
The “Commencement” Problem: Lessons from a Statute’s First Year

Lonny Sheinkopf Hoffman*

Whenever new legislation is enacted, questions can arise over its applicability to pending and future cases. One of the most common formulations used by Congress is to provide for a statute’s application to all cases “commenced” on or after the date of enactment. It routinely uses a commencement trigger both in substantive legislation as well as in positive procedural enactments. Statutory commencement battles have high stakes. Judicial infidelity to statutory text can truncate or expand ab initio the reach of regulatory measures. Surprisingly, however, courts and commentators previously have not given rigorous attention to the commencement problem. As a result of this lack of careful attention, most of the reported decisions either follow older, not particularly well-reasoned precedents or simply engage in dubious analysis. Even the most nimble of judicial craftsmen can stumble.

Using the cases dealing with the commencement problem under the newly enacted Class Action Fairness Act of 2005, I critique the reflexive — and quite common — practice among courts of relying on rules directed to purposes other than answering the statutory inquiry. Such misguided analysis confuses the court’s responsibility. The focal question in interpreting statutory text governing its applicability is what Congress intended when it provided that the statute would apply only to cases “commenced” on or after the law’s effective date. I propose three canons of construction for courts to rely upon in interpreting the meaning of “commenced” when used as a statutory application trigger. The

* George Butler Research Professor of Law, University of Houston Law Center; Visiting Professor, University of Texas School of Law (2005-06). Thanks to Stephen Burbank, Elizabeth Cabraser, Greg Joseph, Linda Mullenix, Ed Sherman, Georgene Vairo, and Patrick Woolley for their input and suggestions on earlier drafts of this paper. As has been the case with so much of my scholarship, I owe a particularly great intellectual debt to Professor Burbank who encourages through direct feedback and, more importantly, by example. The University of Texas Law School Foundation provided necessary funding for this project.

suggestion is that a court that follows these three canons of construction is more likely to keep straight the proper statutory inquiry before it and, thus, more likely to attend to the policies underlying the statute it is applying.

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To begin with, our words are artificial, man-made signs — sound waves or ink marks on paper — devised for use in dealing with experience. Since the patterns of events which we try to pick out from the kaleidoscopic world which confronts us do not come ready-labelled by nature (or carry pocket-handkerchiefs), it is hardly surprising that we discover, when we seek to use our label in a new situation, that they turn out to need further definition before they can be applied. . . . [T]he definition useful for one type of situation can not be used without further consideration if the same word, i.e., the same combination of sound waves or ink marks, is to be used in connection with a different type of problem.¹

INTRODUCTION

Passed in February 2005, the Class Action Fairness Act² (“CAFA”) is the most comprehensive effort at regulating class action litigation that Congress has enacted.³ By its intended effect the statute authorizes the removal of state class action suits previously outside the jurisdictional reach of the federal courts. When combined with other tools in the procedural shed that permit aggregation of cases into a single federal forum,⁴ the additional grant of original jurisdiction to the federal district courts was meant to aid in the global resolution of disputes previously irresolvable by a single decision maker. Whether that approach is a good or bad development depends on your

¹ WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 183-84 (photo. reprint 1968) (1942).

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

³ For good histories of Federal Rule of Civil Procedure 23 and of Congress’s previous involvement in class action reform, see generally Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action,”* 92 HARV. L. REV. 644 (1979) (discussing post-1966 development of class action practice); Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5 (1991) (documenting class actions over three decades).

⁴ Existing rules only permit aggregation for pretrial purposes, but other reforms with broad support in and outside of Congress are in the pipeline. See 28 U.S.C. § 1407 (2006). The Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. (2005), would reverse the Supreme Court’s decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), that explicit statutory authority was lacking in § 1407 for transferee judges to retain a case for trial. House Bill 1038 provides the missing express statutory authority for the transferee court to retain jurisdiction under the general multidistrict litigation statute over district and state actions initially referred to it for trial purposes. In April 2005 the bill passed the House of Representatives and awaits further action by the Senate.

perspective, of course. Additionally, whether the statute will, in fact, achieve its proponents' objectives is another question entirely.⁵

As nearly two years have passed since CAFA's enactment, a valuable opportunity exists for looking at the major questions with which the courts have been engaged in interpreting the new law. The primary problem has been deciding to what cases the statute applies. Although Congress seems, at least facially, to have drawn a crisp line between cases "commenced" before and after the law's passage, defendants — eager to gain the benefits of the new legislation — have repeatedly attempted to extend the statute's reach by challenging the traditional conception that a suit is only commenced when it is filed. These efforts, often creative, are said to be justified by reference to Congress's plain purpose in passing the legislation: "[To] restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance . . ."⁶

While the precise commencement questions raised by the class action law will only remain live issues for a short time — after all, the category of cases in dispute will be limited to those in which suit was already filed in state court before CAFA's effective date but not previously removed, and in which some post-enactment event prompts the defendant to try to remove it into the federal forum — much in the case law commands our attention. The cases decided in CAFA's first years warrant continued and careful consideration because the issues with which the courts have dealt also regularly arise beyond the class action context, and will continue to do so. Whenever new legislation is enacted, questions can arise over its applicability to pending cases. To cite one recent, prominent, and typical example, in the Sarbanes-Oxley Act of 2002, Congress provided that the limitations extension for private causes of action alleging fraud in securities cases brought under the Securities Exchange Act of 1934 would apply only to proceedings "that are *commenced* on or after the date of enactment of this Act."⁷ Innumerable other examples may be

⁵ For a thorough, neutral review of the substantive provisions in the new statute, see Gregory P. Joseph, *The Class Action Fairness Act of 2005: A Preliminary Analysis*, <http://www.josephnyc.lawoffice.com/ClassAction.shtml> (last visited Nov. 9, 2006); see also Georgene M. Vairo's chapter on the CAFA in *Moore's Federal Practice*, JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 23 (3d ed. 2006). More critical commentary regarding the CAFA may be found in Scott Nelson, *A Section-by-Section Analysis of the Class Action Fairness Act of 2005*, <http://www.citizen.org/documents/TheClass%20ActionFairnessAct.pdf> (last visited Nov. 9, 2006).

⁶ § 2(b)(2), 119 Stat. at 5 (discussing "findings and purposes" of legislation).

⁷ See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 804, 116 Stat. 745, 801

cited.⁸ But when has a proceeding been “commenced” for statutory purposes? When is it filed? When the defendant is served with process? What if there is a long lag between these two events? What if the plaintiff files suit and serves the defendant before a new statute goes into effect but adds a new claim or a new party afterwards? Does this event “commence” a new action now subject to the enacted legislation? In short, as long as Congress continues to pass laws and use “commencement” as the statutory trigger, a judicial role in interpreting to whom and over what subject matter the laws apply will remain.⁹

Surprisingly, courts and commentators previously have not rigorously attended to the commencement problem. As a result, most of the reported decisions either reflexively follow older, not particularly well-reasoned precedents or simply engage in dubious analysis.¹⁰ Even the most nimble of judicial craftsmen can stumble.¹¹ If William Eskridge is correct that statutory interpretation is now the Cinderella of legal scholarship,¹² much room for improvement remains in how lawyers, judges, and commentators think about and apply statutory language. Certainly, improvements can be made in the

(codified in part at 28 U.S.C. § 1658(b) (2006)) (emphasis added).

⁸ See, e.g., Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 101(c), 112 Stat. 3227, 3233 (1998) (codified in scattered sections at 15 U.S.C.) (stating that statute “shall not affect or apply to any action commenced before and pending on the date of enactment”); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 108, 109 Stat. 737, 758 (1995) (noting that act’s provisions relating to settlement “shall not affect or apply to any private action [brought] under . . . the Securities and Exchange Act of 1934 . . . commenced before and pending” on December 22, 1995). The commencement question also can arise in the interpretation of private contracts, such as with insurance policies where the date of commencement is a relevant contractual event. See, e.g., *Nat’l Union Fire Ins. v. Willis*, 296 F.3d 336, 341-42 (5th Cir. 2002) (“All three [insurance] policies define ‘Claim’ as ‘a civil . . . proceeding . . . which is commenced by service of a complaint or similar pleading.’ Under this definition, the initial complaint brought by CyberServe ‘commenced’ this civil proceeding as a whole. Under this plain reading of the contract’s language, amended complaints cannot commence a civil proceeding that has already been commenced by the filing and service of the initial complaint. Any other reading would result in one lawsuit qualifying as two different civil proceedings.”).

⁹ Cf. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 1 (1994) (“As long as there has been law, there has been statutory interpretation, and insight into the topic is more practically relevant now than ever before.”).

¹⁰ See *infra* text accompanying notes 21-29.

¹¹ See, e.g., *infra* text accompanying notes 84-92.

¹² ESKRIDGE, *supra* note 9, at 1.

specific application of provisions by which Congress marks the boundaries of a new statute's scope.

This paper is organized into three parts and a conclusion. Part I focuses on two of the initial issues that the courts have faced: specifically, what I will refer to as the problem of "removal as commencement," and the issue of how to deal with cases where the suit is filed before the statute's enactment but service is not effected until afterwards. Part II proposes three novel canons of construction for courts to follow in interpreting statutory touchstones of applicability and explains how this alternative approach would result in a better treatment of the service of process decisions. Finally, in Part III, I turn to the most significant commencement issue the courts have tackled: namely, what to do with cases in which a post-enactment amendment has occurred. In critically assessing these decisions, I argue that a failure to follow my proposed three interpretive rules readily confounds the relevant inquiry with which the court should be engaged in determining how far Congress intends new legislation to reach. The concluding section summarizes my reconceptualization of the judicial task in interpreting statutory triggers of applicability.

I. INITIAL ISSUES FACING THE COURTS WHEN DEALING WITH THE CLASS ACTION FAIRNESS ACT OF 2005

The last section of the remarkable CAFA appears to be anything but: "The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act."¹³ As it turns out, figuring out what Congress meant by "commenced" in section 9 of the CAFA has been the primary problem on which courts have focused in the first full year after the statute's passage.

A. *Earlier Efforts at Finding a Statutory Trigger at the Point of Removal*

The problem raised by section 9 is not new; every time Congress passes new legislation, the question can — and often does — arise. The commencement issue has arisen with specific pieces of substantive legislation, like the Sarbanes-Oxley Act or the Private Securities Litigation Reform Act of 1995. The problem, however, is not even new in the specific context of legislation addressing the scope

¹³ Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 9, 119 Stat. 4, 14 (codified at 28 U.S.C. § 1332).

of the jurisdiction of the federal courts. One of the first reported cases to decide when a case was “commenced,” *Lorraine Motors, Inc. v. Etna Casualty & Surety Co.*, arose when Congress raised the amount in controversy threshold for diversity cases to \$10,000 in 1958 and used the term as the trigger date of applicability.¹⁴ The enabling legislation specifically provided that the higher amount in controversy would apply “only in the case of actions commenced after the date of the enactment of this Act.”¹⁵ That date of enactment was July 25, 1958, but the plaintiff in *Lorraine* had filed his \$5,000 suit shortly before then. If the suit had been removed before July 25, there would be little doubt that the old, lower amount in controversy would have applied and the case could be heard in federal court. Similarly, if the case had been filed after July 25, it is clear that the new, higher threshold would have applied and the case would have had to remain in state court.

