Defining "Primary Defendants" in the Class Action Fairness Act of 2005

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Words are clumsy tools, and it is very easy to cut one's fingers with them, and they need the closest attention in handling; but they are the only tools we have, and imagination itself cannot work without them. You must master the use of them, or you will wander forever guessing at the mercy of mere impulse and unrecognized assumptions and arbitrary associations, carried away with every wind of doctrine.¹

I. INTRODUCTION

On February 18, 2005, President Bush signed into law the Class Action Fairness Act of 2005 (“CAFA”) after congressional efforts spanning over seven years.² One focus of CAFA was the expansion of federal diversity jurisdiction.³ The purpose of this jurisdictional modification was to remedy the influx of complex class action suits in state courts, as well as to regulate plaintiffs’ attempts to defeat federal diversity jurisdiction by naming “token defendants.”⁴ Generally, CAFA provides for federal jurisdiction


³. See 28 U.S.C. § 1332(d) (2005). The Act also makes significant changes with respect to the regulation of settlements in class action suits. These settlement regulations are meant to protect plaintiffs from a recent trend in which class members’ attorneys receive higher settlement fees than the individual class members. S. REP. No. 109-14, at 14–20 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 15–20 (It is important to note that the Senate Judiciary Committee Report on CAFA was not issued until ten days after the legislation was passed; therefore, some courts find it of little value as an interpretive aid.).

when there is minimal diversity\(^5\) and the amount in controversy exceeds $5 million.\(^6\) This provision states the general rule that class actions falling within the scope of CAFA are to be litigated in federal court.\(^7\)

Because CAFA requires plaintiffs to bring nearly all class action claims in federal court, there was a concern that the Act might interfere with the states’ interest in adjudicating truly local disputes.\(^8\) In order to combat this concern, Congress integrated a series of exceptions into CAFA that provide for adjudication of class action suits in state court.\(^9\) These exceptions include the

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5. 28 U.S.C. § 1332(d)(2)(A)–(C) (2005) (minimal diversity exists when at least one member of the plaintiff class is diverse from any defendant).

6. The relevant language may be found in 28 U.S.C. § 1332(d):
   (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.

   (6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

In pre-CAFA class actions, there was much debate as to whether each plaintiff had to individually satisfy the amount in controversy. CAFA eliminates this confusion and allows the plaintiff class to aggregate its claims.

7. CAFA does not apply when the aggregate number of class members is less than one hundred, when the issue involves federal securities laws, or when there is a relation to the internal affairs or governance of a corporation arising under the law of the state where the corporation is incorporated. Rollo & Crowson, supra note 2, at 14.


9. Id.
"Home State" exception, the "Local Controversy" exception, and the "State Action Case" exception.\textsuperscript{10}

The problem with these exceptions is that they are ill-defined.\textsuperscript{11} They provide state court jurisdiction when the primary defendants and the majority of the plaintiff class are citizens of the state in which the action was filed or when one real defendant from whom the class seeks significant relief is local.\textsuperscript{12} The statute is unclear about which defendants classify as "primary" or "significant," thus making it difficult to determine when the exceptions apply.

This comment analyzes several ways in which the ambiguous term "primary defendant," as used in the "Home State" exception and the "State Action Case" exception, should be defined. It also illustrates the importance of distinguishing "primary defendants" from "significant defendants." The comment is organized as follows. Part II includes background information on CAFA. It addresses the history and purpose of the exceptions allowing certain class action suits to remain in state court. Part II also examines one of the first cases to address the meaning of "primary defendant" and introduces the importance of distinguishing between "primary" and "significant" defendants. The section concludes with a summary of the problems posed by the federal jurisdiction exceptions. Part III analyzes the term "primary defendant" through the use of traditional statutory interpretation techniques. It examines the face of the text, the legislative intent of the term, and the use of "primary defendant" in other areas of the law. This section also analogizes CAFA to the Multiparty, Multiforum Trial Jurisdiction Act ("MMTJA"), which utilizes the term "primary defendant" in a similar minimal diversity provision. Part IV proposes a series of possible definitions for "primary defendant" as derived from other areas of the law. Part V concludes with the proposal that classifying the "primary defendants" as those who are directly liable to the plaintiff class is the most effective definition. Defining the "primary defendants" in such a manner is consistent with both the plain meaning of the text


\textsuperscript{11} Rollo & Crowson, \textit{supra} note 2, at 12.

and the legislative intent. It is also the most workable definition from a public policy perspective.

II. BACKGROUND

In order to better understand CAFA, it is important to consider the pre-CAFA jurisdictional problems faced by courts litigating class actions. It then becomes clearer why Congress believed there was a need for the Act. Because of the length and complexity of CAFA, this comment will only focus on several important provisions in CAFA. In analyzing these focal provisions, this comment will explain each provision and illustrate, through the use of *Adams v. Federal Materials Co., Inc.*, the problems that arise in their application.

A. Pre-CAFA Jurisdictional Problems

Congress’s enactment of CAFA was a reaction to the inequitable practices of the parties involved in class action litigation. Defendants fought to remove cases to federal court where it was more likely they could defeat class certification and protect their clients’ interests. Plaintiffs, on the other hand, fought to keep class actions in state court because it was a more favorable forum. They not only had a better chance of getting class certification, but they also had a better chance of receiving larger damages from sympathetic juries.

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13. No. 5:05CV-90-R, 2005 WL 1862378 (W.D. Ky. July 28, 2005). At the time this comment was written, this was one of only a few cases that addressed CAFA and how the term “primary defendant” should be interpreted under the Act. Though the *Adams* case is not directly on point with this issue, its fact pattern is used as a means of illustrating the problems with the ambiguity in the term “primary defendant.” The following cases have since published opinions addressing the term “primary defendant”: *Serrano v. 180 Connect, Inc.*, No. 06-1363, 2006 WL 2348888 (N.D. Cal. Aug. 11, 2006); *Hangarter v. The Paul Revere Life Ins. Co.*, No. 05-04558, 2006 WL 213834 (N.D. Cal. Jan. 26, 2006); and *Kearns v. Ford Motor Co.*, No. 05-5644, 2005 WL 3967998 (C.D. Cal. Nov. 21, 2005).


