

No. \_\_\_\_\_

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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Dr. KIRSTEN KNUDSEN, D.C.,	)	
	)	
Plaintiff-Respondent	)	
	)	Appeal from the United States
and	)	District Court for the Northern
	)	District of Illinois
CHRIS BAKER and VIKKI BAKER	)	
	)	No. 05-CV-05924
Plaintiffs/Intervenors-Respondents	)	
	)	Judge Ruben Castillo
v.	)	
	)	
LIBERTY MUTUAL INSURANCE	)	
COMPANY,	)	
	)	
Defendant-Petitioner.	)	

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**LIBERTY MUTUAL INSURANCE COMPANY'S  
PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1453(c)**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and 7th Cir. R. 26.1, the following is a complete list of (i) all of Petitioner's parent corporations, (ii) any publicly-held companies that own ten percent or more of the stock of Petitioner, and (iii) the names of all law firms whose partners or associates who (A) have appeared for Petitioner in this case in the state court or in the federal district court or (B) are expected to appear for Petitioner in this Court:

Belgrade & O'Donnell, P.C.

Liberty Mutual Equity Corporation

Liberty Mutual Group, Inc.

Liberty Mutual Holding Company, Inc.

Liberty Property-Casualty Holdings, Inc.

LMHC Massachusetts Holdings, Inc.

Mayer Brown Rowe & Maw LLP

Vinson & Elkins L.L.P.

**TABLE OF CONTENTS**

INTRODUCTION AND SUMMARY OF ARGUMENT.....1

STATEMENT OF FACTS .....4

    I. Plaintiffs’ Pre-CAFA Complaints Proposed A Class Limited To Liberty’s Insureds. ....4

    II. The State Court Denied Liberty’s Motion to Dismiss. ....5

    III. The State Court Struck Liberty’s Answer And Affirmative Defenses. ....5

    IV. Plaintiffs Proposed to Expand The Class To Include Liberty Fire Insureds, Prompting Liberty’s First Removal. ....6

    V. The State Court Certified A Nationwide Class Including Policies Issued and Claims Adjusted by More Than Thirty of Liberty’s Affiliates And Subsidiaries. ....7

    VI. The State Court Denied Liberty A Trial On The Merits. ....9

    VII. The District Court Granted Plaintiffs’ Motion To Remand And Denied A Stay. ....10

QUESTIONS PRESENTED .....10

ARGUMENT.....11

    I. Diversity Jurisdiction Exists Under CAFA, Because the September 29 Order Added New Claims that Do Not Relate Back to Plaintiffs’ Pre-CAFA Pleadings. ....11

        A. The September 29 Order added new claims based on new conduct. ....12

        B. The complaint provided no notice of claims based on conduct of others. ....13

        C. The complaint provided no notice of alter-ego claims based on Liberty’s purported domination and control of others. ....14

        D. The complaint provided no notice of stale claims dating back to the 1980s. ....16

    II. Federal-Question Jurisdiction Exists Because The September 29 Order Adds Claims Under Group-Health Policies Governed By ERISA. ....18

CONCLUSION.....20

**TABLE OF AUTHORITIES**

**CASES**

*Aetna Health Inc. v. Davila*,  
124 S. Ct. 2488 (2004) ..... 19

*Beach v. Owens-Corning Fiberglass Corp.*,  
728 F.2d 407 (7th Cir. 1984) ..... 9

*Flynn v. Szwed*,  
224 Ill. App. 3d 107, 586 N.E.2d 539 (1st Dist. 1991) ..... 17

*Foster McGaw Hospital v. Building Material Chauffeurs,  
Teamsters & Helpers Welfare Fund*,  
925 F.2d 1023 (7th Cir. 1992) ..... 5

*Hartlein v. Illinois Power Co.*,  
151 Ill. 2d 142, 601 N.E.2d 720 (1992)..... 5

*Home Savings & Loan Association v. Superior Court of Los Angeles County*,  
54 Cal. App. 3d 208 (Cal. App. 1976) ..... 10

*Kennedy v. King*,  
252 Ill. App. 3d 52, 623 N.E.2d 955 (4th Dist. 1993)..... 16

*Kircher v. Putnam Funds Trust*,  
403 F.3d 478 (7th Cir. 2005) ..... 5

*Knudsen v. Liberty Mutual Insurance Co.*,  
2001 WL 34401234 (Ill. Cir. Ct. Dec. 7, 2001)..... 5

*Knudsen v. Liberty Mutual Insurance Co.*,  
2004 WL 625679 (Ill. Cir. Ct. Mar. 26, 2004)..... 5-6

*Knudsen v. Liberty Mutual Insurance Co.*,  
411 F.3d 805 (7th Cir. 2005) ..... 1-2, 7-9, 12, 15

*Lopp v. Peerless Serum Co.*,  
382 S.W.2d 620 (Mo. 1964) ..... 15

*Marek v. O.B. Gyne Specialists II, S.C.*,  
319 Ill. App. 3d 690, 746 N.E.2d 1 (1st Dist. 2001)..... 16

*Martin v. Franklin Capital Corp.*,  
126 S. Ct. 704 (2005) ..... 10-11

<i>Metropolitan Life Insurance Co. v. Taylor</i> , 481 U.S. 58 (1987) .....	19-20
<i>People v. Pac. Land Research Co.</i> , 20 Cal. 3d 10 (Cal. 1977) .....	10
<i>Schillinger v. Union Pacific Railroad Co.</i> , 425 F.3d 330 (7th Cir. 2005) .....	13-14
<i>Schorsch v. Hewlett-Packard Co.</i> , 417 F.3d 748 (7th Cir. 2005) .....	11-14, 18
<i>Steinberg v. Dunseth</i> , 276 Ill. App. 3d 1038, 658 N.E.2d 1239 (4th Dist. 1995) .....	16
<i>Strickland v. Commc'ns &amp; Cable of Chicago, Inc.</i> , 304 Ill. App. 3d 679, 710 N.E.2d 55 (1st Dist. 1999) .....	17
<i>United States v. Bestfoods</i> , 524 U.S. 51 (1998) .....	15

