Congress passed the Class Action Fairness Act (CAFA) in January 2005, and President George W. Bush signed it into law a month later. Responding to concerns about the litigation of class actions in state court, the legislation is designed to move many state-court class actions to the federal venue. The act is not a model of clarity. In many key respects, it appears that Congress used intentionally vague language to create the necessary consensus for passage, leaving the heavy lifting to the federal courts.

And the courts have done a substantial amount of lifting. CAFA, in its relatively short life, has spawned an abundance of judicial decisions, which reflect a clear consensus on some issues, deep divisions on others, and virtual silence on some provisions that were expected to generate controversy. This book analyzes these decisions and offers practical advice for practitioners who must tackle the sometimes confounding technicalities of this law.

CAFA includes four major categories of changes:

1. It substantially broadens federal jurisdiction for class actions, albeit with numerous important and complex exceptions.
2. It creates an entirely new procedural vehicle—a “mass action”.

CHAPTER ONE

INTRODUCTION AND OVERVIEW

By Gregory C. Cook & Jocelyn D. Larkin
(3) It expands the procedural mechanisms for removal and provides for appeals of removal determinations.

(4) It heightens scrutiny of all class action settlements (including the award of attorneys’ fees), enhances settlement notice requirements, and places new restrictions on coupon settlements.

This first chapter provides an overview of the provisions in these four categories (see the reference chart at the end of this chapter for a summary of the key changes made by CAFA). Chapter 2 chronicles the legislative history and debates leading to CAFA’s enactment and briefly explains pre-CAFA law on class action jurisdiction (which can still be utilized to obtain federal jurisdiction if CAFA does not apply). This comprehensive account provides important context for understanding the law, including the impetus behind its enactment and how its proponents intended certain provisions to function. The remaining chapters tackle CAFA’s provisions, with in-depth analysis of statutory language, descriptions of key judicial interpretations, and suggested strategies for practitioners.

I. Expansion of Federal Jurisdiction

The jurisdiction provisions of CAFA are codified in 28 U.S.C. § 1332(d). These provisions both expand original jurisdiction and create numerous, complex exceptions that cabin the new jurisdictional boundaries.

A. Original Jurisdiction

The requirements for CAFA jurisdiction seem simple enough. CAFA establishes original federal jurisdiction over any “class action” if:

(1) the matter in controversy exceeds $5 million, exclusive of costs and interest;

(2) the class will have 100 or more members; and

(3) minimal diversity exists.

The complexity underlying even the seemingly simplest aspects of CAFA starts with the threshold question of what constitutes a “class action.” The
statute defines a “class action” as “any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.” Chapter 3 addresses what qualifies as a class action, including whether the term “class action” encompasses parens patriae actions brought either by state attorneys general or private counsel standing in for the public or interested parties.

1. Aggregate $5 Million in Controversy

The statute requires that “[t]he 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.” The claims of the class members “shall be aggregated” to determine if that $5 million mark is met. Despite the clarity of language, determining whether more than $5 million is in controversy is not simple and has generated a significant share of the disputes under CAFA.

One issue, unaddressed by the legislation, is which party should bear the burden of proof. In early judicial skirmishes, some litigants sought to rely on a Senate Committee Report, issued ten days after the legislation was passed, which purported to assign the burden of proof to the party that resists federal jurisdiction, reversing traditional jurisdictional principles. Courts have mostly rejected this argument, reaching a consensus that the same burden of proof applies to the amount in controversy under CAFA as it does for purposes of ordinary diversity jurisdiction—the proponent of federal court jurisdiction bears the burden, and that burden varies depending on whether the case was filed in federal court or reached federal court through removal.

Applying the standard likewise has proved difficult. Plaintiffs often have little factual basis upon which to allege the amount in controversy. They may not know how widespread the alleged wrongdoing is or whether the monetary loss is the same for every class member. And, for removed cases, defendants may be hard-pressed to prove the amount in

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1. 28 U.S.C. § 1332(d)(2.)
2. Id. § 1332(d)(6).
controversy if the class definition or the scope of the alleged wrongdoing
is not clear, a situation that occurs surprisingly often because a plaintiff
may not have enough information to plead those allegations with pre-
cision in the first place. Further, these difficulties can be compounded if
injunctive or declaratory relief is sought, and intangible relief must be
reduced to dollars and cents. Given the stakes, litigants are often eager
to initiate discovery to test their opponent’s representations. While many
courts allow at least limited discovery on the amount-in-controversy
issue, others have been loath to unleash the discovery storm on a thresh-
old procedural issue.