15. *Id.* at 2–3.
As part of their forum shopping scheme, plaintiffs also filed "copy cat" class action suits in multiple jurisdictions. As a result, corporate defendants were forced to settle frivolous suits in order to avoid lengthy and expensive litigation in several different states. These multiple suits resulted in greater expenses and wasted resources. Federal courts have the ability to remedy this problem by consolidating same or similar suits filed in multiple jurisdictions.

Plaintiffs' and defendants' competing interests led to Congress's amendment of class action procedures. \textit{Erie Railroad Co. v. Tompkins} stands for the proposition that the result of a case should not be different simply because it was brought in state rather than federal court. CAFA expands federal jurisdiction in an attempt to prevent forum shopping and to stop plaintiffs from "gaming the system" in order to keep their case in state court.

Though forum shopping and plaintiffs' attempts to "game the system" were the primary reasons for amending 28 U.S.C. § 1332(d), the Congressional Record reflects several other reasons for the enactment of CAFA's procedural changes. Congress believed that federal judges would more carefully apply the complex procedural requirements that govern class actions. Allegedly, state courts failed to carefully apply class certification requirements and gave counsel leverage to obtain unwarranted settlements. Congress believed federal judges were more apt to scrutinize class action allegations and to deny certification where a state judge may improperly grant it.

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20. 304 U.S. 64 (1938).
25. \textit{Id.}
Congress also believed that federal courts could help alleviate the strain on state court resources resulting from the increasing number of class action suits brought in state courts.\(^{26}\) Though federal courts also face burdensome caseloads, they have more resources, such as law clerks, magistrate judges, and consolidation procedures, to help alleviate the difficulties inherent in litigating a complex class action suit.\(^{27}\)

These problems are examples of some of the recurring issues in class action litigation that led to the amendment of 28 U.S.C. § 1332, one of several CAFA provisions. Congress believed these problems could be resolved if federal courts were the forum for the majority of these suits.

**B. An Explanation of the Focal Provisions of This Comment**

This comment focuses on CAFA's new diversity requirements as laid out in 28 U.S.C. § 1332(d). As a result of the problems in the pre-CAFA class action regime, Congress amended § 1332’s jurisdictional provisions to provide for the litigation of the majority of class action suits in federal court. It is clear that CAFA makes it easier for plaintiffs and defendants to bring class action suits in federal court, but there was concern that such an exclusive provision would potentially hinder the states’ adjudication of class action suits in which they have a strong interest.\(^{28}\) As stated earlier, Congress developed three exceptions providing instances in which a class action suit should remain in state court: the "Home State" exception, the "Local Controversy" exception, and the "State Action Case" exception.\(^{29}\)

\(^{27}\) Beisner & Miller, *supra* note 16, at 152.
\(^{29}\) *Id.*
1. The "Home State" Exception

The "Home State" exception originated as a means to address class action suits brought in the primary defendant's home state. When analyzing this exception, three sub-categories of cases should be considered to determine whether the case will go to state or federal court. First, under § 1332(d)(4)(B), if two-thirds or more of the members of the plaintiff class and the primary defendants are citizens of the same state in which the suit was filed, then the case may stay in state court. Second, under § 1332(d)(2), if more than two-thirds of the members of the plaintiff class or one or more of the primary defendants are not citizens of the state in which the action was filed, then the case will go to federal court. Lastly, under § 1332(d)(3), if more than one-third but less than two-thirds of the members of the plaintiff class and the primary defendants are citizens of the state in which the action was filed, then jurisdiction is based upon the judge's discretion after evaluating the six factors enumerated in § 1332(d)(3)(A)–(F).

31. Id.
32. Id.
33. Id.
34. The six factors enumerated in 28 U.S.C. § 1332(d)(3)(A)–(F) (2005) include the following:
   (A) whether the claims asserted involve matters of national or interstate interest;
   (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
   (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
   (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
   (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
2. The "Local Controversy" Exception

The "Local Controversy" exception is another exception to federal jurisdiction. It allows state courts to continue adjudicating local controversies involving defendants who are out-of-state corporations. In order for federal courts to decline to exercise jurisdiction, the parties to the suit must satisfy four criteria. First, the plaintiff class must be primarily local (more than two-thirds from the same state). Second, at least one real defendant, whose conduct is central to the claim (significant liability) and from whom the class seeks significant relief, must be local (hereinafter "significant defendant"). The defendant must also be a citizen of the state in which the action was originally filed. Next, the principal injuries allegedly caused by the defendant must have occurred in the state where the suit was brought. Finally, no similar class actions can have been filed against any of the defendants in the preceding three years. The "Local Controversy" exception is generally understood to provide state court jurisdiction for those truly local controversies that uniquely affect a particular locality to the exclusion of all others, not to create a jurisdictional loophole.

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserted the same or similar claims on behalf of the same or other persons have been filed.

35. Id. § 1332(d)(4)(A).


Though the "Local Controversy" exception does not utilize the phrase "primary defendants," it is important to consider this exception in the analysis of "primary defendants" because when the "Home State" exception is inapplicable, the "Local Controversy" exception may be relevant. However, the proper application of the "Local Controversy" exception, like the "Home State" exception, is unclear. It fails to define the phrase "significant defendants." The various articles addressing CAFA have expressed confusion as to what the real difference is between primary and significant defendants. The Adams v. Federal Materials Co., Inc. case, set forth in Part C of this section, illustrates the importance of distinguishing these two terms.

3. The "State Action Case" Exception

The "State Action Case" exception is the final exception to federal jurisdiction. This provision, like the "Home State" exception, also utilizes the phrase "primary defendants." It requires class action suits in which states, state officials, or other governmental entities are the primary defendants to be adjudicated in state court. Once again, the Congressional Record states that this exception is not to serve as a loophole for plaintiffs to bring actions in state court by naming state entities as defendants when the suit primarily targets non-governmental entities.