## STATUTES

28 U.S.C. § 1331 .....	11, 19
28 U.S.C. § 1332(d) .....	11
28 U.S.C. § 1453(c) .....	1, 22
820 ILCS 305/21 .....	5
735 ILCS 5/2-1001(2) .....	2-6
FED. R. APP. P. 26.1 .....	i
FED. R. CIV. P. 15(c) .....	12
FED. R. CIV. P. 23 .....	10

## TREATISE

1 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.10 (Supp. 2005) .....	15
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Pursuant to 28 U.S.C. § 1453(c), Liberty Mutual Insurance Company (“Liberty”) respectfully requests permission to appeal the district court’s December 15, 2005, order remanding this case to state court (“Remand Order” or “RO”).

### INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the type of class action abuse that led Congress to enact the Class Action Fairness Act (“CAFA”). Plaintiffs based this lawsuit against Liberty on insurance policies that clearly stated that they were issued by a separate Liberty affiliate, Liberty Mutual Fire Insurance Company (“Liberty Fire”). The state court protected Plaintiffs from their failure to name the correct defendant by predicating a *default judgment* against Liberty on its purported failure to inform Plaintiffs soon enough that they sued the wrong defendant. Plaintiffs and the state court then parlayed that default judgment in what was then an *individual action* involving only “casualty policies written by Liberty” into a class-wide default judgment in favor of a *nationwide class* embracing all lines of insurance, including group health policies governed by ERISA, and comprising not only insureds of Liberty, but also *insureds of more than thirty of its affiliates and subsidiaries*. Under the state court’s orders, only the amount of damages allegedly owed to this unpleaded and greatly expanded nationwide class will be tried.

Plaintiffs’ decision to balloon the class from one comprising only Liberty’s insureds to one including the insureds of more than thirty of its affiliates and subsidiaries (without taking the straightforward step of adding those affiliates and subsidiaries as defendants) served two goals, neither of them proper. The first was Plaintiffs’ desire to pile as much liability as possible upon the unwarranted, pre-certification order striking Liberty’s answer. Why sue the proper defendants if you can get a default against a parent or affiliate? The second was to evade removal under this Court’s first decision in this case, *Knudsen v. Liberty Mutual Insurance Co.*, 411 F.3d 805 (7th Cir. 2005) (“*Knudsen I*”).

In *Knudsen I*, this Court addressed Liberty’s removal after Plaintiffs proposed to add the insureds of Liberty Fire to the class definition in February 2005. Noting that Liberty prematurely removed “before the state judge could address” that proposal, the Court held that Liberty could not remove “just because a nonparty corporate sibling ha[d] been mentioned in plaintiffs latest papers.” *Id.* at 808. The Court stated, however, that “a new claim for relief (a new ‘cause of action’ in state practice), the 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” under CAFA. *Id.* at 807. The Court further stated that such a change might “lie[] in store” because Plaintiffs had neither named Liberty Fire as a defendant nor alleged any basis for suing Liberty based on policies issued by Liberty Fire. *Id.* at 807-08.

But rather than add Liberty Fire as a defendant after remand—a step that would have permitted removal under *Knudsen I*—Plaintiffs continued to game the system, asking the state court to certify a class including not only insureds of Liberty and Liberty Fire, but also insureds of *more than thirty of Liberty’s other affiliates and subsidiaries*, all without amending their complaint to add any of those entities as defendants.

On September 29, 2005, the state court went along with Plaintiffs’ plan to add claims concerning Liberty’s affiliates and subsidiaries without adding the affiliates and subsidiaries as defendants and certified a massive nationwide class action (the “September 29 Order”). The state court then expanded its default judgment to cover the entire nationwide class.

Despite their attempt to evade *Knudsen I* by refusing to add *new defendants*, Plaintiffs clearly triggered federal jurisdiction by persuading the state court to add sweeping *new claims* that do not relate back to the original complaint. The September 29 Order adds claims based on the alleged underpayment of hundreds of thousands of medical bills that were adjusted by others.

Although Liberty employees have always adjusted claims under policies issued by Liberty Fire and certain other affiliates, including the claims encompassed within the February 2005 class definition at issue in *Knudsen I*, Liberty did not adjust all of the claims encompassed within the new September 29 class definition. App., Tab 32 at 10. Indeed, the September 29 Order adds claims based on alleged underpayments by other entities several years before they became Liberty's affiliates. Thus, the September 29 Order re-created this case from the ground up, changing it from a suit involving payments by Liberty under "casualty policies written by Liberty" into a case involving payments by others under "any insurance" written by more than thirty different insurers, regardless of whether Liberty had any role in selling the underlying policies or making the challenged payments. And Plaintiffs' pre-CAFA pleadings provided Liberty no notice of any such claims. They did not allege any facts concerning any *policies issued by others* or any *claims adjusted by others*. See App., Tabs 1, 2. Nor did they allege Liberty's purported control or domination of any other company or aver any other basis for holding Liberty liable for the acts of others, whether as an alter ego or otherwise. *Id.*

The September 29 Order also added ERISA Claims that support removal. *Id.* at 7-8. Plaintiffs asked the state judge to certify a class including "**all** insureds" of Liberty and its affiliates "whose claims were paid for less than the medical charge, based on the application of a medical cost and utilization database," and they told the judge that their new class definition includes "**all** coverages they [Liberty and its affiliates] write which pay for medical bills." App., Tab 16 at 12-13, 47 (emphasis added). The September 29 Order gave Plaintiffs exactly what they asked for: a class including "**any** insurance in which medical bills are submitted for review." SO at 9 (emphasis added). Accordingly, and for the reasons stated below, the Court should review and reverse the district court's order remanding this case to state court.