In its first decision interpreting CAFA, the Supreme Court did put
to rest at least one question arising from the amount in controversy pro-
vision. In Standard Fire Insurance Co. v. Knowles, the plaintiff sought to
avoid federal jurisdiction by filing a stipulation, promising that the class
would not seek more than $5 million. The defendant was able to establish
that the actual amount at issue was greater than that sum. The Supreme
Court unanimously held that such a stipulation could not prevent the
establishment of CAFA jurisdiction, because the individual plaintiff in an
uncertified class did not have the authority to stipulate on behalf of absent
class members. In interpreting the act, the Court relied on the “primary
objective” of CAFA: “ensuring Federal court consideration of interstate
cases of national importance.”

While the Knowles decision settled the debate on stipulations, applying
the amount in controversial requirements continues to raise a host of other
strategic challenges. Defendants face difficult choices in deciding how
much information to reveal or admit in a sworn declaration necessary to
substantiate the removal petition. Such admissions, while useful to secure
removal, may prove damaging on the merits or in settlement negotiations.

More tough questions posed by the amount-in-controversy provision
include: (1) what date a court should use to determine the amount in con-
troversy, (2) which viewpoint a court should use to value injunctive relief
(i.e., value to the class versus cost to the defendant), and (3) what elements

of relief can be included in the amount. Chapter 4 addresses these issues and offers strategies for both plaintiffs and defendants.

2. **100 Class Members**

The second requirement—that there be 100 class members—presents similar difficulties. Plaintiffs may simply not know this information. For defendants seeking removal, lack of clarity in the state-court complaint may make satisfaction of this requirement a challenge. Chapter 5 examines issues related to the 100-member requirement, including (1) the applicable burden of proof, (2) whether and what kind of extrinsic evidence is allowed to satisfy this burden, (3) whether discovery is allowed, (4) when in the litigation the counting occurs, and (5) strategies the parties may employ regarding this requirement. This chapter also addresses another troublesome question left unanswered by the statute: Does CAFA jurisdiction remain once a court has determined that a class should not be certified? As with many answers to CAFA questions, the case law is evolving and, on this particular issue, courts seem to support continued jurisdiction.

3. **Minimal Diversity**

Minimal diversity is the most straightforward of CAFA’s three jurisdictional requirements. It merely requires that any class member be a citizen of a state different from any defendant.\(^4\) For purposes of determining the citizenship of a party, CAFA retains existing law with the exception of unincorporated associations, which are treated like corporations.\(^5\) Chapter 6 discusses these issues, the limits on minimal diversity, the requirement of citizenship, and how partnerships and limited liability companies are treated.

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4. 28 U.S.C. § 1332(d)(2)(A) (“[A]ny member of a class of plaintiffs is a citizen of a State different from any defendant.”).
5. Id. § 1332(d)(10).
B. Exceptions and Abstention

Buckle your seat belt! While CAFA’s jurisdictional prerequisites seem reasonably straightforward, the exceptions are complex and not necessarily intuitive. The statutory language creating the exceptions is fraught with vague terms and multifactor tests, many of which remain largely untested. Chapter 7 explores these complex exceptions in detail. There are three general categories of exceptions:

1. the home state exceptions
2. the local controversy exception
3. exceptions for certain specific types of actions

The home state exceptions and the local controversy exception require that a certain percentage of the plaintiff class be “citizens” of a particular state, and not merely “residents.” Determining whether this percentage is met can be difficult unless the complaint is carefully pled (i.e., limiting the class to citizens of a particular state).

The citizenship of absent class members—and who bears the burden of proving citizenship—has generated a considerable amount of case law, especially when the dispute arises in the removal context (most courts have now held that the party asserting the exception bears the burden). Proving citizenship for large numbers of absent class members is considerably more difficult than proving citizenship for individual plaintiffs who are present before a court.