Though § 1332(d) allows a select number of class action suits to remain in state court, those cases are the exception and not the rule. Forum shopping was one of the primary problems with pre-CAFA class actions. Therefore, the general purpose of CAFA's procedural changes is to prevent both plaintiffs and defendants from creating jurisdictional loopholes in search of a more favorable forum.
C. Problems with the Exceptions to Federal Jurisdiction As Enumerated in 28 U.S.C. § 1332(d)

Upon analyzing CAFA, interpretive difficulty arises almost immediately because of the exceptions’ failure to define the phrase “primary defendant” as used in both the “Home State” exception and the “State Action Case” exception. CAFA also fails to define the use of “significant defendants” in the “Local Controversy” exception. This section analyzes the problems posed by each of these exceptions through the use of the case *Adams v. Federal Materials Co., Inc.*, which improperly interpreted these provisions. It also emphasizes the importance of distinguishing between “primary defendant,” as used in the “Home State” exception and “State Action Case” exception, and “significant defendant,” as used in the “Local Controversy” exception.

1. Illustration of the Problems with the “Home State” Exception and “State Action Case” Exception

*Adams v. Federal Materials Co., Inc.* was one of the first cases to address the ambiguity of “primary defendants” as used in the “Home State” exception. In *Adams*, plaintiffs filed a class action suit in state court against Federal Materials Co., Inc. (“Federal”), an operator of a ready-mix concrete business, and Hanson, a quarry owner that provided Federal with coarse aggregate used to make concrete. Plaintiffs alleged that the aggregate was defective and that defendants failed to inform the plaintiffs of this defect.

The court’s analysis of the applicability of the “Home State” exception became befuddled when Federal and Hanson, both Kentucky citizens, brought a third party claim against Rogers

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49. *Id.* For other cases that have interpreted the meaning of “primary defendant” since this comment was written, see Serrano v. 180 Connect, Inc., No. 06-1363, 2006 WL 2348888 (N.D. Cal. Aug. 11, 2006); Hangarter v. The Paul Revere Life Ins. Co., No. 05-04558, 2006 WL 213834 (N.D. Cal. Jan. 26, 2006); Kearns v. Ford Motor Co., No. 05-5644, 2005 WL 3967998 (C.D. Cal. Nov. 21, 2005).
51. *Id.*
Group, an Indiana corporation with its principal place of business in Tennessee.\textsuperscript{52} Plaintiffs later named Rogers, the new owner of Hanson’s quarry, as a defendant in the case.\textsuperscript{53} Rogers then sought to remove the case to federal court under 28 U.S.C. § 1332(d)(2)(A) of CAFA.\textsuperscript{54} Plaintiffs contested that the case should remain in state court under the “Home State” exception.\textsuperscript{55}

This case presents an opportunity for determining which of the defendants classifies as primary under this comment’s proposed direct liability definition. Federal and Hanson appear to both be directly liable to the plaintiff class. They were both principal actors in the creation of the defective concrete—one provided the materials, the other created the final product.

Rogers is more difficult to find directly liable. The district court classified him as a primary defendant because the plaintiffs amended their complaint to name Rogers as a defendant and, thus, subjected him to the same liability as Federal and Hanson.\textsuperscript{56} However, this reasoning is faulty. Rogers should not be classified as a primary defendant for purposes of determining federal jurisdiction simply because he is a named defendant. The Memorandum in Support of Plaintiffs’ Motion to Remand alleged that although discovery had just commenced, the evidence indicated that the majority, if not all, of the coarse aggregate was produced while Hanson was still the owner of the quarry.\textsuperscript{57} If Rogers did not produce the defective product, then he did not have a direct relationship to the plaintiff class.

One of the characteristics of a primary defendant is liability to the vast majority of the plaintiff class. If minimal discovery cannot prove that Rogers was “allegedly liable” to the majority of the plaintiff class, then there is no direct liability and Rogers cannot be classified as a primary defendant for purposes of removing the case to federal court. The primary defendants, Federal and Hanson, are

\textsuperscript{52} ld. at *1–2.
\textsuperscript{53} ld. at *1.
\textsuperscript{54} ld. (general CAFA provision providing federal jurisdiction for minimal diversity cases).
\textsuperscript{55} ld. at *2.
\textsuperscript{56} ld. at *5.
\textsuperscript{57} Memorandum in Support of Plaintiffs’ Motion to Remand, No. 5:05-CV-90-R, 2005 WL 1514754, at *4 n.1 (W.D. Ky. May 23, 2005).
citizens of Kentucky and the plaintiffs’ contention that more than two-thirds of the class are citizens of Kentucky is uncontested.\textsuperscript{58} Therefore, the case should have remained in state court under the “Home State” exception.

2. Illustration of the Problems with the “Local Controversy” Exception

In Adams, the court did not consider the “Local Controversy” exception. However, distinguishing between primary and significant defendants is crucial to determining the applicability of the “Home State” and “Local Controversy” exceptions. If the court classified Federal, Hanson, and Rogers as primary defendants, then the “Home State” exception would not apply but the “Local Controversy” exception may have provided alternate grounds for keeping the case in state court. Assuming no similar actions had been filed against Federal and Hanson in the last three years, then the case satisfied the other three factors of the exception. It was uncontested that the plaintiff class was primarily local.\textsuperscript{59} Moreover, Federal and Hanson were both local significant defendants because their businesses and customers were both located in Kentucky.\textsuperscript{60} The buildings constructed with the defective concrete were also primarily located in Kentucky.\textsuperscript{61} Therefore, though the case did not remain in state court under the “Home State” exception, it appears that it may have remained in state court under the “Local Controversy” exception.