## STATEMENT OF FACTS

### I. Plaintiffs' Pre-CAFA Complaints Proposed A Class Limited To Liberty's Insureds.

In March 2000, Knudsen, a chiropractor, sued Liberty in Cook County Circuit Court, alleging breach of contract and consumer fraud. App., Tab 1. Her complaint alleged that she treated an injured worker covered by a workers' compensation policy issued by Liberty, that she took an assignment of the worker's right to seek reimbursement from Liberty, and that Liberty improperly paid her less than the amount that she charged for certain procedures, because it used a medical cost and utilization database to determine the usual and customary charges for those procedures. *Id.* Defining "LIBERTY" as "Liberty Mutual Insurance Company," the complaint stated that the "gravamen" of the lawsuit was Liberty's adjustment of medical claims under "*casualty* insurance policies *written by LIBERTY*," and it proposed the following class:

[A]ll LIBERTY insureds, their third party beneficiaries and their assignees who were entitled to payment of medical bills under any *casualty coverages* pursuant to a *LIBERTY insurance policy*, and who have received a payment from LIBERTY for less than the medical charge, based upon the application of LIBERTY'S internal generated medical cost and utilization database.

*Id.* ¶¶ 1, 10 (emphasis added).

In March 2001, Knudsen filed an amended complaint. App., Tab 2. Like the original, the amended complaint defined "LIBERTY" as "Liberty Mutual Insurance Company" and stated that the "gravamen" of the suit was Liberty's adjustment of medical claims under "policies *written by LIBERTY*." *Id.* ¶ 1 (emphasis added). It proposed the following class:

[A]ll LIBERTY insureds, their third party beneficiaries and their assignees who are entitled to payment of medical bills under *any medical payments coverages* pursuant to a *LIBERTY insurance policy*, and who have received a payment from LIBERTY for less than the medical charge, based upon the application of LIBERTY'S medical cost and utilization database.

*Id.* ¶ 11 (emphasis added). Thus, each of the complaints filed in this action proposed a plaintiff class comprising "*LIBERTY* insureds" under "*LIBERTY* insurance polic[ies]."

## **II. The State Court Denied Liberty's Motion to Dismiss.**

In December 2001, the state court denied Liberty's motion to dismiss the amended complaint. Although "Illinois law does not allow a provider of medical care to sue a workers' compensation carrier" in any forum, *Foster McGaw Hospital v. Building Material Chauffeurs, Teamsters & Helpers Welfare Fund*, 925 F.2d 1023, 1024 (7th Cir. 1991), and although workers' compensation benefits cannot be assigned, 820 ILCS 305/21, Cook County Circuit Court Judge Julia Nowicki held that Knudsen could pursue her claims in court because her inability "to recover damages from an employer for an injury under the Act" barred her from filing "her claim before the Industrial Commission." *Knudsen v. Liberty Mut. Ins. Co.*, 2001 WL 34401234, at \*2 (Ill. Cir. Ct. Dec. 7, 2001). *But cf. Kircher v. Putnam Funds Trust*, 403 F.3d 478, 484 (7th Cir. 2005) (preemption "covers both good and bad . . . claims—especially bad ones"). Although "circuit courts have no original jurisdiction over workers' compensation proceedings," *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 157-58, 601 N.E.2d 720, 727 (1992), Judge Nowicki applied the "primary-jurisdiction" doctrine to hold that the circuit court was a proper forum for Knudsen's claims. *Knudsen*, 2001 WL 34401234, at \*3-4.

## **III. The State Court Struck Liberty's Answer And Affirmative Defenses.**

In July 2003, Plaintiffs—who by now included the Bakers—filed a motion for default based on Liberty's alleged failure to tell them soon enough that they had sued the wrong insurer. *Knudsen v. Liberty Mut. Ins. Co.*, 2004 WL 625679, at \*1 (Ill. Cir. Ct. Mar. 26, 2004). Before considering sanctions, the state court rejected Liberty's argument that Plaintiffs lacked standing because Liberty Fire wrote the policies underlying their claims, holding that Plaintiffs' allegation that they had "contact" with Liberty created an issue of fact "as to whether the claims at issue were handled by Liberty, Liberty Fire, or both." *Id.* Then, without mentioning Liberty Fire's offer to waive limitations if Plaintiffs would sue the correct defendant, App., Tab 19 at 1 &

Ex. 2, or the hearing convened to discuss that offer, App., Tab 8, the court found that Liberty “hid” Liberty Fire’s involvement and “deliberate[ly] attempt[ed] to delay the discovery process until the statute of limitations had run” on claims against Liberty Fire. *Knudsen*, 2004 WL 625679, at \*5. The court then struck Liberty’s answer and affirmative defenses. *Id.* at \*6.

Contrary to the state court’s findings, though, Plaintiffs had long known that Liberty Fire issued the policies underlying their claims and that Liberty Fire—not Liberty—was the proper defendant. First, the policies, as well as letters and other documents received by Plaintiffs as early as 2001, identified Liberty Fire as the issuer of the policies. App., Tab 6 at 8-9 & Ex. 2. Second, Liberty told the plaintiffs in 2003 that they had sued the wrong defendant, causing the Bakers to add Liberty Fire as a defendant in a similar case that they filed in Washington. App., Tab 15 at 1-3 & Exs. 1-4; Tab 36 at 5 n.3.

