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CLASS ACTIONS SEVEN YEARS AFTER THE CLASS ACTION FAIRNESS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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CLASS ACTIONS SEVEN YEARS AFTER THE CLASS ACTION FAIRNESS ACT

FRIDAY, JUNE 1, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 9:30 a.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Chabot, King, Nadler, Conyers, and Scott.

Staff Present: (Majority) Zachary Somers, Counsel; Sarah Vance, Clerk; (Minority) Heather Sawyer, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. Good morning to everyone. I appreciate the witnesses being here, those in the audience, and the Members.

Without objection, the Chair is authorized to declare the recess of this Committee at any time.

In 2005, Congress passed the Class Action Fairness Act, or CAFA as it is commonly known, and President Bush signed it into law. The bill was introduced by Mr. Goodlatte in the House and Mr. Grassley and Mr. Kohl in the Senate and received strong bipartisan support in both chambers. Seven years have passed since then and, as the primary Subcommittee with jurisdiction over civil justice reform, I think it is time to take a look at how CAFA is working. So I have called today's hearing to examine what has worked, what hasn't, and to see what Congress may have missed when it wrote CAFA.

The class action is a mechanism designed to allow injured parties to join together with others who have suffered the same harm when their claims are not large enough to make pursuing them individually cost-efficient. If used properly, class actions are a valuable tool in our system of justice, but they are only beneficial when redress of actual injury suffered by class members is the priority of the litigation. However, in recent years, class actions have been used with increased frequency and in ways that do not promote the interests they were intended to serve.

CAFA was designed as a balanced approach to address some of the most egregious problems in class action litigation. The act was not intended to be a panacea that would correct all issues with class action litigation. Rather, its goals were to promote fairness, ensure that interstate class actions are tried in Federal court, and

establish new protections for consumers against abusive class action settlements.

In many ways, the act has been highly successful at achieving its goals. Nationwide class actions are now more regularly filed in Federal court and defendants can now more easily remove these class actions from State to Federal court. CAFA has also been successful at placing coupon settlements, in which the class members are compensated in near-worthless coupons, under increased scrutiny.

However, despite CAFA's successes, many observers have concluded that some Federal courts have failed to follow congressional intent in applying the statute. This has allowed plaintiffs' attorneys to develop new tactics to get around some of CAFA's provisions in ways that have undermined the goals of Congress.

Additionally, other legal commentators have raised concerns about abuses that CAFA did not address. One of the problems that has emerged since CAFA's enactment is a new form of forum shopping. Whereas prior to CAFA plaintiffs' attorneys filed suit in what were perceived to be the most favorable State courts, after CAFA it appears that attorneys are choosing to file class actions in certain Federal appeals circuits due to a favorable circuit precedent. This is a troubling trend considering that Federal law is supposed to be applied uniformly throughout the country.

This nonuniform application of the law has cut against congressional intent that interstate class actions be tried in Federal court and has led to attempts to game the system. For instance, certain Federal appeals circuits have allowed plaintiffs' attorneys to avoid Federal jurisdiction by putting the burden on the defendant to prove to a, "legal certainty" that the damages at issue exceed the $5 million jurisdictional minimum. Defendants are obviously reticent to prove the plaintiff's case on damages to a legal certainty.

In other cases, plaintiffs' attorneys have been permitted to avoid CAFA's requirements by splitting mass actions into groups of 99 or fewer plaintiffs to avoid CAFA's requirement that mass actions with 100 or more plaintiffs be tried in Federal court.

Additionally, although CAFA did restrict coupon settlements in many class actions, an equally egregious replacement has emerged: cy-pres settlements. In these cases, an uninjured third-party with no connection to the litigation, usually a nonprofit organization, is awarded money as part of a settlement because it would be too difficult or costly to identify alleged victims. These settlements present a whole host of problems, not the least of which is that they almost certainly violate the Constitution's Article III "case or controversy" requirement.

Now, these, I am sure, are just a few of the problems that have emerged since CAFA was enacted 7 years ago. Although I believe that CAFA has been a success overall, I hope that through this hearing we can examine what improvements may be needed to ensure that this system is functioning as it should. We must make sure that the rules governing class actions are fair to both plaintiffs and defendants and that they comply with the dictates of Article III of the Constitution.

And, with that, I would now yield to the Ranking Member of the Subcommittee, Mr. Nadler, for his opening statement.

Mr. NADLER. Thank you, Mr. Chairman.

At the start of the 109th Congress 7 years ago, Republican leadership made the Class Action Fairness Act one of their top legislative priorities. Having failed to pass similar legislation in prior Congresses, they wasted no time after taking control of both houses in the November 2004 elections. Republicans introduced a bill on January 25, 2005, rushed it through both chambers, and got it on the President's desk for signature 24 days later. They moved so fast that the Committee report, upon which many defendants rely in making removal arguments to the courts, was not even filed until 10 days after the bill had been signed into law.

CAFA's proponents claimed that the law was needed to stop plaintiffs' lawyers from bringing class actions to State courts known to be hostile to defendants, particularly out-of-State defendants, and then leveraging those cases to force large settlements. Never mind the many State class actions have uncovered significant corporate wrongdoing, vindicated protections provided under State law, and compensated victims. It was, after all, State class actions that finally uncovered years of corrupt practices in the tobacco industry, including its promotion of addiction through manipulation of nicotine levels and efforts to recruit teenage smokers. These class actions required the tobacco industry to pay $200 billion for the public health disaster caused by smoking, dismantled certain industry groups that had spearheaded the industry's public disinformation campaigns, and banned certain forms of advertising and marketing.

State class actions have similarly uncovered contamination of groundwater that cause certain forms of cancer, fraudulent pricing practices and misleading advertising by drug companies, and predatory payday lending practices. Lawsuits asserting State common law tort and fraud claims and seeking the protection of State consumer and environmental laws have resulted in much needed reform of corporate practices and have compensated those harmed by corporate wrongdoing.

Despite these benefits, CAFA's proponents unquestionably sought to discourage class actions altogether by funneling them away from State courts into the Federal courts, where it was believed that Federal judges would be reluctant to certify classes and would prove more favorable to defendants. Seven years later, CAFA certainly appears to have achieved its core goal of removing class actions from State to Federal courts. Studies undertaken on behalf of the Federal Judicial Conference, for example, show that the number of class actions either removed to or filed originally in Federal court have greatly increased since CAFA's passage.

These empirical studies tell us nothing about whether CAFA has had an overall positive or negative impact on the enforcement of legal rights, access to the courts, or the just, speedy, and inexpensive resolution of class actions.

Kevin Clermont and Theodore Eisenberg, professors of law at Cornell University, studied Federal court decisions involving CAFA and concluded that the law has "produced a lot of litigation in its short life," mostly over questions regarding who bears the burden of proving removal or the law's effective date, and that "most of this litigation has been socially wasteful."

I would ask unanimous consent to submit their article, "CAFA Judicata: A Tale of Waste and Politics," for the record.

Mr. FRANKS. Without objection.

Mr. NADLER. Thank you.

[The information referred to follows:]

Westlaw.
156 UPALR 1553
156 U. Pa. L. Rev. 1553

C

University of Pennsylvania Law Review
June, 2008

Symposium

Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005

Articles

*1553 CAFA JUDICATA: A TALE OF WASTE AND POLITICS

Kevin M. Clermont [FNd1]

Theodore Eisenberg [FNdd1]

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The Class Action Fairness Act (CAFA) has taken on its real form through construction by federal judges. That form emerges in this empirical study of judicial activity and receptivity in regard to the Act. Our data comprise the opinions under the Act published during the two and a half years following its enactment in 2005.

CAFA has produced a lot of litigation in its short life. The cases have been varied, of course, but most typically the resulting published federal opinion involved a removed contract case, with the dispute turning on the statute's effective date or on federal jurisdiction. Even though the opinions shed some light on issues such as jurisdictional burden and standard of proof, most of the judicial activity was socially wasteful litigation. It emphasized transitional efforts to interpret sloppily drafted provisions.

More interestingly, we saw wise but value-laden resistance by judges to CAFA, as they interpreted it in a way that dampened the early hopes of overly enthusiastic removers. Regression analysis confirms the suggestion that one can derive from percentages of cases decided in certain ways. With the exception of Republican male judges, the federal judiciary has not warmly embraced the statute.

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*1554 Introduction

What happened when the Class Action Fairness Act of 2005 (CAFA) [FN1] encountered the federal judges--did the courts match the congressional ardor for class action reform? In an effort to answer this question, we studied the cases decided under the Act after its enactment on February 18, 2005, and before our cutoff of August 18, 2007. We measured judicial activity and receptivity in regard to the Act. It turned out not to be a matter of CAFA ipsa loquitur, because the courts played a role in reshaping the Act. By examining at close range the thing adjudged, we saw social waste by litigation, and we saw wise but value-laden resistance by judges.

I. Background

The Republican Congress, in enacting the Class Action Fairness Act, gave it a broad scope covering interstate class actions, with the expressed intent of defeating the plaintiffs' bar's manipulation of state courts. When the Republican President George W. Bush signed it into law, he declared that it "marks a critical step toward ending the *1555 lawsuit culture in our country." [FN2] The statute's method was to funnel more class actions away from the state courts and into the federal courts, and perhaps thereby to discourage class actions. However, neither the cause of any malady nor the effectiveness of this cure is beyond debate. [FN3]

Let us run through the 2005 Act, showing in bold the potential points of dispute, for each of which we coded.

The Act contained a few minor regulatory provisions aimed at curbing certain class action abuses. [FN4] Notably, in

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what is now *1556 28 U.S.C. § 1712, Congress ratcheted up the judicial scrutiny applicable to a federal CAFA or non-CAFA class action's settlement terms that provide for recovery of discount coupons by class members.

More important for present purposes was the Act's expansion of federal subject matter jurisdiction for class actions or mass actions [FN5] that were commenced on or after the enactment date. In 28 U.S.C. § 1332(d), Congress bestowed original jurisdiction on the federal district courts for sizable multistate class actions, generally those in which ***1557** the plaintiff class contains at least 100 members and their claims aggregated together exceed $5 million, exclusive of interest and costs. The Act does not require complete diversity, but rather minimal diversity, which means that only one member of the class must differ in citizenship from any one defendant:

> (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which --
>
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
>
> (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state. [FN6]

This jurisdiction, by a bewilderingly complicated qualification in subsection (4) of 28 U.S.C. § 1332(d), does not extend either to a class action in which two-thirds or more of the plaintiff members are citizens of the state where the action was filed and the primary defendants are also local citizens (the "home state" exception) or to a class action in which there are certain other markers of localism (the "local controversy" exception). Under subsection (3), if that fraction falls between one-third and two-thirds, and if the primary defendants are citizens of the state where the action was filed, the district court may discretionarily decline jurisdiction over what it sees as an essentially local case. The statute goes on to carve out other cases from federal jurisdiction in subsection (5)(A) (certain actions where the primary defendants are governmental) and subsection (9) (certain securities and corporate actions).

In 28 U.S.C. § 1453, Congress further provided that any defendant can remove a class action from state court to the local federal district court--but only, as one presumes in accordance with the clear legislative history despite the absence of appropriate statutory wording, if the action would be within the original federal jurisdiction of § 1332(d). The statute goes on to say that the removing defendant can be a local citizen and need not seek the consent of the other defendants.

***1558** Upon enactment, all sorts of legal skirmishes and interpretive problems obviously lay ahead for the parties and the courts: What was the meaning of "primary defendants" and the related formulations? How would the one-third and two-thirds numerical tests work, especially for ill-defined classes? More problems lay beyond the words of the statute, including choice of law [FN7] and venue. [FN8] In fact, the Act has already generated much litigation on some other questions, especially on the Act's effective date and threshold jurisdictional questions, including the burden and standard of proof. We wanted to systematically explore that case law.

II. Methodology

Our technique was to apply the search term "('class action fairness act' or cafa) & da(aft February 17, 2005 and bef August 18, 2007)" in Westlaw's U.S. District Court Cases ("dct") and U.S. Courts of Appeals Cases ("cta") databases. Those databases contain the opinions, published in print or online, of the federal district courts and courts of appeals, respectively.

In many situations, empirical research limited to published opinions is dangerous. To begin with, judicial decisions

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represent only the ***1559** very tip of the mass of grievances, and it is sometimes tough to infer from that tip truths about the underlying mass of disputes or what lies below the disputes. [FN9] More to the point, a rather small percentage of judicial decisions appear as published opinions. [FN10] Those published ***1560** opinions are, in fact, a skewed sample of judicial decisions. [FN11] Nonetheless, here we want to see how the courts have treated CAFA as a matter of doctrine. Published opinions are the decisions that move the law. Accordingly, published opinions are exactly what we wish to examine.

This Westlaw search yielded 382 federal district court published opinions and 63 court of appeals published opinions. [FN12] There is our first interesting result: CAFA has produced a lot of cases. [FN13] For comparison purposes, an analogous search for the Private Securities Litigation Reform Act of 1995 [FN14] yielded 154 federal district court opinions and 14 court of appeals opinions in its first two and a half years of existence; for the Securities Liti[HD] ***1561** gation Uniform Standards Act of 1998, [FN15] the numbers were 41 and 6; and for the Multiparty, Multiforum Trial Jurisdiction Act of 2002, [FN16] the numbers were 4 and 1. CAFA's expansion of the right to appeal immediately from orders granting or denying remand [FN17] might explain the larger number of court of appeals decisions, but the number for the district courts, at least, suggests that CAFA, with its wider applicability, made a bigger splash. Relatively and absolutely, CAFA has already generated an impressive hillock of case law. [FN18]

Of course, not all of the CAFA opinions turning up in our search were consequential treatments. Reading the cases revealed the references to CAFA to be inconsequential in about half of the opinions (in some, "CAFA" was used to refer to the Criminal Activity Forfeiture Act, Christians Against Family Abuse, or Citizens Against Forced Annexation). So, we decided to reject any opinion that mentioned CAFA as an aside, but to include it if the court resolved, no matter how easily, a Class Action Fairness Act point disputed by the parties. Only 182 of the district court opinions were relevant in this sense, with 200 irrelevant. On the court of appeals front, 44 were relevant, 19 not. [FN19]

Working with this residue of relevant opinions, we coded them. We coded for all the different types of disputes (bolded above) that could arise in construing CAFA. And we coded for many other things, including court (and its weighted case filings per authorized judgeship [FN20]), judge (and the judge's gender, birth year, confirmation year, ***1562** and party affiliation [FN21]), subject area of claim, certification status, [FN22] decision date, who won the decision, and whether the decision was receptive or resistant to CAFA. [FN23]

III. Observations

A. Nature of Cases

In 91% of our district court CAFA cases, removal brought the case to federal court. The percentage has declined only slightly over the years, coming in at 94% in 2005, 90% in 2006, and 90% in 2007.

These figures appear to clash with the recent results of the Federal Judicial Center (FJC) concerning the impact of CAFA on federal filings through June 2006. [FN24] It concluded that CAFA had approximately doubled the number of diversity class actions, with the annual increase comprising between 300 and 400 cases. [FN25] About three-quarters of the increase in cases primarily asserted state-law contract (including insurance) claims or fraud claims. [FN26] More startling, about three-quarters of the increase consisted of original federal filings, rather than removed cases. Both removal and original cases spiked right after enactment, but removal then faded and original cases climbed. The FJC authors theorized that

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> *1563 [a]s removal becomes more predictable, plaintiff attorneys might decide to file actions initially in federal court to avoid the costs and delays associated with removal. . . . In that way, plaintiff attorneys retain a choice of forum at least to the extent that, in a given case, jurisdiction and venue rules allow filing in more than one federal forum. [FN27]

However, our data do not necessarily conflict with the FJC study. Probably the difference shows merely that among CAFA class actions, removed cases are the ones generating pitched battles and hence published opinions, and especially opinions that expressly mention CAFA. The difference between the two studies thus may reflect the danger of relying only on published cases to get a picture of what is really happening on the ground. [FN28]

The reader must therefore bear in mind that our study features memorable threshold battles. Meanwhile, the FJC is telling us that practitioners may be seeing a lot of cases proceeding directly to struggles over certification and the merits, without any meaningful pause at the threshold. The result would be that our impression of CAFA litigation would differ from some practitioners'. Nevertheless, our skewed sample of published opinions still holds some lessons for those practitioners.

On the one hand, if certain plaintiffs' decisions to institute suit in federal court have resulted in less litigation over threshold issues, while by contrast those other plaintiffs who choose to file in state court are running into a pretty high number of threshold battles, then we could suggest that those who voluntarily choose to file suit in federal court have engaged in sound strategic decision making, at least in terms of reducing litigation costs and time delays.

On the other hand, these immediate savings might turn out not to be worth it. If the state court plaintiffs are actually winning a good share of the CAFA battles and getting remanded, while in the cases that stay in federal court the federal judges turn out to be more parsimonious with certification and possibly more unreceptive on the merits than some state judges (as defendants and lawmakers thought they would be [FN29]), then the short-term gain of avoiding the threshold *1564 struggles by just suing in federal court might constitute a foolish economy.

In any event, the election of federal court by only some plaintiffs creates a selection effect. Plaintiffs who are more squarely within the reach of CAFA presumably would tend to choose federal court. Unless defendants become more selective in choosing which state court cases to remove, the plaintiffs' selectivity will raise the plaintiff win rate in battles over entry to federal court.

Table 1: Number of Published District Court CAFA Opinions from February 2005 to August 2007, by Primary Subject Area

Subject Area	2005	2006	2007	Total
Contract	28	23	23	74
Tort	1	17	10	28
Insurance	11	19	11	41
State labor law	3	8	3	14

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Other subjects	9	12	4	25
Total	52	79	51	182

Table 2: Number of Published Court of Appeals CAFA Opinions from February 2005 to August 2007, by Primary Subject Area

Subject Area	2005	2006	2007	Total
Contract	4	12	2	18
Tort	1	6	4	11
Insurance	1	4	2	7
State labor law	2	3	2	7
Other subjects	1	0	0	1
Total	9	25	10	44

***1565** As to the nature of the claims involved, the cases in our database overwhelmingly involved state law and, indeed, were mostly contract (including insurance) cases. [FN30] The other noteworthy lesson of the data underlying Tables 1 and 2 is that the total number of published cases, once they got going, has remained relatively steady over time. Note that 2006 is our only complete calendar year, so the midway peak is an illusion.

B. Nature of Issues

Many of these CAFA cases involved transitional problems, which a more carefully drafted statute could have avoided. This sloppy drafting [FN31] created a lot of unnecessary social friction and costly litigation by not foreseeing things like effective-date problems. We can show this by examining more closely the nature of the CAFA issues the courts were deciding.

Most of the early disputes over CAFA involved effective-date questions [FN32]--with jurisdictional issues coming in second, but finishing strong. [FN33] The numbers for "other issue" are low; they proportionately ***1566** increase for the appellate decisions only because some difficult questions of appellate jurisdiction fall into this category. [FN34] Incidentally, the numbers in Tables 3 and 4 add up to more than the total number of opinions, because a single opinion can decide multiple issues.

***1567** Table 3: Number of Published District Court CAFA Opinions from February 2005 to August 2007, by Multiple

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Disputed Issues

Disputed Issue	2005	2006	2007	Total
Effective date	35	37	5	77
District court jurisdictional provisions	16	43	35	94
Jurisdictional burden and standard	7	18	8	33
Other issues	6	8	11	25
Total	64	106	59	229

Table 4: Number of Published Court of Appeals CAFA Opinions from February 2005 to August 2007, by Multiple Disputed Issues

Disputed Issue	2005	2006	2007	Total
Effective date	8	9	5	22
District court jurisdictional provisions	1	9	5	15
Jurisdictional burden and standard	1	8	4	13
Other issues	2	16	6	24
Total	12	42	20	74

We realize that a democratic political system will sometimes yield vague and ambiguous statutes, and that the courts are used to working with them. So CAFA is far from unique in creating wasteful litigation. Nonetheless, Congress did an especially poor job here on a predictably important subject, despite spending eight years in the drafting process. The result has been much more social waste due to CAFA than to comparable statutes. And that waste will-- ironically--offset any of the benefits that CAFA's supporters were attempting to create by corralling "wasteful" class action litigation.