The litigation-provoking problem in *Lorraine* was that the plaintiff filed the case before July 25 but removed it afterwards. So the question was nicely posed: when Congress said that the law applies only to cases commenced after July 25, was it referring to the date suit was filed in state court or the date it was removed to (thus “commenced” in) federal court? If the former, then the \$5,000 amount in controversy would have been sufficient to bring the case within the statutory grant of jurisdiction; if the latter, then the amount in dispute would have been too low.

As a general rule, the Supreme Court and lower federal courts recognize that for many purposes state law governs the determination of when a dispute is commenced in state court.¹⁶ And, as it turns out,

¹⁴ 166 F. Supp. 319 (E.D.N.Y. 1958).

¹⁵ Pub. L. No. 85-554, § 3, 72 Stat. 415, 415 (1958) (amending 28 U.S.C. § 1332).

¹⁶ See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1051, n.7 (3d ed. 2002) (“All actions within the purview of the federal rules, including suits in equity, actions at law, diversity actions predicated upon state law, and actions predicated upon federal law, are commenced by the filing of a complaint.”); *id.* § 1052 (“In federal actions based on diversity of citizenship jurisdiction, federal courts apply state law to decide when a lawsuit was commenced for certain purposes, such as computing limitations periods, [but not for all purposes].”); see, e.g., *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) (regarding state law used to fix date that pleading was “properly filed” for purposes of federal Antiterrorism and Effective Death Penalty Act, and Supreme Court observing that “[w]hen a postconviction petition is untimely under state law, ‘that [is] the end of the matter’ for purposes of § 2244(d)(2)”) (citation omitted); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-52 (1980) (reaffirming *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949)) (noting state law, not Fed. R. Civ. P. 3, determines when diversity action commences for purposes of tolling state statute of

according to the law in most states a suit is commenced on the date it is filed.¹⁷ Indeed, it is well recognized that state law determines the date of commencement even for other sections of Title 28 that deal with the scope of removal authority. For instance, 28 U.S.C. § 1446(b) provides that “a case may not be removed on the basis of [diversity jurisdiction] . . . more than 1 year after commencement of the action,”¹⁸ and in this context “commencement” is defined by state law.¹⁹ So if the courts traditionally look to state law to determine the date of commencement, one might ask why the answer would have been any different for deciding when a case was commenced for purposes of the higher amount in controversy put in place by Congress in 1958.

For Judge Joseph Zavatt in *Lorraine*, the difference was congressional intent. In raising the amount in controversy, Congress sought to reduce the number of cases brought into federal court under diversity jurisdiction.²⁰ From this premise, Judge Zavatt then concluded that when Congress referred to “actions commenced after the date of the enactment of this Act” it must have been referring to any cases which were removed to federal court after enactment. Treating the date the case was removed as the date of commencement, rather than the date it was filed, would ensure that the dispute, which was less than \$10,000, did not come within the new jurisdictional limit.²¹

The court in *Lorraine* was right, of course, about Congress’s purpose in changing the amount in controversy. While this type of

limitations); *Herb v. Pitcairn*, 324 U.S. 117, 120 (1945) (stating that for purposes of applying statutory limitations language in Federal Employers’ Liability Act that “[n]o action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued”; holding that “[w]hether any case is pending in the Illinois courts is a question to be determined by Illinois law”); *Cannon v. Kroger Co.*, 837 F.2d 660, 664 (4th Cir. 1988) (“It is clear that a federal court must honor state court rules governing commencement of civil actions when an action is first brought in state court and then removed to federal court . . .”).

¹⁷ See, e.g., CAL. CIV. PROC. CODE § 350 (West 2006) (“An action is commenced, within the meaning of this Title, when the complaint is filed.”).

¹⁸ 28 U.S.C. § 1446(b) (1996).

¹⁹ See 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3723, 621-22 & n.73 (3d ed. 2002) (citing, *inter alia*, *Howell v. St. Paul Fire & Marine Ins. Co.*, 955 F. Supp. 660 (D. La. 1997)); see also *Brown v. Ascent Assurance, Inc.*, No. 4:01CV157-D-B, 2001 WL 1530347, at *2 (N.D. Miss. Oct. 16, 2001).

²⁰ *Lorraine Motors, Inc. v. Aetna Cas. & Sur. Co.*, 166 F. Supp. 319, 323-24 (E.D.N.Y. 1958).

²¹ *Id.* at 324.

amendment may not be the most efficacious jurisdictional filter,²² periodic adjustments in the dollar threshold clearly have been the chosen legislative method for trying to ensure that the federal courts do not hear "petty controversies."²³ Less obvious, though, is why the court in *Lorraine* assumed its conclusion necessarily followed from the premise that the purpose of the statute was to limit federal jurisdiction. Would it not still have been entirely consistent with such an intent for Congress to limit the federal jurisdiction for all new cases filed after July 25, thus closing the federal courthouse doors to any cases filed after July 25 in which the damages sought were less than \$10,000? Indeed, given the relatively small and necessarily finite number of cases filed before July 25 but not yet removed to federal court by that date, this interpretation of "commenced" seems quite sensible. After all, no one would question that any case filed and removed before the statute went into effect would be governed by the old standard. Similarly any case filed (and, by necessity, removed) after the act's effective date would be governed by the new, higher amount in controversy requirement. In short, Congress could quite plausibly have meant to follow the traditional understanding of "commenced" — as in the date the suit is filed in state court — even if it meant that a few cases would still make it into the federal courthouse before the door was closed to them.

But the *Lorraine* court saw the problem differently.²⁴ And whatever fault we might find with the opinion today, its view has come to be accepted not by all²⁵ but by the vast majority of the few courts to consider similar statutory commencement questions. Courts are not the only ones that adopt this analysis. Even the venerable David Siegel has suggested in his commentary accompanying the 1988 Judicial

²² See Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 225-26 (1948) (critiquing use of amount in controversy requirement as jurisdictional filter).

²³ See, e.g., S. Rep. No. 1830-85, at 4 (1958), as reprinted in 1958 U.S.C.C.A.N. 3099, 3101 (describing efforts to raise amount in controversy threshold to point "not . . . so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies").

²⁴ *Lorraine*, 166 F. Supp. at 323-24.

²⁵ See, e.g., *Kieffer v. Travelers Fire Ins. Co.*, 167 F. Supp. 398 (1958) (noting disagreement with *Lorraine* and concluding that commencement in 1958 Act referred to date suit was filed in state court, reasoning that "[t]he language [of the Act] should be construed to mean what it says"); see also *Rhinehart v. Cincinnati Inc.*, 716 F. Supp. 7, 8 (E.D. Mich. 1989).

Improvements and Access to Justice Act (“1988 Act”) that the *Lorraine* court’s reasoning should be preferred.²⁶

Thus, when Congress again raised the amount in controversy to \$50,000 in 1988, the enabling legislation provided that the new threshold “shall apply to any civil action commenced on or after the 180th day after the date of enactment of this title.”²⁷ Several reported decisions then concluded, following *Lorraine*, that a case filed in state court before the effective date of the 1988 Act was nonetheless commenced under section 201(b) on the date it was removed.²⁸ These decisions are arguably even harder to justify than *Lorraine* because Congress made other amendments to 28 U.S.C. § 1332 in the 1988 Act, but separately and differently provided that these amendments “shall apply to any civil action commenced in or removed to a United States district court on or after the 180th day after the date of enactment of this title.”²⁹

Beyond *Lorraine*’s status as a darling in the field, another reason may explain why some courts have used the date of removal as the commencement trigger date for applying new legislation. Courts often appear to be swayed by serious sounding maxims like this one: “It is a fundamental principle of law that whether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the time the petition for removal was filed”,³⁰ or this one: “The

²⁶ David D. Siegel, *Commentary on 1988 Revision*, 28 U.S.C.A. § 1332, at 382 (2006).

²⁷ Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201(b), 102 Stat. 4642 (1988).

²⁸ *Sayers v. Sears, Roebuck & Co.*, 732 F. Supp. 654, 655-56 (W.D. Va. 1990); *Hunt v. Trans. Indem. Ins. Co.*, No. 90-00041 ACK, 1990 WL 192483, at *5 (D. Haw. July 30, 1990); *Gasper v. Nat’l Tea Co.*, No. 89-5168, 1990 WL 6031, at *2 (E.D. La. Jan. 24, 1990); *Nolan v. Boeing Co.*, 715 F. Supp. 152, 155 (E.D. La. 1989); *Adamar of N.J., Inc. v. Karabell*, 719 F. Supp. 1251, 1253 (D.N.J. 1989).

²⁹ See §§ 202(b), 203(b), 102 Stat. 4642.

³⁰ *In re Carter*, 618 F.2d 1093, 1101 (5th Cir. 1980) (citing, inter alia, *Pullman Co. v. Jenkins*, 305 U.S. 534, 537-38 (1939)). With similar sentiment, the court in *Lorraine* also reasoned that saying the case was commenced when it was filed in state court (and, thus, not subject to the new \$10,000 amount in controversy) would mean that:

[A]n action is removable from a State court which could not have been originally instituted in this Court on the day it was removed. I am aware of no precedent to sustain such a holding. . . . A much more specific indication than that appearing in Section 3 [of the 1958 act] would have to be found before it could be said that Congress intended to upset the established principle that no civil action is subject to removal unless the action is one in which the federal court could have exercised original jurisdiction at the time

propriety of removal is evaluated at the time the petition for removal is filed."³¹

Thus, in interpreting the applicability of the 1988 Act raising the amount in controversy requirement to \$50,000, the court in *Hunt v. Transportation Indemnity Insurance Co.*³² concluded that when Congress directed that the higher amount threshold shall apply to suits commenced after date of enactment of the statute, it was referring to the date the suit was removed, not the date it was filed.³³ After citing *Lorraine* and its progeny, *Hunt* emphasized that using the removal date as the date of commencement was also consistent with the fundamental time-of-removal principle, highlighted above. "It offends reason," the court in *Hunt* concluded, "to suggest that diversity of citizenship must be present both at the time of filing of the state action and the time of filing the removal petition but that the jurisdictional amount need be satisfied only when the state action is filed. I cannot believe that Congress intended such an incongruous result."³⁴

The court in *Hunt* misunderstood that the time-of-removal principle to which these other decisions refer is relevant but to an entirely different problem. In the Fifth Circuit's *In re Carter* decision, for instance, the court was talking about what to do when right before trial the federal claim is dismissed and all that remains is a pendent state law claim.³⁵ Must the court dismiss for lack of subject matter jurisdiction? Dismissal is not required, the court held, because subject matter jurisdiction is determined as of the time of removal. Under the then applicable standard, as long as the federal claim is "not obviously meritless," the fact that a plaintiff does not ultimately prevail on it does not divest the court of the jurisdiction it originally possessed.³⁶ Thus, it is appropriate to refer to the principle as "fundamental" or "essential" that subject matter jurisdiction for these purposes is measured as of the time of removal. That principle, however, has

of removal.

Lorraine Motors, Inc. v. Etna Cas. & Sur. Co., 166 F. Supp. 319, 323-24 (E.D.N.Y. 1958).

³¹ *Hunt*, 1990 WL 192483, at *5 (citing *Maseda v. Honda Motor Co.*, 861 F.2d 1248, 1253 (11th Cir. 1988)).

³² *Id.* at *2.

³³ *Id.* at *5.

³⁴ *Id.*

³⁵ *Carter*, 618 F.2d at 1101.