Given their longstanding knowledge that they sued the wrong defendant, Plaintiffs’ continued refusal to sue Liberty Fire is understandable only as a strategic choice. If Plaintiffs had added Liberty Fire as a defendant in this case back in 2003, as the Bakers did in Washington, *see* App., Tab 15 at 2-3 & Ex. 3, then Liberty Fire could have moved for substitution of a new judge under 735 ILCS 5/2-1001(a)(2). And if they had dismissed this lawsuit against Liberty and filed a new action against Liberty Fire, the assignment of a new judge would have been just as likely. Accordingly, Plaintiffs chose to ignore the fact that they had sued the wrong defendant and keep the case before a judge who had proven receptive to their claims.

#### **IV. Plaintiffs Proposed to Expand The Class To Include Liberty Fire Insureds, Prompting Liberty’s First Removal.**

On February 10, 2005, Liberty filed its principal brief in opposition to Plaintiffs’ motion for class certification. App., Tab 9. Liberty argued, *inter alia*, that Plaintiffs were inadequate representatives of the putative class because they based their claims on policies issued by Liberty

Fire, not Liberty. *Id.* at 29-30. Plaintiffs responded on February 25, 2005, by proposing the following, expanded class definition—one including insureds of Liberty Fire:

All Liberty Mutual Insurance Company *and Liberty Fire Insurance Company* insureds, their third party beneficiaries and their assignees who submitted medical bills under any medical payments coverages pursuant to a Liberty Mutual *or Liberty Fire* insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database.

App., Tab 10 at 2 (emphasis added).

On March 30, 2005, Liberty removed this case under CAFA. Acknowledging that CAFA does not apply retroactively, Liberty argued that Plaintiffs' proposed addition of Liberty Fire insureds to the class definition "commenced" a new action that was removable. The district court, per Judge Castillo, disagreed and remanded the case to state court.

This Court, per Judge Easterbrook, denied Liberty's petition for leave to appeal. *Knudsen I*, 411 F.3d at 807-08. Noting that the state court had not yet decided whether to accept Plaintiffs' proposed class definition, the Court held that Liberty could not remove this case "just because a nonparty corporate sibling ha[d] been mentioned in plaintiffs' latest papers." *Id.* The Court recognized, however, that "a new claim for relief (a new 'cause of action' in state practice), the 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." *Id.* Indeed, the Court noted that "[m]aybe that lies in store," because Plaintiffs had neither named Liberty Fire as a defendant nor alleged any basis for suing Liberty based on policies issued by Liberty Fire. *Id.* at 807-08.

**V. The State Court Certified A Nationwide Class Including Policies Issued and Claims Adjusted by More Than Thirty of Liberty's Affiliates And Subsidiaries.**

Emboldened by the remand approved in *Knudsen I*, Plaintiffs went back to state court and asked for an even broader class definition—one embracing all lines of insurance and comprising

not only insureds of Liberty and Liberty Fire, but also insureds of more than thirty of Liberty's other affiliates and subsidiaries. At the class-certification hearing on July 7, 2005, they asked the state court to certify the following class:

All insureds of Liberty Mutual Insurance Company, *its affiliates and subsidiaries* (collectively 'Liberty Mutual'), their third party beneficiaries and their assignees who submitted medical bills covered by a Liberty Mutual insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database.

App., Tab 16 at 12-13; *see also* App., Tab 19 at 1 & Ex. 2. Significantly, Plaintiffs did not amend their pleading to add any of Liberty's affiliates as defendants or to aver any basis for holding Liberty liable for the conduct of others. They *argued* at the hearing that the court could find Liberty liable as a third-party adjuster or as an alter ego of its affiliates and subsidiaries, App., Tab 16 at 11-12, 45-47, but they never *pleaded* any facts to support such a finding.

On September 29, 2005, the state court certified the nationwide class proposed by Plaintiffs, with a few modifications that are not pertinent here. SO at 1-11. The court rejected Liberty's argument (App., Tab 16 at 36-41) that expanding the class to include insureds of its affiliates and subsidiaries would violate Liberty's due-process rights to notice of the claims against it. Misconstruing that argument, the court held that expanding the class did not implicate due process because Liberty's affiliates are not parties and thus could not be held liable. SO at 9. The court also reasoned that allowing Plaintiffs to "attempt to recover from Liberty on behalf of the insureds of [its] affiliates and subsidiaries" was necessary "to prevent Liberty from continuing to benefit from its improper discovery conduct." *Id.* To hold otherwise, the court stated, would render the pre-certification "default against Liberty meaningless." *Id.*<sup>1</sup>

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<sup>1</sup> The state court did not mention Liberty's argument that adjudicating claims arising under workers' compensation acts of sister states would deny full faith and credit to sister-state statutes giving *exclusive* jurisdiction of such disputes to state agencies outside Illinois. *Compare* App., Tab 9 at 11-14 with SO at 1-11; *see also* *Beach v. Owens-Corning Fiberglass Corp.*, 728 F.2d 407 (7th Cir. 1984).