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Still, however wasteful it otherwise was, this flood of CAFA litigation has at least managed to shed some light, albeit of variable intensity. Two examples illustrate the different contributions the courts have made. First, the burden of proof on jurisdiction is a matter that CAFA itself failed to treat, even though its legislative history muddied the question. The result was a lot of litigation attempting to produce clarification just to get us to a point from which the statute could have ***1568** started. [FN35] Second, the standard of proof on jurisdiction has been a longstanding problem, albeit a finer technical point that Congress--more understandably--completely ignored. This issue has produced much less litigation, which has not managed to move the dispute toward resolution. We should expand on both issues.

1. Burden of Proof

A frequent point of contention in CAFA cases has been the determination of who bears the burden of proof on jurisdiction when the defendant removes: the plaintiff who brought suit or the defendant who invoked federal jurisdiction. The burden-of-proof question generated 32 disputes in our district court cases and 11 in our court of appeals cases. In conformity with the traditional rule, consensus under CAFA has settled on imposing the burden for jurisdictional requirements, [FN36] as opposed to exceptions, [FN37] on the removing defendant. The most recent of our set of appellate opinions on this point, by the Eleventh Circuit in Lowery v. Alabama Power Co., explained it this way:

> Under this traditional rule, the defendants, having removed the case to the district court, would bear the burden of establishing the court's jurisdiction. The defendants contend, however, that this traditional rule frustrates CAFA's motivating congressional purpose of expanded access to the federal courts. . . .
>
> The uncertainty surrounding the burden of proof in CAFA cases arises not from the text of CAFA itself--which is silent on the matter--but from a few discrete excerpts of the statute's legislative history. . . .
>
> Although several district courts have followed this apparent congressional intent in shifting the burden of proof onto the plaintiff, the courts ***1569** of appeals have been reluctant to make the shift from such a "longstanding, near-canonical rule." We have recently joined the Second, Third, Seventh, and Ninth Circuits in following the settled practice of placing the burden of proof on the removing [CAFA] defendant. [FN38]

2. Standard of Proof

The second issue, the standard of proof, is more difficult, but only 5 of our district cases and 9 of our appellate cases addressed it. [FN39] The context was almost always a dispute about jurisdictional amount upon removal. Nevertheless, the cases split dramatically.

a. Non-CAFA Cases

The background on this latter issue is that under the prevailing St. Paul test of "legal certainty," for the plaintiff to satisfy the jurisdictional amount requirement for original jurisdiction in a diversity case when the complaint pleads a claim for more than $75,000, the plaintiff need show only a legal possibility that the judgment could exceed $75,000 under the applicable law if the plaintiff were to prevail. [FN40] The plaintiff can pass this test easily, especially in unliquidated tort cases, because jurisdiction will exist even though a recovery over $75,000 is, on the facts, highly unlikely. That is, because the jurisdictional amount and the merits overlap, courts do not apply the preponderance standard that is usual for issues of pure jurisdiction but instead ask for no more than a very modest factual showing to establish jurisdiction: the plaintiff can rebut legal certainty by establishing merely a legal possibility or, in other words, by establishing that a reasonable factfinder could award more than the jurisdictional amount. In sum, the jurisdictional-amount test, as applied to the damages that might be recovered, is actually a prima facie standard of proof that in essence requires a factual showing of a reasonable possibility of exceeding the floor amount. [FN41]

However, for the defendant to remove on the basis of diversity, when the plaintiff did not plead any amount or

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pleaded $75,000 or less, and did not make a binding disclaimer of damages in excess of ***1570** $75,000, the defendant bears the burden--but the showing required of the defendant has remained unclear. [FN42] In almost all courts the standard is high, but it ranges from requiring the defendant to show a legal certainty that recovery, if there is one, will exceed $75,000, [FN43] down the step-scale of probability [FN44] to requiring a showing that more likely than not any recovery will exceed $75,000. [FN45] Some courts have ***1571** required less, such as a substantial possibility [FN46] or a reasonable possibility, [FN47] but such authority is relatively scanty and shaky. Of late, the courts, and especially the appellate courts, [FN48] markedly appear to be converging on the preponderance-of-the-evidence standard, which requires a more-likely-than-not showing. [FN49] This still-tough approach ***1572** against removal jurisdiction is seemingly incongruent with the anything-goes flavor of the St. Paul test for original jurisdiction.

b. CAFA Cases

If anything, the CAFA cases have added to the confusion. The Eleventh Circuit in Lowery [FN50] followed its non-CAFA precedent [FN51] to apply the preponderance standard. Curiously, on this particular issue, the court did not cite another panel's earlier CAFA decision that had applied the preponderance standard. [FN52] Strikingly, however, the Lowery court all but ridiculed its own approach:

> There is a unique tension in applying a fact weighing standard to a fact-free context. . . .
>
> . . . .
>
> . . . We note, however, that in situations like the present one--where damages are unspecified and only the bare pleadings are available--we are at a loss as to how to apply the preponderance burden meaningfully. . . .
>
> . . . Regardless, our precedent compels us to continue forcing this square peg into a round hole. [FN53] Insightfully, the court suggested that the "unabashed guesswork" in the search for a "readily deducible" amount might in effect push the actual standard toward the higher legal-certainty standard. [FN54]

Similarly, a district court in the Sixth Circuit ruled that "CAFA does not alter" the problem, and so it applied its non-CAFA precedent in support of the preponderance standard. [FN55] The Second Circuit did ***1573** the same, without discussion. [FN56] The Fifth Circuit did too, but in a different context. [FN57]

The Third Circuit in Morgan [FN58] also followed its non-CAFA precedent, [FN59] but this precedent meant a legal-certainty standard. Although one of its district courts had earlier found the circuit law on the precise point to be unsettled [FN60] and the Morgan court spoke with little clarity, another district court in the circuit later read its words to mean "that the Defendants must prove the requisite amount in controversy, $5 million, to a legal certainty." [FN61]

New complications, however, arose in the Ninth Circuit. In Lowdermilk, its most recent CAFA case on the point in our dataset, the Ninth Circuit abandoned its allegiance in non-CAFA cases to the preponderance standard, deciding in favor of the legal-certainty test for CAFA cases. [FN62] The Lowdermilk court stressed the limited nature of federal jurisdiction and the idea that the plaintiff is master of the complaint. [FN63] But the holding may be limited to the facts of that case, wherein the plaintiff pleaded damages below the jurisdictional amount. Shortly before, another panel had applied the preponderance standard in a CAFA case in which the plaintiff's complaint did not specify damages. [FN64] Some earlier non-CAFA cases had also distinguished between the plaintiff's not pleading damages and the plaio[HD] ***1574** tiff's pleading less than the jurisdictional amount. [FN65] And subsequently the Ninth Circuit did try to limit Lowdermilk to CAFA cases in which the plaintiff's complaint clearly specified inadequate damages. [FN66]

Finally, the Seventh Circuit adopted a complicated standard in Brill, the only one of these CAFA cases to develop a standard that upheld federal jurisdiction. [FN67] The Brill court seems to have required merely as a burden of production that the defendant show by a preponderance that the claim exceeded the jurisdictional amount. At the same time, the

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court said that this showing would sustain federal jurisdiction unless the plaintiff could come back to show to a legal certainty that the claim did not meet the jurisdictional amount. The court's motivation to complicate matters was the usual concern with the difficulty of applying a factual standard to an undeveloped factual record. Some earlier non-CAFA cases had deployed the same burden-shifting approach. [FN68]

c. Optimal Approach

The messy CAFA cases at least generate an incentive to rethink the whole problem of measuring jurisdictional amount upon removal. To begin, courts seem to find it all too natural to invoke the phrase "legal certainty," because the Supreme Court in St. Paul enshrined that phrase as the very permissive test for the plaintiff's invocation of original jurisdiction. [FN69] Upon the defendant's invocation of removal jurisdiction, however, the phrase becomes ambiguous, with possible meanings spread across three major camps:

1.At one extreme, "legal certainty" could mean by direct analogy that the defendant has to show merely a reasonable possibility that the jurisdictional amount exists. In other words, whoever invokes federal jurisdiction, be it plaintiff or defen[HD] ***1575** dant, has to show only a possibility of being right about the jurisdictional amount. This approach treats plaintiffs and defendants equally, [FN70] and it somewhat curtails plaintiffs' tactical abuse in provisionally making low-ball claims to preclude removal. [FN71] However, it makes no sense to allow the defendant to dislodge the plaintiff from state court on as minimal a showing as that required by St. Paul for a plaintiff to invoke federal jurisdiction; under the prevailing philosophy of jurisdiction, more should be required to dislodge a party from a proper court than is initially required to invoke jurisdiction.

2.Accordingly, most courts applying "legal certainty" have jumped to the other extreme, converting the phrase to mean that the defendant must show a virtual certainty that the jurisdictional amount exists. Part of the reason for this conversion might be semantic, in that the phrase "legal certainty" carries its own impetus to mean what it says and thus impose a very high standard rather than a very low standard. Another reason was that this removal issue arose in an era different from St. Paul's, at a time when enforcing limits on access to the overworked federal courts (especially on the basis of diversity) was quite appealing. [FN72] In any event, the conversion is not necessarily illogical in relation to St. Paul: under this approach, for both original and removal jurisdiction, the plaintiff, as master of forum-choice, gets his or her way if there is a possibility that his or her position on jurisdictional amount is correct.

3.Many courts do not feel limited to these two choices. Given the stark choice that the phrase "legal certainty" offers between a pro-defendant approach and a pro-plaintiff approach, most circuit courts in non-CAFA cases have succumbed to the allure of compromise. [FN73] And of course the phrase "preponderance of the evidence" is also in the air, because it is the ***1576** usual standard of proof, including for jurisdictional issues that do not overlap the merits. [FN74] Here, however, any sort of preponderance standard cannot escape the central incoherence caused by applying a fact-weighing standard to an undeveloped factual record.

We see this incoherence as a major argument against any middle standard, such as a preponderance approach. Although courts are fairly adept at applying the legal-certainty standard without full discovery and without an evidentiary hearing (such as on motions for summary judgment), courts find curtailing the opponent's procedural opportunities for factual development to become more questionable as the standard moves from a legal-certainty extreme toward the middle standard of preponderance. Moreover, a middle standard would, in theory, more often necessitate jurisdictional dismissals during or after trial, when the facts get better developed. These difficulties are huge. [FN75]

The CAFA appellate cases are picking up on this incoherence. Lowery, Morgan, Lowdermilk, and Brill all express some degree of repulsion from factual standards and therefore incline toward returning to a legal-certainty approach--and

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because of the aforementioned weight of authority and policy arguments, these four cases mostly lean toward the more demanding of the two versions of the legal-certainty test. Indeed, that workable legal-certainty test, under which the defendant must show to a virtual certainty that the jurisdictional amount exists, has prevailed in many district courts and in at least one circuit court for non-CAFA cases. [FN76]

We find the major argument for the demanding legal-certainty test lying in the often-overlooked fact that the courts here are engaged not in some common-law endeavor but in construing the removal statutes. [FN77] The purpose of those statutes is not to favor defendants blindly but to even things up somewhat by giving them the delimited power, ***1577** in some but not all circumstances, [FN78] to counter a plaintiff's choice of state court for a suit that is within federal jurisdiction. The main thrust of the statutes, then, was to tie the scope of removal jurisdiction to the scope of original jurisdiction. [FN79] Accordingly, any policy arguments about helping or hindering defendants are secondary to arguments based on the relative scope of removal and original jurisdiction. More particularly, under the statutes, the defendant can remove only if the suit, as put forward by the plaintiff, is necessarily within the federal jurisdiction. The plaintiff is master of the complaint, and so can refuse to plead a federal question or to demand in excess of the jurisdictional amount. [FN80] The plaintiff can thereby defeat removal, unless a federal question is necessarily in play, such as through preemption, [FN81] or unless the demanding legal-certainty test certifies that more than $75,000 is necessarily at stake. Any less-demanding test for jurisdictional amount, like the preponderance approach, means that defendants could remove suits that are not within federal original jurisdiction and thus violate the most basic theme of the removal statutes.

***1578** Therefore, the best approach in general, and even more so for CAFA cases where the question is new and where defendants' abuse is especially problematic, is to require that the removing defendant show to a legal certainty that any recovery will exceed the jurisdictional amount. If the defendant had to meet such a high standard, it would mean that the defendant would often fail in its removal effort. [FN82] Just as the plaintiff can very easily survive the St. Paul test for original jurisdiction, the plaintiff will very easily survive this legal-certainty test applied to removal and so will achieve remand. This standard of proof consistently enables the plaintiff to be the master of forum choice.

A lot rides on this point. The standard of proof is determinative of jurisdiction, meaning that the parties know what they are doing when they wage battle over this seemingly arcane point that we have now examined at some length. Plaintiffs will suffer disadvantage if the statute and its construction go one way, and defendants will suffer disadvantage if the rulings go the other way--that is, the party whom the court sticks with the burden of proof on a spongy jurisdictional determination will suffer. [FN83] Moreover, doctrine not only affects the parties' fortunes but also constrains the judges' freedom. Prior rulings strongly influence subsequent judicial decisions on doctrine. For example, prior decisions on the burden of proof produced the result that, in the CAFA context, the burden for jurisdictional requirements, as opposed to exceptions, is on the removing defendant. [FN84]

***1579** Thus, doctrine matters. We certainly do not contend to the contrary. But it remains possible that doctrine is not alone in influencing outcomes. We still must consider whether judicial attitudes for or against CAFA play a role, at least in some restricted realm of wriggle room. If so, and if judicial attitudes in fact incline against CAFA, then the hope of moving toward the optimal approach on standard of proof increases.

C. Judicial Reactions

The following data seem to show that both the district courts and the courts of appeals have resisted an expansive reading of CAFA. Because so many of the cases in our database were removed cases in which the plaintiff opposed application of CAFA, this resistant attitude among federal judges resulted in a high plaintiff win rate.

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We shall look first at the plaintiff win rate, because so much prior empirical research has emphasized this metric. We shall define "plaintiff win rate" as the fraction of plaintiff wins among the opinions in our database that went either for the plaintiff or the defendant, as opposed to decisions for neither. Then we shall shift to our measure of receptive/resistant reaction [FN85] in order to look more directly at judicial disposition. We shall define "resistance rate" as the number of opinions in our database in which the court took a narrow view of CAFA, divided by the total of opinions in which the court took either a narrow or an expansive view of CAFA.

1. District Courts

The plaintiffs succeed in our cases at the unusual rate of almost two-to-one. This high plaintiff win rate could mean that the federal district courts are resisting what they see as improper use of CAFA by defendants. True, some plaintiffs are siphoning off cases squarely within CAFA by suing in federal court originally, and so bringing in state court a larger percentage of nonremovable cases. [FN86] Yet, defendants are correctly seeing CAFA as a pro-defendant statute, which prompts them to overuse it by unsuccessfully removing or otherwise ***1580** trying to impose CAFA on plaintiffs. [FN87] Thus, the theory might run that the district courts, by resisting this sort of move by defendants, give plaintiffs the lopsided win rate we observe in published opinions.

Or it could be that the plaintiff win rate in the CAFA cases is not surprisingly high in the first place. True, defendants ordinarily do very well in removed cases, compared to original federal filings. [FN88] But perhaps plaintiffs have a high win rate in their efforts actually aimed at resisting removal. A couple of Alabama districts, for example, exhibit a peculiarly high rate of remand that exceeds 80% [FN89]--nationally there is only about a 20% remand rate for removed actions. [FN90] If in over half the cases there is no effort to remand, [FN91] the plaintiffs' national success rate would be a middling rate somewhat over 40%. Therefore, plaintiffs in our cases are doing remarkably well.

In any event, we would expect the defendants' failures to be concentrated at the beginning of CAFA's existence, as overly enthusiastic defendants flocked to the federal haven and the parties had not yet had the chance to adjust to the judiciary's statutory construction. In fact, the plaintiffs' 76% win rate in 2005 fell to 65% in 2006 and then to the more normal rate of 47% in 2007.

Table 5 gives the percentage of opinions in our database that went for the plaintiff, doing so for each set of opinions that involved a particular kind of CAFA dispute. It shows that plaintiffs did extremely well in litigation involving CAFA's effective date. Litigation on this issue was strictly transitional. Thus, defendants' successes mounted as the nature of the disputed issues evolved beyond the effective date. That early litigation, involving the defendants' losing battles to get cases into federal court, constituted social waste.

***1581** Table 5: Plaintiff Win Rate in Published District Court CAFA Opinions from February 2005 to August 2007, by Multiple Disputed Issues

Disputed Issue	Plaintiff Win Rate (%)
Effective date	80
District court jurisdictional provisions	47

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Jurisdictional burden and standard	47
Other issues	56
Total	63

Contrariwise, we would not expect the plaintiff win rate to vary much with primary subject area of the claims. Table 6 shows statistically insignificant differences. Recall that the three categories exhibiting the most extreme win rates, those categories other than contract and insurance, are the smallest categories in number of cases.

Table 6: Plaintiff Win Rate in Published District Court CAFA Opinions from February 2005 to August 2007, by Primary Subject Area

Subject Area	Plaintiff Win Rate (%)
Contract	67
Tort	54
Insurance	64
State labor law	71
Other subjects	54
Total	63

We could state all of these results alternatively in terms of the receptive/resistant code, but the story would be the same. Given that most of the cases were removal cases, where a victory for plaintiff was the resistant position, the resistance rate will be similar to the plaintiff win rate. Accordingly, the district courts resisted expansion of CAFA 63.3% of the time over the two and a half years, while they gave the plaintiffs a 62.7% win rate.

***1582** 2. Courts of Appeals

Tables 7 and 8 show that, in a fashion similar to the district court CAFA cases, the courts of appeals exhibited elevated plaintiff win rates on CAFA disputes (especially for effective-date issues) but showed no pattern across subject area of claims (for example, the 0% win rate in the "other subject" category simply means that the Brill decision, involving the Telephone Consumer Protection Act and being the only appellate case to fall into that category, was decided in favor of the defendant [FN92]). The 57% overall plaintiff win rate on appeal reflects who won the appeal, plaintiff or defendant, regardless of who the appellant was. The plaintiffs' 89% win rate in 2005 fell to 52% in 2006 and then to 49% in 2007, a more normal rate for appellate courts.

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Table 7: Plaintiff Win Rate in Published Court of Appeals CAFA Opinions from February 2005 to August 2007, by Multiple Disputed Issues

Disputed Issue	Plaintiff Win Rate (%)
Effective date	73
District court jurisdictional provisions	53
Jurisdictional burden and standard	62
Other issues	55
Total	57

Table 8: Plaintiff Win Rate in Published Court of Appeals CAFA Opinions from February 2005 to August 2007, by Primary Subject Area

Subject Area	Plaintiff Win Rate (%)
Contract	76
Tort	45
Insurance	29
State labor law	67
Other subjects	0
Total	57

***1583** Most of the CAFA appeals (68%) resulted in affirmance, just as most non-CAFA appeals do. [FN93] Combining the high affirmance rate with the elevated plaintiff win rate in the district courts implies that plaintiffs should indeed have a high win rate for CAFA appeals. So, to get a better gauge of plaintiff success on appeal, we should instead compare the rate of reversal when the plaintiff is the appellant to the reversal rate when the defendant is the appellant. Ordinarily, plaintiffs see a dismal rate of success on appeal, with defendants doing more than twice as well--an effect that we labeled "plaintiphobia" in another article. [FN94] But in this regard, the CAFA appeals differ strongly from the ordinary: for CAFA, the defendants saw a 37% reversal rate in 35 cases, not statistically different from the 29% reversal rate for

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plaintiffs who appealed 7 cases. [FN95] This additional piece of the puzzle *1584 tends to show that it is opposition to extension of CAFA, rather than any aberrational pro-plaintiff attitude, that is driving the appellate judges. Apparently, the appellate courts' concern with CAFA causes them to overcome their usual leanings, which are pro-defendant relative to the district courts, and instead act like the district courts to restrict that statute's scope.

Again, we could state all of these results alternatively in terms of the receptive/resistant code, but the story would still be the same. In fact, the overall resistance rate in the court of appeals was 60%, quite consistent with the district courts' resistance rate of 62%. CAFA seems to be a matter that unites trial and appellate judges.

D. Regression Models

It looks as if judicial resistance to extension of CAFA was at work. Does this judicial resistance reveal a judicial inclination that is at least somewhat political?