The Adams case emphasizes the interpretive difficulty that arises as a result of Congress’s failure to define the terms “primary defendant” and “significant defendant.” These three exceptions—the “Home State” exception, the “Local Controversy” exception, and the “State Action Case” exception—serve to allocate cases between state and federal court, so it is important to distinguish between the two kinds of defendants. Providing a means to define and distinguish “primary defendants” from “significant defendants” will lessen the time and expense of litigating an

\textsuperscript{58} Adams, 2005 WL 1862378, at *5.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at *2.
\textsuperscript{61} Id. at *5.
already complex class action suit. The definitions of these phrases will be particularly important when the plaintiff class names several defendants and desires to keep the class action in state court.

III. STATUTORY INTERPRETATION ANALYSIS

In proceeding through the statutory interpretation process, this comment analyzes "primary defendants" both from a textualist’s perspective and from a purposivist’s perspective.

A. Analysis of the Text in 28 U.S.C. § 1332(d)

For most judges and interpreters, the analysis of a statute’s meaning begins with the text. Therefore, this comment’s interpretation of “primary defendant” as used in § 1332(d) begins with an analysis of the text itself and then moves on to an analysis of the surrounding text.

[62. New textualists, like Justice Scalia, look only to the plain or ordinary meaning of a word. William N. Eskridge, Jr., Textualism, The Unknown Ideal?, 96 Mich. L. Rev. 1509, 1511 (1998). The focus of new textualists is strictly upon the internal context of a statute; therefore, they look to the statute as a whole, dictionaries and grammar books, canons of construction, and common sense judgments. Id. at 1532.]

[63. Purposivists, on the other hand, often apply what Judge Posner calls imaginative reconstruction, looking to how the legislator enacting the statute would have applied the statute. Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 817 (1983). Judges applying a purposivistic approach often rely on the language and apparent purpose of a statute, its background, the legislative history (particularly floor statements of the sponsors and committee reports), and other related statutes. Id. at 818.]

[64. Both textualism and purposivism are “agency” theories of statutory interpretation in that they operate from the traditional premise that the judge functions as the faithful agent of the legislature in interpreting a statute. This comment will not analyze CAFA from the perspective of “nonagency” theories of statutory interpretation that reject this traditional premise. See generally William N. Eskridge, Jr., Dynamic Statutory Interpretation 13–80 (1994).]

1. The Text Itself

Defining a word in terms of its opposite is useful in examining ambiguous text. "Secondary" is the antonym of "primary." Webster's Third New International Dictionary defines the adjective "primary" as "first in rank or importance; functioning or transmitted without intermediary: direct; not derived from or dependent on something else: firsthand, independent, original." This definition implies that a "primary defendant" is someone who plays a principal role in the litigation, someone with whom the plaintiff class is most directly related, someone who may be classified as being most responsible for the injury caused to the class members. Note that "primary defendant," as used in the statute, is in its plural form. Thus, there can be more than one primary defendant. If such is the case, then it becomes difficult to determine how to evaluate which of the defendants is most culpable. The statutory text thus far reveals that the defendants must classify as parties of primary rather than secondary

66. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1800 (Philip Gove ed., Merriam-Webster 1986) (1961). Though judges' reliance on dictionaries has been criticized over the years because of their limited ability to reflect the statutory text, it is a less controversial tool when utilized in the beginning of the interpretive process to identify the general outlines of word meanings. Symposium, Changing Images of the State—Looking it Up: Dictionaries and Statutory Interpretation, 107 HARV. L. REV. 1437, 1450–52 (1994).

67. 28 U.S.C. § 1332(d) (2005) states in part:

(3) 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 . . . (emphasis added).

. . .

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief . . . (emphasis added).

68. This issue will be addressed later in this comment.
importance. They must also have a direct connection to the wrongdoing, as well as to the plaintiff class.

2. The Surrounding Text—A Focus on the Differences Between “Primary Defendants” and “Significant Defendants” As Utilized in CAFA

Another useful method in determining the meaning of an ambiguous term is to analyze the statutory text surrounding the term. As illustrated in the Adams case, analyzing who classifies as a “significant defendant,” as opposed to a “primary defendant,” is essential in the application of the proper jurisdictional exception.

Presumably, the terms classifying these two defendants do not mean the same thing or else Congress would have simply used “primary defendant” in the “Local Controversy” exception as well. The committee’s reference to a “significant defendant” in § 1332(d)(4)(A)(II)(aa)–(cc) is intended to encompass those local defendants who are the primary, rather than the peripheral, focus of the plaintiffs’ claims. The defendant must be a target from whom significant relief is sought by the entire class and whose alleged conduct forms a significant basis for the claims asserted by the class.

Compare the intended meaning of “significant defendant” with the intended meaning of “primary defendant.” There are many similarities between the two definitions. For example, both definitions require the defendants to be liable to a majority of the class. They also both refer to the defendants as “targets” of the lawsuit. While a “significant defendant” is one from whom significant relief is sought, a “primary defendant” is one who will suffer the greatest loss if liability is found. If a defendant will

71. Id.
72. See source cited infra note 85.
74. Id.
suffer the greatest loss if liability is found, then the plaintiffs must be seeking significant relief from that particular defendant. If that is true, then a "primary defendant" is a "significant defendant." On the other hand, if a defendant is one from whom significant relief is sought, he will not necessarily suffer the greatest loss, such that he may be deemed a "primary defendant." Though the relief from one defendant may be significant, it may not be as significant as some of the other defendants who will suffer a greater loss. This analysis implies that all "primary defendants" are "significant defendants," but not all "significant defendants" are "primary defendants."