³⁶ *Id.* at 1101, 1103.

nothing to do with the question of how we determine when a suit is commenced for purposes of new legislation.

The same, of course, is true of the equally fundamental principle that when a suit is filed in federal court, an original basis of subject matter jurisdiction must exist at the time of filing. Consider *Grupo Dataflux v. Atlas Global Group, L.P.*,³⁷ where the Supreme Court, per Justice Scalia, held that a post-filing change in the status of a party cannot cure a defect that previously existed at the time it was originally filed in federal court. In *Grupo Dataflux*, the plaintiff was a Texas partnership that sued two Mexican citizens in federal court on diversity grounds. Immediately before trial, it was determined that at the time of filing the partnership also had two Mexican partners. This finding meant the parties were not completely diverse when the suit began. The Court ruled that this jurisdictional defect was not cured by the post-filing deletion of the Mexican partners because the statutory grant of diversity jurisdiction in § 1332 requires the existence of complete diversity at the time of filing. According to Scalia, this requirement is a rule of “hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure.”³⁸

In the context of *Grupo Dataflux*, the time-of-filing rule fixes the date of filing as the relevant moment in time for measuring the existence of subject matter jurisdiction, just as the time-of-removal principle fixes that moment for determining whether the state case is within an original grant of jurisdiction to the district court. Obviously, the two rules are corresponding — the former applies to cases initially brought in federal court; the latter to state suits that are removed under 28 U.S.C. § 1441(a) into the federal forum. Additionally, both act as gatekeepers to ensure that the federal courts only entertain disputes over which they possess subject matter jurisdiction. Neither rule has any relevance, however, to the statutory determination of when a case is “commenced” in state court where that term is used to trigger application. If the only source of the court’s jurisdiction is derived from a statute not otherwise applicable to the case because Congress did not intend it to apply to the dispute, then no grant of original jurisdiction exists on which the case can proceed in federal court and, thus, no basis for its removal from state court.³⁹

³⁷ 541 U.S. 567 (2004).

³⁸ *Id.* at 570-71.

³⁹ See 28 U.S.C. § 1441(a) (2006) (“Except as otherwise expressly provided by Act

To clearly illustrate the point, imagine a suit brought by a plaintiff from Texas against two defendants, one of whom is also from Texas and the other is from New York. When filed, obviously there is not complete diversity of citizenship. If a month later the plaintiff dismisses the Texas defendant, then there is complete diversity at that point, and the case is now removable as within the original jurisdiction of the court under § 1332(a) (assuming, of course, all other requirements are satisfied, such as minimum amount in controversy). The suit was not removable when it was first commenced (i.e., filed) in state court. This conclusion squares with the notion that § 1441 requires complete diversity at the time of removal; but saying it was not removable when it was commenced is not to say that it was commenced when it was removed.

B. *CAFA Cases and the "Removal as Commencement" Argument*

With such a rich legacy of precedents and references to "fundamental principles," it is not surprising that in the first heady days after passage of the CAFA, defendants thought they had a good shot at successfully arguing that a case filed in state court before February 18, 2005 should be treated as commenced within the meaning of section 9 of the CAFA if it was removed after February 18.

But in the first reported decision concerning the CAFA, handed down on March 9, 2005, Judge Marcia Krieger of the United States District Court for the District of Colorado rejected the argument that suit was commenced within the meaning of section 9 when it was removed to federal court. Her decision was subsequently affirmed by the Tenth Circuit in *Pritchett v. Office Depot, Inc.*⁴⁰

In *Pritchett*, the plaintiff brought a suit in state court in April 2003 seeking to represent a statewide class of similarly situated persons. The court certified a litigation class in June 2004. The CAFA took effect about a month before trial was set to begin in the case. Two weeks before the scheduled trial date, however, the defendant removed the case, citing the new grant of original jurisdiction given to

of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

⁴⁰ 420 F.3d 1090, 1097 (10th Cir. 2005), *affg* 360 F. Supp. 2d 1176 (D. Colo. 2005). On March 18, 2005, the Tenth Circuit first entered an order denying the defendant leave to appeal. An initial decision was reported at 404 F.3d 1232 on April 11, 2005. That opinion was then amended and superseded on August 18, 2005 by the written opinion that now appears at 420 F.3d 1090.

the district courts by the CAFA and arguing that the date of removal was the date the suit was commenced within the meaning of section 9.

In analyzing whether to remand the case, the Tenth Circuit began by observing that the defendant's argument was inconsistent with the traditional understanding that a cause of action is typically commenced when it is first brought.⁴¹ The appellate court also found support for its conclusion in the statute's legislative history. The court noted that a prior version of the legislation had allowed for the removal of cases commenced before the CAFA's effective date if a state judge certified a class after the effective date.⁴² Even this broader provision, which had no direct application in *Pritchett* because the class action certification order was also entered before February 18, 2005, did not make it into the final version of the bill. This omission suggested to the court that Congress's intent in the CAFA was not to make the new legislation applicable to cases pending before the statute's enactment.⁴³ The court also cited as further evidence of legislative intent two statements from sponsoring legislators clearly expressing the view that the CAFA would not apply to actions already pending in state court prior to February 2005.⁴⁴

The *Pritchett* court further bolstered its decision affirming remand by citing the long standing presumption against exercising federal jurisdiction. Not surprisingly, the defendant had based its removal as commencement argument on *Lorraine* and similar decisions. Those decisions had previously held, in the context of construing statutory amendments raising the amount in controversy threshold for diversity cases, that the date of removal should count as the commencement date.⁴⁵ The Tenth Circuit did not reject the reasoning in the *Lorraine* line of cases but, instead, distinguished them. It did so by noting that where these courts had previously used the date of removal as the date of commencement for purposes of applying a higher amount in controversy requirement, they were acting consistently with the general presumption to strictly construe removal statutes. Thus, the

⁴¹ *Id.* at 1094 (citing, inter alia, definition of "commenced" in Fed. R. Civ. P. 3).

⁴² *Id.* at 1095 (citing H.R. 516, 109th Cong. § 7 (2005)).

⁴³ *Id.*

⁴⁴ *Id.* at 1096 (citing 151 CONG. REC. S1079 (daily ed. Feb. 8, 2005) (statement of Sen. Dodd) ("[CAFA] does not apply retroactively, despite those who wanted it to. A case filed before the date of enactment will be unaffected by any provision of this legislation."); 151 CONG. REC. H753 (daily ed. Feb. 17, 2005) (statement of Rep. Goodlatte) ("Since the legislation is not retroactive, it would absolutely have no effect on the 75 class actions already filed against Merck in the wake of the Vioxx withdrawal.")).

⁴⁵ *Id.*

court observed, the cases on which the defendant relied were actually consistent with treating the state case in *Pritchett* as commenced before the CAFA's enactment because in both instances the court would be strictly construing the scope of federal jurisdiction.⁴⁶

The Tenth Circuit acknowledged that the specific legislative intent in the CAFA was to expand federal jurisdiction, but suggested that recognition of this intent begged the immediate question to be decided. Arguably ambiguous language in the statute should be construed in accordance with the general principle in cases like *Shamrock Oil & Gas Corp. v. Sheets*,⁴⁷ the court observed, which requires a narrow reading of the breadth of federal jurisdictional authority.⁴⁸

Finally, the *Pritchett* court's decision was also based on a concern that the defendant's interpretation would expand the federal docket even further and disrupt pending state cases.⁴⁹ In this latter regard, the timing of the removal in *Pritchett* made the defendant's argument especially difficult to swallow because the case had been pending for several years and was removed only weeks before trial was scheduled to begin. In short, the defendant engaged in too much gamesmanship and forum shopping for this argument to have had much hope of success in *Pritchett*.

Following *Pritchett*, the First, Seventh, and Ninth Circuits have similarly rejected arguments that the date of commencement is calculated from the date of removal.⁵⁰ No other circuit courts have addressed the question. District courts around the country have similarly rejected the argument that a case is commenced when it is removed.⁵¹

⁴⁶ *Id.* at 1096-97.

⁴⁷ 313 U.S. 100 (1941).

⁴⁸ *Pritchett*, 420 F.3d at 1097.

⁴⁹ *Id.*

⁵⁰ *Natale v. Pfizer, Inc.*, 424 F.3d 43, 44-45 (1st Cir. 2005); *Pfizer, Inc. v. Lott*, 417 F.3d 725, 726 (7th Cir. 2005); *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 686-88 (9th Cir. 2005).

⁵¹ See *Natale*, 424 F.3d at 44-45; *In re Expedia Hotel Taxes & Fees Litig.*, 377 F. Supp. 2d 904, 906 (W.D. Wash. 2005) (rejecting removal as commencement argument and similarly rejecting claim that cases were commenced after CAFA's enactment where several previously filed suits were consolidated by state court judge into single proceeding on February 18, 2005); *Zuleski v. Hartford Accident & Indem. Co.*, No. 2:05-0490, 2005 WL 2739076, at *3 (S.D. W. Va. Oct. 24, 2005); *Komeshak v. Concentra, Inc.*, No. 05-CV-261-DRH, 05-CV-349-DRH, 2005 WL 2488431, at *3 (S.D. Ill. Oct. 7, 2005); *Yescavage v. Wyeth, Inc.*, No. 205CV294FTM33SPC, 2005 WL 2088429, at *3 (M.D. Fla. Aug. 30, 2005) (rejecting argument that removal constituted commencement for CAFA purposes); *Alsup v. 3-Day Blinds*, No. 05-287-

C. *The Lapse Between Filing and Service of Process as a Factor in the Commencement Analysis*

Over the last couple of years, numerous courts have addressed a related argument that probably raises an even more challenging question than the removal-as-commencement argument advanced but readily rejected in the district and intermediate appellate courts. How should we treat a case that is filed before a statute's effective date when service of process is not accomplished until after the statute has gone into effect? Where there have been delays between filing and service, defendants have argued that the state case was "commenced" within the meaning of section 9 of the CAFA only on the date of service and, thus, the action may be removed as within the court's original jurisdiction.

Some cases outside of the CAFA context have ignored the existence of a state rule that fixes commencement as the day suit was filed when service of process is accomplished after filing. For instance, in *Greer v. Skilcraft*,⁵² the plaintiff delayed serving the defendant and the court treated the case as not commenced for purposes of § 1446(b) until service had been completed.⁵³ The court reasoned that the one-year period would not begin to run "until the complaint has been filed and there has been a *bona fide* effort to have it served" because "[t]o hold otherwise would be to provide the plaintiff the power to prevent removal by manipulation and inaction."⁵⁴

In the CAFA cases, the district courts are split on this question, though the majority have reflexively used the date of service as the

GPM, 2005 WL 2094745, at *3 (S.D. Ill. Aug. 25, 2005) (rejecting argument that case commenced after date of enactment because President did not sign bill passed by Congress until following day); *see also* Price v. Berkeley Premium Nutraceuticals, Inc., No. 05-73169, 2005 WL 2649205, at *4 (E.D. Mich. Oct. 17, 2005) (holding that *Pritchett* did not compel dismissal where plaintiffs initially filed action in state court that was removed on basis of jurisdictional grant under § 1332(a) but subsequently remanded, and then refiled suit in federal court after February 18, 2005, on basis of new grant of jurisdiction from CAFA); Meredith v. Clayton Homes, Inc., No. 05-CV-4050 (W.D. Ark. Sept. 14, 2005), *available at* http://www.mcglinchey.com/images/pdf/1_int14.PDF (following *Pritchett* to reject defendant's claim that CAFA applied to action filed in state court on February 17, 2005, and holding that action commences for CAFA purposes on date of filing); Bryant v. Gen. Motors Corp., No. 05-CV-4028 (W.D. Ark. Sept. 12, 2005), *available at* <http://www.mcglinchey.com/images/pdf/intF.PDF> (following *Pritchett* to reject defendant's claim that CAFA applied to action filed in state court on February 4, 2005, and holding that action commences for CAFA purposes on date of filing).