On the one hand, it very well could be that the judges were just playing a neutral role. They arguably faced down an onslaught of overly enthusiastic defendants, doing so by simply applying CAFA's existing restrictions and perhaps by invoking a few "neutral" maxims, such as their duty to construe narrowly any grant of jurisdiction. We must admit that, in repelling the onslaught, the courts did not create a visible pile of opinions outlandish enough to refute their neutrality. [FN96]

On the other hand, it is conceivable that the judges, on average, were expressing their disapproval of CAFA. [FN97] That orientation could *1585 affect outcome on the margins, in difficult cases where the judges' ideology would have an impact on win rate. [FN98] That is, the judges' value-laden view of CAFA might be producing the judicial favoring of plaintiffs. Some of our results do in fact show just how value-laden these CAFA issues are:

• Interestingly, plaintiffs prevail in the district court more often, to a statistically significant degree, before Democrat judges (71%), but even Republicans favor plaintiffs more than half the time (55%).

• As to gender, plaintiffs prevail in the district court slightly more often before female judges (70%), but even male judges favor plaintiffs more than half the time (62%). Female Republicans (71%) and female Democrats (68%) showed no real difference, acting like male Democrats (72%). So, male Republicans (48%) are the distinctive group, to a statistically significant degree. [FN99]

*1586 • The Republican-male effect in the district court is most pronounced on issues other than effective date, that is, on issues where arguably ideology matters more or the answer is less clear cut. If we look at the issues other than effective date, male Republicans give plaintiffs a win rate of 33%, compared to 62% before other judges. That means, perhaps surprisingly, that male Republicans are deciding CAFA cases in a way that expands federal jurisdiction.

These results are important. In brief, the courts have resisted CAFA, and their motivation appears value laden. Moreover, the Republican-male effect is showing up in the published district court opinions under study or, in other words, in the decisions that moved the law. [FN100]

However, these results, developed one variable at a time, might be explainable by confounding factors. For example, perhaps Republican male judges adjudicate a different mix of CAFA issues than do other judges. Because we lack the benefit of a controlled experiment--and because filtering by the publication decision defeats random assignment--we cannot completely eliminate the possibility of confounders influencing our findings.

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Nevertheless, we can at least use regression analysis to control for the various factors observable in the opinions. In our regression ***1587** models, the dependent variable is coded "1" if the district court decision is receptive to federal class action treatment under CAFA and "0" if the decision instead takes a narrow view of CAFA. The explanatory variables include controls for case-, judge-, and district-level characteristics.

First, groups of cases can have substantially different characteristics that lead to varying outcomes, and to varying features such as rates of trial and settlement. [FN101] Four classes of case characteristics that are available in our data are worth noting: (1) There is the characteristic of the kind of CAFA issue. The pattern of CAFA issues varies over time and in outcome, as Tables 3 and 5 show. The effective-date issue is the most distinctive type of CAFA dispute, as measured by plaintiff win rate. We therefore include in our regression analysis a dummy variable that equals 1 if the case involved CAFA's effective date. (2) Subject-area categories, as shown in Tables 1 and 6, also show varying numbers and plaintiff win rates, so we include them in the regressions. But the statistical insignificance of the pattern suggests that this characteristic may not materially contribute to the models. (3) The removal or original genesis of the CAFA filing might be associated with case outcome. We therefore include a dummy variable for the origin of the case, equal to 1 when the case came to federal court via removal. (4) The models include a variable for the date of each opinion's decision, in order to account for any linear time trend in case outcomes.

Second, analysts have long associated case outcomes with judge characteristics, though findings of associations between outcomes and judge characteristics such as political party and gender have been inconsistent. [FN102] The party and gender effects reported above suggest including a dummy variable equal to 1 for Republican male judges. To help control for judges' age and experience, which might be associated with party or gender, we also include in the regression models each judge's birth year and confirmation year.

Third, district characteristics are potentially relevant because, for example, some commentators model judicial behavior as being responsive to traditional incentives, which include desire to minimize ***1588** workload. [FN103] If they are right, one would expect judges in busy districts to be less receptive to the increased burden on federal courts that would result from an expansive view of CAFA. We account in the regressions for district court caseloads by using the district-level measure of weighted case filings per judge. [FN104]

Table 9 shows the summary statistics for all of these variables used in our regression models.

***1589** Table 9: Summary Statistics for Regressed District Court CAFA Cases

Variable	Mean	Std.Dev.	Min.	Max.	Signif.
Judicial receptivity	0.35	0.48	0	1	-
Republican male judge	0.31	0.47	0	1	.019
Republican judge	0.44	0.50	0	1	.095

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Female judge	0.26	0.44	0	1	.447
Birth year of judge	1944.47	9.88	1911	1966	.386
Confirmation year of judge	1993.22	7.74	1961	2007	.647
Removed case	0.92	0.27	0	1	.755
District's weighted filings per judge	479.22	112.73	239	927	.336
Decision year	2006.02	0.76	2005	2007	.006
CAFA effective date in issue	0.44	0.50	0	1	.001
Contract case	0.40	0.49	0	1	.999
Tort case	0.15	0.36	0	1	.479
Insurance case	0.24	0.24	0	1	.562
State labor law case	0.08	0.28	0	1	.141
Other type of case	0.12	0.33	0	1	.803

Note: Significance tested in the last column is the association between each variable and the dichotomous variable of judicial receptivity to CAFA; tests are based on Fisher's exact test for dichotomous variables and the Mann-Whitney test for continuous variables. N, the number of opinions for which all variables were ascertainable, is 156 (of a full sample of 182 opinions), representing a set that included opinions from 51 of the 56 districts and 116 of the 133 judges.

Table 10 reports regression results for models of judicial receptivity to CAFA, with each model utilizing a different set of variables. The regressions consistently show the Republican-male factor to have a significant effect on district court leaning. The coefficients' size and positive sign mean that such judges are markedly more receptive to an expansive reading of CAFA; the magnitude of the effect is indeed substantial, with the marginal effect being about a 20% increase in the probability of an expansive CAFA ruling. In addition, whether the case entailed an effective-date dispute consistently had a significant effect (judges appear less resistant to CAFA in later disputes, as the effective-date disputes fade

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away and the parties adjust to the judicial construction of the statute). Contrariwise, the insignificance of the factor representing docket pressure indicates that judges are not re[HD] ***1590** sisting CAFA merely because of a heavy workload. Something other than such narrow self-interest is motivating the judges.

Table 10: Logistic Regression Results for District Court CAFA Cases

Dependent Variable: Judicial Receptivity Independent Variable	(1)	(2)	(3)
Republican male judge	0.836*	0.852*	0.939*
	(2.20)	(2.27)	(2.57)
Birth year of judge	0.039	(1.18)	
Confirmation year of judge	-0.044	(1.24)	
Removed case	-0.487	-0.446	-0.371
	(0.71)	(0.65)	(0.55)
District's weighted filings per judge	-0.000	(0.10)	
Decision date	0.001	0.001	0.001
	(1.18)	(1.23)	(1.47)
CAFA effective date in issue	-0.986*	-1.044*	-0.925*
	(2.16)	(2.28)	(2.18)
Case type (contract = reference)	Tort	0.062	0.002
	(0.09)	(0.00)	
Insurance	0.229	0.25	

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	(0.39)	(0.46)	
State labor law	-1.267	-1.197	
	(1.28)	(1.25)	
Other subject	-0.150	-0.240	
	(0.20)	(0.32)	
Constant	-10.439	-21.781	-23.188
	(0.22)	(1.23)	(1.49)
Observations	156	156	156
Correctly classified	70.5%	70.5%	72.4%
Reduction in error†	16.4%	16.4%	19.0%
Hosmer-Lemeshow p-value, 10 groups	0.501	0.862	0.636
Akaike information criteria	200.88	196.81	192.19

Note: Logistic regression is appropriate because the dependent variable is dichotomous. The decision date used in the models is the full date and not merely the year; robust z statistics are in parentheses; and standard errors are clustered by district.

† Reduction in error = reduction in percent misclassified, compared to 64.7% by the naïve model of always predicting against judicial receptivity to CAFA.

– Significant at 10%; * significant at 5%; ** significant at 1%.

***1591** The set of all published opinions to date allows us to conclude that most federal judges have resisted CAFA. However, this set of opinions overwhelmingly featured threshold disputes about effective date or federal jurisdiction, rather than involving matters of certification and the merits. [FN105] So, judicial resistance may be aimed only at CAFA's intent to funnel cases from state to federal courts, rather than rejecting CAFA's more substantive distaste for class actions.

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Statutory and rule fixes may not work. [FN106] Sometimes the law of unintended consequences causes the fix to have an effect opposite the one intended. [FN107] The effects of CAFA could be big or small, and on balance they could favor defendants or in the end even favor plaintiffs. It is too early to tell. This Article is but the first piece of evidence. It suggests that federal judges may dampen any big effects that would have favored the defendants.

This Article is not the place to develop our own views of the merits of CAFA, beyond noting that big parts of its motivation and effectuation appear to us to be questionable [FN108] and that at least initially defendants greeted it with too much enthusiasm. [FN109] We therefore lean toward considering the judicial resistance to be wise. Of course, we recognize that our evaluation is value laden--but then so is the judges' reaction.

***1592** Conclusion

CAFA has produced a lot of litigation in its short life. Typically, the resulting published federal opinions involved removed contract cases, where the dispute turned on the statute's effective date or on federal jurisdiction. Our study of these decisions shows most of this litigation to have been socially wasteful. The decisions also reveal that most trial and appellate judges, with independence and wisdom but also with values engaged, have embraced CAFA with coolness. The judges thereby changed the statute on the books. And they very well may continue to do so.

[FNd1]. Flanagan Professor of Law, Cornell University. We would like to thank for their enthusiastic and tireless coding and research assistance Amanda M. Burke '09 and Lauren Dana Westberg '10. And we thank for their comments and suggestions Donald Frederico, Michael Heise, Lonny Hoffman, and Trevor Morrison. We are especially thankful to the organizers and participants of the University of Pennsylvania Law Review Symposium, Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005, and to our two insightful commentators, Professor Steve Burbank, who also was instrumental in organizing the symposium, and District Judge Lee Rosenthal, who incidentally contributed to our database the fine exemplar of Werner v. KPMG LLP, 415 F. Supp. 2d 688 (S.D. Tex. 2006), in which the court declined to exercise CAFA jurisdiction after resolving burden-of-proof and effective-date issues.

[FNdd1]. Henry Allen Mark Professor of Law, Cornell University.

[FN1]. Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). See generally Georgene M. Vairo, Class Action Fairness Act of 2005 (2005); 7A Charles Alan Wright et al., Federal Practice and Procedure §1756.2 (3d ed. 2005) (discussing CAFA's expansion of both diversity and removal jurisdiction).

[FN2]. Remarks on Signing the Class Action Fairness Act of 2005, 41 Weekly Comp. Pres. Doc. 265, 265 (Feb. 18, 2005); see also Edward A. Purcell, Jr., The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform, 156 U. Pa. L. Rev. 1823, 1861-63, 1867 (2008) (stressing partisan support for CAFA).

[FN3]. See Anna Andreeva, Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over, 59 U. Miami L. Rev. 385, 392-405 (2005) (presenting and rebutting four arguments in favor of CAFA); Purcell, supra note 2, at 1851-56 (outlining the problems with the old class action regime and arguing that CAFA "chose not to address most of them, at least not directly"); Congress Watch, Pub. Citizen, Class Action "Judicial Hellholes": Empirical Evidence Is Lacking (2005), available at http:// www.citizen.org/documents/OutlierReport.pdf (reporting that very few jurisdictions are "unfair" to defendants and that various states have altered their class action rules for defendants' benefit); cf. Thomas E. Willging & Shannon R. Wheatman, Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?, 81 Notre Dame L. Rev. 591, 645, 652-54 (2006) (finding, on limited data, no differences in treatment of class ac-

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tions between state and federal courts, and observing that "[a]ttorney perceptions of judicial predispositions toward their clients' interests show little or no relationship to the judicial rulings in the surveyed [state and federal class action] cases").

For the time being, defense lawyers seem quite content with the motives and effects of the Act. See, e.g., Podcast: Class Actions and Consumers: Do the Twain Still Meet? (Am. Bar Ass'n 2007), http://www.abanet.org/cle/podcast/noscarch/dl/abacle_podcast_ classactionsandconsumers.mp3 (presenting arguments by John H. Beisner and Donald R. Frederico that state court class actions and unfavorable settlements are down, while federal decisions are prompt, predictable, and sound). But academics lean the other way, at least in the many law review articles that CAFA has generated. A Westlaw search applying this Article's standard search term, "('class action fairness act' or cafa) & da(aft February 17, 2005 and bef August 18, 2007)," to the titles of articles in the Journals and Law Reviews database, and excluding CLE-like materials, yielded 61 articles over the thirty-month period, of which 11 were student written. Of the articles taking a pronounced evaluative position on CAFA, "unfavorable" ran three-to-one against "favorable." On the range of academic views, see Judith Resnik, Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions, 156 U. Pa. L. Rev. 1929, 1934-37 (2008).

[FN4]. See 28 U.S.C. §§1711-1715 (Supp. V 2005) (prescribing rules for attorney's fees, class-member losses and discrimination, and notifications to state and federal officials of proposed settlements). Class action abuses were the original target of the bill, but over its formative years the bill's jurisdictional adjustments grew in relative importance. See Edward F. Sherman, Class Actions After the Class Action Fairness Act of 2005, 80 Tul. L. Rev. 1593, 1594-95 (2006). Although Laurens Walker, in The Consumer Class Action Bill of Rights: A Policy and Political Mistake, 58 Hastings L.J. 849, 849 (2007), provides some convincing arguments that these sections on abuse are "the most significant provision[s] of the new law," but see Robert H. Klonoff & Mark Herrmann, The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements, 80 Tul. L. Rev. 1695, 1711-20 (2006) (concluding that CAFA's settlement provisions do not adequately protect class members from unfair settlements), the fact remains that not a single case in our database involved a dispute over them. This lack of cases may be because reformers had exaggerated the degree of abuse, especially in the federal courts. Evidence of systematic abuse of coupon settlements or other nonmonetary relief was scant. See Thomas E. Willging & Shannon R. Wheatman, Fed. Judicial Ctr., An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation 50-52 (2005), available at http://www.fjc.gov/public/pdf.nsf/lookup/clact05.pdf/$file/clact05.pdf (finding that settlements of no value to federal class members were rare); Thomas E. Willging et al., Fed. Judicial Ctr., Empirical Study of Class Actions in Four Federal District Courts 77-78 (1996), available at http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$file/rule23.pdf (similar); Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27, 60 (2004) (finding questionable types of "soft" relief, such as injunctive relief or coupons, present in 7% of published federal and state class action settlements, while finding evidence of beneficial soft relief in 12% of the settlements). However, the early cases we studied would not likely involve many disputes over settlement terms. Coming after our study's period was Figueroa v. Sharper Image Corp., 517 F. Supp. 2d 1292, 1306-11 (S.D. Fla. 2007), in which the court described various objections made to a proposed settlement agreement. See Linda S. Mullenix, CAFA and Coupons, Nat'l L.J., Nov. 12, 2007, at 24 (stressing the Figueroa settlement's coupon component and the court's "in-depth analysis of procedural and substantive fairness of coupon settlements in a post-CAFA world").

[FN5]. "Mass actions" are actions involving numerous plaintiffs that, while not technically class actions, are joined by some procedure. 28 U.S.C. §1332(d)(11) (Supp. V 2005). In our coded database, only two cases involved a mass action, Lowery v. Ala. Power Co., 483 F.3d 1184, 1218-21 (11th Cir. 2007) (declining jurisdiction, in the course of a major opinion), aff'g Lowery v. Honeywell Int'l, Inc., 460 F. Supp. 2d 1288 (N.D. Ala. 2006); Abrego Abrego v. Dow Chem.

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Co., 443 F.3d 676, 686-70 (9th Cir. 2006) (declining jurisdiction), and only three other cases discussed mass actions, Garcia v. Boyar & Miller, P.C., No. 06-1936-D, 2007 WL 1556961, at *4 n.3 (N.D. Tex. May 30, 2007) (declining to treat the cases as a mass action, without any real dispute); Lester v. Exxon Mobil Corp., No. 06-9158, 2007 WL 1029507, at *2 (E.D. La. Mar. 29, 2007) (finding a removal petition to be premature, and thus not deciding whether the action was a mass or class action); In re Prempro Prods. Liab. Litig., No. 03-1507, 2007 WL 641416, at *1 (E.D. Ark. Feb. 27, 2007) ("A review of Plaintiffs' Amended Complaint makes it clear that this is a class action, not a mass action.").

[FN6]. 28 U.S.C. §1332(d)(2) (Supp. V 2005).

[FN7]. CAFA's choice-of-law possibilities have attracted a fair amount of scholarly attention. See, e.g., Stephen B. Burbank, Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy, 106 Colum. L. Rev. 1924, 1949-52 (2006) (suggesting that federal choice-of-law rules should apply only in the CAFA cases in which the state choice-of-law doctrine is "materially influenced" by a state policy reflecting "a bias in favor of aggregate litigation"); Samuel Issacharoff, Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act, 106 Colum. L. Rev. 1839, 1864-71 (2006) (arguing for uniform federal choice-of-law rules in "national market" CAFA cases); Richard A. Nagareda, Bootstrapping in Choice of Law After the Class Action Fairness Act, 74 UMKC L. Rev. 661, 683-84 (2006) (using "anti-bootstrapping stricture" to justify a uniform federal choice-of-law doctrine); Patrick Woolley, Erie and Choice of Law After the Class Action Fairness Act, 80 Tul. L. Rev. 1723, 1755-57 (2006) (concluding that CAFA itself cannot support abandoning state choice-of-law rules in diversity suits). Our coding for choice of law in these early cases, however, turned up only a single case, Bonime v. Avaya, Inc., No. 06-1630, 2006 WL 3751219 (E.D.N.Y. Dec. 20, 2006). Bonime involved an Erie issue regarding the applicability of state law class action limitations in federal court, with the court applying state law to defeat the federal class action.

[FN8]. Our coding turned up not a single dispute over venue. This result is less surprising once one realizes that most of these CAFA cases involved removal, where venue is indisputably proper in and only in the local federal court. 28 U.S.C. §1446(a) (2000). Original cases were seemingly all brought where a substantial part of the claim arose. See 28 U.S.C. §1391(a)(2), (b)(2) (2000) (listing a "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred" as a proper venue for a civil action).

[FN9]. Nevertheless, substantial evidence exists that case characteristics often transcend litigation's filtering process. That is, studies of subsets of litigated cases can yield insights broader than the studied subset. See Theodore Eisenberg, Negotiation, Lawyering, and Adjudication: Kritzer on Brokers and Deals, 19 Law & Soc. Inquiry 275, 292-93 (1994) (book review) (finding that case categories in which plaintiffs do relatively well at the settlement stage are also categories in which plaintiffs do well at the litigation stage); Theodore Eisenberg, The Relationship Between Plaintiff Success Rates Before Trial and at Trial, 154 J. Royal Stat. Soc'y ser. A 111, 113 (1991) (finding that case categories in which plaintiffs do relatively well at the litigated pretrial stage are also categories in which plaintiffs do relatively well at trial).