1. Home State Exceptions

CAFA includes two home state exceptions, which are triggered when a certain percentage of the class members and the “primary defendants” are both from the forum (or home) state. These exceptions were a well-meaning but awkward effort to recognize that state courts can retain jurisdiction over important disputes among their citizens. While the statutory language was an attempt to define such disputes theoretically, it fails to recognize that often neither parties nor courts will have access to the type of information required to meet these prerequisites, particularly at the outset of litigation.
The term “primary defendants” is not defined in the statute and has at least two dimensions of uncertainty. First, does the term mean “all” primary defendants? Commentators and the courts have assumed that it does, which is the most logical reading of the statute. Second, what does “primary” mean? Solvent? A deep pocket? Allegedly responsible for some magic threshold percentage of the wrong (say 30 percent)? As explained in Chapter 7, this question remains largely unresolved in the case law.

The home state exceptions emerge from three provisions, in which jurisdiction, or abstention from jurisdiction, turns on what percentage of the class members are from the home state.

a. More than Two-Thirds of Class = Mandatory Abstention, § 1332(d)(4)(B)
The district court cannot accept jurisdiction if all the primary defendants and two-thirds of the class are citizens of the state in which the action was originally filed.

b. More than One-Third but Less than Two-Thirds of Class = Discretionary Abstention, § 1332(d)(3)
If all the primary defendants are citizens of the forum state, and between one-third and two-thirds of the proposed plaintiff class are citizens of the state in which the action was filed, a district court may, in its discretion, decline to exercise jurisdiction. The statute provides for a multifactor test to consider in exercising this discretion—a test that has been rarely used. The factors include:

(1) whether the claims asserted involve matters of national or interstate interest;
(2) whether the governing laws are that of the forum state or another state;
(3) whether the action was pleaded in order to avoid federal jurisdiction;
(4) whether there is a distinct connection between the forum and the class members or defendants;
whether the number of citizens from the forum state is substantially larger than the number from other states and the citizenship of class members from other states is evenly dispersed; and

whether during the three years prior to filing the class action any class actions asserting similar claims on behalf of the same or different people were filed.

c. Less than One-Third of Class from Forum State = Mandatory Jurisdiction, § 1332(d)(2)

Even if all of the primary defendants are citizens of the forum state, CAFA still provides for mandatory jurisdiction if less than one-third of the members of the class are citizens of the forum state (assuming other requirements are met, such as 100 members, minimal diversity).

2. Local Controversy Exception

For controversies that are truly local in content, Congress provided another exception from CAFA’s broad jurisdiction. A district court must decline jurisdiction in a class action if:

(1) more than two-thirds of the proposed plaintiff class are citizens of the state in which the action was originally filed;

(2) at least one defendant is a citizen of the forum state and
   a. is a defendant from whom “significant relief” is sought and
   b. is a defendant whose alleged conduct forms a “significant basis” for the claims asserted; and

(3) principal injuries were incurred in the forum state.

These terms—“significant relief” and “significant basis”—are not defined in the statute and have generated litigation as discussed in the chapters that follow. There is one additional wrinkle: this exception does not apply if there have been any similar class actions filed against any of the defendants during the preceding three years.

6. Id. § 1332(d)(4).
3. Other Exceptions
Yet there is more. Adding to the home state and local controversy exceptions, CAFA creates blanket exemptions for certain categories of cases, such as when

(1) primary defendants are states, state officials, or other government entities;
(2) the complaint includes “solely” securities claims; or
(3) the complaint includes “solely” state law claims involving internal corporate affairs.7

II. The New Vehicle: “Mass Action” Jurisdiction, § 1332(D)(11)
CAFA also provides federal jurisdiction for “mass actions,” although the statute is not clear as to whether this jurisdiction is merely for removal or also for original filings. A “mass action” is defined as a civil action that joins claims for “monetary relief” brought on behalf of 100 or more plaintiffs when those claims involve common questions of law or fact and “are proposed to be tried jointly.” Chapter 8 clarifies the concept of mass action and addresses: (1) the application of other CAFA provisions to a mass action, (2) the differences in amount in controversy between a mass action and a traditional class action, and (3) the strategic implications of idiosyncratic provisions applicable only to mass actions.