Distinguishing the differences between these terms is difficult. The phrase "primary defendants" has been defined by courts and has also been utilized in other statutory contexts.75 "Significant defendants," on the other hand, is undefined both judicially and statutorily. Therefore, determination of its meaning is speculative.76

B. Legislative Intent

For judges utilizing a purposivist approach, the next step in the statutory interpretation process entails an evaluation of legislative intent.77 While the reconstruction of congressional intent is a

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75. See sources cited infra notes 92–135 and accompanying text.
76. Due to a lack of legislative history, other than that stated in the text above, and a lack of case law and statutes applying "significant defendant," this term is not analyzed in the same depth as "primary defendant." Despite a lack of authority defining or applying this term, it is important to recognize that there is a potential distinction between "significant defendants" and "primary defendants" as used in CAFA. For cases that have recently discussed the meaning of "significant defendant" in the context of the "Local Controversy" exception, see Evans v. Walter Indus., Inc., 449 F.3d 1159, 1168–69 (11th Cir. 2006); Caruso v. Allstate Ins. Co., No. 06-2613, 2007 WL 64162, at *3–5 (E.D. La. Jan. 8, 2007); Robinson v. Cheetah Transp., No. 06-0005, 2006 WL 468820 (W.D. La. Feb. 27, 2006); Kearns v. Ford Motor Co., No. 05-5644, 2005 WL 3967998, at *7–8 (C.D. Cal. Nov. 21, 2005).
77. While there is controversy surrounding the use of legislative intent in statutory interpretation, it is utilized in this comment as a means of further exploring all potential definitions of "primary defendant."
difficult, and perhaps impossible, task,\footnote{Max Radin, \textit{Statutory Interpretation}, 43 \textit{Harv. L. Rev.} 863, 869–72, 875–78 (1929).} the Congressional Record contains several important clues as to the purposes underlying CAFA’s exceptions.

First, Congress has expressed a strong preference that class actions be heard in federal court.\footnote{151 \textit{Cong. Rec.} H723, H730 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).} Therefore, §1332(d) should be read broadly with a preference for class actions to be brought in federal court; conversely, the exceptions to federal jurisdiction in §1332(d) should be read narrowly.\footnote{\textit{Id.}} The exceptions are exceptions, not loopholes for avoiding federal jurisdiction.\footnote{151 \textit{Cong. Rec.} H723, H732 (daily ed. Feb. 17, 2005) (statement of Rep. Goodlatte).} As a result, plaintiffs should be prohibited from naming “token defendants” merely to keep cases in state court.\footnote{Blumstein, \textit{supra} note 4, at 19.} Second, the new removal standards are meant to prevent plaintiffs’ lawyers from manipulating their cases to keep them in state court.\footnote{Rollo & Crowson, \textit{supra} note 2, at 13.} Finally, Congress intended for the plaintiffs, not the defendant, to bear the burden of demonstrating that a case should be remanded to state court.\footnote{S. \textit{Rep. No.} 109-14, at 43–44 (2005), \textit{reprinted in} 2005 U.S.C.C.A.N. 3, 41. See sources cited \textit{supra} note 3 and accompanying text for a statement of why courts may choose not to use the Senate Judiciary Committee Report as an interpretive aid.} Thus, they must demonstrate which defendants are primary to the class action.

The sponsors’ statement gives some indication of how Congress intended to define “primary defendant.” Their intent was for the term primary defendants:

[T]o reach those defendants who are the real targets of the lawsuit, i.e. the defendants who would be expected to incur most of the loss if liability is found. Thus, the term “primary defendant” should include any person who has substantial exposure to significant portions of the proposed class in the action, particularly any defendant that is
allegedly liable to the vast majority of the members of the proposed classes, as opposed to simply a few individual class members.\textsuperscript{85}

Congress recognized that courts may need to engage in fact-finding, as well as discovery, in order to determine who constitutes a primary defendant.\textsuperscript{86} However, Congress emphasized that this discovery should be limited to information readily available and not burdensome to acquire.\textsuperscript{87} The sponsors' use of "allegedly liable" in their definition of "primary defendants," as well as their allowance of only minimal discovery, implies that the classification of a defendant as primary will involve some speculation. Congress recognized the difficulty in determining which defendants will suffer the largest proportions of liability at the outset of the litigation. Therefore, as long as there is some evidence to classify defendants as primary, they may be named as such for purposes of determining state or federal jurisdiction under § 1332(d).\textsuperscript{88}

The legislative history of CAFA also reveals that a state only has jurisdiction under the "Home State" exception if almost all of the members of the plaintiff class are from the same state as the primary defendants.\textsuperscript{89} As used in this provision, a primary defendant must have been an active participant in the wrongdoing and the outcome of the defendant's conduct must have affected all of the plaintiff class rather than a select few.\textsuperscript{90}

In sum, the legislative history reveals that Congress intended for the primary defendants to be those who: (1) are likely to incur most of the loss when liability is found; (2) actually participated in the wrongdoing; and (3) are liable to the whole class as opposed to just a few. "As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in

\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.} (stating that "[l]ess burdensome means (e.g., factual stipulations) should be used in creating a record upon which jurisdictional determinations can be made").
\textsuperscript{90} \textit{Id.}
interpreting the statute." Though some judges, such as Justice Scalia, would afford no weight to this statement, other judges would use it as an element in their analysis. For purposes of completeness, Congress's definition of "primary defendant" will be utilized as one factor in this comment's formulation of the appropriate definition of "primary defendant."

C. Defining "Primary Defendant" by Drawing Analogies to Its Use in Related Statutes and Other Areas of the Law

This section analyzes the use of "primary defendant" as it is applied in the Multiparty, Multiforum Trial Jurisdiction Act ("MMTJA"), as well as its use in tort law. It also analyzes judicial interpretations of the term. The use of "primary defendant" in CAFA may be analogized to the use and interpretation of the term in these three areas of the law.

1. The Multiparty, Multiforum Trial Jurisdiction Act's Use of "Primary Defendant"

The MMTJA may be analogized to CAFA because, like CAFA, it contains a minimal diversity jurisdiction provision

91. Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976). It is significant to note that the emphasis placed on legislative intent was less controversial at the time of this case than it is today. The influence of Justice Scalia's new textualist approach and concerns about the misuse of legislative intent have led to a decline in the use of legislative intent as an interpretive device. Lori L. Outzs, A Principled Use of Congressional Floor Speeches in Statutory Interpretation, 28 COLUM. J.L. & SOC. PROBS. 297, 297 (1995). It is purposivists who would place more emphasis on the sponsors' statement. Posner, supra note 63, at 818.