[FN10]. In one sense, this shortcoming is becoming more serious. The rate of publishing appellate dispositions in the Federal Reporter has dipped from almost 50% of all dispositions in 1976 to just over 20% in 2000. Kevin M. Clermont & Theodore Eisenberg, Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments, 2002 U. Ill. L. Rev. 947, 968. This decreasing sample is certainly not representative of all appellate dispositions. For example, publication choices skew seriously toward publication of reversals rather than affirmances: federal courts of appeals' civil dispositions show an 82% affirmance rate for all appeals from tried judgments, but the Federal Reporter's dispositions in comparable cases show only a 63% affirmance rate. Id. at 968-69; cf. infra note 99 (providing another example of this skewing, viz., the varying effect of the judge's sex). Yet today, Westlaw makes accessible and so effect-

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ively "publishes" almost all court of appeals dispositions that do not make it into the Federal Reporter. See William R. Mills, The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research, 46 N.Y.L. Sch. L. Rev. 429, 432-33 (2003) (distinguishing "publication" in sources outside the Federal Reporter from court rules that limit a decision's precedential effect); Andrew T. Solomon, Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?, 26 Miss. C. L. Rev. 185, 203-11 (2007) (discussing in detail the growth of accessibility through electronic databases, the Federal Appendix, and court websites); see also Robert Timothy Reagan et al., Fed. Judicial Ctr., Citing Unpublished Opinions in Federal Appeals (2005), available at http://www.fjc.gov/public/pdf.nsf/lookup/citatio3.pdf/$file/citatio3.pdf (providing more detail on the distinction between decisions published outside the Federal Reporter and decisions that are nonprecedential under court rules). Incidentally, 97% of appellate dispositions on the merits, issued after oral hearing or submission on briefs, currently come by way of a reasoned ruling, with 36% of all those dispositions coming by an opinion signed by a judge and 61% by a reasoned but unsigned ruling. See James C. Duff, Admin. Office of the U.S. Courts, 2006 Judicial Business of the United States Courts 52 tbl.S-3 (2006), available at http:// www.uscourts.gov/judbus2006/completejudicialbusiness.pdf; cf. Mitu Gulati & C.M.A. McCauliff, On Not Making Law, Law & Contemp. Probs., Summer 1998, at 157, 186-96 (criticizing short-form dispositions).

Most district court opinions and decisions, however, still do not appear in print or in Westlaw. See Hillel Y. Levin, Making the Law: Unpublication in the District Courts, 53 Vill. L. Rev. (forthcoming 2008), available at http:// ssrn.com/abstract=1006101 (decrying the low rate of publication). Docket entries, at least, are widely available through the Public Access to Court Electronic Records (PACER) service, http://pacer.psc.uscourts.gov/, albeit not in text-searchable form.

[FN11]. The limited availability has very serious and varied skewing effects. See, e.g., Brian N. Lizotte, Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts, 2007 Wis. L. Rev. 107, 120-24 (questioning the validity of studies based solely on decisions available on Lexis and Westlaw). The determinants of publication are by no means obvious. See David A. Hoffman et al., Docketology, District Courts, and Doctrine, 85 Wash. U. L. Rev. (forthcoming 2008) (manuscript at 41-44), available at http://ssrn.com/abstract=982130 (arguing that fear of reversal primarily motivates the rare event of district court publication, more so than, say, the desire to move the law, make a mark, or signal an audience); Lizotte, supra, at 138-46 (analyzing publication patterns and identifying factors correlated with the decision to publish); cf. Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 Vand. L. Rev. 71, 74-75 (2001) ("Understanding these diverse [determinants of publication] is crucial for... legal academics and social scientists who rely upon databases of published opinions to track judicial behavior.").

[FN12]. In the district court database, one decision appears twice, but we counted it only once: Mattera v. Clear Channel Communications, Inc., 239 F.R.D. 70 (S.D.N.Y. 2006). The All Federal & State Cases ("allcases") database additionally yielded one Supreme Court case that inconsequentially noted that CAFA did not yet apply, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 571-72 (2005) (explaining that CAFA, not being retroactive, cannot be relevant to the Court's interpretation of 28 U.S.C. §1367, which was enacted in 1990); one inconsequential bankruptcy case, In re Northwestern Corp., No. 03-12872, 2005 WL 2847228 (Bankr. D. Del. Oct. 25, 2005); and fifteen state cases. The state cases, not surprisingly, turn out to offer few occasions for illuminating discussion of CAFA, the best being Dix v. ICT Group, Inc., 161 P.3d 1016, 1024 (Wash. 2007), in which the court refused to dismiss a pre-CAFA class action, given the speculative nature of the defendants' contention that the plaintiffs could instead maintain a CAFA federal action.

[FN13]. On the one hand, we could have produced more cases by using other search terms, such as statutory citation rather than statutory name. For example, Lonny Hoffman, in a thorough study of CAFA's jurisdictional exceptions, came up with more cases on point than we did. See Lonny Sheinkopf Hoffman, Burdens of Jurisdictional Proof, 59 Ala. L.

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Rev. (forthcoming 2008) (manuscript app. at 46-49), available at http://ssrn.com/abstract=1005477. We nevertheless stuck with our sampling technique in order to limit our sample to opinions focused enough to mention expressly the "Class Action Fairness Act" or "CAFA," and especially in order to avoid further biasing our database toward kinds of CAFA disputes that involved some particular statutory section.

On the other hand, extending our search from Westlaw to Lexis would have had an insubstantial effect. See Lizotte, supra note 11, at 134-35.

[FN14]. Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

[FN15]. Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.).

[FN16]. Pub. L. No. 107-273, §11020, 116 Stat. 1758, 1826 (codified in scattered sections of 28 U.S.C.). Here we used a three-year window because of this Act's different effective-date provision, and used broader search terms because of the Act's odder name.

[FN17]. 28 U.S.C. §1453(c) (Supp. V 2005).

[FN18]. Admittedly, CAFA is no Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965-66 (2007), which imposed a plausibility test on pleadings, thereby discombobulating a basic area of law and managing to generate 2200 citations in its first five months. See Resnik, supra note 3, at 1949-51.

[FN19]. A few cases showed up more than once, either as subsequent steps at the trial court level or on appeal. We counted each different published opinion separately.

[FN20]. We obtained the weighted filings from Duff, supra note 10, at 414 tbl.X-1A, and Leonidas Ralph Mecham, Admin. Office of the U.S. Courts, 2005 Judicial Business of the United States Courts 430 tbl.X-1A (2005), available at http://www.uscourts.gov/judbus2005/contents.html. This statistic accounts for both civil and criminal filings. We had to use the 2006 numbers for the 2007 opinions, because the 2007 numbers are not yet available.

[FN21]. We obtained the judges' attributes from the S. Sidney Ulmer Project's Attributes of Federal Court Judges, http://www.as.uky.edu/polisci/ulmerproject/auburndata.htm (last visited Apr. 15, 2008).

[FN22]. Usually, the decisions in our database came without class certification having been decided. Class certification, or even a motion for certification, correlates with a much higher plaintiff recovery rate. See Nicholas M. Pace et al., RAND Inst. for Civil Justice, Insurance Class Actions in the United States, at xxi-xxii (2007).

[FN23]. Although there are dangers in coding an attitudinal factor like resistance to CAFA, see Caprice L. Roberts, In Search of Judicial Activism: Dangers in Quantifying the Qualitative, 74 Tenn. L. Rev. 567 (2007), we minimize them by defining resistance simply as a decision that narrows the scope of that statute and so restricts federal class action treatment. A court might take a narrow view of CAFA by construing rigorously its requirements or construing expansively its exceptions.

[FN24]. Thomas E. Willging & Emery G. Lee III, Fed. Judicial Ctr., The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Third Interim Report to the Judicial Conference Advisory Committee on Civil Rules (2007), available at http://www.fjc.gov/public/pdf.nsf/lookup/cafa0407.pdf/ $file/cafa0407.pdf.

[FN25]. Id. at 14 fig.3.

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[FN26]. Id. at 5-6 & fig.2a.

[FN27]. Id. at 16-17; cf. Emery G. Lee III & Thomas E. Willging, The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals, 156 U. Pa. L. Rev. 1723, 1753 & fig.3 (2008) (noting that the number of removed diversity class actions was trending downward in the pre-CAFA period as well).

[FN28]. See supra notes 10-11 and accompanying text.

[FN29]. Although scant empirical basis supported CAFA's enactment, see supra note 3, it is true that defendants who choose to remove know what they are doing and end up in a more favorable forum. See Kevin M. Clermont & Theodore Eisenberg, Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction, 83 Cornell L. Rev. 581, 593, 594 tbl.1 (1998) (finding a plaintiff win rate in original diversity cases of 71%, compared to 34% for removed diversity cases).

[FN30]. Incidentally, our contract category included fraud claims asserted in connection with a contract. For this reason, our results here match the FJC's results. See Lee & Willging, supra note 27, at 1755-56 & fig.4 (changing their label for fraud to "Consumer Protection/Fraud"). For theories on why contract cases predominate under CAFA, see Howard M. Erichson, CAFA's Impact on Class Action Lawyers, 156 U. Pa. L. Rev. 1593, 1615-21 (2008), which argues that the increased likelihood of litigating in federal court encourages contract claims and discourages tort claims.

[FN31]. The winner for sloppiness is CAFA's authorization of immediate appeal from certain jurisdictional decisions by district courts, but only if litigants appeal "not less than 7 days after entry of the order"--when Congress meant "not more than 7 days." See Adam N. Steinman, "Less" Is "More"? Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act's Appellate Deadline Riddle, 92 Iowa L. Rev. 1183, 1183 (2007).

[FN32]. Likewise, a study of district court and appellate court published opinions on CAFA at the eighteen-month mark found that of the 151 opinions, 85 (56%) dealt with effective-date problems while 48 (32%) involved amount-in-controversy or burden-of-proof issues. Ashish R. Talati, The Class Action Fairness Act of 2005: Changing the Class Action Landscape Circuit by Circuit, 61 Food & Drug L.J. 561, 563 chart 1 (2006). A twelve-month review stressed effective-date problems even more. Lonny Sheinkopf Hoffman, In Retrospect: A First Year Review of the Class Action Fairness Act of 2005, 39 Loy. L.A. L. Rev. 1135, 1136-48 (2006).

[FN33]. We include under "jurisdictional provisions" our codes for disputes over citizenship (13 opinions involved such a dispute); class size (15); jurisdictional amount (58, by far the largest number for any of these codes); and discretionarily local (15), mandatorily local under the home state or local controversy exceptions (26), and other excepted claims (10). The total for jurisdictional provisions in Table 3 is less than the sum of the numbers in this footnote because Table 3 gives the number of opinions that involved one or more of these jurisdictional codes.

We present disputes over jurisdictional burden and standard of proof separately because we discuss them in detail below.

[FN34]. In addition to the rare case involving a mass action, see supra note 5 and accompanying text, or choice of law, see supra note 7 and accompanying text, the "other issue" category in the district courts overwhelmingly involved threshold issues--usually ones with a jurisdictional flavor that did not fall within our specific jurisdictional codes. For example, the most common of these issues involved whether jurisdiction over a removed case survived denial of certification. Most of those cases proceeded in the right direction by upholding jurisdiction. See, e.g., Colomar v. Mercy Hosp., Inc., No. 05-22409, 2007 WL 2083562, at *2-3 (S.D. Fla. July 20, 2007) (criticizing resort to discretionary remand in Giannini v. Schering-Plough Corp., No. 06-6823, 2007 WL 1839789 (N.D. Cal. June 26, 2007)); Genenbacher v. Cen-

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turyTel Fiber Co. II, 500 F. Supp. 2d 1014, 1016-17 (C.D. Ill. 2007); Falcon v. Philips Elecs. N. Am. Corp., 489 F. Supp. 2d 367, 368-69 (S.D.N.Y. 2007); see also Richard H. Field, Benjamin Kaplan & Kevin M. Clermont, Materials for a Basic Course in Civil Procedure 979-80 (9th ed. 2007) ("[T]he denial of certification will not oust jurisdiction, because the court reached a determination that the case was a class action for jurisdictional purposes under a different and lower standard of proof than the determination that the case was not a class action for certification purposes."). But, of course, one case went the other way. See McGaughey v. Treistman, No. 05-7069, 2007 WL 24935, at *3-4 (S.D.N.Y. Jan. 4, 2007). For more on this debate, see Stephen B. Burbank, The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View, 156 U. Pa. L. Rev. 1439, 1456 n.62 (2008); Linda S. Mullenix, CAFA Jurisdiction, Nat'l L.J., Feb. 4, 2008, at 13; Posting of Sean Costello to Drug and Device Law Blog, CAFA's Revolving Door?, http:// drugandlawblog.blogspot.com/2008/02/cafas-revolving-door.html (Feb. 4, 2008, 08:23). Only one other opinion verged toward the merits, by deciding certification after rejecting a jurisdictional objection. See Kavu, Inc. v. Omnipak Corp., 246 F.R.D. 642, 651 (W.D. Wash. 2007) (certifying class).

The courts' treatment of these "other issues" was typical of their treatment of the cases in general, with judicial resistance to CAFA on these particular issues registering at 64%. See infra text accompanying Table 6.

[FN35]. See Lonny Sheinkopf Hoffman, The "Commencement" Problem: Lessons from a Statute's First Year, 40 U.C. Davis L. Rev. 469 (2006) (examining the difficulties created by CAFA's often-ambiguous language).

[FN36]. Commentators early recognized this as a hot-button issue. See, e.g., Linda S. Mullenix, CAFA Proof Burdens, Nat'l L.J., Dec. 19-26, 2005, at 12; Georgene M. Vairo, Is CAFA Working?, Nat'l L.J., Nov. 14, 2005, at 12. Indeed, it now gets its own section of the CAFA Law Blog. CAFA Law Blog: Jurisdictional Burden of Proof, http://www.cafalawblog.com/cat-jurisdictional-burden-of-proof.html (last visited Apr. 15, 2008).

[FN37]. See Lowery v. Ala. Power Co., 483 F.3d 1184, 1208 n.55 (11th Cir. 2007) ("We note in passing that the law of this circuit shifts the burden of proving the applicability of exceptions to CAFA's removal jurisdiction to the plaintiff seeking a remand."). For a difficult example, note that the courts have come uniformly to treat the one-third and two-thirds provisions of §1332(d)(3)-(4) as exceptions, even though excellent arguments exist that they should form part of the prima facie showing of jurisdiction. See Hoffman, supra note 13, at 27-28 (arguing the same for §1332(d)(5) and (9)).

[FN38]. Lowery, 483 F.3d at 1207-08 (citations and footnotes omitted) (declining jurisdiction).

[FN39]. See infra Part III.B.2.b.

[FN40]. See St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938).

[FN41]. See Kevin M. Clermont, Jurisdictional Fact, 91 Cornell L. Rev. 973, 1008-11 (2006).

[FN42]. See 14C Charles Alan Wright et al., Federal Practice and Procedure §3725 (3d ed. 1998 & Supp. 2007) (providing 51 pages of text and 87 pages of supplement on "Amount in Controversy in Removed Actions"); Alice M. Noble-Allgire, Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined from the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform To Preserve Defendant's Equal Access to Federal Courts, 62 Mo. L. Rev. 681 (1997) (discussing the circuit split on the issue). "As the numerous cases on the subject make clear, when the amount in controversy claimed in the plaintiff's state court complaint exceeds $75,000, the complaint generally is determinative of the amount in controversy issue for federal removal jurisdiction purposes ...." 14C Wright et al., supra, §3725, at 73.

[FN43]. See, e.g., Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 217 (3d Cir. 1999), abrogated on other

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grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559 (2005); 14C Wright et al., supra note 42, §3725, at 89 n.26 (listing cases that follow this legal-certainty standard). The Meritcare approach was endorsed by Samuel-Bassett v. KIA Motors America, Inc., 357 F.3d 392, 396-98 (3d Cir. 2004), but this later opinion was hopelessly confused. See Valley v. State Farm Fire & Cas. Co., 504 F. Supp. 2d 1, 4 (E.D. Pa. 2006) (reading Samuel-Bassett to "require remand when it appears to a legal certainty that the plaintiff's claims do not satisfy the amount in controversy requirement"). Courts do not explain what they mean by "legal certainty" here, but clearly they do not mean it in the St. Paul v. Red Cab sense. Rather, they mean it in the more usual legal sense of highest probability. Legal certainty conventionally means being virtually certain, which requires proof beyond a reasonable doubt. See Kevin M. Clermont, Procedure's Magical Number Three: Psychological Bases for Standards of Decision, 72 Cornell L. Rev. 1115, 1118-20 (1987) (grouping standards of proof into three categories: "more-likely-than-not," "much-more-likely-than-not," and "virtual certainty"). So, under the Meritcare approach, the defendant must show that any recovery almost certainly will exceed $75,000.

[FN44]. Between legal certainty and preponderance, there is conceivably the standard of high probability, which would require the defendant to show that any recovery much more likely than not will exceed $75,000. See Clermont, supra note 43, at 1123. This standard appears to get the approval of Moore's Federal Practice, where the authors (Professors Martin H. Redish and Georgene Vairo) approve of the legal-certainty cases but slightly water down the standard by talking of a required showing that an award at the jurisdictional amount would be "outside the range of permissible awards," presumably meaning that it could not survive a new-trial motion for inadequacy. 15 James Wm. Moore et al., Moore's Federal Practice §102.107[3] (3d ed. 2007); 16 id. §107.14[2][g][vi]. But see Clermont, supra note 41, at 1009-10 (disapproving factual standards of this sort).

[FN45]. See, e.g., Everett v. Verizon Wireless, Inc., 460 F.3d 818, 822 (6th Cir. 2006); Kroske v. US Bank Corp., 432 F.3d 976, 980 (9th Cir. 2005); Friedman v. N.Y. Life Ins. Co., 410 F.3d 1350, 1353 (11th Cir. 2005); James Neff Kramper Family Farm P'ship v. IBP, Inc., 393 F.3d 828, 831 (8th Cir. 2005); Garcia v. Koch Oil Co. of Tex., 351 F.3d 636, 638-39 (5th Cir. 2003); United Food & Commercial Workers Union, Local 919 v. CenterMark Props. Meriden Square, Inc., 30 F.3d 298, 305 (2d Cir. 1994) (equating "reasonable probability" with preponderance); 14C Wright et al., supra note 42, §3725, at 90 n.27 (listing other cases); cf. Oshana v. Coca-Cola Co., 472 F.3d 506, 511 (7th Cir. 2006) (allowing plaintiff to rebut a removal notice by showing to a legal certainty that the claim did not meet the jurisdictional amount), cert. denied, 127 S. Ct. 2952 (2007); Martin v. Franklin Capital Corp., 251 F.3d 1284, 1290 (10th Cir. 2001) (requiring a preponderance showing "at a minimum"), aff'd on other grounds, 546 U.S. 132 (2005).

[FN46]. See, e.g., Haley ex rel. Davis v. Ford Motor Co., 417 F. Supp. 2d 811, 813 (S.D. Miss. 2006) ("[T]he defendant must demonstrate that the severity of the damages alleged give[s] rise to a reasonable probability that the jurisdictional amount has been met."); 14C Wright et al., supra note 42, §3725, at 91 n.28 (listing more cases); cf. Jones v. Allstate Ins. Co., 258 F. Supp. 2d 424, 428 (D.S.C. 2003) (recognizing "reasonable probability" to be a standard lower than preponderance). These cases require careful parsing. A "reasonable probability" could mean, and has meant, just about anything. But in those cases where it represents a separate standard, it appears to be an analogue of the standard that some courts apply to flagrant abuse of the ad damnum by plaintiffs. See, e.g., Nelson v. Keefer, 451 F.2d 289, 295-96 (3d Cir. 1971) (seeming to require a showing by plaintiffs of a substantial possibility of exceeding the amount-in-controversy requirement, in light of the court's analogies to the new-trial test, which equates clear error by a jury with a decision made without a substantial possibility that it was correct); Clermont, supra note 41, at 1009-10 (noting that courts have rejected a stricter test to determine when the claim of damages is flagrantly exaggerated). Thus, we phrase it as a substantial-possibility standard in the text. Apparently, this is the standard preferred by Noble-Allgire, supra note 42, at 724, 728, 754.

[FN47]. See, e.g., Quinn v. Kimble, 228 F. Supp. 2d 1036, 1037 (E.D. Mo. 2002) ("[I]t does not appear to a legal cer-

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tainty that the controversy between the parties is for less than the jurisdictional amount."), confirmed on renewed motion, 228 F. Supp. 2d 1038 (E.D. Mo. 2002); Ball v. Hershey Foods Corp., 842 F. Supp. 44, 47 (D. Conn. 1993) (requiring a "'reasonable possibility that the plaintiff can recover more than'" the jurisdictional amount (quoting Ross v. Inter-Ocean Ins. Co., 693 F.2d 659, 663 (7th Cir. 1982))), aff'd mem., 14 F.3d 591 (2d Cir. 1993); Hale v. Billups of Gonzales, Inc., 610 F. Supp. 162, 164 (M.D. La. 1985) (resorting to the double negative in characterizing the defendant's burden as that of "proving that it does NOT appear to a legal certainty that the claim is actually for less than the requisite jurisdictional amount"); 14C Wright et al., supra note 42, §3725, at 92 n.30 (listing more cases); cf. ALI, Study of the Division of Jurisdiction Between State and Federal Courts 344-48 (1969) (proposing a statute that would embody this approach). This standard is the so-called inverted legal-certainty test, in that it is the analogue of the St. Paul legal-certainty test normally applied to original jurisdiction and so requires only a reasonable possibility that recovery will exceed the jurisdictional amount.