⁵² 704 F. Supp. 1570 (N.D. Ala. 1989).

⁵³ *Id.* at 1582.

⁵⁴ *Id.* at 1583.

date suit was “commenced” within the meaning of section 9, without regard to the reason state law refers to the date of service.⁵⁵ The only circuit court decision on the subject is by the Ninth Circuit, which treated the case as commenced when it was filed, rejecting the argument that the state suit was not commenced until after the defendant received service of process.⁵⁶ In reaching this conclusion, however, the court failed to engage the substantive question, dismissing the defendant’s policy arguments in support of its position as based on “largely hypothetical worries.”⁵⁷ The question, thus, is how should a federal court decide when a case is commenced for purposes of deciding if a new statute applies to it when the suit is filed before the statute’s effective date but service of process is effected afterwards?

⁵⁵ For cases using date of service as date of commencement, see, for example, *Eufaula Drugs, Inc. v. TDI Managed Care Servs., Inc.*, 2:05-CV-293-F, 2005 WL 3440635, at *3 (M.D. Ala. Dec. 14, 2005); *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, No. 2:05-CV-292-F, 2005 WL 3440636, at *4 (M.D. Ala. Dec. 14, 2005); *Dinkel v. Gen. Motors Corp.*, 400 F. Supp. 2d 289, 293 (D. Me. 2005); *Brown v. Kerkhoff*, No. 4:05 CV 00274 JEG, 2005 WL 2671529, at *7 (S.D. Iowa Oct. 19, 2005) (noting that though not directly engaging question, court appears to presume that if service of process had not been accomplished within 90 days of filing suit, date of commencement for purposes of CAFA might be considered as of date service eventually accomplished; presumption appears particularly hard to square with IOWA R. Civ. P. 1.301(1), which provides: “For all purposes, a civil action is commenced by filing a petition with the court”). Three district court cases have rejected the date of service of process as the date of commencement for CAFA purposes. See *Jones v. Fort Dodge Animal Health*, No. 1:06-cv-47-SPM/AK, 2006 WL 1877103, at *3-4 (N.D. Fla. July 5, 2006) (rejecting defendant’s argument that commencement should be determined by date service of process was affected, and explaining that limitations and commencement are two different legal questions); *Hensley v. Computer Sciences Corp.*, No. 05-CV-4081, 2006 WL 662463, at *3 (W.D. Ark. Mar. 15, 2006); *Lussier v. Dollar Tree Stores, Inc.*, No. CV 05-768-BR, 2005 WL 2211094, at *3 (D. Or. Sept. 8, 2005).

⁵⁶ *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 689 (9th Cir. 2005).

⁵⁷ *Id.* (rejecting defendant’s argument that using date of filing as date of commencement when service has not yet been effected “will lead to unanticipated and undesirable results where state procedure allows for significant lapse of time between filing in state court and service upon a defendant” because “[t]hese are largely hypothetical worries — we are not aware of any actions that fall in this category” and “[i]n any event, they concern only actions that were filed before February 18, 2005, and will shortly phase themselves out”). *But cf. Jones*, 2006 WL 1877103, at *3 (dealing with situation where service of process was more than one year after filing and holding that commencement occurred on date of filing).

II. RETHINKING COMMENCEMENT: AN ALTERNATIVE APPROACH

Where legislation is silent as to the meaning of a particular term used as a trigger of applicability, such as “commenced” in section 9 of the CAFA, I suggest that courts use three principles or canons of construction in undertaking the analysis. The first canon of construction is to determine whether Congress intended the term to be given content by the application of state law or federal law. Although courts and scholars have proposed different interpretive approaches for addressing this kind of statutory interpretation question,⁵⁸ I think the most felicitous approach for purposes of the CAFA may be to consider directly the various sources on which a court could draw. The choices seem to be: (i) follow the definition given by another federal law; (ii) fashion an interpretation that comports with the court’s best guess of the drafter’s intent; or (iii) turn to state law.

As to the first choice, the most obvious option is Rule 3 of the Federal Rules of Civil Procedure, which defines when a case is commenced in federal court. There are a number of problems with believing, however, that Congress intended federal courts to use Rule 3 to define when a case is commenced within the meaning of section 9 of the CAFA. The first and most obvious difficulty is that Congress did not make reference to Rule 3 in section 9. It would have been easy enough to do so; Congress could have simply said, for instance, “This Act shall apply to all cases commenced on or after X date, and a case shall be deemed commenced using the measure set forth in Rule 3.” The failure to reference Rule 3 directly suggests a second difficulty with assuming Congress intended the rule to govern the meaning of “commenced” under section 9. Congress likely did not reference Rule 3 — it typically does not reference the rule when it has used date of commencement as an applicability trigger in other statutes — because it does not make sense to use a rule that marks the date suit is commenced in federal court to answer when a suit is commenced in state court.⁵⁹

⁵⁸ See generally RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 693-98, 723-24 (5th ed. 2003) (discussing interpretive theories of federal common law and meaning of federal statutory terms).

⁵⁹ See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1051, § 1051 n.11 (3d ed. 2002) (noting that “Federal Rule 3 is irrelevant to the determination of whether an action was timely filed in state court prior to removal” (citing *Winkels v. George A. Hormel & Co.*, 874 F.2d 567 (8th Cir. 1989)) (“[T]he Federal Rules of Civil Procedure are designed to ‘govern procedure after removal.’ . . . Thus, Rule 3 is wholly irrelevant.”) (citation and quotation marks)).

Even if the statute is read as silently authorizing resort to Rule 3, this rule only measures commencement at the point a case is originally brought; it does not answer whether some post-filing event, like an amendment adding a new claim or party, commences a new action within the reach of new legislation.⁶⁰ Thus, Rule 3 cannot, at least by itself, answer the question.

Finally, the suggestion that Congress intended Rule 3 to be the measure of "commenced" within the meaning of section 9 has to account for the effect that such an interpretation would have. Under Rule 3, a case is commenced when it is filed.⁶¹ By contrast, as we have seen, some states treat commencement as not occurring until after service of process has been completed. Thus, the effect of relying on Rule 3 in applying section 9 would be to bring fewer cases within the federal system than if the court relied on various state laws, a result that would seem at least somewhat at odds with the expressed goal of the CAFA to expand federal jurisdiction.

If Congress did not intend "commenced" to be defined by reference to Rule 3, what about allowing the courts to fashion a federal common law rule of commencement?⁶² To justify reliance on federal common law, it would presumably have to be shown from the text or legislative purposes of the statute that compelling reasons exist for ignoring state law and fashioning a wholly new and independent federal common law rule or set of rules.⁶³ For instance, the courts could fashion a common law rule that extends the statute's reach to any cases "filed or removed" after February 18, 2005. Such a reading would be uniform; it would also expansively treat the federal legislative intent to broaden federal jurisdiction. In the case of the CAFA, however, such a showing appears difficult to make given the text and legislative history of this particular statute. The statute does not say it applies to cases

omitted)).

⁶⁰ See *infra* Part III.

⁶¹ FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court.").

⁶² Cf. COOK, *supra* note 1, at 146 ("[I]n filling out legislation enacted by Congress in pursuance of clearly granted powers, e.g., to regulate interstate commerce, the federal courts will create what may perhaps be called a federal 'common law' for those fields.").

⁶³ See FALLON, *supra* note 58, at 723-24. See generally Stephen Burbank, *Interjurisdictional Preclusion, Full Faith and Credit, and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 734 (1986) (arguing that Rules of Decision Act directs court to fill in statutory gap using state law unless statute otherwise provides or requires application of federal law, latter determined by reference both to statutory text and legislation's animating policy purposes).

“commenced or removed” after passage of the Act. And, as we have seen in the previous section, the CAFA courts have rightly and routinely rejected such a reading of section 9, which is precisely to say that they have rejected fashioning such a federal common law interpretation of “commenced.”⁶⁴

One option remains: to fashion a federal common law rule that borrows state law as the rule of decision. By contrast to the first two options, borrowing state law as federal law to fill in the gap in section 9 of the CAFA has the singular virtue of being consistent with the traditional reliance by courts on state law in many circumstances to provide the rule of decision on what counts as “commenced” when the term is used as a statutory commencement trigger.⁶⁵ For instance, as previously noted, the majority of courts have interpreted the term “commenced” as it is used in § 1446(b) by reference to state law.⁶⁶ This approach obviously is not conclusive of the legislative intent in section 9. Even though courts have used state law to interpret other statutes, they do not have to refer to state law to interpret all statutes. It does seem probative, however, that Congress chose to use a term that the courts have often said should be defined by reference to state law and that it correspondingly failed to make any specific reference to Rule 3 or to otherwise define the boundaries of the statute’s application more precisely.

Assuming state law governs the definition of when a state suit is commenced, the second canon of construction is to determine whether the state rule fixes the time at which an action is commenced. As previously noted, in most states (usually by rule or statute) a suit is commenced on the date it is filed.⁶⁷ In a few jurisdictions, a suit is not

⁶⁴ We may similarly reject other efforts to fashion a single rule as a matter of federal common law. For instance, it might be suggested that a better reading of section 9 would be to treat a case as commenced only at the point that the court certifies a class. While this reading has the virtue of capturing precisely the cases about which Congress was concerned — those in which a state court had certified a class with interstate commerce implications — it again is inconsistent with the plain language of the statute. It also has the further difficulty of being directly inconsistent with the legislative history, where an earlier version of the CAFA authorized the removal of cases where a class had been certified after the act went into effect. Compare H.R. 516, 109th Cong. § 7 (2005) (providing, in original House bill, for removal in cases where class certification order is entered after CAFA’s enactment date), with Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 9, 119 Stat. 4, 14 (containing no such language).

⁶⁵ See *supra* note 15.

⁶⁶ See *supra* note 18.

⁶⁷ See, e.g., CAL. CIV. PROC. CODE § 350 (West 2006) (“An action is commenced, within the meaning of this Title, when the complaint is filed.”).

commenced until after service has been accomplished.⁶⁸ The key to this second step is to focus on whether a specific provision of state law fixes the time at which commencement is measured. The rule in Iowa is typical of state commencement rules: “For all purposes, a civil action is commenced by filing a petition with the court.”⁶⁹ When such a provision exists, particularly one as plain as Iowa’s (“*For all purposes*”), the proper conclusion is to treat an action filed in state court as commenced when the petition is filed, regardless of when service is accomplished.

In focusing on state rules that fix the moment of commencement, it is also important not to confuse them with “fundamental principles” of federal subject matter jurisdiction. Earlier suggestions observing that the right to remove depends on the state of affairs at the time of removal and not exclusively at the point of filing have the potential to mislead courts into believing that a case may be treated as commenced at the point it is removed when that term is used as a trigger of statutory applicability. As we have seen, however, the time-of-removal principle does not bear relevance to the statutory inquiry.⁷⁰ If the statute does not apply because the case was commenced prior to its effective date, then the case lacks a basis for original jurisdiction and the right to remove the suit from state court.