As an additional justification for allowing Plaintiffs to sue Liberty based on policies issued by others, the state court credited Plaintiffs' assertion that Liberty "and its affiliates filed one income tax return; there was one board of directors making the decision for investments for all companies; and Liberty provides the office space, the employees and the adjusting for all the companies." *Id.* In reality, however, Liberty has not provided adjusting services for all of its affiliates and subsidiaries. Indeed, Liberty has *never* provided adjusting services for several of its affiliates and subsidiaries; six did not even become affiliated with Liberty until after Knudsen filed her amended complaint in March 2001. App., Tab 32 at 10. Thus, Liberty clearly did not adjust all of the claims encompassed within the certified class. *Id.*

#### **VI. The State Court Denied Liberty A Trial On The Merits.**

After learning that Liberty was removing this case to federal court, the state court expanded its 2004 sanctions order to cover the entire nationwide class on all claims, thereby denying Liberty any trial on the merits and ordering that the case "will proceed with proof of damages." App., Tab 29. The state court thus parlayed its pre-certification sanctions order in what was then only an individual case involving "policies written by Liberty" into a class-wide finding of liability regarding policies issued and claims adjusted by more than thirty different insurers nationwide. The state court based this colossal class-action penalty on nothing more than Plaintiffs' own error in failing to sue the insurance company that was expressly named in the governing insurance policies.<sup>2</sup>

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<sup>2</sup> Applying the pre-certification sanctions order to deprive Liberty of a trial on the merits of unpleaded claims on behalf of this greatly expanded class was an obvious denial of due process. *See, e.g., People v. Pac. Land Research Co.*, 20 Cal. 3d 10, 16-17 (Cal. 1977) ("[A] defendant in a class action has a due process right to secure a determination of the . . . composition of the class . . . prior to determination of the merits of the action. . . . [A] defendant is entitled to know, before final determination of the substantive issues in a class action, the full potential consequences and liability that may attach to a judgment against him."); *Home Savings & Loan Ass'n v. Superior Court of Los Angeles County*, 54 Cal. App. 3d 208, 212 (Cal. App. 1976) ("Prior to final determination of any substantive issue in a class

## **VII. The District Court Granted Plaintiffs' Motion To Remand And Denied A Stay.**

On October 14, 2005, Liberty removed this case again and moved for reconsideration of the September 29 Order under FED. R. CIV. P. 23. App., Tabs 30, 31, 32. Liberty argued that removal was proper for two reasons. First, the September 29 Order added new claims that do not relate back to Plaintiffs' pre-CAFA pleadings and thus commenced a new action under CAFA. App. Tab 32 at 3-18. Second, the September 29 Order added claims under group-health policies governed by ERISA. *Id.* at 18-19.

On December 15, 2005, the district court granted Plaintiffs' motion to remand. RO at 9. First, the court held that the September 29 Order does not "commence" a new action under CAFA because Knudsen's complaint gave Liberty all the information necessary to defend the claims certified by that order *Id.* at 5-7. Second, the court held that the September 29 Order "neither adds ERISA claims nor presents a basis for complete preemption." *Id.* at 7-8. And, despite the recent decision in *Martin v. Franklin Capital Corp.*, 126 S. Ct. 704 (2005), the court also awarded attorneys' fees to Plaintiffs, stating that the removal statute "makes an award of attorneys' fees 'the norm' for improper removal." *Id.* at 9. Finally, on December 21, 2005, the district court denied Liberty's motion to stay its remand order pending appeal. App., Tab 39.

### **QUESTIONS PRESENTED**

1. Whether the September 29 Order added new claims that do not relate back to the filing of the original complaint and thus "commenced" a new action under CAFA?
2. Whether the September 29 Order added claims under group-health policies subject to exclusive federal jurisdiction under ERISA?

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action, defendant ha[s] the right to know the full potential consequences and liability that may attach to the determination.").

## ARGUMENT

Removal on October 14, 2005, was proper for two reasons. First, diversity jurisdiction exists under 28 U.S.C. § 1332(d), because this case satisfies CAFA's substantive requirements and the September 29 Order added new claims that do not relate back to the original complaint. Second, federal-question jurisdiction exists under 28 U.S.C. § 1331, because the September 29 Order added claims under group-health policies governed by ERISA. Accordingly, and for the reasons stated below, the Court should review and reverse the district court's remand order.

### **I. Diversity Jurisdiction Exists Under CAFA, Because the September 29 Order Added New Claims that Do Not Relate Back to Plaintiffs' Pre-CAFA Pleadings.**

There is no dispute that this case satisfies CAFA's substantive requirements, *i.e.*, that the matter in controversy exceeds \$5 million and that minimal diversity exists. *See* 28 U.S.C. § 1332(d)(2); App., Tab 32 at 2-3. And although Knudsen filed this action before CAFA took effect in February 2005, CAFA nonetheless applies because the September 29 Order added new claims that do not relate back to the original complaint. *See Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 751 (7th Cir. 2005) ("amendments [to class definitions] that kick off wholly distinct claims" that do not relate back to filing of original, pre-CAFA complaints "commence" new actions for purposes of removal under CAFA).

The district court agreed that jurisdiction exists under CAFA if the September 29 Order added new claims that do not relate back to the original complaint. *See* RO at 4. The court also agreed that the test for relation back under FED. R. CIV. P. 15(c) and the "functionally identical" Illinois rule is whether "the original complaint furnished to the defendant all the information necessary to prepare a defense to the claim[s]" certified by the September 29 Order. *Id.* (citing *Schorsch*, 417 F.3d at 751). The court's error lay in its application of that test to conclude that the original complaint gave Liberty all of the necessary information. It plainly did not.

**A. The September 29 Order added new claims based on new conduct.**

As this Court observed in *Knudsen*, the last-filed complaint defines “LIBERTY” as “Liberty Mutual Insurance Company” and asserts claims against “LIBERTY” on behalf of “LIBERTY insureds, their third party beneficiaries and their assignees . . . under any medical payments coverages pursuant to a LIBERTY insurance policy . . . .” *Knudsen I*, 411 F.3d at 807. As framed by that complaint, this case asserted only claims based on the conduct of Liberty in selling and adjusting “policies written by Liberty,” which began using a medical cost and utilization database to adjust claims under its policies in 1994. App., Tab 32 at 9.