[FN48]. Noble-Allgire, supra note 42, at 695-97 & n.33.

[FN49]. 14C Wright et al., supra note 42, §3725, at 90. The supplement to the Wright and Miller treatise lists 156 new citations in its footnote for the preponderance standard, but only 37 new citations, all of which are from the district court level, for the higher legal-certainty standard. Id. §3725, at 45-61 (Supp. 2007). Although the footnote on the reasonable-possibility standard mixes in additional legal-certainty cases, the footnote on the substantial-possibility standard mixes in additional preponderance standard cases. These offsetting errors leave the preponderance standard clearly in the ascendancy.

[FN50]. Lowery v. Ala. Power Co., 483 F.3d 1184, 1208-11 (11th Cir. 2007) (declining jurisdiction).

[FN51]. See cases cited supra note 45. Subsequent non-CAFA cases apply Lowery as a precedent. See, e.g., Ellis Motor Cars, Inc. v. Westport Ins. Corp., No. 07-0020, 2007 WL 1991573, at *1 (M.D. Ala. July 5, 2007).

[FN52]. See Miedema v. Maytag Corp., 450 F.3d 1322, 1330 (11th Cir. 2006) (declining jurisdiction).

[FN53]. Lowery, 483 F.3d at 1209-11.

[FN54]. Id. at 1211.

[FN55]. Brown v. Jackson Hewitt, Inc., No. 06-2632, 2007 WL 642011, at *2 (N.D. Ohio Feb. 27, 2007) (declining jurisdiction). The Sixth Circuit later approved this approach in a CAFA case. See Smith v. Nationwide Prop. & Cas. Ins. Co., 505 F.3d 401, 404-05 (6th Cir. 2007).

[FN56]. See Blockbuster, Inc. v. Galeno, 472 F.3d 53, 58 (2d Cir. 2006) (declining jurisdiction).

[FN57]. See Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc., 485 F.3d 804, 813-14 (5th Cir. 2007) (declining jurisdiction, though here the issue was the uncontroversial standard for proving citizenship).

[FN58]. Morgan v. Gay, 471 F.3d 469, 474 (3d Cir. 2006) (declining jurisdiction).

[FN59]. See cases cited supra note 43.

[FN60]. See In re Intel Corp. Microprocessor Antitrust Litig., No. MDL 05-1717, 2006 WL 1431214 (D. Del. May 22, 2006), reconsideration denied, 436 F. Supp. 2d 687, 688 (D. Del. 2006) (upholding jurisdiction by applying the Seventh Circuit's Brill approach, which is discussed in the text accompanying note 67, infra).

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[FN61]. Lamond v. Pepsico, Inc., No. 06-3043, 2007 WL 1695401, at *4-5 (D.N.J. June 8, 2007) (declining jurisdiction).

[FN62]. See Lowdermilk v. U.S. Bank Nat'l Ass'n, 479 F.3d 994, 998-1000 (9th Cir. 2007) (2-1 decision) (declining jurisdiction).

[FN63]. See id. at 998-99.

[FN64]. See Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 683 (9th Cir. 2006) (per curiam) (declining jurisdiction). The Lowdermilk court expressly noted that it was deciding the question reserved by Abrego Abrego: the standard applicable when the complaint requests damages below the jurisdictional amount. Lowdermilk, 479 F.3d at 996.

[FN65]. See 16 Moore et al., supra note 44, §107.14[2][g][v] (disapproving that distinction).

[FN66]. See Guglielmino v. McKee Foods Corp., 506 F.3d 696, 700 & n.4 (9th Cir. 2007) (dictum).

[FN67]. See Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448-49 (7th Cir. 2005) (Easterbrook, J.) (upholding jurisdiction), followed by Home Depot, Inc. v. Rickher, No. 06-8006, 2006 WL 1727749, at *1 (7th Cir. May 22, 2006) (upholding jurisdiction).

[FN68]. See 14C Wright et al., supra note 42, §3725, at 94 n.37 (favoring this approach, as embodied in De Aguilar v. Boeing Co., 47 F.3d 1404, 1411-12 (5th Cir. 1995), while emphasizing that the showings should not be sequential and that the plaintiff should forward all of his or her information on jurisdictional amount without waiting).

[FN69]. See St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289-90 (1938).

[FN70]. See Noble-Allgire, supra note 42, at 699-703, 718-19 (arguing that the St. Paul legal-certainty test "simply puts the defendant in precisely the same position as a plaintiff who filed the action directly in federal court in the first place," and that this is consistent with the policy behind removal statutes).

[FN71]. See id. at 692, 722 (noting the possibility of such strategic behavior).

[FN72]. See 14C Wright et al., supra note 42, §3725, at 96.

[FN73]. See, e.g., Gafford v. Gen. Elec. Co., 997 F.2d 150, 158 (6th Cir. 1993) ("We conclude that the 'preponderance of the evidence' ('more likely than not') test is the best alternative. We believe that this test best balances the competing interests of protecting a defendant's right to remove and limiting diversity jurisdiction.").

[FN74]. See, e.g., McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) (noting the general proposition that a plaintiff must support his or her claim of jurisdiction by a preponderance of the evidence).

[FN75]. See generally Clermont, supra note 41 (discussing the need to avoid problems of jury right, res judicata, and collateral attack).

[FN76]. See supra notes 42-49 and accompanying text.

[FN77]. Moreover, the courts give a strict construction to the removal statutes, and "the trend of the decisions is to restrict and limit the removal jurisdiction of the federal courts." 14B Wright et al., supra note 42, §3721, at 340.

[FN78]. See, e.g., 28 U.S.C. §1441(b) (2000) (disadvantaging defendants relative to plaintiffs by disallowing removal if,

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in the absence of federal question jurisdiction, any served defendant is a citizen of the forum state). CAFA lifts this limit, but still ties removal jurisdiction to original jurisdiction.

[FN79]. See 14B Wright et al., supra note 42, §3721, at 292 ("In general, and of cardinal importance, an action is removable from a state court to a federal court only if it might have been brought in the latter originally. This requirement that all of the conditions for original jurisdiction must be satisfied before removal will be allowed has been enforced in innumerable cases by courts at all levels of the federal judiciary."). Of course, special removal statutes authorize rare removal that goes beyond original jurisdiction. See, e.g., 28 U.S.C. §§1442-1443 (2000) (authorizing removal for suits against federal officers and for certain civil rights matters). But these statutes are express exceptions to the linkage between removal jurisdiction and original jurisdiction, and in any event they do not involve jurisdictional amount.

[FN80]. See Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699, 702 (1972) (focusing on the critical question of "whether the federal district court would have had original jurisdiction of the case had it been filed in that court"); Greenshields v. Warren Petroleum Corp., 248 F.2d 61, 65 (10th Cir. 1957) ("Removability is dependent upon the course of pleading actually used by the pleader and not by what he could have asserted had he so chosen."); 14B Wright et al., supra note 42, §3721, at 332 ("[T]he defendant cannot remove... on the ground that an alternative course of conduct that would have permitted removal of the case was available to the plaintiff."); id. §3722, at 453.

[FN81]. 14B Wright et al., supra note 42, §3722, at 437-60; id. §3722.1. Likewise, the plaintiff can often defeat removal by joining a nondiverse party, subject to the fraudulent joinder doctrine, which is supposed to be very narrow but is ever-exposed to ill-advised judicial stretching. Clermont, supra note 41, at 1011 n.170. This pattern suggests that under current law, in the absence of express statutory change, the plaintiff should be able to use the various available devices broadly to defeat removal, with the defendant able to counter only by making an overwhelming showing of some sort.

[FN82]. A true test of legal certainty, being comparable to judgment as a matter of law, would be so high that few tort cases could survive it:

> It would rarely seem possible that a defendant could prove that the amount of damages would, as a matter of law, have to exceed a certain amount, because few, if any, rules of law require damages of a certain amount to be awarded, such as those limiting amount or kinds of damages in certain situations.

Stephen J. Shapiro, Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach, 59 Baylor L. Rev. 77, 111 (2007).

[FN83]. Lonny Hoffman, in his empirical study of CAFA's jurisdictional exceptions, concluded that "allocation of the burden of proof is a key determinant in the forum contest's outcome." Hoffman, supra note 13, at 4. He had observed that the plaintiff heavily tends to win the forum contest when the burden of proof stays on the defendant, but heavily tends to lose when the court, as it usually does for CAFA exceptions, shifts the burden to the plaintiff. Id. at 3-4. Our results are consistent with this finding. In our district court jurisdictional burden-of-proof cases, the plaintiff win rate was 52% when the dispute concerned jurisdictional requirements (with the burden typically on the defendant), but only 25% when the dispute concerned jurisdictional exceptions (with the burden typically on the plaintiff).

[FN84]. See supra text accompanying notes 36-38.

[FN85]. See supra note 23.

[FN86]. See supra text accompanying note 27.

[FN87]. See Theodore Eisenberg & Trevor W. Morrison, Overlooked in the Tort Reform Debate: The Growth of Erro-

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neous Removal, 2 J. Empirical Legal Stud. 551, 554-55 (2005) (discussing the effect of CAFA on erroneous removal).

[FN88]. See supra note 29.

[FN89]. See Eisenberg & Morrison, supra note 87, at 568-74 (studying published and unpublished decisions).

[FN90]. See Kevin M. Clermont & Theodore Eisenberg, Litigation Realities, 88 Cornell L. Rev. 119, 123 fig.1 (2002); see also Eisenberg & Morrison, supra note 87, at 567.

[FN91]. See Eisenberg & Morrison, supra note 87, at 571 (noting an effort to remand in about half the removed cases in the high-remand-rate districts of Alabama).

[FN92]. See Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005) (upholding jurisdiction).

[FN93]. See generally Clermont & Eisenberg, supra note 90, at 126, 150-52 (finding an overall affirmance rate above 80%, but only just above 60% for published opinions, because reversals are more likely to be published); Kevin M. Clermont & Theodore Eisenberg, Appeal from Jury or Judge Trial: Defendants' Advantage, 3 Am. L. & Econ. Rev. 125, 130-34 (2001) (noting the consistently high affirmance rates on appeal); supra note 10 (noting that the affirmance rate in all appellate dispositions is higher than the affirmance rate in published appellate dispositions). The affirmance rate, which is the complement of the reversal rate, means the percentage of appeals that reach a decisive outcome and emerge as affirmed rather than reversed. We narrowly define "affirmed" as affirmed or dismissed on the merits. We define "reversed" as reversed or modified, in part or completely.

[FN94]. See Clermont & Eisenberg, supra note 10, at 967 tbl.5 (finding a 29% reversal rate for defendants and a 13% reversal rate for plaintiffs in appeals from all judgments); Theodore Eisenberg & Michael Heise, Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal, 38 J. Legal Stud. (forthcoming 2009), available at http://ssrn.com/abstract=988199 (finding a reversal rate of 21.5% of trial judgments appealed by plaintiffs compared to 41.5% of ones appealed by defendants); see also, e.g., Kevin M. Clermont & Theodore Eisenberg, Anti-Plaintiff Bias in the Federal Appellate Courts, 84 Judicature 128, 129 (2000) (discussing findings that defendants succeed significantly more often than plaintiffs on appeal from civil trials); Kevin M. Clermont & Theodore Eisenberg, Judge Harry Edwards: A Case in Point!, 80 Wash. U. L.Q. 1275, 1275 76 (2002) (defending the empirical findings discussed above against an attack by a federal judge); Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals, 7 Emp. Rts. & Emp. Pol'y J. 547, 548 (2003) ("On appeal[,] [employment-discrimination plaintiffs] have a harder time in upholding their successes, as well as in reversing adverse outcomes.").

[FN95]. In 2 of the 44 appellate cases, the result was such that neither plaintiff nor defendant prevailed. Of course, the remaining sample of 42 is modest in size, so that the absence of a statistically significant difference might be owing to insufficient statistical power. Nevertheless, a power calculation of 0.57 reveals that if the normal defendants' advantage prevailed, our sample had approximately a 57% chance of detecting the advantage at a significance level of 0.05. At a significance level of 0.10, the sample had a power of 0.72.

[FN96]. An additional datum is that not one of our cases awarded "just costs" for improper removal under CAFA. See 28 U.S.C. §1447(c) (Supp. V 2005); Martin v. Franklin Capital Corp., 546 U.S. 132, 136 (2005) (reading the statute to authorize courts to award costs and fees when the defendant lacked an objectively reasonable basis for removal). But cf. Eisenberg & Morrison, supra note 87, at 561, 576 (arguing for more frequent fee-shifting to deter erroneous removal). Coming after our study's period was Alicea v. Circuit City Stores, Inc., 534 F. Supp. 2d 432, 436 (S.D.N.Y. 2008)

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(awarding costs and attorney's fees).

[FN97]. Over the years, the Judicial Conference expressed some opposition to the various predecessor versions of the CAFA bill, mainly on grounds of workload and federalism. See, e.g., Letter from Leonidas Ralph Mecham, Sec'y, Judicial Conference of the U.S., to Senator Patrick J. Leahy, Ranking Member, Comm. on the Judiciary, U.S. Senate (Apr. 25, 2003), reprinted in 151 Cong. Rec. S1225, 1233 (daily ed. Feb. 10, 2005); see also Burbank, supra note 34, at 1447-48, 1512-16, 1533-35, 1539-41 (discussing the judiciary's waffling); Judith Resnik, Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power, 78 Ind. L.J. 223, 303-04 (2003) (noting the Judicial Conference's opposition). Also, the Conference of Chief Justices, representing the state supreme courts, opposed CAFA. 151 Cong. Rec. S1225, 1248 (daily ed. Feb. 10, 2005); see also Daniel R. Karon, "How Do You Take Your Multi-State, Class-Action Litigation? One Lump or Two?" Infusing State Class-Action Jurisprudence into Federal, Multi-State, Class-Certification Analyses in a "CAFA-nated" World, 46 Santa Clara L. Rev. 567, 573 n.28 (2006); cf. Georgene M. Vairo, Foreword: Developments in the Law, The Class Action Fairness Act of 2005, 39 Loy. L.A. L. Rev. 979, 990 (2006) (going beyond "CAFA-nated" to add "CAFA-esque" to the world of puns, but thereby revealing the serious split over the pronunciation of CAFA's initial vowel as an "a" or an "ä").

[FN98]. See generally Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002); Cass R. Sunstein et al., Are Judges Political? An Empirical Analysis of the Federal Judiciary (2006); James Stribopoulos & Moin A. Yahya, Does a Judge's Party of Appointment or Gender Matter to Case Outcomes? An Empirical Study of the Court of Appeal for Ontario, 45 Osgoode Hall L.J. 315 (2007) (finding similar effects in a comparative study).

[FN99]. A recent study likewise shows a pronounced effect of sex on judging. See Christina L. Boyd et al., Untangling the Causal Effects of Sex on Judging 25 (July 3, 2007) (unpublished manuscript), available at http:// ssrn.com/abstract=1001748 (finding that sex discrimination complainants fare better before female judges in published federal appellate opinions). Although that article views itself as bringing "closure" to the debate, id. at 31, we are more cautious. Evidence indicates that the legal system can appear quite different depending on whether one views it from the perspective of the mass of cases or a more filtered set of cases. See Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. Legal Stud. 257, 263-64, 281 (1995) (noting that a district judge's political affiliation may be more or less relevant depending on whether a case is appealed or results in a published opinion); Theodore Eisenberg & Stewart J. Schwab, What Shapes Perceptions of the Federal Court System?, 56 U. Chi. L. Rev. 501 (1989) (studying perceptions of the federal court system in the constitutional tort context). Indeed, previous studies suggest that judicial sex effects that sometimes show up in published opinions, which our study utilizes, do not necessarily carry over to the mass of decisions. One such study is Ashenfelter et al., supra, which verified the existence of random assignment in a set of civil rights cases and then exploited random assignment of cases of the same case type to account for case characteristics. Another is Gregory C. Sisk et al., Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning, 73 N.Y.U. L. Rev. 1377 (1998), which exploited federal district court discussions of the same legal issue (the Federal Sentencing Guidelines) to control for the principal covariate of concern (strength of cases) in comparing outcomes across judges in a complete sample of cases addressing the legal issue. Neither Ashenfelter et al., supra, at 281, nor Sisk et al., supra, at 1451-54, found a judicial sex effect in the mass of decisions.

Boyd et al., supra, wrongly deemed the use of propensity scores to be essential. In fact, the scores can be inferior to verified random assignment in controlling for unobserved covariates. See Marshall M. Joffe & Paul R. Rosenbaum, Invited Commentary: Propensity Scores, 150 Am. J. Epidemiology 327, 327 (1999) ("[U]nlike random assignment of treatments, the propensity score typically does not balance covariates that were not observed."). However, Boyd et al. make a substantial contribution to the extent that they suggest that observational studies of judges lacking the characteristics of

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the Ashenfelter et al. and Sisk et al. studies may be improved by considering the use of propensity scores.

[FN100]. The impact of judicial values might be even more intense in the courts of appeals. See Christopher Zorn & Jennifer Barnes Bowie, An Empirical Analysis of Hierarchy Effects in Judicial Decision Making 19 (June 30, 2007) (unpublished manuscript), available at http://ssrn.com/abstract=987862 (finding that the effect of judges' policy preferences on their decisions increases as one moves up the judicial hierarchy).

[FN101]. See, e.g., Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124, 1161-72 (1992) (examining the effect of case categories on outcomes after trial by judge or jury).

[FN102]. See supra notes 98-99 and accompanying text.

[FN103]. See, e.g., Jonathan R. Macey, Judicial Preferences, Public Choice, and the Rules of Procedure, 23 J. Legal Stud. 627 (1994) (arguing that judicial responses to various legal rules are often the result of judges' self-interest); Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 Sup. Ct. Econ. Rev. 1, 39 (1993) (positing that "judicial effort has a diminishing effect on the satisfactions from judicial voting").

[FN104]. See supra note 20. Adding dummy variables for the circuit and accounting for district characteristics by use of a multilevel model do not affect these results in any important way. On the mixed pattern of variations by circuit, see Lee & Willging, supra note 27, at 1759-60 & figs.6 & 7.

[FN105]. See supra note 34.

[FN106]. See, e.g., Kuo-Chang Huang, Mandatory Disclosure: A Controversial Device with No Effects, 21 Pace L. Rev. 203, 262 (2000) (concluding that the mandatory disclosure amendments to the Federal Rules of Civil Procedure failed to achieve their goals of expediting the disposition of cases and reducing litigation costs).

[FN107]. Cf. Robert A. Hillman, The Rhetoric of Legal Backfire, 43 B.C. L. Rev. 819, 821 (2002) (finding inaccurate the frequent claims that a law will produce results directly contrary to those intended).

[FN108]. See supra notes 3-4.

[FN109]. See supra Part III.C (noting a high plaintiff win rate shortly after CAFA's enactment).
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Mr. NADLER. Their conclusion is quite a blow for a law touted as a key part of the Republicans' tort reform agenda. Far from reducing frivolous, time-consuming, and expensive litigation, CAFA appears to have encouraged such litigation, enmeshing the parties

and the courts in lengthy battles over threshold questions that threaten meaningful access to the courts and delay resolution of claims on their merits. Of course, that may be the real intent of the law.

I, along with several colleagues, expressed grave concerns and voted against CAFA because of the threat it poses to meaningful vindication of State-based rights. It is State, not Federal, law that provides many core health, safety, and consumer protections. It is, therefore, the State, and not Federal courts, that have authority to interpret their State's law and enforce their State's vision of justice. CAFA upends this system, making it far more likely that Federal judges will have the last word on the meaning of State law.

While Federal judges presiding over a case under CAFA must apply State law under the principles of judicial federalism announced long ago in *Erie Railroad Company v. Tompkins* that this task will prove more difficult as more and more cases are removed from the State court. Gaps in States' substantive law will grow wider as State courts are deprived of the opportunity to address certain areas of State law, weakening the ability of States to regulate activity within their borders, and protect their citizens.