92. 28 U.S.C. § 1369 (2005) states:
(a) In general.—The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location, if—
(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;
(2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or
utilizing the term "primary defendant." This section draws an analogy between CAFA and the MMTJA by analyzing the MMTJA and its application of the minimal diversity provision.93

The MMTJA, enacted in 2002, allows minimal diversity jurisdiction when a single accident causes the deaths of at least seventy-five people.94 The similarities between the jurisdictional provisions in the MMTJA and CAFA are evidenced by the context in which they were created. Both were intended to move a class of cases from state to federal court, as indicated by the minimal diversity provisions in both.95 However, they both include exceptions to federal jurisdiction that were integrated into the statutes as compromise clauses.96

The legislative history of both statutes provides similar interpretations of "primary defendants." The House Report on the MMTJA describes a "primary defendant" as "one who is expected to suffer the greatest loss if found liable."97 This definition is almost identical to the one provided by Congress in CAFA's sponsors' statement.98 Not only are the definitions in the statutes similar, but the legislative history of both statutes also indicates

(3) substantial parts of the accident took place in different States.
(b) Limitation of jurisdiction of district courts.—The district court shall abstain from hearing any civil action described in subsection (a) in which—
(1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and
(2) the claims asserted will be governed primarily by the laws of that State.

93. Rollo & Crowson, supra note 2, at 15.
95. Id. § 1369(a); id. § 1332(d)(2)(A)-(C).
96. Passa v. Derderian, 308 F. Supp. 2d 43, 54 (D.R.I. 2004). It is significant to note that the author of the MMTJA, Representative Sensenbrenner, was also a sponsor of CAFA. See id. at 52. See also 51 CONG. REC. H723, H727 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner). Sensenbrenner's participation in the drafting of both these clauses indicates that a similar interpretation of "primary defendants" may be applied to both provisions.
98. See source cited supra note 85.
that a “primary defendant” must be someone who is liable to every member of the class. The similarities between CAFA’s and the MMTJA’s purpose and legislative history support the appropriateness of analogizing the use of “primary defendant” in the MMTJA to the use of “primary defendant” in CAFA.

Passa v. Derderian was the first case to apply the term “primary defendant” in the context of the MMTJA. In this case, more than seventy-five people were killed as a result of a fire that broke out in a crowded nightclub. The fire allegedly started when band members, along with their manager, ignited pyrotechnic devices that lit the ceiling’s foam insulation on fire. The named defendants included the members of the band, the management company, the record label, the nightclub owners, a corporation owned by the nightclub owners, a real estate company, insulation manufacturers, event sponsors, and representatives of government agencies. The dispute was over § 1369(b), which provides that a district court shall exercise jurisdiction if the minimal diversity requirements are satisfied, at least seventy-five people died, and a series of other factors are fulfilled.

The opinion addressed three possible definitions of “primary defendants”: (1) those who are the deepest pockets; (2) those who are most culpable of the wrongdoing; and (3) those who are facing direct liability. The court concluded that defining the “primary defendants” as those who are directly liable to the plaintiff class provided the most workable definition under the statute. It stated “that all defendants sued directly in a cause of action maintain a dominant relationship to the subject matter of the controversy, while those parties sued under theories of vicarious liability, or joined for purposes of indemnification or contribution, maintain an indirect or ‘secondary’ relationship to the

100. 308 F. Supp. 2d 43.
101. Id. at 46.
102. Id.
103. Id. at 47.
104. Id. at 50–51. See also source cited supra note 92 and accompanying text.
106. Id. at 63.
litigation." It reasoned that this definition was the most practical because it only requires a review of the complaint to determine which defendants are sued directly, as opposed to requiring the court to make a pre-trial determination of culpability.

The utility of Passa's direct liability definition becomes evident after a complete analysis of the use of "primary defendants" in other areas of the law and after the consideration of a series of other possible definitions.

2. An Analysis of the Use of "Primary Defendants" in Other Areas of the Law

Other areas of the law that utilize the term "primary defendants" are instructive in narrowing the scope of defendants who fall into this category. "Primary defendant" has many different meanings depending on the context of its use. This section looks to how courts have defined the term "primary defendants" and analyzes how tort law has utilized similar terminology.

a. Judicial Interpretations of "Primary Defendants"

Courts have defined the phrase "primary defendants" in determining liability, as well as a defendant's connection to the plaintiff. The following section analyzes these judicial definitions as used in cases involving the Racketeer Influenced and Corrupt Organizations Act ("RICO"), securities fraud, and tobacco antitrust.

In RICO claims, courts have defined "primary defendants" as those who participate in the racketeering activity; whereas, the secondary defendants are judicially defined as the aiders and abettors of that activity. For example, in Rolo v. City Investing Co. Liquidating Trust, plaintiffs claimed they were deceived by a fraudulent marketing scheme that induced them to purchase

107. Id. at 62.
108. Id. at 63.
110. Id.
residential lots and homes at inflated prices. Claims against thirty-five defendants were brought under RICO, the Land Sales Act, federal securities laws, and common law fraud. Plaintiffs’ complaint classified the defendants according to the nature of their participation in the alleged fraudulent acts by dividing them into six different categories. They were then further divided into categories of primary and secondary defendants. The primary defendants were those who allegedly participated in the operation and management of affairs through racketeering activity. The secondary defendants were those who allegedly aided and abetted the racketeering activity by assisting the primary defendants in defrauding the plaintiffs.

The use of “primary defendants” in RICO claims distinguishes primary and secondary defendants as, respectively, those who were the instigators and active participants in the operation of the wrongful activity and those who participated in a derivative way. This classification of “primary defendants” is consistent with the congressional definition, which provides that primary defendants are not merely assistants. If a subset of the defendants aided and abetted in the conspiracy, then it is unlikely that their activity caused a direct effect upon the majority of the plaintiff class. Under Congress’s definition, the defendant’s liability must affect the vast majority of the plaintiffs rather than a select few.