Finally, the third canon of construction is to distinguish between state rules that fix the date of commencement with those that set requirements for maintaining the action or that have some other, even more specific purpose in mind, such as offering an additional window to plaintiffs for avoiding a limitations bar. State procedural law often addresses the consequences of failing to accomplish service within a set period of time or within a generally reasonable period after filing. For instance, in Iowa, a separate procedural rule provides: “If service of the original notice is not made upon the defendant . . . within 90 days after filing the petition, the court . . . shall dismiss the action without prejudice as to that defendant . . . or direct an alternate time or manner of service.”⁷¹

⁶⁸ See, e.g., *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1094 (10th Cir. 2005) (noting that filing commonly commences action, but that in Connecticut action commences by service); *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 351-52 (1999) (citing New York as example of state that treats service of summons as requisite to commencement of suit).

⁶⁹ IOWA R. CIV. P. 1.301(1).

⁷⁰ See *supra* text accompanying notes 30-39.

⁷¹ IOWA R. CIV. P. 1.302(5).

What is the relevance of this Iowa provision to the determination of when such a suit was commenced under section 9 of the CAFA? The answer is that it has no direct relevance, though obviously the statutory provision may indirectly affect the outcome of the case. Specifically, failure to serve process within ninety days of filing may have consequences under Iowa law, but we should not confuse the federal judge's obligation to follow this state law rule with assuming it to be relevant to the meaning of a statutory commencement trigger. This rule simply permits the federal court to terminate a suit previously "commenced" (within the meaning of Rule 1.301(1) of the Iowa Rules of Civil Procedure) if service was not accomplished within three months. Of course, if the federal judge does dismiss the suit on the authority of this state service provision, any subsequent action brought by the plaintiff would then come within the CAFA's reach, not because the service provision means the suit was commenced on the date service was accomplished but because *the newly filed case* would have been brought after February 18, 2005. This is what I mean by saying that the effect of the court granting a dismissal pursuant to Rule 1.301(1) would indirectly bring the plaintiff's claims within the scope of the new legislation.⁷²

Still other state service provisions do not require or make permissible the dismissal of the action, but instead they discuss the consequence in terms of limitations. Once again, untimely service under such a statutory provision should have no relevance to the interpretation of "commenced" when used as a yardstick of statutory applicability. Some courts, however, have felt compelled by the existence of such a statute to find the state suit was not commenced until after the CAFA went into effect. The better reasoned decisions reject such a conclusion.

In *Lussier v. Dollar Tree Stores, Inc.*, for instance, the defendant argued that the case was not commenced until it was served with a copy of the complaint and summons.⁷³ The case was filed in Oregon days before the CAFA went into effect, but the defendant was not served until more than two months later. The key point about Oregon's state rule is that it treats a case as commenced on the date of filing, and it only uses the date of service of process when there is a

⁷² See also FED. R. CIV. P. 4(m) ("If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court . . . shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time . . .").

⁷³ No. CV 05-768-BR, 2005 WL 2211094, at *3 (D. Or. Sept. 8, 2005).

question of limitations at issue.⁷⁴ Consequently, Oregon Revised Statute section 12.020 merely grants a two month extension to a plaintiff beyond the end of limitations. However, if a defendant is not served within sixty days of filing, but well within the limitations bar, section 12.020 does not require the suit’s dismissal and thus may not have even an indirect impact on the CAFA commencement question. The fact that the defendant in *Lussier* was served more than sixty days after suit was filed has no bearing on when the state action was commenced for purposes of section 9 of the CAFA, and the court in *Lussier* rightly rejected such a suggestion. The untimely service meant only one thing under Oregon law: if the plaintiff’s initial suit was filed just before limitations ran, plaintiff would not be able to take advantage of the two month extension granted by section 12.020. As to the plaintiff’s claim, it would be barred by limitations (an outcome one suspects would have been quite satisfactory to the defendant).

When differences are not kept straight between state statutes that fix the date of a suit’s commencement and those that impose requirements for instituting and maintaining the action or those that tie specific acts to particular objectives (such as extending the period of limitations), problems frequently arise. Consider the decision in *Eufaula Drugs, Inc. v. TDI Managed Care Services, Inc.*, where the court upheld removal under the CAFA even though the complaint was filed before the date of the statute’s enactment.⁷⁵

In *Eufaula*, the plaintiff filed suit in Alabama state court on February 14, 2005. At the time she filed suit, she did not provide the clerk’s office with information on where to serve process. She did not wait long — only two weeks — and there was no problem with limitations running in the interim; but this slight delay proved significant. The Alabama rule provides simply that “[a] civil action is commenced by filing a complaint with the court.”⁷⁶ The *Eufaula* court, however, cited

⁷⁴ OR. R. CIV. P. 3 (providing that “[o]ther than for purposes of statutes of limitations, an action shall be commenced by filing a complaint with the clerk of the court”). See also OR. REV. STAT. § 12.020 (2006) (“(1) Except as provided in subsection (2) of this section, for the purpose of determining whether an action has been commenced within the time limited, an action shall be deemed commenced as to each defendant, when the complaint is filed, and the summons served on the defendant. (2) If the first publication of summons or other service of summons in an action occurs before the expiration of 60 days after the date on which the complaint in the action was filed, the action against each person of whom the court by such service has acquired jurisdiction shall be deemed to have been commenced upon the date on which the complaint in the action was filed.”).

⁷⁵ No. 2:05-CV-293-F, 2005 WL 3440635, at *3 (M.D. Ala. Dec. 14, 2005).

⁷⁶ ALA. R. CIV. P. 3(a).

state common law cases that had held “[i]n the context of determining whether an action has been commenced within the statute of limitations, the filing of the complaint commences the action only if it is filed with the bona fide intention of having it immediately served.”⁷⁷ Relying on these decisions, the court in *Eufaula* found the CAFA applicable. The court reasoned that the bona fide intention standard “should also be applied when determining the meaning of ‘commenced’ in section 9 of CAFA.”⁷⁸ In waiting two weeks before getting the completed summons to the clerk’s office, the court reasoned that the plaintiff had “intentionally” not filed the summons along with the complaint and thus had “objectively failed to show a bona fide intent to proceed with the action.”⁷⁹ “So,” the court concluded, “for the purpose of CAFA, the action was not ‘commenced’ until February 28, 2005.”⁸⁰

What the *Eufaula* court failed to explain is why a standard established for deciding whether limitations will bar a claim has relevance to the determination of what the Congress meant by “commenced” in section 9 of the new class action statute. Maybe the plaintiff’s claims against the defendant would be barred by limitations if the plaintiff failed to act with bona fide intent to have the suit immediately served (that is, assuming the suit was filed just on the cusp of limitations running). But the existence of a common law rule (or statutory provision) relevant to the determination of whether a suit is timely filed for purposes of the statute of limitations does not mean that the suit was not commenced when it was initially filed, as the general Alabama Rule of Civil Procedure plainly provided.⁸¹

As we will see in Part III, courts have followed similar faulty reasoning when a post-enactment amendment has been sought in deciding the commencement question under section 9 of the CAFA. A court rigorous in its approach — attending to the three canons of construction I suggest — may better keep straight the proper inquiry about which it is engaged. The court is less likely to be distracted by whether, under state law, a suit should be thrown out as a result of the failure to timely serve process; whether a particular claim should be dismissed for being brought outside of the period of limitations; whether an action should be abated in favor of an earlier, related suit;

⁷⁷ *Eufaula*, 2005 WL 3440635, at *3 (citing *Ward v. Saben Appliance Co.*, 391 So. 2d 1030, 1035 (Ala. 1980)).

⁷⁸ *Id.* at *4.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ ALA. R. CIV. P. 3(a).

or any number of other questions with which state law may be concerned.

III. APPLYING THE THREE CANONS OF CONSTRUCTION TO THE THORNIEST COMMENCEMENT CASES: POST-ENACTMENT AMENDMENTS

Beyond the removal-as-commencement line of argument and the cases that address the contention that commencement is pegged to completion of service of process, the remaining CAFA cases dealing with commencement problems have addressed the effect an amendment adding a new claim or party has when sought after the CAFA's effective date. In broad view, the question raised by these cases is whether the filing of a new claim triggers commencement of a new action that is now within the statute's reach. I will discuss how the courts approached these cases and why the alternative approach I suggest is a preferable treatment of the problem.

Following *Pritchett*, the Seventh Circuit's decision in *Knudsen v. Liberty Mutual Insurance Co.*⁸² was the next appellate court decision to interpret the CAFA. The decision marked the first in a line of several other Seventh Circuit panel decisions that consistently rejected attempts to have the new statute apply to a previously filed state action.⁸³ Like the defendant in *Pritchett*, Liberty Mutual argued that the state case, which had been brought before February 18, 2005, was commenced after CAFA's effective date. The twist in *Knudsen* was the

⁸² 411 F.3d 805 (7th Cir. 2005). After remand, the defendant removed again and on the second go round the Seventh Circuit upheld jurisdiction. *Knudsen v. Liberty Mut. Ins. Co.*, 435 F.3d. 755 (7th Cir. 2006).

⁸³ See *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 750-51 (7th Cir. 2005) (discussing when plaintiff amended suit to add new claim that would expand class definition, defendant removed, arguing new case commenced, but appellate court disagreed, noting: “This is still just one suit, between the original litigants. Litigants and judges regularly modify class definitions We can imagine amendments that kick off wholly distinct claims, but the workaday changes routine in class suits do not.”). Similarly, in another case, the plaintiffs filed a post-CAFA amendment seeking certification of a national class (previously a statewide class). The amended complaint (mistakenly) rejoined a previously dismissed defendant and the appellate panel affirmed the district court's remand order. The appellate panel found that as to the rejoined defendant, it “was never really brought back into the case” but was only “a scrivener's error” on plaintiffs' part that could be corrected by subsequent amendment. *Schillinger v. Union Pac. R.R.*, 425 F.3d 330, 333 (7th Cir. 2005). As for nationwide certification, the court recognized that the expanded class would have been far more onerous to defend against, but, following *Knudsen* and *Schorsch*, concluded that “the potential for a larger amount of legal research and discovery in and of itself is not a significant enough step to create new litigation.” *Id.* at 334. See also *Phillips v. Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2006); discussion *infra* notes 109-13.

defendant's argument that a case can come within the new statute if the plaintiff makes any "substantial" or "significant" amendment after the CAFA's effective date. In *Knudsen*, the change sought by plaintiffs was in the class definition.

Liberty Mutual found some support for its argument in a couple of related contexts. During the pendency of any litigation, representative or otherwise, claims are often amended, parties may be added, and other changes in the shape of the pleadings and structure of the litigation occur. When a new cause of action is asserted or a new defendant added, the removal statutes recognize that the right to remove the case to the federal forum may then be triggered, even though the case as initially filed was not within the original jurisdiction of the district court.⁸⁴ This rule, indeed, was the point previously made in the discussion of the time-of-filing and time-of-removal principles that courts, like the *Hunt* court, have misconstrued as relevant to the interpretation of a statutory commencement problem. The *Hunt* court's mistake, as we saw earlier, was in forgetting that the principle is meant to fix a moment in time for measuring the existence of subject matter jurisdiction and does not bear on the interpretation of the words chosen by Congress for marking the boundaries of a new law's reach.⁸⁵

The *Knudsen* court rebuffed Liberty Mutual's argument: "The doctrine of significant change," as Judge Frank Easterbrook somewhat derisively called the defendant's argument, was an unworkable, imprecise standard because it could be raised anytime a plaintiff amended earlier pleadings.⁸⁶ Judge Easterbrook continued:

Now as a matter of normal language (and normal legal practice) a new development in a pending suit no more commences a new suit than does its removal. Plaintiffs routinely amend their complaints, and proposed class definitions, without any suggestion that they have restarted the suit — for a restart (like a genuinely new claim) would enable the defendant to assert the statute of limitations. Liberty Mutual concedes that routine changes do not allow removal but insists that a "substantial" or "significant" change must do so. Yet significance is not the measure of a new claim; a plaintiff may assert an entirely novel legal theory in

⁸⁴ See 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3732, 311-48 (3d ed. 1998).