It has also become fairly common for defendants to remove cases to Federal court and then to argue that a removed case is too complex and unmanageable, because of the variety of State laws that must be considered in the cases; it is too complex and unmanageable to be certified as a class action under the Federal rules. So, first, get it into Federal court; and, second, say that Federal courts are incapable of handling it, case dismissed. This seems like a one-two sucker punch, and I am curious to hear from our witnesses today on how this practice falls within the rubric of fairness under the Class Action Fairness Act.

I am most interested in hearing about whether the additional burden that CAFA imposes on Federal courts is harming the quality of justice, not just for CAFA cases, but for all other cases on the Federal docket. We raised concerns about the vacancies in the Federal bench before CAFA was passed. The percentage of vacancies has since doubled, from 5 percent to 10 percent as of September 2011. Yet the Senate refuses to confirm the President's nominees. Something must give in this equation. Congress cannot and should not continue to burden and hamstring the courts simultaneously, particularly where there is no demonstrated need to do so and no corresponding assurance that Federal judges are willing and able to undertake the task that we have imposed.

With that, I look forward to hearing from our witnesses, and I yield back the balance of my time.

Mr. FRANKS. I thank the gentleman.

And I now yield to the Ranking Member of the full Committee, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman.

Anyone listening to our opening statements would think that we are talking about two different things. The wide differences of the view are astounding, but they happen regularly in the Judiciary Committee. I tend to lean toward the Nadler description of what it is we are doing here today and why we are doing it, and I would like to add a few other additional points to that viewpoint.

First of all, I think the Class Action Fairness Act was seriously misnamed. It is anything but that. It was designed to benefit the defendants and work to the detriment of the large numbers of people who suffered harm. The fact is that the Class Action Fairness Act has worked well in helping defendants remove cases to the Federal court, where the proponents think they will have a greater advantage. As much as this bill was promoted as a necessary curb to forum shopping, it has proved to be the ultimate form of forum shopping for the defendants.

I had three concerns in 2005. I still have them, and would point out that, first, the Class Action Fairness Act undermines State laws and State courts. State law provides the source of many consumer and environmental protections through tort and statutory law. Class actions are vital to enforcing these rights, as they allow the aggregation of smaller claims that otherwise might not warrant individual litigation. The Class Action Fairness Act makes virtually every class action, by allowing removal by the defendant so long as at least one defendant and one class member are diverse, removable to the Federal courts, divesting State courts, of course, of the ability to interpret and develop State law.

Secondly, the Class Action Fairness Act makes class certification more difficult and expensive. We warned that Federal courts would be less likely to certify class actions, especially given the requirements of the Federal rules of civil procedure for predominant questions of law and fact. And then especially in the wake of the Supreme Court decision in *Wal-Mart Stores v. Dukes*, where a million and a half female workers had their case thrown out as a result of a five-four ideological division in the Court on whether the suit satisfied the requirement, whether these were questions of law or fact common to the class of female employees. The five conservative justices said "no," shutting down the suit and limiting the ability of other plaintiffs to ban together. This rule makes Federal courts an even more favorable forum for defendants in both environmental/consumer and employment discrimination cases.

Third, we expressed the concern that the bill would increase the workload of our already overburdened courts. It has been already observed that the number of vacancies has doubled and there are far fewer Federal judges than State judges. And growing caseloads leave Federal judges even less time.

And so I look forward to the testimony, and I yield back the balance of my time.

Mr. FRANKS. And I thank the gentleman.

And, again, I welcome the witnesses here this morning.

Our first witness is Martin Redish, the Ancel Professor of Law and Public Policy at Northwestern University School of Law. He has been described as "without a doubt the foremost scholar on issues of Federal court jurisdiction in this generation" and has been recognized as the 16th most cited legal scholar of all time. Professor Redish is the coauthor and the author of more than 80 articles and 15 books, including the book "Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit."

Our second witness is Thomas Sobol, a managing partner of Hagens Berman Sobol Shapiro's Cambridge office. In practice for almost 30 years, he leads drug-pricing and healthcare class actions

against pharmaceutical and medical device manufacturers, recovering more than $12 billion for his clients. Mr. Sobol has served as a Special Assistant Attorney General for the Commonwealth of Massachusetts and the States of New Hampshire and Rhode Island and as private counsel for Massachusetts and New Hampshire in litigation against the tobacco industry.

Our final witness is John Beisner, co-head of Skadden's Mass Torts and Insurance Litigation group. Over the past 25 years, he has defended major U.S. and international corporations in more than 600 purported class actions filed in Federal courts and in 40 State courts at both the trial and appellate levels, including matters before the U.S. Supreme Court. Mr. Beisner a frequent writer and lecturer on class action and complex litigation issues and has been an active participant in litigation reform initiatives.

And, again, I want to thank you all for appearing before us today.

And each of the witnesses' written statements will be entered in the record in its entirety. I would ask that each witness summarize his testimony in 5 minutes or less. To help you stay within that time, there is a timing light on the table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

And before I recognize the witnesses, it is the tradition of the Subcommittee that they be sworn. So if you will please stand.

[Witnesses sworn.]

Mr. FRANKS. Thank you. You may take a seat.

Also, to the witnesses, please turn on your microphone before speaking.

I would now recognize our first witness, Professor Redish, for 5 minutes.

TESTIMONY OF MARTIN H. REDISH, ANCEL PROFESSOR OF LAW AND PUBLIC POLICY, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Mr. REDISH. Thank you, Mr. Chairman.

I would like to preface the substance of my comments by emphasizing that it is now time for Congress to take control of important procedural issues. Normally, Congress cedes to the Rules Advisory Committee and ultimately to the Supreme Court the control of the Federal Rules of Civil Procedure. But there are certain procedural devices—class actions being perhaps the most important, but others, including discovery abuse and discovery cost allocation, which are deserving of significant concern now—have enormous impact on the lives of our citizens, have sociopolitical impacts on the Nation and on the economy that go well beyond the four walls of the courthouse.

The Advisory Committee is not elected, is not accountable, is not representative. The Supreme Court, for very important reasons, is not elected or accountable. It is only this body, the Congress of the United States, that is representative of and accountable to the electorate. It is this body that should be making the basic moral socioeconomic choices as to how procedure operates when that procedure has significant impact outside of the four walls of the courthouse.

Now, today our concern is the class action. The Class Action Fairness Act was a major reform that I believe has done a great deal of good, but it is time to move on to other areas of reform. The modern class action has significant pathologies that undermine basic due process rights of individual litigants and, more importantly for present purposes, the separation of powers and distribution of authority between the judicial and legislative branches.

The class action, contrary to the views of many, is not a roving instrument to do justice. The class action is a Federal Rules of Civil Procedure appearing in Rule 23. It comes right after Rule 22 dealing with interpleader and before Rule 24 dealing with intervention. A lawsuit does not arise under Rule 23. A lawsuit arises under the substantive law, be it legislative, common law, or constitutional law, that is being enforced in the particular proceeding.

What has happened in all too many situations is that, through a process equivalent to a type of alchemy, the class action procedure, in direct contravention to the directives of the Rules Enabling Act pursuant to which the Federal rules were enacted and in direct contravention to the separation of powers between the branches, alters the underlying DNA of the substantive law.

Substantive law contains two portions: a proscriptive portion, what primary behavior is prohibited or restricted; and a remedial portion, how are we to remedy violations of the proscriptive portions of the law. In all the laws that are being enforced in the modern class action, the remedial device chosen by Congress or in diversity cases by the state, legislatures is a compensatory device. The legislative body simultaneously deters future harm and compensates individuals who have been injured as a result of the violation of their legal rights.

But in all too many situations, the class action is what I call a "faux class action." It is a cardboard cutout of a class action. Many class members, because they become members of the class through mere inertia rather than by any affirmative choice on their part, are completely unaware that they are involved in a lawsuit. Many are unfindable and unreachable. Oftentimes the claims are so small that it wouldn't make sense for them, as a matter of economic efficiency, to file.

What happens in these cases is that the lawyers become the real parties in interest. The lawyers, bringing these suits, who are uninjured in any legally cognizable way, are the ones pursuing the remedy. This is not necessarily illegal because we have qui tam suits, but that is not what these underlying laws have provided.

The cy-pres remedy that has been provided as a means of covering these kinds of violations of substantive law has been used all too often where the money that goes unclaimed is given to a charity. The charity is not an injured party, the charity has not suffered harm, and this is a symptom of the perversion of the class action process. I believe significant legislative reforms are called for.

Thank you.

Mr. FRANKS. Thank you, Professor.

[The prepared statement of Mr. Redish follows:]

TESTIMONY OF MARTIN H. REDISH

Louis and Harriet Ancel Professor of Law
and Public Policy

Northwestern University School of Law

Before the Subcommittee on the
Constitution of the Committee on the
Judiciary of the House of Representatives

June 1, 2012

INTRODUCTION

My name is Martin H. Redish. I am the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University School of Law, where for the last 39 years I have taught and written extensively on the subjects of constitutional law, free expression, federal jurisdiction and civil procedure. I am the author of 15 books and 90 scholarly articles on those subjects. I am one of the primary revisers of the current edition of the multi-volume treatise, Moore's Federal Practice. I am also Senior Counsel to the law firm of Sidley Austin (though none of the views expressed today should necessarily be attributed to either institution).

I have been asked by this Subcommittee to testify today about the need for legislative reform of federal class actions in general and the need for legislative revision of the use of so-called "cy pres" awards in class action proceedings in particular. In responding to that request, I draw on the insights I gained in writing my book, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* (Stanford University Press; 2009), as well as my subsequent article, co-authored with Peter Julian and Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis,* 62 Florida Law Review 617 (2010). That article has been either quoted or cited in three recent cy pres decisions in the federal courts of appeals, in three different circuits.[1]

Cy pres awards are designed to provide the "next best" form of relief in cases in which it is impractical or impossible to compensate directly injured class members once liability has been determined or the case has been settled. Cy pres refers to efforts to provide unclaimed compensatory funds to a charitable institution that is in some way related either to the subject of the case or the interests of the victims, broadly defined. Such awards (which are employed in the form of either coercive judicial awards or settlements in class action proceedings) are generally described as a means of disposing of unclaimed property. In reality, however, such awards function as an integral part of the remedy awarded in a class proceeding.

In 2005, Congress enacted the Class Action Fairness Act, which has gone a long way towards reducing some of the abuses imposed on out-of-state corporate defendants in state court class actions. It is now time for Congress to remedy some of the most important pathologies in administration of the federal class action. The ever-increasing resort to cy pres awards as part of the resolution of federal class actions, while of legitimately great concern in and of itself, is in many ways merely a symptom of deeper and more fundamental defects in administration of the modern class action. Simply put, in far too many instances the class action proceeding is viewed by courts, advocates and the public as some sort of roaming device for doing justice. In reality, it is nothing of the sort. It is, rather, nothing more than a complex procedural joinder device, laid out in Rule 23 of the Federal Rules of Civil Procedure—appearing in between Rule 22 (Interpleader) and Rule 24 (Intervention). It is nothing more and nothing less than that. A lawsuit does not "arise under" Rule 23; it "arises under" the underlying substantive law—either federal or state—which the plaintiffs

[1] *In re* Lupron Marketing and Sales Practices Litigation, __F.3d___, 2012 WL 1413372 (1st Cir. 2012); Klier v. Elf Atochem North America, Inc., 658 F.3d 468, 480-82 (5th Cir. 2011) (Jones, J., concurring); Nachshin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011).

seek to enforce. In those instances in which existing remedies provided by substantive law fail to achieve legislative goals of deterrence, it may well he appropriate for the relevant legislative hody to consider adjustments in the available remedies. But neither our controlling constitutional nor statutory framework permits those changes to be implemented by the judiciary under the disguise of procedure through implementation of the class action procedure. To pervert the class action device into a means of furtively altering applicable suhstantive law not only unambiguously contravenes the Rules Enabling Act[2] pursuant to which Rule 23 was promulgated; it also threatens core elements of our form of constitutional democracy, in which the authority for promulgation of substantive law is exercised by a representative and accountable legislative body.

The widespread use of cy pres awards as a means of resolving federal class actions[3] is little more than a cover for these far deeper constitutional and democratic pathologies in the modern use of the class action procedure. Thus, while it is extremely important for Congress to correct the constitutional and statutory harms brought about by cy pres, it is equally important to impose legislative checks on the ahuses which have allowed the class action device to be magically transformed, in a manner similar to alchemy, into a freestanding means of remedying corporate and governmental wrongdoing.

In the first section of my testimony I explain the concept of cy pres, briefly describe both its origins in the law of trusts and its modern transformation into a device for resolving litigation in class action law. In the second section I explore the serious constitutional and statutory problems to which that transformation gives rise. In the third section I explain how the use of cy pres has been employed to mask the fundamental pathologies of the modern class action. In the final section I suggest ways in which Congress might reform class action procedure in order to avoid these harms.

I. THE ORIGINS AND DEVELOPMENT OF CY PRES IN CLASS ACTIONS

The term "cy pres" derives from the French expression, "cy pres comme possible," which translates to "as near as possible." The device was developed originally in the law of trusts, where it is deeply rooted (extending back to the time of Justinian). However, it was only by means of rather strained analogy that the concept of cy pres was introduced into the law of class actions. Following the revolutionary amendment of the class action procedure in 1966, large damage classes with large numbers of small claims became a relatively common occurrence. Because of Rule 23's new structure, many individuals holding these claims could become claimants without even being aware that they were plaintiffs in a class action proceeding. Both courts and attorneys quickly hecame

[2] 28 U.S.C. s 2072.

[3] While it is difficult to know with any level of certainty how often cy pres awards are employed in the federal courts, few could doubt the practice's importance in modern class action procedure. In our 2010 article on the cy pres doctrine, my co-authors and I noted that a study of the relevant online sources "revealed 120 federal class action cases from 1974 through 2008, where the court either included a cy pres award as part of a judgment or approved a cy pres distribution as part of a settlement." Redish, Julian & Zyontz, *supra,* 62 Fla. L. Rev. 617, at Section IV. Our study revealed that the practice's use has clearly been on the rise: "From 1974 through 2000, federal courts granted or approved cy pres awards to third party charities in thirty class actions, or an average of approximately once per year. Since 2001, federal courts granted or approved cy pres awards in sixty-five class actions, or an average of roughly eight per year." *Id.*

aware that there would be serious problems transferring awards or settlement funds from defendants to their victims. By the early 1970s scholarly commentary began to suggest the drawing of an analogy to trust law's version of cy pres as a means of disposing of the often large amounts of unclaimed funds in a manner that satisfied the interests of justice: the amounts remaining in the damages or settlement fund due to the failure of absent class plaintiffs to claim their share would be awarded to a deserving charity that was in some way related to the subject of the lawsuit. In this way, much like the use of cy pres in trust law, the funds would be awarded in "the second best" manner. Many considered this alternative to be far preferable to the other alternatives for disposing of those unclaimed funds, such as escheat to the state, reversion to the defendant or additions to the awards of those class members who had in fact filed claims.[4]

Though no one seemed to recognize the problem at the time, the analogy of class action cy pres to trust law's version of the doctrine is plagued with logical and practical flaws. In the context of trust law, it is quite possible that the wishes of the trust creator, for whatever reason, may no longer be carried out. Because the trust creator has passed on by this point, however, there is of course no way to ask what his or her second choice for the disposal of the trust corpus would be. Thus, the alternatives facing the court charged with enforcing the trust are either to have the funds escheat to the state—the one result we can be sure that the trust creator did *not* intend—or come up with a second best alternative. In stark contrast, litigation and the substantive laws enforced in it do not normally contemplate a "second best" alternative; the substantive law vests in specified victims the legal right to sue to enforce its directives. Either that law is able to be enforced, or it is not. If it cannot be enforced, it is up to the law creator (usually a legislative body) to go back to the legislative drawing board to consider alternative means of enforcing its substantive directives and prohibitions. Unless and until it does so, there is nothing in the substantive law that authorizes an enforcing court to shape alternative substantive remedies, whether or not they can be described as the "second best" alternative. Most certainly, there is nothing in either Rule 23 (the class action rule) or the Rules Enabling Act (pursuant to which all of the Federal Rules of Civil Procedure have been promulgated) that authorizes the exercise of such judicial creativity. To the contrary, that Act expressly *prohibits* the Supreme Court, under the guise of procedural rulemaking, from modifying or enlarging existing substantive rights.[5] In the section that follows, I explore in more detail the fundamental problems, both conceptual and practical, in the use of cy pres awards in class action proceedings.

II. THE CONSTITUTIONAL AND STATUTORY PROBLEMS WITH THE USE OF CY PRES IN CLASS ACTIONS

By criticizing judicially authorized donations to what are concededly worthy charities, one naturally risks subjecting oneself to the most unattractive labels of "Grinch" or "Scrooge." Nevertheless, there is little doubt that use of cy pres in the class action context is improper as a matter of both democratic theory and constitutional law. As an intrinsic matter, cy pres suffers from two key constitutional flaws. First, the doctrine unconstitutionally transforms the judicial process

[4] For a more detailed description of the history of cy pres and its use in the modern class action, see Redish, Julian & Zyontz, *supra*, 62 Fla. L. Rev. 617, at Section II.
[5] 28 U.S.C. s 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right.").

from a *bilateral* private rights adjudicatory model into an impermissible *trilateral* process, involving the plaintiff class, the defendants and the entity which may well benefit the most from the proceeding, the receiving charity. Second, the practice violates constitutionally dictated separation of powers (as well as the Rules Enabling Act) because through the use of a wholly procedural device it effectively transforms the underlying substantive law from a compensatory remedial structure to the equivalent of a civil fine—a remedy at no point authorized by that substantive law.

A. "Trilaterization" of the Bilateral Adjudicatory Process

When courts invoke cy pres in a class action,[6] they introduce a non-party into the litigation as a legally significant actor. In this manner, cy pres transforms what begins as an adversary dispute into a less than full adversarial trilateral process, wholly unknown in the adjudicatory structure contemplated by the case-or-controversy requirement of Article III of the Constitution. It achieves this result by ordering or authorizing an award to an uninjured private entity which has no involvement whatsoever in the legally relevant events that gave rise to the suit. Awarding "damages" to an uninjured third party effectively transforms the court's function into a fundamentally executive role; no longer is the court functioning as a judicial vehicle by which legal injuries suffered by those bring suit are remedied. Instead, the court is presiding over the administrative redistribution of wealth for purposes of social good. As a result, the practice violates both the constitutional separation of powers and the constitutionally dictated case-or-controversy requirement.[7]

Compounding this constitutional violation is the inherently deceptive manner in which it is achieved. What makes cy pres so deceptive is the superficial appearance of the resolution of a live dispute: the plaintiff class is presumably made up of those who claim to be victims, and whose rights are alleged to have been violated by defendants' unlawful behavior. The constitutional problem, however, is that requiring defendants to donate to an uninjured charitable recipient amounts to a remedial non-sequitur. The primary beneficiary of the process has sued no one—and with good reason, since its legal rights have presumably been violated by no one. Thus, ordering the transfer of defendants' funds to the charitable third party remedies the violation of no one's rights protected under the applicable substantive law. Cy pres thus ignores the core requirements of the "private rights" adjudicatory model dictated by the case-or-controversy requirement imposed by Article III of the Constitution. Under that model, it is only plaintiffs who have been injured in fact by the unlawful actions of the defendant who are allowed to sue. While in a cy pres situation the charity is of course not technically a party to the suit, as a practical matter its interests are as implicated and impacted by the adjudication as any of the named litigants. For all practical purposes, then, use of cy pres in federal class actions introduces the equivalent of an uninjured party who will formally benefit from resolution of the federal judicial process.

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[6] It should be noted that while courts have on occasion provided for cy pres awards in coercive relief, more often cy pres appears in a settlement agreed upon by the parties. However, every such settlement must be approved by the court. Moreover, absent the defendant's awareness that such relief might well be awarded coercively it is highly doubtful that it would agree to cy pres awards in many instances.

[7] Courts have on occasion reasoned that the charity is not a "party" to the proceeding. But such reasoning puts form over substance. Indeed, the charity will often be the primary beneficiary of the entire process.