Passa addressed the use of “primary defendants” in securities fraud actions. The primary parties in a securities fraud action are those who improperly purchase and sell securities from secondary defendants, parties who have only a “legally cognizable relationship to the plaintiff.” Once again, as in RICO claims, the

111. Id. at 647.
112. Id.
113. Id. at 648.
114. Id. at 650.
115. Id.
116. Id. at 650, 656.
distinction between primary and secondary defendants in the context of securities fraud actions is based upon the identification of the active participants in the wrongdoing. A defendant who is liable to the plaintiff merely through his relationship to one of the primary defendants in the litigation does not necessarily classify as primary. There must be a direct connection to the plaintiff class that creates liability to the majority of the plaintiffs.

The Supreme Court’s use of the term “primary defendants” in United States v. American Tobacco Co.\(^\text{119}\) represents another valuable resource for formulating a definition of “primary defendants.” In this case, the Supreme Court utilized the term “primary defendants” in a suit brought against numerous defendants in the tobacco industry for violations of the anti-trust act.\(^\text{120}\) Twenty-nine of the defendants were individuals, sixty-five were American corporations, and two were foreign corporations.\(^\text{121}\) The Court classified the defendants as either primary or subsidiary.\(^\text{122}\) American Tobacco Co., one of the sixty-five American corporations, was deemed a primary defendant because of its “dominant relation to the subject matter of the controversy.”\(^\text{123}\) Five of the other sixty-five corporations were classified as subsidiary defendants because their relation to the controversy was accessory.\(^\text{124}\) This case re-emphasizes that a primary defendant must be someone who is an active participant in the wrongdoing—a principal actor rather than merely an accessory.\(^\text{125}\)

### b. Use of “Primary Defendant” in Tort Law

Tort law is another area of law that utilizes the term “primary defendant” in conjunction with “secondary defendant.” The use of

\(^119\) 221 U.S. 106 (1911).
\(^120\) Id. at 108.
\(^121\) Id. at 142–43.
\(^122\) Id. at 143.
\(^123\) Id.
\(^124\) Id.
\(^125\) Cf. 151 CONG. REC. H723, H732 (daily ed. Feb. 17, 2005) (statement of Rep. Goodlatte) (arguing that the term “primary defendant” should include those allegedly liable to a large majority of members of a class in a class action suit).
these terms often arises in the context of indemnification, contribution, and vicarious liability.\(^{126}\) Third parties are brought into an action for contribution and indemnification purposes as a result of a named defendant’s belief that they are partially or entirely responsible for the injury to the plaintiffs.\(^{127}\) These third party defendants are probably not primary defendants under CAFA because they may or may not have a direct relationship to the plaintiffs. Recall the Passa case, which stated that “all defendants sued directly in a cause of action maintain a dominant relationship to the subject matter of the controversy, while those parties sued under theories of vicarious liability, or joined for purposes of indemnification or contribution, maintain an indirect or ‘secondary’ relationship to the litigation.”\(^{128}\)

The problem with stating that all parties joined for purposes of contribution or indemnification are not primary defendants is that the plaintiffs may have simply omitted a party who is in fact primary to the action. Plaintiffs’ ability to omit a party creates a potential loophole because the plaintiff class may rely on the named defendants to join these omitted parties in order to keep the action in state court. It then becomes difficult to determine if the omitted party was joined simply as a means for the other primary defendants to recover contribution or indemnification or if the third party defendant actually has a relationship with the plaintiffs. Under a literal interpretation, if a party is joined for purposes of contribution or indemnification, then he probably cannot be classified as a “primary defendant” for purposes of determining jurisdiction.

Indemnification, as opposed to contribution, utilizes two important concepts in determining apportionment of liability that may be analogized to the use of primary and secondary defendants in CAFA. Those concepts are the “active-passive distinction” and the “primary-secondary dichotomy.”\(^{129}\) The “active-passive distinction” recognizes that some defendants have participated in


\(^{127}\) *Id.* at 276.


\(^{129}\) Shapo, *supra* note 126, at 284.
causing injury to the plaintiffs in a more direct and controlling manner.\textsuperscript{130} If a defendant falls under the active tortfeasor category, then he is unlikely to recover indemnity from the passive tortfeasor because he has engaged in the most direct acts toward the plaintiffs.\textsuperscript{131}

The "primary-secondary dichotomy" also distinguishes between primary and secondary tortfeasors.\textsuperscript{132} A secondary tortfeasor's liability arises only by operation of law, such as with vicarious liability in the context of respondeat superior.\textsuperscript{133} It is the employee who is in fact liable; therefore, the employer should be able to seek reimbursement from the employee.\textsuperscript{134} The legislative history of CAFA provides that "an executive of a corporate defendant who, in the interest of completeness is named as a co-defendant in a class action against his employer, normally should not be deemed as a primary defendant."\textsuperscript{135} Therefore, it does not appear that CAFA recognizes as primary those defendants who are named simply for their relationship to the other principal defendants in the action.

The "active-passive distinction" and "primary-secondary dichotomy" further illustrate the idea that a primary defendant connotes someone who has a direct relationship with and direct liability to the plaintiffs. It is ultimately those "active" and "primary" tortfeasors who will suffer the greatest liability since they will be unable to recover indemnification from the "passive" and "secondary" tortfeasors.

3. Summary of What Other Areas of the Law Contribute to the Definition of "Primary Defendants" in CAFA

The use of "primary defendants" in other areas of the law reveals a theme, which emerges from each category. A primary defendant must be a principal, rather than a secondary or subsidiary actor. He must be someone with a strong, direct

\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 285.
\textsuperscript{134} Id.
relationship with all members of the plaintiff class. He must be an active participant in the wrongdoing. This theme, which weaves throughout every area of the law utilizing the phrase "primary defendant," should carry through to the jurisdictional provisions of CAFA.

IV. AN ANALYSIS OF POTENTIAL DEFINITIONS

Various proposals have been suggested for the most appropriate definition of "primary defendant." The following section analyzes several of these proposals and distinguishes the advantages and disadvantages of each definition.

