawling proceeding in which Liberty Mutual will be required to pay on account of other insurers' decisions taken long ago under different rules for calculating proper payment, and without even an opportunity to defend itself on the merits or even insist that the policies' actual terms be honored, illustrates why Congress enacted the Class Action Fairness Act.⁵⁸

⁵² *Id.* at *1.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 3.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

The Seventh Circuit approach, therefore, allows federal jurisdiction over cases that were filed in state court pre-CAFA, if a plaintiff class amends the complaint, post-CAFA, to either 1) add a new defendant, or 2) add a claim which would be considered new for limitations purposes under state relation back doctrine. CAFA does not provide jurisdiction, however, when plaintiffs make routine amendments to a complaint. The court's decisions seem to have notice as a common factor—where a defendant could not have been on notice of plaintiffs' post-CAFA changes, at the time the suit was originally filed in state court—those changes will commence a new civil action which will be removable under CAFA.

B. *The Narrow Interpretation of CAFA*

Although all of the circuit courts to address CAFA's commencement provision have adopted the Seventh Circuit's interpretation of CAFA's applicability, district courts in Arkansas⁵⁹ and Iowa have determined that CAFA applies only to cases which were filed in state court after February 18, 2005.⁶⁰ This narrow interpretation rests upon two major arguments, the plain language and legislative history of the statute.

1. Plain Language

In *Weekly v. Guidant*, an Arkansas district court rejected defendant's argument that an amendment to certify a nationwide class commences a new civil action for purposes of jurisdiction under CAFA, claiming that Congress used "clear, unambiguous, and familiar legal terms" when defining to which cases CAFA would apply.⁶¹

⁵⁹ Recently, the 8th Circuit adopted the Seventh Circuit's approach, rather than that of the district court in its circuit, without discussion. See *Plubell v. Merck & Co.*, 434 F.3d 1070 (8th Cir. 2006)

⁶⁰ *Weekly v. Guidant*, 392 F. Supp. 2d 1066, 1068 (E.D. Ark. 2005); *Comes v. Microsoft*, 403 F.Supp.2d 897, 903 (S.D. Iowa 2005).

⁶¹ *Id.* at 1067.

The district court referenced the use of the phrase “any civil action” in other removal statutes. Under 28 U.S.C. § 1452, any claim *or* cause of action may be removed; the court therefore determined that statutes delineate between a “civil action” and a “claim or cause of action.”⁶² Moreover, in order to amend a pleading, a civil action must already be commenced.⁶³ The district court concluded that the phrase “civil action” in CAFA, therefore, refers to all components of a proceeding, including subsequent changes; as such, it can only be commenced once.⁶⁴

The district court also referenced 28 U.S.C. § 1446(b), which provides that if a case by its initial pleadings is not removable, the defendant may file notice of removal within thirty days after the defendant receives “a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable....”⁶⁵ The court determined that, if Congress intended for CAFA to apply to civil actions commenced in state court pre-CAFA, that became removable post-CAFA, it would have included the same language in CAFA’s applicability provision.⁶⁶ The district court dismissed the Seventh Circuit’s relation back approach on the same grounds, noting that Congress did not include any language in CAFA stating that it “applied to actions in which the complaint was amended after February 18, 2005, so as to make the action removable, unless the amendment related back to the initial complaint.”⁶⁷

2. Legislative History

The district court in *Weekly* also relied upon CAFA’s legislative history in concluding that Congress intended a narrow interpretation of § 9. The court noted that a under previous version of

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1068.

⁶⁶ *Id.*

⁶⁷ *Id.*

the house bill, CAFA provided jurisdiction in cases where a *class certification order* was entered after CAFA's enactment date. Under that version, CAFA would apply, not only to cases filed in state court post-CAFA, but also to cases filed in state court pre-CAFA—where the state court made the class certification decision post-CAFA. The version of CAFA that Congress eventually passed contained no such language. The court concluded, therefore, that Congress intended to narrow CAFA's applicability to include only cases which were filed in state court post-CAFA.⁶⁸

An Iowa district court, in *Comes v. Microsoft Corporation*, relied upon much of the same analysis as *Weekly* in determining that CAFA applies only to cases which were filed in state court after CAFA's enactment.⁶⁹ The *Comes* court further pointed out that this narrow interpretation of CAFA's applicability comports with "Congress's intent to limit the effect of [] CAFA on currently pending legislation." The court also cites a previous Iowa district court decision⁷⁰, which refers to two statements in the Congressional Record from sponsoring legislators, indicating that CAFA does not apply to state cases which were pending at the time CAFA was enacted.⁷¹

The district court decisions narrowly interpreting CAFA rest upon a presumption that Congress did not intend to for CAFA to apply retroactively. Because of this presumption, these courts held that CAFA cannot apply to pending state court cases where, post-CAFA, plaintiffs added either a new defendant or a new claim, because Congress did not include specific language in the statute.