⁸⁵ See *supra* text accompanying notes 30-34.

⁸⁶ *Knudsen*, 411 F.3d at 806.

midsuit without creating a “new” claim in the sense that the defendant could block it by asserting that it had been propounded after the period of limitations expired. Moreover, “significance” often lies in the eye of the beholder; it is not a rule of law so much as it is a cast of mind or an assessment of likely consequences, which may be difficult if not impossible to foresee. A doctrine of “significant change” thus would go against the principle that the first virtue of any jurisdictional rule is clarity and ease of implementation.⁸⁷

As it turns out, the addition of post-enactment claims or parties was actually moot in *Knudsen* because the court observed that plaintiffs were not asserting new claims or adding new defendants. The plaintiffs only sought a revision in the class definition (to make more specific reference to the actual company from which the plaintiffs’ policies were issued). Short of either an attempt to add a new claim or defendant, the panel rejected the defendant’s attempt to find that the amendments in *Knudsen* commenced a new action for purposes of the CAFA.

Despite his misgivings, Judge Easterbrook did not shut the door entirely on post-enactment amendments. Given the specific factual posture in *Knudsen*, it appeared that the plaintiffs may well have sued the wrong defendant; that is, the plaintiff had named a related corporate entity when the actual policies owned by plaintiffs were issued by an affiliate. Absent an assertion that the two corporations should be treated as one and the same — an alter ego type argument — then the plaintiffs were probably going to have to amend their pleading to add the right defendant. If and when they did, Judge Easterbrook strongly suggested that the joinder of the newly named defendant would likely permit removal under the CAFA because the new defendant would not have been named until after the legislation went into effect.⁸⁸

⁸⁷ *Id.*

⁸⁸ *Id.* at 807 (“[T]he addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes. Removal practice recognizes this point: an amendment to the pleadings that adds a claim under federal law (where only state claims had been framed before), or adds a new defendant, opens a new window of removal” (citing, *inter alia*, 28 U.S.C. § 1446(b))). Indeed, it was precisely the joinder post-enactment of a new defendant in *Adams v. Federal Materials Co.*, No. Civ. A. 5:05CV-90-R, 2005 WL 1862378, at *4 (W.D. Ky. July 28, 2005), that led the court to conclude, citing *Knudsen*, that the action as to that defendant was now commenced after February 18,

In this connection, Judge Easterbrook referenced Rule 15(c) of the Federal Rules of Civil Procedure. Rule 15(c) is the magic provision of the federal rules that allows an otherwise stale claim to relate back to a time before the expiration of limitations and, thus, to revive the claim. In *Knudsen*, Judge Easterbrook mused (in dicta only, because the court had previously found that the change in class definition did not amount to a new claim to which Rule 15(c)'s relation back rule might apply) that the analysis under this relation back rule may apply in deciding whether the CAFA applies to a case where there has been a new claim or new party added.⁸⁹

What Judge Easterbrook probably meant by referencing the federal relation back rule was that the courts may find it useful to apply relation back law by analogy, as a way of approaching the question of whether a new claim or addition of a new party after a statute's enactment is sufficiently distinct from the original filing so as to constitute the commencement of a new action for statutory purposes.⁹⁰ What he actually said was that:

We imagine, though we need not hold, that a similar approach will apply under the 2005 Act, perhaps modeled on Fed. R. Civ. P. 15(c), which specifies when a claim relates back to the original complaint (and hence is treated as part of the original suit) and when it is sufficiently independent of the original contentions that it must be treated as fresh litigation.⁹¹

But because there was no amendment adding a new claim or new party in *Knudsen*, the language was not explored further. The Seventh Circuit would revisit the reference in dicta to Rule 15 in later cases. In

and thus within the CAFA's reach. *See id.* at *2 (noting that "Plaintiffs' decision to add Rogers Group as a defendant presents precisely the situation in which it can and should be said that a new action has 'commenced' for purposes of removal pursuant to the CAFA"). This decision is clearly correct and has since been followed by the Fifth Circuit in *Braud v. Transport Service Co.*, 445 F.3d 801, 806 (5th Cir. 2006). As to any defendant brought into the suit after February 18, 2005, the claims against him have been commenced after the effective date of the new statute. *See infra* text accompanying notes 100-01.

⁸⁹ *Knudsen*, 411 F.3d at 807-08.

⁹⁰ *Cf.*, e.g., *Werner v. KPMG, L.L.P.*, 415 F. Supp. 2d 688, 701 (S.D. Tex. 2006) ("When a pending suit is amended in state court to add a new claim, courts look to relation-back rules as a way of analyzing whether the amendment so changes the action as to commence a new action rather than merely continue the previously-filed suit.")

⁹¹ *Knudsen*, 411 F.3d at 807.

the meantime, however, this passing reference has caused all kinds of mischief.

Since *Knudsen*, nearly every court to consider this question has assumed, following Judge Easterbrook’s suggestion, that relation back rules should be used in deciding whether a post-CAFA amendment triggers application of the statute. Perhaps most remarkably, his decision has spawned many different kinds of analysis in applying relation back rules. Some courts have relied on Rule 15(c) in rejecting the argument that a post-CAFA amendment commenced a case that is now removable under the new statute.⁹² Other courts have relied on Rule 15(c) in accepting the argument that a post-CAFA amendment commenced a case that is now removable under the new statute.⁹³ Still other courts have agreed that the relation back rule for amendments is relevant for determining when a case is commenced for CAFA purposes, but thought state relation back law, not federal law, should be applied.⁹⁴ Finally, a few courts have concluded —

⁹² See, e.g., *Miller v. Hypoguard USA, Inc.*, No. 05-CV-0186, 2006 WL 1285343, (S.D. Ill. May 8, 2006) (rejecting defendant’s argument for CAFA applicability under both federal and Illinois relation back law); *Brown v. Kerkhoff*, No. 4:05 CV 00274 JEG, 2005 WL 2671529 (S.D. Iowa Oct. 19, 2005) (rejecting argument that post-CAFA amendment commenced case after February 18, 2005, as well as several other arguments advanced); *Phillips v. Ford Motor Co.*, No. 05-CV-503-DRH, 2005 WL 2654247 (S.D. Ill. Oct. 17, 2005), *aff’d*, 435 F.3d 785 (7th Cir. 2006); *Eufaula Drugs, Inc. v. Scripsolutions*, No. 2:05CV370-A, 2005 WL 2465746 (M.D. Ala. Oct. 6, 2005) (rejecting argument that CAFA applied following filing of amended lawsuit where only differences between two complaints was substitution of misspelling of defendant’s name and correction of defendant’s address for service); *Siew Hian Lee v. CitiMortgage, Inc.*, No. 4:05CV1216JCH, 2005 WL 2456955, at *2 (E.D. Mo. Oct. 5, 2005) (relying on analysis under FED. R. CIV. P. 15(c) in rejecting argument that amendment commenced case to bring it within statute’s reach); *Judy v. Pfizer, Inc.*, No. 4:05CV1208RWS, 2005 WL 2240088 (E.D. Mo. Sept. 14, 2005) (accord); *New Century Health Quality Alliance, Inc. v. Blue Cross*, No. 05-0555-CVWSOW, 2005 WL 2219827 (W.D. Mo. Sept. 13, 2005) (accord).

⁹³ See, e.g., *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310, 1313-16 (E.D. Okla. 2005) (relying on analysis under FED. R. CIV. P. 15(c) in accepting argument that amendment commenced new case to bring it within statute’s reach); *Senterfitt v. SunTrust Mortgage, Inc.*, 385 F. Supp. 2d 1377, 1380-83 (S.D. Ga. 2005) (accord).

⁹⁴ See, e.g., *Phillips v. Ford Motor Co.*, 435 F.3d 785 (7th Cir. 2006) (applying Illinois relation back, which tracks language of federal relation back, to reject defendant’s argument that addition of new plaintiffs commenced action for purposes of CAFA); *Plubell v. Merck & Co.*, 434 F.3d 1070, 1071 (8th Cir. 2006) (applying Missouri relation back, which tracks language of federal relation back, to hold that amended pleading that substitutes new class representative relates back to original filing); *Prime Care of Ne. Kan., L.L.C. v. Humana Ins. Co.*, 447 F.3d 1284 (10th Cir. 2006) (stating that forum state’s relation back law governs whether amendment is distinct enough to give rise to new commencement date); *Schorsch v. Hewlett-*

correctly, in my view — that reliance on any relation back rule is misplaced.⁹⁵ Regrettably, one of the unifying characteristics of the

Packard Co., 417 F.3d 748 (7th Cir. 2005) (stating that although court had previously applied FED. R. CIV. P. 15(c) in *Knudsen* to illustrate “the difference between claims that relate back and those that do not,” state law must be applied to “supply the rule of decision”); *Weber v. Mobil Oil Corp.*, No. 5:05-CV-01175, 2006 WL 2045875 (W.D. Okla. July 20, 2006) (stating that determination of whether plaintiff’s amended petition related back should be applied under Oklahoma law, which tracks federal law); *Tiffany v. Hometown Buffets, Inc.*, No. C 06-2524 SBA, 2006 WL 1749557 (N.D. Cal. June 22, 2006) (analyzing “prevailing view” under prior case law as to whether state of federal relation back should be applied, and holding that state relation back should be applied); *Santamarina v. Sears, Roebuck & Co.*, No. MDL-1703, 2006 WL 1517779 (N.D. Ill. May 24, 2006) (applying state relation back law to reject defendant’s claim that routine change to class definition and addition of two plaintiffs recommenced action for CAFA purposes); *Schillinger v. 360Networks USA, Inc.*, No. 06-138-GPM, 2006 WL 1388876 (S.D. Ill. May 18, 2006) (stating that “the weight of authority appears to apply the law of the state where a class action was filed in determining whether an amendment relates back”); *Werner*, 415 F. Supp. 2d at 688 (applying Texas relation back law along with other procedural and civil law provisions to reject third-party intervenors’ claim that plaintiff’s amendments to assert direct claims against them recommenced suit for CAFA purposes); *Cima v. Wellpoint Healthcare Networks, Inc.*, No. 05-CV-4127-JPG, 2006 WL 1914107 (S.D. Ill. Feb. 3, 2006) (stating that Illinois’s three-prong relation back rule was “a suitable mechanism for resolving the dispute before it”); *Whitehead v. Nautilus Group, Inc.*, 428 F. Supp. 2d 923 (W.D. Ark. 2006) (applying Arkansas’ Rule 15(c) to find that plaintiff’s amended complaint related back to original date of filing); *Morgan v. Am. Int’l Group, Inc.*, No. C-05-2798 MMC, 2005 WL 2172001, at *2 (N.D. Cal. Sept. 8, 2005) (relying on state relation back rule in rejecting argument that post-filing amendment adding new party commenced new action to bring case within statute’s reach); *see also* *Briggs v. Geico Gen. Ins. Co.*, No. 06-CV-00550, 2006 WL 1897210, at *2 (D. Colo. July 10, 2006) (applying Colorado’s Rule 15(c) relation back rule to reject defendant’s argument that when their case was severed from prior case, date of severance was date of commencement for CAFA purposes; writing that “the anticipated complaint in [the newly severed case] is essentially an amended complaint which was necessary to implement the state court’s severance order” and that Briggs’s claims should relate back to initial assertion of those claims in original pre-severance action). Some courts have also found that the question of federal versus state relation back is uncertain but nevertheless applied the state rule. *Braud*, 445 F.3d at 807-08; *Moniz v. Bayer*, No. 06-10259-NMG, 2006 WL 2356008, at *3-4 (D. Mass. Aug. 14, 2006).