If a mass action is removed, CAFA only provides jurisdiction over those plaintiffs who satisfy the $75,000 threshold set forth in 28 U.S.C. § 1332(a). Thus, the district court could presumably retain the action for those above the threshold (provided there were at least 100) and perhaps remand the rest.

Mass actions do not include any civil action in which:

(1) all of the claims arise from an event in the forum state and the alleged injuries occurred in the forum state or its contiguous states;
(2) the claims are joined due to a defendant’s motion;

7. Id. § 1332(d)(5).
(3) all claims are asserted on behalf of the public, pursuant to a state statute; or
(4) the claims were consolidated for purposes of streamlining pretrial proceedings.8

The multidistrict litigation transfer procedure is not available for mass actions that have been removed unless a majority of the plaintiffs requests transfer under this section.9

III. Removal and Appeals
A. Removal Jurisdiction: (1) Unanimity Not Required, (2) Forum Citizen May Remove, (3) One-Year Limitation Eliminated
CAFA’s removal provisions mark a major departure from several of the longstanding restrictions on removal of non-class cases. Adding a new section to the judicial procedure code (28 U.S.C. § 1453), CAFA allows the removal of a class action by any defendant who is a citizen of the forum state regardless of whether any other defendant consents to removal (there is no requirement of unanimity). For class or mass actions, CAFA eliminates the one-year deadline for removal, although it retains the existing requirement that an action be removed 30 days from when it first becomes removable. Chapter 9 addresses issues surrounding the CAFA removal provisions, including: (1) who can remove and when, (2) how courts treat amendments to complaints, (3) what happens when class certification is denied, (4) whether other traditional limits on diversity jurisdiction apply, and (5) what to consider in deciding whether to remove.

B. Appeal of Remand Orders: Allowed but Discretionary with Strict Time Limits
Unlike normal removal law, CAFA permits appeals of remand orders, although such appeals are discretionary (the appellate court “may accept

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8. Id. § 1332(d)(11)(B)(ii).
9. Id. § 1332(d)(11)(C).
The statute provides no guidance on the exercise of this discretion.

The statutory language regarding when to file an appeal from a remand order initially led to much bemused head scratching by courts and litigants. A poster child of sloppy legislative drafting, the provision required that appeals be filed “not less than 7 days” after entry of the order—apparently permitting an appeal anytime after the expiration of seven days. Congress corrected that problem in 2009, substituting a very tight deadline—“not more than 10 days after entry of the order.”

Interestingly, CAFA also imposes strict time deadlines on the appellate courts themselves, which is unusual in the context of civil cases. The appellate court must “complete all action on such appeal” within 60 days of the appeal (with a possible extension of ten days “on its own motion”) or by joint agreement of the parties. If there is no order on the appeal within the prescribed period, then the appeal is deemed denied.

Chapter 10 addresses class action appeals. It focuses primarily on the many factors relevant to appeals of CAFA remand decisions, including time limits, contents of the application, factors considered in granting such applications, and whether district court proceedings are stayed pending the appeal. It also addresses other potential avenues to appeal class action orders in this context.

IV. Changes to Class Action Settlements

CAFA includes a number of provisions designed to address certain perceived problems in class action settlements.10 While some of these provisions have a significant real-world impact, others appear aimed at problems that either do not exist or exist in very rare cases and that courts have discussed only infrequently.

Among other things, CAFA

(1) requires that defendants send notice of proposed class action settlements to appropriate federal and state officials;

10. Id. §§ 1711–1715.
(2) regulates coupon settlements;
(3) protects against loss by class members; and
(4) protects against discrimination based on geographic location.

The provisions regarding notice and coupon settlements have the most significant impact on settlements and strategy. Chapter 11 discusses these changes, including the all-important question of, what is a “coupon?”

A. Mandatory Notice to Appropriate Federal and State Officials
Within Ten Days and 90-Day Waiting Period

The notice provisions of CAFA are vexingly unclear, impose short time windows, and have potentially dangerous consequences for parties who fail to comply. They are a trap for the unwary and demand close attention.