The September 29 Order added at least two new kinds of claims based on at least two new kinds of conduct. First, it added claims based on policies *issued by others* but *adjusted by Liberty*. These include, for example, claims under workers’ compensation and personal auto policies issued by Liberty Fire since 1994. App., Tab 16 at 39. These also include claims under group-health policies issued by Liberty Life Assurance Company of Boston (“Liberty Life”) since the 1980s. App., Tab 32 at 9, 11-12; Tab 20 at 1-2.

Second, the September 29 Order added claims based on policies *issued by others* and *adjusted by others*. These include, for example, claims under workers’ compensation policies issued and adjusted by Liberty Northwest Corporation (“LNW”) since 1996. App., Tab 26. Importantly, though, the newly added claims also include claims under policies issued and adjusted by some of Liberty’s affiliates *before those companies became affiliated with Liberty*. Such claims include:

- (a) claims under workers’ compensation policies issued by Bridgefield Employers Insurance Company and Bridgefield Casualty Insurance Company and adjusted by their vendor, Summit Consulting, Inc., from 1994 through 1997, *before* those companies became affiliated with Liberty in 1998 (App., Tab 22 at 1-2);
- (b) claims under auto policies issued by Oregon Auto Insurance Company (“Oregon Auto”) and North Pacific Insurance Company (“North Pacific”) and adjusted by

their vendor, Mitchell, in 1998 and 1999, *before* Oregon Auto and North Pacific became affiliated with Liberty in 2002 (App., Tab 23 at 1-2); and<sup>3</sup>

- (c) claims under group-health policies issued and adjusted by Employers Insurance Company of Wausau (“Employers of Wausau”) from 1985 through 1997, *before* it became affiliated with Liberty in 1998 (App., Tab 20 at 1; Tab 21 at 1-2).

Because the September 29 Order does not limit the certified class to any particular period, *see* SO at 2, it added all of these claims and many more, regardless of their age. Indeed, it adds many claims that were already time-barred—and could not have been brought against the issuing or adjusting companies—when Knudsen filed this case in March 2000. *See* App., Tab 41. These claims are precisely the type of “new claim[s]” that this Court warned in *Knudsen I* “could well commence a new piece of litigation” under CAFA. 411 F.3d at 807.

**B. The complaint provided no notice of claims based on conduct of others.**

The district court acknowledged that the certified class “does involve additional and different policies.” RO at 4. But the court relied on *Schillinger v. Union Pacific Railroad Co.*, 425 F.3d 330 (7th Cir. 2005), to hold that the September 29 Order does not commence a new action under CAFA. RO at 4-5. That was clear legal error.

The pre-CAFA complaint in *Schillinger* proposed a class of Illinois landowners whom the defendants allegedly harmed through their use of their railroad rights of way. 425 F.3d at 332. After CAFA’s enactment, the state court granted the plaintiffs’ motion to amend their class definition to include landowners nationwide. *Id.* This Court held that the amended complaint did not commence a new action under CAFA because the original complaint provided the defendants with notice of the conduct that formed the basis for the amended complaint, *i.e.*, the same defendants’ allegedly improper use of their rights of way. *Id.* at 334.

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<sup>3</sup> The district court’s description of the certified class (RO at 2) suggests that it is limited to claims adjusted by Liberty or one of its affiliates or subsidiaries. The September 29 Order states no such limitation. *See* SO at 2. The class encompasses claims adjusted by third-party vendors, as well.

In contrast, the September 29 Order added new claims based on the conduct of others: (1) claims based on policies *issued by others* and (2) claims based on bills *adjusted by others*. Specifically, it allows Plaintiffs to sue Liberty based on the independent conduct of Liberty’s affiliates and subsidiaries in using medical cost and utilization databases to adjust medical claims under their own policies, *even before they became affiliated with Liberty*. Because the pre-CAFA pleadings gave no notice of such claims, *Schillinger* is inapposite.<sup>4</sup>

**C. The complaint provided no notice of alter-ego claims based on Liberty’s purported domination and control of others.**

The pre-CAFA pleadings also failed to give Liberty “all the information necessary . . . to prepare a defense” of the alter-ego claims added by the September 29 Order. *Schorsch*, 417 F.3d at 751 (internal citation omitted). That failure raises an additional and independent bar to relation back and, therefore, an independent basis for removal.

As noted above, the September 29 Order permits Plaintiffs to sue Liberty based on policies issued and adjusted by others, including policies issued and adjusted by others before they became affiliated with Liberty. Because Liberty had no contact with the class members for whom Plaintiffs press such claims, Liberty’s only plausible basis for liability to them is as an alter ego of the affiliates and subsidiaries who issued and adjusted their policies.

But alter-ego liability does not arise from mere ownership of a subsidiary or affiliation with an affiliate. *See United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (“It is a general principle of corporate law deeply “ingrained in our economic and legal systems’ that a parent

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<sup>4</sup> *Schorsch* is distinguishable on similar grounds. In that case, the plaintiff expanded the class from consumers of one printer product containing an allegedly faulty chip to include consumers of two other printer products containing the same allegedly faulty chip. The Court held that such an expansion did not constitute a new action because “drum kits and cartridges are consumables for printers *made by one firm* and *subject to one set of legal rules* . . . .” 417 F.3d at 750 (emphasis added). In this case, the new claims involve (1) claims based on policies *issued by others* and (2) claims based on bills *adjusted by others*, including claims subject to a different set of legal rules: those prescribed by ERISA.

corporation . . . is not liable for the acts of its subsidiaries.”). Rather, it arises where the parent completely controls the subsidiary with respect to a transaction and uses that control to commit a fraud or otherwise violate a duty owed to the plaintiff in connection with that transaction. 1 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.10 (Supp. 2005).