⁹⁵ *See, e.g.,* *Weekley v. Guidant Corp.*, 392 F. Supp. 2d 1066, 1069 (E.D. Ark. 2005) (rejecting argument that post-CAFA amendment commenced case to bring it within statute’s reach and similarly rejecting suggestion that FED. R. CIV. P. 15(c) (or any state relation back rule) has any relevance to inquiry, describing sole question as matter of statutory construction); *Smith v. Collingsworth*, No. 4:05CV01382-WRW, 2005 WL 3533133, at *5 (E.D. Ark. Dec. 21, 2005) (stating, in accord with *Weekley*, that “in view of the simple directive in section 9 of CAFA, whether an amended complaint relates back is irrelevant”); *Comes v. Microsoft*, 403 F. Supp. 2d 897, 903 (S.D. Iowa 2005) (observing that “[i]f Congress had intended the CAFA to apply to currently pending cases that were amended after the enactment of the CAFA, it could have explicitly done so”). Both *Weekley* and *Collingsworth* are called into question,

cases that apply relation back law is that they often do so reflexively and without any real awareness that the commencement problem posed by the CAFA cannot be answered strictly by reference to Rule 15 (or the comparable state rule).

To be precise, there are two fundamental difficulties with the suggestion initially advanced in *Knudsen* that Rule 15(c) — a rule that governs the revival of late-filed claims for limitations purposes — also has relevance in the context of applying the CAFA. First, Judge Easterbrook fails to explain why, if relation back law has any relevance, the proper rule to consider is Rule 15 and not state relation back rules. As noted earlier, the court’s responsibility is to ascertain whether Congress intended the term “commenced” to be given content by the application of state law or federal law. Although it may sometimes be a close question in other circumstances, with the CAFA I have argued above that the best reading of legislative intent is that Congress expected federal courts to look to state law to determine when a suit has been commenced for purposes of section 9.⁹⁶ In a later case, Judge Easterbrook conceded the misstep of referencing the federal rule, but he also continued to insist that relation back law has relevance to the determination of whether a post-CAFA amendment could serve as a commencement trigger under section 9.⁹⁷

The second and more problematic difficulty with Judge Easterbrook’s assumption that relation back rules have relevance to the commencement question is that it is untethered to any consideration of the statutory language in the CAFA. Congress did not provide that the statute would apply to cases pending before February 18, 2005 if a post-enactment amendment does not relate back to the original date of filing. Notably, in this connection, section 9 is silent on the question of amended complaints and relation back rules, in a separate statutory section governing the date on which citizenship of the parties is to be determined, reference is made to the effect of filing of an amended complaint.⁹⁸

however, by the Eighth Circuit’s subsequent decision in *Plubell*, 434 F.3d at 1074.

⁹⁶ See *supra* text accompanying notes 59-66.

⁹⁷ *Schorsch*, 417 F.3d at 750; see also *Phillips*, 435 F.3d at 787 (observing that “[s]ince the question for decision . . . is whether adding named plaintiffs commences a new suit *in state court*, the answer should depend on state procedural law”).

⁹⁸ See 28 U.S.C. § 1332(d)(7) (2005) (“Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion or other paper, indicating the existence of Federal jurisdiction.”).

Even if we accept that congressional silence is not a sufficient answer to the problem because Congress may have intended the federal courts to fill in gaps in the statute with existing law, there is another and more fatal problem with reliance on Rule 15 or its state equivalent. Rote recitation of relation back law as relevant to the commencement question fails to recognize that most of the time the inquiry into the relation back of amendments asks the wrong question. Generally, relation back rules are directed at deciding whether a claim, otherwise stale under the governing limitations law, may nevertheless be maintained. But in applying section 9 of the CAFA, we want to know what Congress meant by saying the Act would apply to cases commenced after February 18, 2005; in answering *this* question, we do not care whether the claim is timely. To say it is timely (either because it was brought before limitations ran or because relation back law made it timely) is simply and only to say that it may be heard. It is not to say anything about when the suit was commenced.

It may be suggested that this characterization of relation back law is too dismissive, that relation back law generally is designed to deal with the problem of when changes in a lawsuit commence a new lawsuit. Certainly good historical evidence to this effect exists, at least regarding Rule 15 of the Federal Rules of Civil Procedure.⁹⁹ On this account, it may be perfectly reasonable to use relation back law in answering whether a post-CAFA amendment “commences” a new lawsuit as that term was used by Congress in section 9 of the Act.

There are two responses to this line of argument. First, the bare assertion that it may be reasonable to use relation back law to answer when a new suit is commenced by post amendment changes in a lawsuit seems to confuse what may be wise with what Congress intended. More to the substantive issue, while the historical evidence and traditional use of relation back law may support more generous interpretations of Rule 15(c) than most courts today typically give it, they do not explain why such an argument would justify resort to relation back rules to measure “commenced” when used (as it is in the CAFA) as a statutory applicability trigger. The turn to relation back law ignores that even in defining when changes in a lawsuit

⁹⁹ See ROBERT W. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 185 (1952) (noting that “[t]he principal object [of Rule 15(c)(2)] . . . is to obviate the harsh and scholastic doctrine, which in case of an amendment after the statute of limitations had run on the claim, treated deviation from the original statement in almost any material particular as the averment either of a new cause of action or of a cause of action for the first time, and thus as bringing the claim with the bar of the statute”).

commence a new suit, the relation back rules are — and always have been, even on Millar’s description — only directed at deciding time limitation bars.

None of this is to exclude the possibility that a particular relation back rule could bear on the commencement problem in section 9, and we will see an example of such a rule, discussed below. But if a state law rule — whether relation back or some other rule — is going to be used, it is necessary to consider the purposes for which the rule defines “commencement” so as to be certain that the rule is capable of being applied consistently with the purposes Congress generally had in mind with section 9. With this perspective, the application of relation back law will usually be misguided. In this regard, we may consider three of the most common circumstances in which post-enactment amendment problems can arise.

A. Amendments Adding New Claims by Existing Parties

When a court is faced with new claims sought to be included by a plaintiff who has already filed suit before the effective date of the new legislation, relation back law has no place in the analysis. It is appropriate to look to state law to determine whether (and when) it fixes the date of commencement for suits filed in state court when the federal statute does not instruct differently (the first and second rules, outlined above). Yet reflexive consideration of relation back rules — state or federal — confuses the inquiry with which the court must be involved in interpreting section 9 of the CAFA: namely, what did Congress mean when it referred to cases “commenced” on or after the effective date of the statute? In answering this question, we care not a whit about whether the claim is timely. Moreover, Congress could have explicitly made the new statute applicable to any case filed after enactment as well as to any case previously pending in which a post-enactment amendment adding a new claim or party was sought. But it did not. Indeed, as we have seen, it even saw fit to address in another section of the CAFA the effect of pleading amendments. And according to accepted conventions of statutory interpretation, we should not presume Congress meant what it had an opportunity to say but did not.¹⁰⁰ Under the law of most states, a case is commenced

¹⁰⁰ See *supra* text accompanying notes 59-60. Thus, I would similarly dissent from the Seventh Circuit’s most recent decision in *Knudsen v. Liberty Mutual Insurance Co.* (*Knudsen II*), 435 F.3d. 755, 758 (7th Cir. 2006), where the court found that “a novel claim tacked on to an existing case commences new litigation for purposes of the Class Action Fairness Act” and that the addition of post-February 18, 2005 claims by

when it is filed. The attempt to add new claims to that previously filed suit (whether such claims are ultimately proven timely or not) does not alter the statutory commencement analysis.

B. Amendments Seeking to Assert Claims Against New Defendants

If we follow the three rules of construction and are cognizant of the difference between rules that fix commencement of a suit and those that are directed to different purposes, like relation back rules used to measure timeliness, the proper treatment of this second amendment circumstance is clear. If a plaintiff seeks to amend the suit to assert claims against a new defendant, a new suit plainly has been commenced as to *this* defendant.¹⁰¹ This situation is one of the possibilities to which the court in *Knudsen* made reference and was the actual set of circumstances before the court in *Adams v. Federal Materials, Co., Inc.* The conclusion that a new suit has been commenced as to the newly named defendant is further borne out by existing removal law.¹⁰² The conclusion that a new suit has been commenced in this circumstance has nothing to do with relation back rules, however, and it is nonsensical even to talk in those terms. What difference does it make to the application of the new statute that the defendant was on notice that she could have been, but was not previously, sued? Why should it matter for purposes of applying a statutory applicability provision like section 9 of the CAFA that the plaintiff's failure to initially join the defendant was or was not the result of a mistake? The point is that we do not need relation back law to tell us that a new action has been commenced against this defendant, and it will usually be unhelpful to bring relation back law to bear on the question.

C. Amendments Seeking to Join Additional Plaintiffs

This last category of amendment is a bit more challenging, though even here with some additional effort we can expose reliance on

the plaintiffs against Liberty Mutual in this suit were sufficiently "novel" to commence a new action.

¹⁰¹ Cf. *Adams v. Fed. Materials Co.*, No. 5:05CV-90-R, 2005 WL 1862378 (W.D. Ky. July 28, 2005); discussion *supra* note 88.

¹⁰² See 28 U.S.C. § 1446(b) (2006) ("If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . .").

relation back rules as misguided. First, it is necessary to distinguish between two contexts: direct and representational litigation. In traditional, direct litigation, the assertion of claims by a plaintiff who previously was not a party to the case as clearly constitutes the institution of a case commenced by that plaintiff at that moment as does the institution of claims by an existing plaintiff against a new defendant. As to the newly joined plaintiff, there were no prior claims; thus, any claims brought by her after the date a new statute goes into effect would be governed by the new law.

But representational litigation, such as claims asserted in the class action context, is different. Although claims are only asserted in the name of the plaintiff who brings the suit, the nature of representational litigation is such that the named plaintiff is purporting to speak on behalf of someone else.¹⁰³ They may not be the ones in whose name the suit is litigated, but the rights of the absent class members are being adjudicated (at least for so long as the named plaintiff is treated as an adequate representative or the absent class members choose to allow him to do so). This relationship is precisely why the Seventh Circuit in *Schorsch v. Hewlett-Packard Co.*¹⁰⁴ was justified in rejecting the argument that an amendment seeking to broaden the size of the plaintiff class did not constitute commencement of a new case within the meaning of the CAFA.¹⁰⁵

It follows from this discussion of the nature of representational litigation that if an absent class member ever decided to go from being an unnamed member of the group to asserting claims in her own name on behalf of the others (an event that happens not infrequently in class litigation), then an amendment substituting this person as a new named plaintiff in the suit should not be treated as having “commenced” a new case within the meaning of section 9. Instead, we should treat the claims that the absent class member-turned named plaintiff is now asserting in her own name as commenced when they

¹⁰³ See *Hansberry v. Lee*, 311 U.S. 32, 41-42, 43-44 (1940) (“In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree. . . . [M]embers of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties . . .”).