CAFA states that within ten days after submitting a proposed class action settlement in court for preliminary approval, each defendant participating in the settlement must notify the appropriate state officials of all states in which class members reside and the appropriate federal officials of the proposed settlement.11

If proper notice is not provided, a class member may choose not to be bound by the settlement.

If proper notice is not provided, a class member may refuse to comply with and choose not to be bound by the settlement. Ninety days must pass between notice to all officials and final approval of a proposed settlement.

It is unclear exactly what the state and federal officials can and should do with the notices that they do receive. Notably, CAFA does not confer standing on officials who wish to object to a settlement, although any attempt by a government regulator to intervene or file an amicus brief in support of an objection will likely have an impact on a trial judge’s decision to approve or disapprove a proposed settlement. Even more worrisome for parties committed to settlement is that notices may prompt state

11. Id. § 1715.
regulators to file their own actions, which in turn may attract media attention and new private lawsuits based on related allegations not released by the settlement, all of which alter the settlement calculus for the parties.

1. Who Is the Appropriate Federal or State Official?
The “appropriate” federal official is the attorney general of the United States or, in a case in which the defendant is a depository institution, the person with federal supervisory or regulatory power over that defendant as to the matters alleged in the case.

The “appropriate” state official is the individual in the state with the primary supervisory or regulatory power over the defendant or the person who authorizes the defendant to conduct business in the state, assuming that at least some of the class allegations relate to that regulation or supervision. If there is no state official who meets this test, the state attorney general is the appropriate state official.

Because the potential consequences of failing to provide the governmental notice are so dire, CAFA includes a safe harbor.

Because the potential consequences of failing to provide the governmental notice are so dire, CAFA includes a safe harbor provision that protects defendants if they notified the appropriate federal official and either the state attorney general or the appropriate state official. Thus, the safest course for a defendant is to always notify the state attorney general in addition to any other state officials.

2. Contents of Notice to Regulators
Taken as a whole, CAFA’s requirements for the content of the notice are cumbersome. A notice of the proposed settlement to regulators must contain

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(1) the complaint, any amended complaints, and any materials filed with the complaint;
(2) notice of any judicial hearing scheduled;
(3) proposed or final notice to class members of their rights to ask for exclusion from the class action (if no right of exclusion, then a statement that no right exists) or the notice of a proposed settlement of a class action;
(4) the proposed or final class action settlement agreement;
(5) settlements or agreements created contemporaneously between class counsel and defense counsel;
(6) notice of dismissal or final judgment;
(7) if feasible, the names of class members residing in the state and their estimated proportionate share of the claims and, if providing names is not feasible, a reasonable estimate of the number of class members residing in each state and their estimated proportionate share of the claims; and
(8) all written judicial opinions relating to the settlement, the notice, and the dismissal or judgment.

B. Coupon Settlements: Attorneys’ Fees Limited

Proponents of CAFA were particularly vocal about coupon settlements—the practice of settling class actions by providing class members with coupons to purchase goods from the defendant in lieu of cash settlements. Some argued that a consumer who is stuck with a defective product should not be forced to purchase another product from the same company. Others suggested that plaintiffs’ attorneys were walking away with their fees in cash while defendants were converting class action settlements into sophisticated marketing schemes that rewarded, rather than punished, corporate misfeasors. Despite these objections, CAFA did not actually eliminate the use of coupons in class action settlements, but primarily targeted the fees sought by plaintiffs’ attorneys.

CAFA provides that if class members receive coupons in a class action settlement and the attorneys’ fees are to be determined as a percentage of recovery, that percentage must be based on the value to class members of
the coupons actually redeemed as opposed to issued.\textsuperscript{14} As an alternative, the court, in its discretion, may base attorneys’ fees on the time counsel reasonably expended on the case with the potential use of the lodestar multiplier.\textsuperscript{15} The court may also consider equitable relief obtained in the settlement in setting a reasonable fee.\textsuperscript{16} These provisions have discouraged coupon settlements and, as a consequence, there has been little case law applying them.

CAFA also provides that the court in its discretion may order that a portion of the unclaimed coupons be directed to a charitable or governmental entity.\textsuperscript{17} If a proposed settlement agreement includes distributing coupons to charitable or governmental entities, these coupons are not included in calculating attorneys’ fees.