And Plaintiffs’ pre-CAFA pleadings do not allege such domination or control—much less any injury flowing from any such domination or control. Plaintiffs *argued* at the class-certification hearing that Liberty and its affiliates file a single income-tax return and that a single board of directors makes the investment decisions for all of Liberty’s affiliates. *See* App., Tab 16 at 45-47; *see* also SO at 9. But, despite the knowledge that they purportedly gained from reading Liberty’s public filings, *see* App., Tab 16 at 45, they never *pleaded* any such facts, either before or after CAFA. Indeed, this Court noted as recently as June 2005 that “Plaintiffs do not contend that” Liberty and Liberty Fire “are alter egos.” *Knudsen I*, 411 F.3d at 807.

Moreover, alter-ego liability cannot be based on misconduct of a subsidiary or affiliate before its affiliation with the defendant. *See, e.g., Lopp v. Peerless Serum Co.*, 382 S.W.2d 620, 625-26 (Mo. 1964) (holding that alter-ego plaintiff must show that “defendant company controlled the subsidiary ‘instrumentality’ with which [plaintiff] contracted” “at the time his alleged breach of contract arose”). When this case was filed in March 2000, therefore, Liberty clearly had no reason to anticipate that it would be sued in September 2005 based on the conduct in 1998 of a subsidiary that it did not acquire until 2002.

Accordingly, the alter-ego claims added by the September 29 Order do not relate back to Knudsen’s original complaint. *See Kennedy v. King*, 252 Ill. App. 3d 52, 56, 623 N.E.2d 955, 958 (4th Dist. 1993) (“where one complaint alleges liability predicated upon defendant’s own actions and the other complaint alleges defendant to be liable for the actions of, or incident

caused by, another, the amended complaint is unlikely to relate back to the original one”).<sup>5</sup>

Contrary to the district court’s conclusion (RO at 5), neither *Marek v. O.B. Gyne Specialists II, S.C.*, 319 Ill. App. 3d 690, 746 N.E.2d 1 (1st Dist. 2001), nor *Steinberg v. Dunseth*, 276 Ill. App. 3d 1038, 658 N.E.2d 1239 (4th Dist. 1995), supports a different result. In those cases, the original complaints alleged claims based on the conduct of the same people whose actions formed the basis of the later-filed alter-ego claims. *Marek*, 319 Ill. App. at 698, 746 N.E.2d at 8; *Steinberg*, 276 Ill. App. 3d at 1045, 658 N.E.2d at 1246. Thus, the defendants could not have been surprised by the factual allegations underlying the later-filed claims.

Here, Plaintiffs’ pre-CAFA pleadings alleged neither any facts concerning the conduct of any of Liberty’s subsidiaries or affiliates (*i.e.*, their independent use of medical cost and utilization databases to adjust claims under their own policies) nor any facts concerning Liberty’s purported control of any of its subsidiaries or affiliates. Thus, neither *Marek* nor *Steinberg* supports relation back of the alter-ego claims certified by the September 29 Order.

**D. The complaint provided no notice of stale claims dating back to the 1980s.**

As noted above, some of Liberty’s affiliates, such as Employers of Wausau, began using medical cost and utilization databases to adjust claims under their policies long before Liberty

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<sup>5</sup> The district court attempted to distinguish *Kennedy*, asserting that it involved a “subsequent action” rather than the addition of a new claim to an existing action. RO at 5. The district court stated:

Liberty’s reliance on *Kennedy* . . . is misplaced. While Liberty alleges a new *claim* commenced a new action in the instant case, in *Kennedy*, the state court held that a subsequent *action* for agency or negligent entrustment did not relate back to an original *action* for negligence against the automobile owner.

*Id.* (emphasis in original).

The district court was mistaken. Just like this case, *Kennedy* involved the addition of new claims to an existing action. The *Kennedy* court explained:

[N]egligent entrustment and liability for the negligence of Hess under an agency theory were separate *claims* from the *claim* raised in the original complaint, which was that King negligently operated a motor vehicle. The original complaint did not put King on notice of the later *claims* raised by Kennedy [in her proposed amended complaint].

*Kennedy*, 252 Ill. App. 3d at 57, 623 N.E.2d at 958 (emphasis added). In truth, therefore, *Kennedy* supports Liberty’s argument that new claims added by the September 29 Order do not relate back.

began using such databases to adjust claims under its policies in 1994. By adding claims based on affiliates' use of such databases, therefore, the September 29 Order greatly expanded the period of time for which Plaintiffs seek to hold Liberty liable. App., Tab 32 at 7-9.

But Plaintiffs' pre-CAFA pleadings gave Liberty no notice of claims reaching back as much as ten years before Liberty began using a medical cost and utilization database to adjust claims under its own policies. Accordingly, and because Liberty had no opportunity to preserve evidence regarding such stale claims, those claims do not relate back. *See Strickland v. Commc'ns & Cable of Chicago, Inc.*, 304 Ill. App. 3d 679, 687, 710 N.E.2d 55, 61 (1st Dist. 1999) (amended complaint adding allegations that defendants ratified their employee's alleged assault did not relate back to original pleadings, which failed to place defendants on notice "that they should investigate the facts or preserve evidence relating to their conduct after the alleged assault"); *Flynn v. Szwed*, 224 Ill. App. 3d 107, 114, 586 N.E.2d 539, 544 (1st Dist. 1991) (amended complaint alleging that defendant committed medical malpractice beginning in 1977 did not relate back to original complaint, which "failed to put defendant on notice that he would be required to defend his conduct during any treatment of plaintiff before 1980").