¹⁰⁴ 417 F.3d 748 (7th Cir. 2005).

¹⁰⁵ *Id.* at 750 (noting that “[c]lass members are represented vicariously but are not litigants themselves”).

were first brought vicariously on her behalf by the original named plaintiff.¹⁰⁶

I have said that relation back law is concerned only with the timeliness of a claim and, thus, is not directly relevant to deciding when a suit is commenced under section 9. You will note that this argument does not exclude the possibility that a particular state relation back rule may be indirectly relevant to the statutory analysis. In this connection, it is worth considering Judge Richard Posner's recent decision in *Phillips v. Ford Motor Co.*¹⁰⁷

In *Phillips*, the court specifically addressed the question whether the substitution of previously absent class members for the original named plaintiffs commenced a new suit under section 9. In *Phillips*, Judge Posner described relation back law as “particularly important” in the case.¹⁰⁸ But if we follow his opinion closely, we actually see it was not relation back law that did the work necessary for the court to reach its decision that the CAFA was inapplicable. In the bargain, we may also observe — despite the ability of a few careful souls to recognize the limited utility of relation back law¹⁰⁹ — how a focus on relation back rules is more likely to confound the relevant inquiry with which the court should be engaged in analyzing the commencement problem.

In *Phillips*, plaintiffs brought an action in state court before the CAFA went into effect seeking certification of a class of owners of certain Ford cars made from 1989 to 1995. The state judge then certified two classes of past and present owners and lessees of model years 1989-1996 Ford vehicles. Thereafter, plaintiffs amended to add two new class members, who bought 1996 model year cars, to conform to the state court's certification order and to deal with a potential limitations problem that the previous plaintiffs may have faced. Defendant removed the suit to federal court following the addition of the newly named plaintiffs. The district court held, following *Knudsen*, that neither the amendment to the class definition nor the naming of the two additional plaintiffs commenced a new action for purposes of the CAFA.

Writing for the appellate panel, Judge Posner affirmed that the substitution of new plaintiffs for those previously named did not

¹⁰⁶ Cf. *Weber v. Mobil Oil Corp.*, No. 5:05-CV-01175, 2006 WL 2045875, at *3 (W.D. Okla. July 20, 2006) (likening intervention to addition of absent class members as named plaintiffs).

¹⁰⁷ 435 F.3d 785 (7th Cir. 2006).

¹⁰⁸ *Id.* at 788.

¹⁰⁹ See *supra* note 90.

commence a new suit for purposes of the CAFA.¹¹⁰ He first and perceptively emphasized that in the precise circumstance before the court the initial action had not been dismissed and that no new case had been initiated by the absent class members now turned named plaintiffs.¹¹¹ Why were the absent class members able to step into the shoes of the original named plaintiffs instead of having to start over? The explanation, as Judge Posner noted, is that in class litigation in Illinois, absent class members can be substituted for the original named plaintiffs without having to file a new suit.¹¹² The state law permitting substitution, typically used to avoid having to dismiss the suit as moot when the named plaintiff no longer serves as an adequate representative of the class,¹¹³ is simply an embodiment of the nature of representational litigation. The named class representative is asserting a claim not only on her own behalf but also on behalf of all of the unnamed class members, as well.

Recognition, then, that the claims of the absent class members had been previously commenced by the filing of the original class action suit should have been sufficient, by itself, to explain why the amendment that substituted the two named plaintiffs in *Phillips* did not commence a new case within the meaning of section 9. But instead of stopping at this recognition and account of class litigation, Judge Posner continued by likening the state substitution rule to relation back law and emphasizing that it was of “particular importance” to the ability of absent class members to substitute in for the original named plaintiffs.¹¹⁴ Why was it so important? In the next portion of *Phillips*, we see the move from a proper focus on fixing the moment of commencement to an erroneous consideration of whether the claims sought to be added by amendment are time barred. Judge Posner continued, describing the import of the state’s substitution rule:

Illinois in effect allows named plaintiffs to be substituted with relation back (“in effect” because the formal rule is that the filing of a class action tolls the statute of limitations for class members, so that they can if necessary be substituted for the

¹¹⁰ *Phillips*, 435 F.3d at 788.

¹¹¹ *Id.* at 787.

¹¹² *Id.* at 788.

¹¹³ *Id.* at 787 (collecting and citing authorities).

¹¹⁴ *Id.* at 788.

named plaintiffs, without being barred by reason of the passage of time since the suit was filed)¹¹⁵

When I say that it was erroneous to look to the state substitution rule, I do not mean to suggest that the timeliness of the claims will have no relevance at some other point in the litigation, of course. For the absent class member who would otherwise be forever barred from recovery, the rule makes all the difference in the world. But, and this point is key, what Judge Posner's discussion of the state substitution rule reveals is that *Phillips* conflates the question of whether the claims of the newly named plaintiffs were timely — an immensely important question, to be sure, to the parties — with the statutory commencement inquiry with which the court should have been exclusively focused at this stage in the litigation.

Consider what would have happened if the claims of the new named plaintiffs would not have been untimely even in the absence of a state preservation rule for absent class members. In other words, what if resort to the state class action substitution rule was unnecessary because their claims would not otherwise have been time barred? In this circumstance, the absent class members would not need their claims to relate back; they could bring their own, independent action. Does this mean that if the state court allows them to substitute into the pending case as newly named plaintiffs instead of having to file a new suit we should nevertheless treat the proceeding as having been commenced at the point the amendment was granted for purposes of the CAFA?

If you try to answer by reference to whether their claim was timely by virtue of the state's substitution rule, you will be endlessly lost and needlessly mired in the legal verisimilitude of approximations. This point is where the mischief of turning to relation back law is most pronounced. We soon end up in an Alice in Wonderland world of misdirected inquiries, such as trying to apply the standards in Rule 15(c) or its state equivalent to the statutory commencement inquiry. Did the defendant have notice of the amended claim such that it will not be unduly prejudiced? Was the initial failure to join a party now named as a defendant the result of a mistake?¹¹⁶ What kind of notice

¹¹⁵ *Id.*

¹¹⁶ *See, e.g.,* *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310, 1315-16 (E.D. Okla. 2005) (analyzing whether amended claim related back to earlier filing for purposes of determining reach of CAFA and observing, inter alia, that court must apply "a four-factor inquiry to determine whether the Rule 15(c) requirements of fair notice and lack of prejudice have been met" and separately discussing (though ultimately dismissing) question of whether plaintiffs' failure to join defendant was

are we even talking about and what relevance does the kind of notice have to whether Congress intended the new law to apply to the suit? And what of *mistake*? Only a lawyer suffused for too long with the minutiae of the law would instinctively assume that in interpreting the word “commenced” in section 9 the appropriate enterprise is to decide whether an amendment to a pleading relates back to the original date of filing for limitations purposes.

CONCLUSION

In the initial years after the CAFA’s passage, courts have been wrestling with an issue that can and often does recur whenever Congress enacts new legislation: how to discern when a case is “commenced” when the term is used to trigger statutory applicability. Reflecting back on these decisions, we may observe that the CAFA courts have fared no better than most of their predecessors in analyzing the relevant issues in a statutory commencement inquiry. Most have not given rigorous attention to the question and, by consequence, have either followed earlier reported decisions that do not stand up to scrutiny or simply have produced poorly reasoned opinions.

In this article, I have suggested that interpreting the meaning of “commenced,” when used as a statutory application trigger, raises the same difficulties that arise whenever we are tasked with fixing meaning to words. The great danger, as always, is forgetting the admonition that “the definition useful for one type of situation can not be used without further consideration if the same ‘word,’ i.e., the same combination of sound waves or ink marks, is to be used in connection with a different type of problem.”¹¹⁷ In avoiding this pitfall with statutory commencement problems, judges need to keep in mind three essential canons of construction.

Where the statutory text is otherwise silent, the first canon of construction is to determine whether Congress intended a statutory triggering term, such as “commenced” in section 9 of the CAFA, to be defined by state or federal law. In many instances, this first step is difficult. As regards the CAFA, I have argued that the best reading is that Congress intended federal courts to follow the traditional approach of borrowing state law in ascertaining when a case has been commenced.

result of mistake).

¹¹⁷ COOK, *supra* note 1, at 183-84.

Assuming state law governs the definition of when a state suit is commenced, the second canon is to determine whether a state rule fixes the time at which an action is commenced and, if so, what that relevant date is. In this connection, we should also be careful not to confuse fundamental principles of federal subject matter jurisdiction analysis with a statutory directive that fixes the moment of commencement. Properly understood, the time-of-removal principle on which courts like *Lorraine* and *Hunt* placed great weight bore no relevance to their common interpretive task. If the only source of the court's jurisdiction is derived from a statute not otherwise applicable to the case because Congress did not intend it to apply, then there is no grant of original jurisdiction at all on which the case can proceed in federal court and, thus, no basis for its removal from state court.

Finally, the third canon is to distinguish between state rules that fix the date of commencement with those that set requirements for maintaining the action or that have some other and even more specific purpose in mind. Dubious results follow when courts fail to distinguish between state statutes that fix the date of a suit's commencement with those that impose requirements for instituting and maintaining the action or tie specific acts to particular objectives.

Nearly all courts faced with post-enactment amendments adding new claims or parties have applied some version of relation back law to determine whether the amendment relates back to the original filing. They may or may not reach the right result. But in turning to relation back law and applying rules and concepts suitable to a different problem, the reasoning is skewed because the decision does not attend to the policies underlying the statute. We do not need relation back law to tell us when a state case has been "commenced" within the meaning of the CAFA, and it usually misguides the inquiry.

When the text of a law passed by Congress does not instruct differently, reflexive consideration of service of process requirements imposed for other purposes, or of relation back rules used for measuring the timeliness of an otherwise stale claim, confuses the inquiry before the court. The consequence is that courts end up defining the scope of statutes without regard to the policies that animated their passage. To honor legislative intent and the judicial responsibility to discern it when the text is unclear, it is necessary to recollect that the question — the only relevant question — is to determine what Congress meant by the triggering words it chose. A court that follows these three canons of construction is more likely to better keep straight the proper inquiry about which it should be engaged.

Statutory commencement battles have high stakes, as the intensity and fevered pitch of the arguments over the application of the CAFA vividly illustrate. Judicial infidelity to statutory text can truncate or expand ab initio the reach of regulatory measures. Whatever solace we take in knowing that misinterpretations in applying a commencement trigger in particular instances are necessarily and temporally finite, that knowledge provides little comfort to those immediately affected. It also is a rather myopic view of the whole landscape. Nearly a half century after *Lorraine* and countless debates over statutory commencement, we may perhaps be disabused of the notion that our law develops in isolation. Accretion seems more apt a description, and though direct appellate review may wipe away much unwanted accumulation, it is plain to see that some remains. The challenge is knowing what to scrape away.