⁶⁸ *Id.* at 1068-69.

⁶⁹ *Comes v. Microsoft*, 403 F.Supp.2d 897, 903 (S.D. Iowa 2005).

⁷⁰ *Brown v. Kerkhoff*, No. 4:05 CV 00274 JEG, 2005 WL 2671529 at *6 n.12 (S.D. Iowa October 19, 2005) .

⁷¹ 151 Cong. Rec. S1080 (daily ed. February 8, 2005) (statement of Sen. Dodd) ([The Act] does not apply retroactively, despite those who wanted it to. A case filed before the date of enactment will be unaffected by any provision of this legislation.); 151 Cong. Rec. H753 (daily ed. February 17, 2005) (statement of Rep. Goodlatte) ("Since the legislation is not retroactive, it would have absolutely no effect on the 75 class actions already filed against Merck in the wake of the Vioxx withdrawal.")

C. Courts Should Continue to Adopt the Seventh Circuit Approach

The Seventh Circuit's interpretation of § 9 of CAFA is more well-reasoned in light of CAFA's purpose and legislative history, and in light of existing federal law.

The district court in *Weekly* looked to CAFA's legislative history to conclude that CAFA does not apply to state court suits that were pending when it passed. The court relied principally on the fact that a previous version of CAFA included broader language, that CAFA would apply to suits where the class certification order occurred post-CAFA. The court concluded that because Congress changed the language to suits which "commenced" post-CAFA, it intended that CAFA would not apply to any cases that were already pending.

The more narrow language of CAFA's current applicability provision, however, does not signal that Congress intended to exclude civil actions with significant post-CAFA amendments from jurisdiction. If CAFA provided jurisdiction over any case that was certified as a class after February 18, 2005, there would be a huge retroactive application of CAFA. Any class action that was filed in state court pre-CAFA, but where the court did not make a decision regarding certification until after CAFA passed would be subject to removal. However, under the Seventh Circuit's interpretation, the only cases that can be removed are those where the defendant either could not have been on notice about a new claim or where a defendant was not even a party to the suit at the time of filing. Therefore, the Seventh Circuit's approach does not retroactively apply CAFA; jurisdiction will only exist where a civil action has gone through a significant enough change that it either commences against a new party or it commences an entirely new claim.

Although allowing removal of some cases that were filed in state court before CAFA was enacted may upset the settled expectations of class plaintiffs, class plaintiffs retain control over how they want their suit to proceed. If a class wants to prevent removal of the suit, the class need only refrain from adding new parties or

drastically changing the definition of the class at this point in the litigation.

1. New Defendants

The Seventh Circuit correctly determined that amending a complaint to add a new defendant constitutes commencement of a new civil action, thus providing federal jurisdiction under CAFA. The civil action commences as to the newly added defendant at the time the defendant is added, not at the time the suit was originally filed in state court, for three reasons. First, existing case law dictates that a suit cannot commence against a defendant before they are a party to the suit, as they would have no notice and be unable to raise defenses. Second, existing federal law provides for a new window of removal—where removal was not originally possible—after a complaint is amended. Third, under CAFA, *any* defendant may remove a suit to federal court—meaning that if a suit commences against a new defendant after CAFA’s effective date, that new defendant can remove the entire civil action.

Although CAFA does not contain specific language that it applies to new parties added post-CAFA, the statute fails to define the term “commence” altogether. Therefore, it is logical that CAFA was not intended to replace existing case law regarding when a suit is commenced against a new defendant. The general rule is that “a party brought into court by an amendment, and who has, for the first time, an opportunity to make defense to the action, has a right to treat the proceeding, as to him, as commenced by the process which brings him into court.”⁷² The reasoning behind this rule is that defendants should not be deprived of actions that they could have taken were they originally parties to the suit, because they had no notice of the original proceedings.⁷³ Interpreting CAFA to state that a civil action commences against a defendant at the time it was initially filed in state

⁷² *Braud v. Transport Service Co. of Illinois*, 445 F.3d 801, 805 (5th Cir. 2006) (citing *United States v. Martinez*, 195 U.S. 469 (1904)).

⁷³ *See Braud*, 445 F.3d at 805.

court, before that defendant was a party, is contrary to firmly established principles of notice.