B. Indirect Transformation of the Underlying Substantive Law

An additional pathological consequence of this trilaterization process is the legally improper transformation of the underlying substantive law from the compensatory framework enacted in that substantive law from a compensatory remedial framework into the practical equivalent of a civil fine. Substantive laws necessarily contain two elements: a behavioral proscription and an enforcement mechanism. The proscription regulates a private or governmental actor's primary behavior, while the enforcement mechanism dictates either consequences for violation of that proscription or some directly coercive means for future enforcement of that proscription. The enforcement mechanism may compensate a victim of the wrongdoer's behavior or provide for punitive damages or criminal or administrative enforcement. The remedial choice adopted hy the promulgating legislative body is as much a part of the substantive law as is the proscriptive element.

Alteration of the underlying substantive law's remedial choice may not be made under the guise of a rule of procedure. To do so could easily lead to deception of the electorate hy leading them to believe that the remedy imposed for law violation is one thing, while in reality the procedural rules have furtively transformed that chosen remedy.[8] It is presumably for this reason that the drafters of the Rules Enabling Act expressly prohibited such indirect substantive modification. Thus, in addition to contravening the constitutional principles of separation of powers and case-or-controversy and undermining core precepts of American democracy, use of cy pres in federal class actions violates the unambiguous restrictions imposed by the Enabling Act.

It might be responded that, rather than transform the remedial element of the underlying substantive law into a form of civil fine, cy pres is instead properly seen as relevant solely to the question of how to dispose of unclaimed property, an issue that arises not infrequently hoth in the litigation context and other situations. By viewing cy pres through the lens of unclaimed property disposition, one might reason that the question of cy pres relief should be thought to be divorced from the underlying substantive law that is enforced in the class proceeding. In reality, however, viewing class action cy pres as merely a matter of the suhstantively neutral administration of unclaimed property grossly and misleadingly oversimplifies the applicable legal dynamics. To conceptualize this radical non-compensatory damage disposition method as nothing more than the trans-substantive disposal of unclaimed property effectively places form over suhstance. The difficulties in distrihution of class wide relief to individual claimants will often be readily apparent to all involved at the time of class certification. Yet when cy pres relief is deemed available, the court will certify the class, despite the presence of these glaring difficulties in administering relief. Both court and parties, then, often recognize that cy pres relief will form a central element in the "relief" awarded to the class. Thus, cy pres relief is much more appropriately deemed an integral part of class relief.

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[8] For a more detailed examination of the theory of legislative deception, see Redish & Pudelski, *Legislative Deception, Separation of Powers, ond the Democratic Process: Harnessing the Political Theory of United States v. Klein,* 100 Nw. U. L. Rev. 437 (2006).

III. CY PRES RELIEF AND THE "FAUX" CLASS ACTION

While cy pres awards have been employed in a variety of class action proceedings, there can be little doubt that its use's most invidious impact is the facilitation of what I referred to in my book on class actions as the most serious perversion of the class action procedure: the development of the "faux" class action.[9] The faux class action describes those class proceedings in which the claims of the individual absent class members are so small and/or the difficulty in either finding them or distributing the individual awards so great that as a practical matter they will receive no damages, despite a plaintiffs' victory. Those absent class members, then, are interested parties in name only. They have not made the choice to sue, and because they are deemed members of the class without any affirmative assent on their part, they may well not even be aware of the class proceeding's existence. In short, they are little more than a cardhoard cutout of a class. The real parties in interest in these faux class actions are the plaintiffs' lawyers, who are the ones primarily responsible for bringing this proceeding.

I should emphasize that this is not necessarily a criticism of plaintiffs' lawyers as a theoretical matter. While no doubt abuses exist, to seek to profit from efforts to ferret out wrongdoing is a venerable tradition in our social and legal history. We have long accepted the concept of "bounty hunters," who make their living by bringing wrongdoers to justice. In the litigation process, such efforts are referred to as qui tam proceedings, in which those who have not themselves been injured by a private actor's unlawful behavior are entitled to benefit from successfully bringing a civil proceeding against that wrongdoer in court. Qui tam today takes the form of suits brought under the False Claims Act, as a means of ferreting out and punishing fraud on the government. But the key point to recognize is that such a remedial model has been adopted in no other substantive law that might be enforced in a class action.[10] To the contrary, all of those laws have adopted a purely compensatory remedial model as a means of enforcing their behavioral proscriptions. Under the model adopted by these laws, the remedy provided contemplates only that those actually injured by defendant's unlawful behavior will be made whole by the award of damages from the wrongdoer. In this way, these substantive laws are designed to simultaneously compensate victims and deter future unlawful behavior. Use of the class action procedure in those cases in which the supposedly real parties in interest—the absent plaintiffs in the class—will never be compensated and the only actors to actually profit are the plaintiffs' attorneys (i.e., faux class actions) effectively transforms the remedial element of the underlying substantive law from a compensatory model into a qui tam—or "bounty hunter"—remedial model. As a result, while the electorate is led to believe that the remedy for wrongdoing committed by corporate defendants will be compensation

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[9] *See* Martin H. Redish, *Wholesale Justice: Constitutianal Democracy and the Problem of the Class Action Lawsuit* 23-56 (2009).

[10] It should be noted that due to an absence of injury in fact on the part of bounty hunter plaintiffs, serious constitutional problems of standing may restrict Congress's ability to create such a bounty hunter remedial model outside of the narrow and historically well established practice involving fraud against the government, where the qui tam action provided for in the False Claims Act has been rationalized as an assignment of the government's claim against the defendant. That issue is beyond the scope of my present testimony. For present purposes, I may assume, solely for purposes of argument, that such an action would not run afoul of Article III's case-or-controversy requirement.

of the victims, in reality most of those victims will benefit not at all from the litigation; instead, it will be only the attorneys who brought the suit who will benefit.

Will the electorate be deceived by such a transformation? Would anyone really care? Is it likely to matter to anyone that what purports to be a compensatory remedial model in a statute proscribing specified corporate behavior in reality has been made into a bounty hunter form of relief actually botber anyone? We cannot really know the answer to that question, thougb it is, at the very least, plausible that many citizens wbo (for whatever reason) do not approve of plaintiffs' lawyers[11] but who are willing to tolerate them because they facilitate the compensation of injured victims would no doubt consider important the fact that no victims are actually being compensated. For democracy to function effectively, however, courts and legislative bodies must presume that citizens care whether a law will in reality do wbat it purports on its face to do. To be sure, some will care about some laws more than others, but it is highly likely that different citizens will care about different laws. In the end, then, it is likely that at least some citizens will care—often deeply--about most laws enacted by Congress. That a law that provides "X" bas, through the shell game of procedure been effectively transformed into "Y" or even "not X" is surely inconsistent with the democratic premise that the citizenry may judge its elected legislators by what laws they enact. It undermines core precepts of representation and accountability, without which democracy is rendered meaningless.

It should be recalled that in any event, one need not even accept this core precept of American political theory in order to reject the faux class action. As already noted, the Rules Enabling Act expressly prohibits such indirect manipulation of controlling substantive law. Thus, a court should invalidate the use of a procedural rule to manipulate underlying substantive law without even reaching issues of constitutional law or democratic theory.

The reason that cy pres has become so popular as a means of disposing of unclaimed class action awards is quite probably that it serves as a superficial antidote to the invidiousness of the faux class action. Cy pres allows those responsible for the bringing of the class action proceeding to add the appearance of a socially valuable wealtb transfer (i.e., the award of unclaimed funds to a charity)—something tbat would be completely missing absent the charitable award. But as already explained, this laundering of the faux class action is a change in appearance only. In reality, the cy pres award is itself improper as a violation of controlling constitutional and statutory directives. That it also disguises tbe fundamental pathologies of the faux class action only exacerbates the serious problems caused by the award of cy pres relief in federal class action suits.

I should emphasize that my concern over the pathologies and abuses of the modern class action does not necessarily imply that I am opposed to the class action procedure in its entirety. Indeed, as I wrote in my book on the subject of class actions, "in no way am I opposed to the existence of the class action procedure. To tbe contrary, the class action represents an innovative means of resolving major legal problems that might otherwise overwhelm the judicial system. I doing so, however, it should not be permitted to overwhelm our nation's normative and

[11] It should, after all, be recalled that the activities of plaintiffs' lawyers, such as John Edwards, have become a subject of hot debate in recent presidential elections.

constitutional commitments to democratic accountability, separation of powers, procedural due process, or individual autonomy."[12] A class action proceeding in which injured parties voluntarily choose to join their claims with others who possess similarly situated claims, with the majority of claimants assuming a passive role and representation handled by a few named parties, is a perfectly legitimate—often valuable--multi-party procedural device. It is only when the class action procedure is employed in a manner that effectively transforms the underlying substantive law or undermines the due process rights of either absent class members or defendants that the process becomes pathological.

The argument has often been made that even where the class action procedure fails to compensate absent class members, its use is still of vital social importance because it acts as a deterrent to widespread unlawful corporate behavior. Absent the class proceeding, the argument proceeds, the small amount of individual damage would allow the wrongdoer to cause widespread harm without fear of policing through private lawsuits. I fully appreciate the argument. Indeed, its accuracy is, purely as a practical matter, virtually indisputable. But that fact does not justify use of a procedural aggregation device such as the class action to establish an entirely new substantive remedial framework. Rule 23 of the Federal Rules of Civil Procedure is simply too small a procedural tail to wag so large a substantive dog. Surely, such a narrow focus on result orientation cannot allow the circumvention of the Rules Enabling Act, basic separation–of-powers principles, the case-or-controversy requirement of Article III, or the core democratic premises of transparency, representation and accountability. Yet those will inevitably be the results if Rule 23 is employed to impose so dramatic an alteration in the DNA of the underlying substantive law.

If Congress ultimately determines that its existing remedial framework fails to achieve congressionally established goals, it is of course appropriate for Congress to consider adoption of alternative remedial devices. But neither Congress nor the judiciary is permitted to achieve those goals indirectly, through the manipulation of the controlling legal and constitutional framework.

IV. POSSIBLE LEGISLATIVE REMEDIES

In my opinion, the courts should themselves invalidate the use of cy pres relief in class actions, because of the practice's inconsistency with applicable constitutional and statutory directives. But while recent decisions have evinced a growing judicial concern with the practice,[13] to this point no decision—at least of which I am aware—has reached this conclusion. But it must be remembered that Congress retains full legislative control over the Federal Rules of Civil Procedure, and may therefore modify them through the enactment of legislation if it so desires. I strongly urge Congress to consider and ultimately adopt reform legislation to cure the pathologies to which cy pres relief has given rise, as well as the deeper pathologies which cy pres is likely designed to shield.

The first option, naturally, is simply for Congress to prohibit the use of cy pres awards, included as either elements of coercive judicial awards or as part of judicially approved settlements of class

[12] Redish, *supra* note 9, at ix.
[13] *See* cases cited in note 1, *supra*.

action proceedings in federal court. In addition, however, Congress should consider a second reform: insertion into the class certification process of an additional requirement, above and beyond those currently imposed by Rules 23(a) and (b): the prerequisite that prior to certification the certifying court have determined that there is legitimate reason to believe that a substantial portion of the class will actually be compensated as a result of a settlement or coercive award. Absent such a finding, the class will degenerate into a faux class action. Where such a finding has been made (and it will probably be necessary at some point to operationalize the concept of "substantial portion"). It is true that such a determination necessarily involves a prediction of future events, rendering the decision difficult in many instances. But in a large number of class proceedings it should not be all that difficult for the court to determine that neither an award nor a settlement is likely to benefit much of the absent class. In making this determination, the court may look to four factors: (1) the size of the absent class; (2) the amount of injury likely suffered by individual class members; (3) the difficulty in finding absent class members; and (4) the difficulty in actually compensating absent class members. Where a class is very large, individual class members have likely suffered only a relatively small amount of damages, it will be difficult to find many of the class members, and there is no obvious means of easily compensating them, it is highly likely that a large portion of the absent class members will benefit not at all from the award. In these cases, payment of the remaining funds to an uninjured charity should not be considered an acceptable alternative mode of punishment.

These suggestions are designed to represent merely possible beginnings of what would have to be a far more detailed process of developing specific legislative reforms as a means of curing the pathologies to which my testimony has pointed. The main goal of my testimony, however, has been to convince members of this Subcommittee that such reform is essential to the preservation of the effective and legitimate operation of the federal system of litigation. If I have achieved that goal, then I will take satisfaction that I have been able to contribute to the start of an effort to make sure that the class action does only what a complex procedural aggregation device is designed to do.

Thank you for providing me with this opportunity.

Mr. FRANKS. And I now recognize Mr. Sobol for 5 minutes.

TESTIMONY OF THOMAS M. SOBOL, PARTNER, HAGENS BERMAN SOBOL SHAPIRO, LLP

Mr. SOBOL. Good morning, Mr. Franks. Good morning, Members of the Subcommittee.

I bring to bear 30 years of the practice of law and some real-world experience in dealing with class actions. And while I do so, my views are my own, not those of my clients or my firm.

Now, if the proponents of CAFA made one promise about the new statute, it was, to use their own words, this: that CAFA does not change substantive law—that is, in effect, it is a procedural provision only.

Now, judged by those terms, CAFA is an abysmal failure. It is true that over the past 7 years since its passage, CAFA has changed where cases get filed, and it has stopped or prevented the occasional reverse auction where the rights of consumers are not sufficiently recognized. But CAFA's biggest impact has been to deny consumers access to substantive State laws that protect consumers.

CAFA usurped from State courts the ability to interpret their own laws and protect their own citizens. It vested in the Federal judiciary with virtually sole authority over nationwide or multi-State class actions. But, at the same time, CAFA did not provide any instruction as to how the Federal judiciary was to handle these numerous large State-law-based consumer protection cases. It did not explain how a single Federal judge was to handle what previously had been the work of numerous State court judges addressing many separate State class actions involving State law.

By failing to do so, CAFA presents the Federal judiciary with a problem for which there is no immediate solution. As a result, Federal courts often deny certification of multi-State class actions when multiple States' laws are at play. The denial of access of justice is not based on the merits of the case but on a technical procedural issue under the Federal Rules of Civil Procedure—manageability. And the result is that consumers are denied access to justice.

Decades ago, every State passed consumer protection statutes prohibiting unfair or deceptive trade practices. But when all is said and done, State consumer protection laws are based on a single simple proposition: Don't lie, don't steal, don't cheat. Most big and small businesses have no problem complying with this simple proposition. It is only the rare and unethical of businesses or businesspersons who become defendants in significant consumer protection matters. On this, there can be no partisan view and no belief that businesses need to be free to lie, steal, or cheat.

Now, contrary to most Federal statutes and regulations, every State consumer protection statute provides both public and private enforcement. And the predominance of State action in this area is consistent with tradition. The Supreme Court has long recognized the historic primacy of State regulation in matters of health and safety. But then Congress enacted CAFA, brandishing a machete where a scalpel would have sufficed to address complaints about the class action vehicle. In wielding this awkward instrument, Con-

gress ignored its potential and likely effects on consumers' ability to bring State consumer protection and common law claims.

Since the passage of CAFA, Federal courts have denied efforts to certify claims by consumers basically on the basis that the cases are too complicated or too unmanageable. In other words, as I think that Mr. Nadler indicated, there has been a one-two punch. First, the cases must go to Federal court, and they all get consolidated into one place. But now that they are all consolidated in one place, they are too complicated to proceed.

As the grounds of the denial of class certification, Federal courts often cite the need to apply the law of the State where each consumer resides because each respective State's interest in enforcing its consumer laws trumps its interest. But by refusing to certify any class in the face of unmanageability or insurmountable obstacles posed by multiple State laws, these certification refusals deny American citizens their constitutional guarantee to a day in court.

Thank you, Mr. Chairman.

Mr. FRANKS. Thank you, sir.

[The prepared statement of Mr. Sobol follows:]

Testimony of Thomas M. Sobol[1]
Before the Subcommittee on the Constitution
Of the Committee on the Judiciary
United States House of Representatives

Hearing: "Class Actions Seven Years After the Class Action Fairness Act"

June 1, 2012

I. Introduction

If the proponents of the Class Action Fairness Act of 2005 ("CAFA") made one promise about the new statute, it was this: CAFA "does not change substantive law—it is, in effect, a procedural provision only."[2] Judged by these terms, CAFA is an abysmal failure. True, in the seven years since its passage, CAFA has changed where cases get filed and reduced the possibility of the rare reverse-auction settlement that does not fully address the injury imposed by a company's conduct on the class. But CAFA's biggest impact has been to deny consumers access to the substantive state laws that protect consumers, including that governing unfair and deceptive trade practices, warranties, antitrust, unjust enrichment, negligence, and other common law torts.

CAFA usurped from state courts the ability to interpret their own laws and protect their own citizens. It vested the federal judiciary with virtually sole authority over nationwide or multistate class actions. But CAFA did not provide any instruction as to how the federal judiciary was to handle these numerous, largely state law based consumer protection class actions. It did not explain how a single federal judge was to handle what previously had been the work of numerous state court judges addressing many separate state class actions involving state law. By failing to do so, CAFA presented the federal judiciary with a problem for which there was no immediate solution. As a result, federal courts routinely deny certification of multistate classes when multiple states' laws are at play. The denial of access to justice is not based on the merits of the case but on a technical procedural issue under the Federal Rules of Civil Procedure – manageability. These denials leave consumers with no recourse.

The federal courts' denials are not surprising; proponents of CAFA expected the Act would reduce the power of class actions and, with it, American citizens' abilities to combat unfair and deceptive practices. Only America's consumers and workers have suffered. Every day, the public continues to be harmed by the corporate wrongdoing. Every day, the refusal of the federal courts to allow class actions challenging such behavior under state laws makes it easier and

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[2] S. Rep. No. 109-14, at 61 (2005) (accompanying passage of the Act in February 2005). *See also id.* at 56 ("[CAFA] is court reform—not tort reform. It would simply allow federal courts to handle more interstate class actions. It makes no changes in substantive law whatsoever.")

easier for companies to shirk corporate accountability and avoid any legal consequences for their misconduct.

II. CAFA – Provisions of the Law

As the Committee knows, CAFA has two primary components. First, the Act includes a "consumer class action bill of rights"[3] requiring court scrutiny of proposed class settlements awarding coupons to class members to ensure the settlement is "fair, reasonable, and adequate," provides for alternative measures of attorney fees in such cases, and compels notice of class action settlements be sent to appropriate state and federal officials to provide them an opportunity to voice opposition.[4] Arguably, this first component was mere window dressing for the Act as it did little to change the existing practice; Rule 23(e) of the Federal Rules of Civil Procedure already required that a court "may approve [a proposed settlement] only after a hearing and on finding that it is fair, reasonable, and adequate."[5] Other portions of the rule governed the procedures to be used in determining and awarding attorney's fees.[6]

Second, and of far more significance, CAFA expands federal court jurisdiction over class actions by amending the diversity jurisdiction statute (28 U.S.C. §1332) and modifying the class action removal statute (28 U.S.C. §1453).[7] With limited exceptions, any class action in which a member of the proposed class is a citizen of a different state than any defendant – in other words, where *any* diversity, rather than the traditional requirement of *complete* diversity, exists – shall be heard in federal court. I focus my remarks here on this expansion of federal court jurisdiction and concurrent contraction of states' rights to interpret and enforce their own state and common law causes of action.

III. Consumer Protection Is a State Law Issue

Congress passed the Federal Trade Commission Act in 1914, creating the Federal Trade Commission ("FTC"), in an attempt to police unfair methods of competition.[8] In 1938, the Wheeler-Lea Amendment added a broad prohibition on "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce," declaring them unlawful.[9] The FTC Act allows the federal government to prosecute deceptive trade practices on behalf of the public but it contains no private right of action allowing consumers to bring their own claims.

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[3] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.) ("CAFA").

[4] *Id.* at 119 Stat. 6-7.

[5] Fed.R.Civ.P. 23(e)(2).

[6] *Id.* at 23(h) (added in 2003).

[7] CAFA, *supra* note 3, at 119 Stat. 9-13.

[8] 15 U.S.C. §41 et seq. (2012).

[9] Wheeler-Lea Amendment of 1938, ch. 49, §3, 52 Stat. 111 (codified at 15 U.S.C. §45(a) (1)).

Between and 1961 and 1981, every state enacted consumer protection statutes, sometimes referred to as "little FTC Acts,"[10] prohibiting unfair and/or deceptive trade practices.[11] As one would expect given fifty-one laboratories, some differences in the statutes exist. But the fundamental commonalities among them cannot be ignored. When all is said and done, state consumer protection laws are based on a simple proposition: don't lie, don't steal, and don't cheat. Most big and small businesses have no trouble complying with this simple proposition. It is only the rare and unethical of businesses or business persons who become defendants in significant consumer protection matters. On this, there should be no partisan view and no belief that businesses need to be free to lie, steal, or cheat.