CAFA’s coupon-settlement provisions touch on a few areas beyond fees. CAFA requires that, before a court approves a coupon settlement, it must hold a hearing and make written findings that the settlement is fair, reasonable, and adequate.\textsuperscript{18} This provision appears substantially identical to existing law under Federal Rules of Civil Procedure section 23(e)(2), although CAFA expressly requires written findings.

Once again, CAFA leaves a key question open. The statute does not define “coupon,” raising the question whether equitable relief or “claims made” settlements would qualify as “coupons.” Most courts have assumed that they do not.

\textbf{C. No “Net Loss” by Class Members}

CAFA provides that the court may only approve a class settlement that results in a “net loss” to the class member if the nonmonetary benefits substantially outweigh the loss. It is difficult to imagine what such a settlement would look like or why Congress felt compelled to regulate it. Even before CAFA, it was unlikely that a net loss settlement would have been proposed or approved in any federal court.

\begin{itemize}
\item 14. Id. § 1712(a).
\item 15. Id. § 1712(b)(1).
\item 16. Id. § 1712(b)(2).
\item 17. Id. § 1712(e).
\item 18. Id. § 1712(e).
\end{itemize}
D. No Discrimination Based on Geographic Location
CAFA forecloses another potentially illusory danger: geographic discrimination. Section 1714 provides that a court may not approve a class settlement in which some class members receive a larger award solely because they live geographically closer to the court. While it is unclear that any such settlement has ever been proposed in federal court, it is certain now that one never will be.

V. Conclusion
This book aims to explain how a seemingly simple piece of legislation has, in practice, proved quite complex, producing a number of unexpected results and requiring both plaintiffs and defendants to contemplate an array of strategic choices when litigating class actions. While the initial reaction of many commentators was that CAFA’s major impact would be on the number of removals, the greatest expansion of federal jurisdiction under CAFA has been the result of initial filings of diversity class actions, according to a 2008 study by the Federal Judicial Center.

Numerically, the expansion of federal jurisdiction has been in initial filings of diversity class actions.

It remains unclear whether plaintiffs are choosing federal court simply to avoid the inevitable CAFA removal battle or whether they are choosing federal court because they believe it provides an advantage over the state forum. Certainly for those states where class certification has been harder to obtain, CAFA has provided an extra impetus for original filings in federal court. Other advantages, such as speedier federal dockets, the availability of simple electronic filing, and more effective management of discovery, may also motivate plaintiffs to file CAFA actions in federal courts.

The increase in originally filed class actions has had significant effects, including (1) an increase in the number of Multidistrict Litigations (MDLs), (2) an increase in the coordination and sophistication of plaintiffs’ counsel,
and (3) an increase in battles initiated by defendants about whether federal jurisdiction exists in those originally filed CAFA cases.

At the same time, CAFA has slowed down the pace of litigation. The new threshold battles over the application of the jurisdictional prerequisites as well as the complex abstention provisions and exceptions, particularly where courts have allowed discovery on these issues, are the primary culprits. The appeal provision for remand orders has added still further delay.

CAFA’s strict settlement requirements have driven strategy and can be an impediment to settling some class actions in federal court. First, CAFA requires very prompt notice to state and federal regulators, which the parties may prefer to avoid and which can prompt regulators to intervene in a suit, slowing down the resolution of the matter and threatening the delicate balance underlying the settlement. Second, CAFA regulates coupon settlements and the fees available to attorneys in such cases. These limitations can mean that cases (particularly those with less merit) may be more difficult to settle than they otherwise would be if brought in state court. These settlement restrictions have the potential to drive some plaintiffs and defendants away from federal court.

In sum, CAFA has added important new strategic considerations for both plaintiffs and defendants. Plaintiffs’ counsel must think through the array of issues presented by CAFA before pleading the complaint in order to avoid immersing themselves in a morass of procedural motions and jurisdictional discovery that may not be productive. For their part, defendants have a short time period in which to decide whether it is worthwhile to attempt removal and to assemble evidence to support such an attempt. This book provides both plaintiff and defense counsel with a clearer picture of the statute, the case law, and the strategy so they can make fully informed decisions for their clients.
Quick Reference Chart–Changes to Class Action Jurisdiction Under CAFA

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