A. Deep Pockets

A defendant with the deepest pockets is one way to define "primary defendant." A defendant with the deepest pockets is the one most capable of paying damages to an injured plaintiff; therefore, he is the one the plaintiff is most likely to sue. However, such a definition is inconsistent with the sponsors' interpretation of "primary defendant." The deepest pockets will not necessarily include those defendants who will suffer most of the loss when liability is found. There is no direct correlation between a defendant's actual liability and his ability to pay. Therefore, defining "primary defendants" as those with the deepest pockets is impractical since Congress's intent in enacting this legislation was to discourage the naming of defendants who are not actual targets of the lawsuit.

The congressional definition of "primary defendants" requires the defendant to be the one who is the "real 'target' of the lawsuit." The "target" defendant is one whom the plaintiff has selected for special attention. This defendant may have been

137. See source cited supra note 85 (quoting the sponsors' definition of "primary defendant").
targeted for several reasons: his perceived culpability, his negative public perception, or his “deep pocket.” It is unclear to which “target” CAFA refers. It appears that the defendant is to be targeted as result of his culpability. This inference is implicit in Congress’s specification that the primary defendant be one who is allegedly liable to a majority of the plaintiff class. Under this analysis, it is irrelevant that the “deep pocket” has the ability to pay if he is not in fact a “target” for purposes of culpability.

Defining “primary defendants” as “deep pockets” is also a poor public policy. It violates the premise of the tort system, which states, “liability should be based on a factual determination that the defendant failed to meet certain standards.” If a “primary defendant” is defined as such because he is a “deep pocket,” then future harm will not be deterred because the emphasis is placed on wealth, rather than on culpability.

Though defining “primary defendants” as “deep pockets” may seem practical, the basis for the classification should be on liability rather than on an ability to compensate the plaintiff. If the “deep pocket” turns out to be the primary defendant, then at least the relationship between the defendant and the plaintiff class is based on liability rather than on wealth.

B. Primary v. Secondary Liability and Direct v. Vicarious Liability

Primary or direct liability is another possible means of defining “primary defendant.” Black’s Law Dictionary defines “primary liability” as “liability for which one is directly responsible, as opposed to secondary liability.” “Secondary liability,” in turn, is defined as “liability that does not arise unless the primarily liable party fails to honor its obligation.”

140. Id.
142. Id.
144. Id.
A primarily liable defendant is one who is directly liable. Therefore, it is appropriate to define "primary defendant" as one who is directly liable to the plaintiff class. These two terms go hand in hand with one another. The use of direct liability to define primary defendants is consistent with congressional intent as well as the ordinary meaning of the words. The word "primary" necessarily implies someone who is a principal rather than peripheral actor in the litigation. A primary defendant cannot be secondarily or vicariously liable because these terms are contrary to the plain meaning of the word "primary."

One potential problem with the definition of "direct liability" is determining how to classify a defendant as directly liable before the trial begins. The simple solution, as discussed earlier, is to conduct minimal discovery. Though such a procedure may not produce concrete evidence of a defendant's culpability, there need only be enough to prove on the face of the complaint that the defendant is "allegedly liable."

Defining the "primary defendants" as those who are "directly liable" also poses a potential loophole for plaintiffs to defeat federal jurisdiction. Though defendants who join the action for purposes of contribution and indemnification may ultimately be the primarily liable parties, classifying defendants as primary is only important at the outset of the litigation. Until a full-fledged trial takes places, it is impossible to determine who the primary defendants are. Therefore, plaintiffs have the opportunity to simply refrain from naming an out-of-state defendant they do not "believe" is directly liable in order to defeat federal jurisdiction. They may instead rely on the named, in-state, primary defendants to bring these out-of-state defendants into the action as third parties.

In Adams, let us assume that all three defendants were primary. The plaintiff class did not initially name Rogers as a primary defendant, though he may in fact have been subject to the

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145. Id.
147. See sources cited supra notes 85–88.
148. Id.; see discussion supra Part II.C.1.
149. See sources cited supra notes 49–61 and accompanying text.
same amount of liability as Federal and Hanson. By relying on the
named primary defendants to bring Rogers into the action as a
third party, the plaintiffs could have kept the case in state court.

Despite this potential loophole, defining the “primary
defendants” as those who are directly liable is a greater protection
against forum shopping than pre-CAFA litigation procedures.
Under CAFA, plaintiffs can no longer name local defendants
unless they are expected to suffer most of the loss if liability is
found and unless they are expected to be liable to a majority of the
plaintiff class.

V. CONCLUSION

Defining the “primary defendants” as those who are directly
liable is sound public policy and is consistent with both the plain
meaning of the words and with the legislative intent. It fosters a
good public policy because it holds accountable those defendants
who are primarily responsible for the plaintiff’s injuries. In doing
so, it satisfies the goal of tort law to deter future misconduct.
“Direct liability” is consistent with the plain meaning of the words
because it necessarily places those who are primarily, as opposed
to secondarily, liable in the category of “primary defendants.”
Finally, under the sponsors’ definition, if a defendant is directly
liable, then he will be among those who are the real targets of the
lawsuit, those who will be liable to the majority of the plaintiff
class, and those who will suffer most of the loss if liability is
found.

Few cases have applied such a definition in the context of
CAFA. Even so, there are many other areas of the law that have
made the distinction between the words “primary” and
“secondary.” As illustrated throughout this comment, direct
liability is consistent with these distinctions.

Defining “primary defendants” as those who are directly liable
to the plaintiff class satisfies Congress’s intent to keep class
actions in federal court. It limits who the plaintiffs may name as
primary defendants to the suit and makes it more difficult for them
to name “token defendants” as a means to keep the action in state
court. Because Congress intends for the plaintiffs to carry the
burden of proving who classifies as a primary defendant, imposing
a direct liability requirement on the primary defendants will make it more difficult for them to allege the liability of non-target defendants.

Though CAFA seeks to repair many of the inequities in class action procedures, there are many ambiguities in the new law. Defining “primary defendants” as those who are directly liable enables judges and attorneys to more efficiently and effectively litigate a class action suit in a manner that is fair to both plaintiffs and defendants.

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