The district court attempted to distinguish *Strickland* and *Flynn*, stating that "the expanded class" certified by the September 29 Order "involves the same allegations of use of the medical cost and utilization database to pay plaintiffs less than the medical charge, and thus relates back to the original complaint." RO at 7. This reasoning overlooks the crucial distinction between the "use of [a] medical cost and utilization database" **by Liberty** to adjust claims under its own policies beginning in 1994 and the **independent** "use of [a] medical cost and utilization database" **by others**—several of Liberty's affiliates and subsidiaries—to adjust claims under their policies, **even before they became affiliated with Liberty**. Nothing in Plaintiffs' pleadings

gave Liberty the information necessary to prepare a defense of claims based on the independent “use of [a] medical cost and utilization database” by Employers of Wausau and other affiliates as many as fifteen years before they became affiliated with Liberty.

\* \* \* \* \*

In sum, the September 29 Order added sweeping “new claim[s]” under this Court’s decision in *Knudsen I*—claims that: (1) are based on the conduct of others, including conduct of others before they became Liberty’s affiliates; (2) seek to impose alter-ego liability on Liberty for its purported domination and control of others, including alter-ego liability for conduct of others before they became Liberty affiliates; and (3) expand by more than ten years the timeframe for which Plaintiffs seek to hold Liberty liable. These new claims do not relate back because Plaintiffs’ pre-CAFA pleadings obviously did not give Liberty “all the information necessary . . . to prepare a defense” of them. *Schorsch*, 417 F.3d at 751 (internal citation omitted). The September 29 Order therefore commenced a new action removable under CAFA.

**II. Federal-Question Jurisdiction Exists Because The September 29 Order Adds Claims Under Group-Health Policies Governed By ERISA.**

In addition to commencing a new action under CAFA, the September 29 Order also warrants removal because it added claims that are completely preempted by ERISA.

As a general rule, “determining whether a particular case arises under federal law turns on the ‘well-pleaded complaint’ rule.” *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207 (2004). But there is an exception to this rule: “[W]hen a federal statute wholly displaces the state-law cause of action through complete pre-emption,” the state claim can be removed.” *Id.* Section 502(a) “ERISA is one of [those] statutes.” *Id.* “Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court.” *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987).

Because the September 29 Order added claims based on group-health policies issued as parts of employee-benefit plans—and because those claims are completely preempted by ERISA—federal-question jurisdiction exists under 28 U.S.C. § 1331. *See, e.g., Davila*, 542 U.S. at 221 (defendant properly removed action alleging that defendants breached state statute by failing to pay for certain medical services because plaintiff’s claim was completely preempted under § 502(a)(1)(B)); *Taylor*, 481 U.S. at 66 (defendant properly removed action for breach of contract, retaliatory discharge, and wrongful termination of disability benefits because plaintiff’s claim for disability benefits fell “within the scope of § 502(a)”).

Indeed, the district court acknowledged that “Section 502(a) appears to be implicated in the expanded class definition of ‘all insureds’ of Liberty” and its affiliates. RO at 8. Relying on dictum from page 1 of the September 29 Order, however, the district court held that neither the Plaintiffs nor the state court “contemplated” ERISA claims and that the certified class involves only claims under workers compensation and automobile policies. *Id.* That was error.

First, the class definition is clear. It expressly includes “[*a*ll insureds” of Liberty and its subsidiaries and affiliates “whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database,” including insureds under group-health policies issued by Liberty affiliates Liberty Life and Employers of Wausau. SO at 2.

Second, the dictum that the district quoted from page 1 of the September 29 Order plainly describes the scope of this case *before* class certification, because it says that “[t]his case involves a class action suit brought in connection with medical payments made by Liberty Mutual Insurance Company (“Liberty”) pursuant to workers compensation and automobile policies *allegedly issued by Liberty.*” (Emphasis added). As certified by the September 29 Order, this case now “involves” far more than “policies allegedly issued by Liberty.”

Third, Plaintiffs' arguments on the record at the class-certification hearing belie the district court's conclusion that Plaintiffs did not "contemplate" ERISA claims. At the hearing, they insisted that the class definition ultimately adopted in the September 29 Order "doesn't say anything about workers' comp or anything like that." App., Tab 16. They argued that "[t]here's nothing [in the class definition] about limiting this to workers' comp" and that the proposed class also includes "homeowners, fire, marine, *all the coverages* they [Liberty and its affiliates] write which pay for medical bills." *Id.* at 47 (emphasis added).

Fourth, the state court clearly adopted Plaintiffs' broad reading of the class definition, stating that Plaintiffs may assert against Liberty in this action claims under "*any insurance* in which medical bills are submitted for review." SO at 9 (emphasis added).

Regardless of whether the Plaintiffs and the state court specifically "contemplated" ERISA claims, therefore, they clearly contemplated that the certified class would include "*any insurance* in which medical bills are submitted for review" and that it would not be limited to workers' compensation or auto policies. SO at 9 (emphasis added). Accordingly, the district court erred as a matter of law in rejecting Liberty's contention that ERISA provides an alternative basis for federal jurisdiction.

### CONCLUSION

For the reasons stated above, Liberty respectfully requests that the Court review and reverse the district court's remand order.

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**CERTIFICATE OF SERVICE**

The undersigned counsel for Defendant-Petitioner Liberty Mutual Insurance Company hereby certifies that on December 27, 2005, he served the foregoing Petition for Permission to Appeal under 28 U.S.C. § 1453(c) by overnight delivery to each of the following counsel for the Plaintiff-Respondent and Plaintiffs-Intervenors-Respondents:

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