Moreover, under the existing removal statute, a new window of removal opens where the initial case was not removable, but where a defendant receives “a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable.”⁷⁴ In any other state court case, if addition of a new defendant would provide diversity jurisdiction, the defendants can remove the case to federal court.⁷⁵ It is logical to assume that if Congress intended to change existing law regarding when defendants could remove suits, it would have included specific language in CAFA speaking to it. Suits filed in state court pre-CAFA are not removable because CAFA does not retroactively apply; however, when plaintiffs add a new defendant, the suit becomes removable by that defendant—because it has commenced as to him post-CAFA. Because CAFA allows a suit to be removed by *any* defendant, the new defendant can remove the entire civil action to federal court.⁷⁶

2. New Claims

The Seventh Circuit’s decision that new claims added post-CAFA may give rise to jurisdiction is logical in light of existing federal law regarding statutes of limitations.

In deciding that a civil action can commence only once, the *Weekly* court relied upon the distinction between a “civil action” and a “claim” or “cause of action.” The *Weekly* court held that because a civil action encompasses all subsequent changes, it can only commence once—at the time a plaintiff initially files it in state court. However, this distinction does not undermine the Seventh Circuit’s interpretation. Although a civil action may commence only once, when plaintiffs add a new claim that does not relate back to the original civil action, it is separate and fresh litigation. Therefore, it

⁷⁴ 28 U.S.C. § 1446(b) (2005); *Id.*

⁷⁵ 28 U.S.C. § 1446(b) (2005).

⁷⁶ 28 U.S.C. § 1453 (b) (2005).

does not “re-commence” the civil action, but rather, it is a new civil action—commencing for the first time. This is demonstrated by the use of “relation-back” doctrine in the context of statutes of limitations. The reason why courts determine that new claims are barred by statutes of limitations when they do not relate back to the original cause of action, is because they are considered commencement of *new* “civil action”, and that civil action has commenced after the statute of limitations has run. The *Weekly* court’s distinction between “civil actions” and “claims”, if carried over to statutes of limitations, would seem to dictate that plaintiffs could amend complaints to add new and wholly distinct “claims” after the statute of limitations had run. Because the new claims are subsumed by the greater civil action, and because the civil action was filed within the statute of limitations, the claims would not be barred.

Although the Seventh Circuit’s relation-back analysis borrows from a seemingly separate area of law, statutes of limitations, its use in the CAFA context is appropriate. The purpose of the relation-back doctrine is to prevent plaintiffs from escaping the statute of limitations on a new claim simply by tacking it on to a pending claim. However, plaintiffs are not barred from adding new claims, even after the statute of limitations has run, if those claims “relate-back” to the original cause of action. The Federal Rules define relation back as when the claim asserted in the amended pleading “arose out of the conduct, transaction, or occurrence set forth...in the original pleading.”⁷⁷ The Federal Rules, and most states, employ the relation-back doctrine, therefore, to exclude only those amendments to the original pleadings that the defendant did not have notice of. Under this standard, courts assume that the defendant will not be prejudiced if the new cause of action is allowed to proceed, because the defendant either was or should have been aware that it might be liable. However, if the new cause of action does not arise out of the same conduct, transaction, or occurrence as the original civil action, it is deemed separate and fresh litigation—or, in other words, a new civil action which is barred by the statute of limitations. If an amendment to the original pleadings can

⁷⁷ Fed. R. Civ. P. 15(c).

be considered new litigation for statute of limitations purposes, it should also be considered “commencement” of a new civil action in the CAFA context. If a class action defendant could not have been on notice of the cause of action in an amended complaint, that cause of action cannot be said to be part of the original civil action. Rather, it is a new civil action, which should trigger jurisdiction under CAFA.

CONCLUSION

CAFA has broadened federal diversity jurisdiction over state court class action suits in several ways. It has lessened diversity, amount in controversy, and removal requirements. However, determining to which cases CAFA applies is no easy task. Because the statute fails to define when a civil action “commences”, federal courts have attempted to fashion their own interpretation of the term.

The Seventh Circuit has broadly interpreted CAFA’s applicability, and several other circuits have followed suit. Because Congress failed to define the term “commence”, the Seventh Circuit borrowed concepts from existing federal law in reaching the determination that CAFA can provide jurisdiction over state court class actions suits that were pending at the time of CAFA’s enactment. Allowing federal jurisdiction over suits where plaintiffs have added either new defendants, or new claims which do not relate back to the original cause of action, does not amount to a retroactive application of CAFA, and therefore is consistent with CAFA’s legislative history.

Other circuit courts facing this issue should adopt the Seventh Circuit’s approach. Although plaintiff class members’ settled expectations of litigating their cases in state court may be upset in some cases, plaintiffs retain control over how their suit proceeds. If a plaintiff class refrains from adding new defendants or new claims which do not relate to the original pleadings, defendants will be unable to remove those suits to federal court.