Contrary to the FTC Act and most of the statutes and regulations the FTC is charged with overseeing, every state's consumer protection statute provides for both public and private enforcement.[12] While many early versions of state consumer protection statutes lacked recourse for private consumer redress, instead vesting sole enforcement ability in public entities, "[i]t quickly became apparent… that the state could not alone handle the quantity of consumer complaints, and states that did not already provide for a private right of action created one by amending their statutes."[13] Over the years, state courts gained significant experience and expertise interpreting and applying these laws on behalf of their citizens.

The predominance of state action in this area is consistent with tradition: even the Supreme Court has long recognized "the historic primacy of state regulation of matters of health and safety."[14] State common law has traditionally provided some consumer protection remedies in the forms of actions for deceit, strict liability, and warranty violations. The introduction of state consumer protection statutes "made it considerably easier for consumers to obtain legal redress."[15]

With the advent of multistate (and multinational) corporations, an extensive transportation infrastructure, the internet, and billions of dollars spent each year on advertising and marketing, rare is the good or service that cannot be learned about and obtained across state lines. In this world, the vast majority of fraud perpetrated against consumers, workers, and purchasers is

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[10] Indeed, more than half of these statutes explicitly reference the Federal Trade Commission Act.

[11] *See* 1 Dee Pridgen & Richard M. Alderman, Consumer Protection and the Law 167-73 (2011-2012 ed. 2011). At least three states had consumer protection laws on the books prior to 1961: Delaware (1953), Minnesota (1943), and Wisconsin (1921).

[12] *Id.* at 420-21.

[13] *Id.* at 421.

[14] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (noting the existence of a "presumption against the preemption of state police power regulations" in areas such as health and safety and concluding that federal manufacturing and labeling requirements applicable to medical devices did not preempt common law claims of negligence and strict liability). *See also Altria Group, Inc. v. Good*, 555 U.S. 70, 80 (U.S. 2008) (discussing the federal Labeling Act, 79 Stat. 282, 15 U.S.C. § 1331, and observing "Nothing in the clause suggests that Congress meant to proscribe the States' historic regulation of deceptive advertising practices. The FTC has long depended on cooperative state regulation to achieve its mission because, although one of the smallest administrative agencies, it is charged with policing an enormous amount of activity.").

[15] Pridgen & Alderman, *supra* note 11, at 16.

carried out nationwide; swindlers have no respect for zip codes and do not stop at state boundaries. Private remedies for policing this fraud lay almost exclusively with the enforcement of state – and perhaps many states' – consumer protection acts and common law policies.

Then Congress enacted CAFA, brandishing a machete where a scalpel would have sufficed to address complaints about the class action vehicle. In wielding this awkward instrument, Congress ignored its potential and likely effects on consumers' ability to bring state consumer protection and common law claims, real effects proven over the last seven years.

IV. Federal Courts Routinely Deny Certification and Thereby Thwart State Attempts to Protect Their Citizens

Before CAFA, federal courts would often not certify multistate class actions. In the decade before enactment of the statute, the U.S. Courts of Appeal of at least six circuits had denied or reversed class certification in multistate class actions because of perceived difficulties in dealing with variations in state substantive law.[16] The U.S. Chamber of Commerce crowed about the fact that federal courts regularly refused to certify such classes, suggesting to the U.S. Court of Appeals for the Second Circuit that "it is nearly a truism that nationwide class actions in which the claims are subject to varying State laws cannot be certified because they are simply unmanageable."[17]

During this pre-CAFA time, vigilant state courts were able to carry the weight of state consumer protection class action litigation. While federal courts were reluctant to get involved in multistate actions and sit as a super-class action forum, state courts routinely and effectively embraced their traditional role of protecting consumers by overseeing class actions. This process allowed consumers to have their claims adjudicated and state courts to deal with state-by-state issues, while preserving the resources of the federal judiciary to address federal and other concerns. For example, in the 1990s and early 2000s, Microsoft faced claims by the U.S. Department of Justice, state Attorneys General, and scores of consumers that the company violated federal and state antitrust laws by monopolizing the market and forcing consumers to overpay for software. Single-state class action suits on behalf of consumers proceeded in approximately twenty states, nearly all of which resulted in successful resolutions. At the same time, Judicial Panel on Multidistrict Litigation transferred and consolidated before one judge all related federal cases against Microsoft. Allowing the state courts to oversee claims concerning their own consumer protection laws relieved the federal judiciary of the necessity of weighing in all state-specific matters.

In one fell swoop, CAFA changed all that. CAFA placed nearly all class actions on the shoulders of the federal judiciary, foisting upon them the work of all state court judges, and virtually removed state court judges from the picture in major class matters.

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[16] *See* 151 Cong. Rec. S1168 (statement of Sen. Bingaman) (listing the Third, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits and noting at least twenty-six federal district courts had likewise denied certification of multistate consumer classes).

[17] *Id.* (statement of Sen. Bingaman) (quoting U.S. Chamber of Commerce amicus brief in *In re Simon II Litig.*, ultimately decided by the Second Circuit at 407 F.3d 125 (2d Cir. 2005)).

Since the passage of CAFA, the federal courts have only picked up the pace, denying efforts to certify claims by consumers, workers, and others on the grounds that "rendering a class action on these claims essentially unmanageable is the tremendous variation in state laws that would overwhelm any common questions that could be demonstrated."[18] Even nationwide classes utilizing a single state's laws have been criticized and decertified in the federal courts. In fact, the Eighth Circuit twice decertified the same nationwide class of consumers implanted with recalled prosthetic heart valves linked to heart failure.[19] The district court found the defendant's

[18] *Thompson v. Jiffy Lube Int'l, Inc.*, 250 F.R.D. 607, 630 (D. Kan. 2008) (finding differences in state consumer protection acts, negligence, unjust enrichment, and punitive damages principles undermine the typicality and commonality prongs of Rule 23 and defeat class certification). For just a sampling of post-CAFA denials of class certification of consumer protection, unjust enrichment, and other state and common law claims, *see, e.g.*, *Powers v. Lycoming Engines*, 272 F.R.D. 414, 430 (E.D. Pa. 2011) ("because we cannot group the differing laws to apply them as a unit, a single nationwide class action would be unmanageable.... Thus, in light of the choice of law issues, we cannot conclude that a class action would be manageable."); *Marshall v. H & R Block Tax Servs. Inc.*, 270 F.R.D. 400, 410 (S.D. Ill. 2010) (denying motion to certify eleven-state class of purchasers of extended warranty on defendant's services, writing "the differences in the required proofs of the states' statutes demonstrate that a multi-state certification would not be manageable because of the multiple and different variables that would have to be proved as to each class member. The Court therefore concludes that common issues of law do not predominate in Plaintiffs' consumer protection claims.."); *Muehlbauer v. GMC*, 2009 U.S. Dist. LEXIS 26971, 14 (N.D. Ill. 2009) (denying motion for class certification brought by consumers alleging defective manufacture of anti-lock brake components in cars sold nationwide, writing "Courts have long held that the laws of unjust enrichment vary from state to state and therefore are not appropriate for nationwide class action treatment.... The cases do not stand for the proposition that only national class actions for unjust enrichment are inappropriate; rather, the cases explain that multi-state class actions for unjust enrichment are inappropriate because the individual states' laws regarding unjust enrichment are too nuanced to lend themselves to class treatment."); *Alligood v. Taurus Int'l Mfg.*, 2009 U.S. Dist. LEXIS 131371, 10-12 (S.D. Ga. 2009) (denying motion for class certification for nationwide class or subclasses of purchasers of rifles and ammunition on grounds that state warranty laws differ and "the attempt to manage variations in state law with six different subclasses for each defendant would likely result in a procedural quagmire, making the case unmanageable."); *Vulcan Golf LLC v. Google, Inc.*, 254 F.R.D. 521, 533-34 (N.D. Ill. 2008) (concluding "the differences in the unjust enrichment laws are sufficiently substantive to preclude class certification."); *Siegel v. Shell Oil Co.*, 256 F.R.D. 580, 584-85 (N.D. Ill. Sept. 23, 2008) (denying certification of consumer protection and unjust enrichment claims, noting "[l]ike the variation in the states' unjust enrichment laws, '[s]tate consumer-protection laws vary considerably.'"); *In re Conagra Peanut Butter Products Liability Litigation*, 251 F.R.D. 689, 697 (N.D. Ga. 2008) (after describing in detail differences in states' unjust enrichment laws, stating that "[t]his morass is useful to establish not only the lack of uniformity of unjust enrichment claims across the country, but also the inferiority of class-wide resolution due to discerning the many differing legal standards."); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 158 (S.D.N.Y. 2008) (decertifying a settlement class after determining "differences in the pertinent state consumer-protection laws undermine the cohesiveness of the Settlement Class, and raise concerns regarding the propriety of grouping individuals with distinctly different substantive claims in a single nationwide class."); *In re. GMC Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 315 (S.D. Ill. 2007) (denying motion for class certification after holding that "determining whether GMC in fact has made enforceable express warranties to the class, as Plaintiffs claim, will require the Court to apply the significantly-differing laws of forty-seven states, a prospect that defeats both the predominance and manageability requirements of Rule 23(b)(3).")

[19] *In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1120-21 (8th Cir. 2005); *In re St. Jude Medical, Inc.*, 522 F.3d 836, 839-40 (8th Cir. 2008) (*In re St. Jude II*). But the district court was not as quick to certify nationwide classes as critics would suggest. Plaintiffs had asked the district court to certify three nationwide classes of consumers implanted with the faulty heart valves: one for injunctive relief in the form of medical monitoring, one under the Minnesota consumer protection statutes, and one based on common law for personal injuries. After conditionally certifying all three classes, the district court decertified the personal injury class, finding variations in state law would affect predominance and superiority, by requiring at least 25 subclasses. *See In re St. Jude.*, 425 F.3d at 1118.

home state of Minnesota bore significant and sufficient contacts to the challenged acts and certified a nationwide class of patients under the Minnesota consumer protection statutes; in 2005, the Court of Appeals decertified the class on the grounds that the lower court failed to engage in a full choice-of-law analysis for each individual consumer, speculating that Minnesota lacked sufficient contact with many class members' claims and that many other states' laws would govern.[20] Following remand and the recertification of the same class under the same statutes, the Court of Appeals again decertified the class in 2008, seemingly finding the Minnesota consumer protection statutes require a showing of reliance – despite the Minnesota Supreme Court's holding to the contrary.[21]

As grounds for the denial of class certification, federal courts often cite the need to apply the law of state where each consumer resides because "each respective state's interest in enforcing its consumer fraud laws trumps [the forum state's] interest."[22] But by refusing to certify any class in the face of "unmanageability" or "insurmountable obstacles" posed by multiple states' laws governing a class action, federal courts are failing to respect any state's interest in enforcing its consumer protection laws.

Worse yet, these certification refusals deny American citizens their Constitutional guarantee to a day in court and the opportunity to have their claims adjudicated. If consumers must band together in a class action to seek redress for their injuries, because any single individual's claim is too small to justify the costs of litigation, and if such class actions can only proceed in federal courts that will not certify their claims, the courthouse doors effectively close, leaving consumers with no remedy.

Applying choice-of-law considerations and certifying a multistate class is not easy. It can require a significant undertaking, both by counsel and the court, but it is not impossible.[23] Despite this, many courts refuse to entertain the possibility.

Published decisions of courts denying motions for class certification or decertifying classes do not tell the full story. The problem goes much deeper than the many decisions one can cite where a federal court denied class certification of consumer protection, warranty, unjust enrichment, and other state and common law claims, due explicitly to concerns over the difficulties that may be found in choice-of-law issues, multiple states' laws, or subclasses. CAFA's legacy – this unwillingness or inability to allow meritorious claims to continue in the face of choice-of-law issues and/or the application of multiple states' laws – is much broader. It resides in courtrooms and law offices across the nation, where no public record reveals its

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[20] *In re St. Jude*, 425 F.3d at 1120-21.

[21] *In re St. Jude II*, 522 F.3d at 839-40 (finding that even though the Minnesota consumer protection acts require no showing of reliance, the defendant is entitled to defend the case by showing or attempting to show individual instances of failure to rely on the defendant's misrepresentations and that such potential variation defeats class certification).

[22] *Laney v. Am. Std. Cos.*, 2010 U.S. Dist. LEXIS 100129, *68 (D.N.J. 2010) (refusing to certify a nationwide class due to in part to the unmanageability of applying multiple states' consumer protection acts)

[23] *See, e.g., In re Pharm. Indus. Avg. Wholesale Price Litig.*, 252 F.R.D. 83, 107 (D. Mass. 2008) (certifying a class of third party payors of health care benefits and a class of third party payors and consumers under the consumer protection statutes of multiple states).

presence but its impact is felt nonetheless. It is in the remarks of a judge who tells litigants that the court does not have the resources to manage a case in which the amended complaint asserts claims under the laws of fifty states. Or in the decision of an attorney who tells prospective class members that although they and thousands others were defrauded, he cannot file their case because the courts will not allow a multistate class to be certified.

Even the Hon. Jack B. Weinstein, long castigated by big business as too consumer-friendly, opted against contending with state law claims in a recent class action concerning allegedly fraudulent and illegal misrepresentations about the blockbuster atypical antipsychotic Zyprexa. Instead certifying a class of third party payors under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961–1968, Judge Weinstein observed:

> In view of the ease of administering a class action based upon a single national law, RICO, it would be inexpedient and wasteful of court and litigant energy to attempt to shape the present case to conform to fifty separate state substantive-procedural rules. In the absence of a federal conflicts of law rule, or other solution, the court prefers to avoid engaging in such a daunting enterprise. Solutions required under the Class Action Fairness Act of 2005, providing for removal of state-substantive-law-based cases, can be put off for the future.[24]

The fact that many federal jurists can be hamstrung by the increased attention to state law these cases require should come as no bombshell. CAFA was enacted with no accompanying increase in resources to the federal judiciary to deal with an increased caseload and substantially more of these potentially complex cases. Instead, a single federal judge is now expected to do the work of multiple state court judges (and in the same amount of time). CAFA also failed to provide for changes to the procedural rules governing class actions or the choice-of-law frameworks under which they would have to operate to attempt to allow meritorious claims to continue and instead thrust the federal judiciary into the role of developing and interpreting various states' laws, a role long held by state courts. As NYU Law Professor Arthur Miller noted at the time,

> It is not surprising that federal courts are reluctant to grant certification to multistate class actions based on state consumer protection laws. After all, these are laws with which the federal courts generally are not familiar or comfortable. Imagine the discomfort of a federal judge, then, when confronted with a case involving tens of thousands of individuals from all fifty states and state laws that at least superficially appear to be different. Moreover, our federal courts have limited resources and are responsible for adjudicating a tremendous array of substantive matters. State courts, on the other hand, are far more comfortable handling cases involving state contract or tort law and are, therefore, more inclined to try to find a way to hear and resolve those cases.[25]

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[24] *UFCW Local 1776 & Participating Emplrs. Health & Welfare Fund v. Eli Lilly & Co. (In re Zyprexa Prods. Liab. Litig.)*, 253 F.R.D. 69, 201 (E.D.N.Y. 2008), *rev'd*, 620 F.3d 121 (2d Cir. 2010).

[25] 151 Cong. Rec. S1170 (daily ed. Feb. 9, 2005) (text of letter from Arthur B. Miller to Sen. Bingaman).

Many foresaw just this result. During debate on CAFA, Senators Dianne Feinstein of California and Jeff Bingaman of New Mexico introduced an amendment that would clarify the application of state law in multistate class actions.[26] Seeking to add a new subsection to CAFA entitled "Choice of State Law in Interstate Class Actions," the amendment provided that a "district court shall not deny class certification, in whole or in part, on the ground that the law of more than 1 State will be applied" and would instead take steps to "attempt to ensure that plaintiffs' State laws are applied to the extent possible."[27] The amendment, Professor Miller noted, would prevent consumers from being ensnared

> in the ultimate Catch-22 situation – their lawsuit is in federal court because the class includes people from many states and Congress has said that is the only place the class can go, but then, the federal court will not grant class certification precisely because the class involves citizens from multiple states. *That simply violates the most basic principles of citizen access to the courts.*[28]

The Feinstein-Bingaman amendment would have prevented this result by "allow[ing] a federal court to choose not to follow the choice-of-law rule of the state in which the court is located. The federal judge could instead make the case more manageable by choosing the law of one state with sufficient ties to the underlying claims to meet the choice of law requirements that the Constitution demands be met."[29] The amendment failed.

V. CAFA Favors Defendants at the Expense of Consumers

"Class actions were designed to provide a mechanism by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same harm and seek redress for their injuries."[30] They exist solely to attempt to level the playing field between individual consumers harmed in small but concrete ways and companies, most of which have sprawling reach, virtually unlimited resources, and a cadre of hourly-paid attorneys at their disposal. In the last seven years, CAFA has tilted the field back towards class action defendants. For example:

- *MDL proceedings.* If multistate class actions cannot be heard in state court and federal courts refuse to address and certify classes involving multiple states' laws, CAFA leaves only one apparent alternative: the filing of nearly fifty single-state class actions concerning the same conduct.[31] Nearly all of these actions could and would be removed under CAFA and transferred and coordinated through the multidistrict litigation process,

[26] *See id.* at S1166 (statement of Sen. Feinstein).

[27] *Id.* (providing text of SA 4).

[28] *Id.* at S1170 (text of letter from Arthur B. Miller to Sen. Bingaman) (emphasis added).

[29] *Id.*

[30] S. Rep. No. 109-14, at 4.

[31] This assumes the economic viability of filing in every state, an assumption that cannot be made lightly. Many states' populations are too small to justify the significant resources that litigating class actions take; their citizens would likely be left out of any chance at recovery.

an outcome specifically contemplated by the Act.[32] Considering "the convenience of parties and witnesses" as required by the statute governing multidistrict litigation, the Judicial Panel on Multidistrict Litigation often sends the cases to a federal court in the defendant's backyard, which serves as a waiting room until the federal court denies class certification on the grounds that too many states' laws are at issue.

- *Forum-shopping*. Plaintiffs are often accused of forum-shopping to attempt to find a court most receptive to their claims.[33] But CAFA itself is the epitome of forum-shopping, with the shoe on the other foot and Congress's imprimatur: if defendants do not want to be in state court, they no longer have to be.

- *"Justice delayed is justice denied."*[34] Between removal, multidistrict litigation consolidation proceedings, the potential certification of novel issues of state law to state supreme courts, and the fact that a single judge must now bear the full weight of complex consumer class actions, the time from injury to recovery (if any) can drag on for years and years. These delays harm only consumers and injured victims.

VI. The Combination of CAFA and Mandatory Arbitration Provisions Limits Consumers' Access to the Courtroom

The tilting of the playing field does not end with CAFA. While CAFA significantly limits the ability of consumers to hold corporations accountable, big businesses are taking affirmative steps to avoid any and all accountability, even before a claim is ever filed. Consumer contracts often include provisions requiring all claims be resolved not through the court system but through arbitration, a process that is expensive and stacked against consumers in favor of corporate repeat players. This one-two punch – limiting class actions and foreclosing all other legal remedies – makes it virtually impossible for consumers to access the courtroom to hold wrongdoers accountable.

Although class actions are frequently the *only* practical way consumers can hold a corporation accountable and bring a claim against the company for smaller amounts of money, the Supreme Court recently gave corporations the green light to ban *all* class proceedings – both in court and in arbitration – in the fine print of contracts, so long as that ban is included within an arbitration clause. In *AT&T Mobility LLC v. Concepcion*, the Court found that the Federal Arbitration Act ("FAA") allows corporations to deny consumers their Seventh Amendment right to a trial by jury and instead force them into a corporate-designed system of mandatory binding arbitration for any disputes.[35] Because no individual consumer would bother with a formal process to recover $30,

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[32] S. Rep. No. 109-14, at 38 (stating "[i]f other class actions on the same subject have been (or are likely to be) filed elsewhere, the Committee intends that this consideration would strongly favor the exercise of federal jurisdiction so that the claims of all proposed classes could be handled efficiently on a coordinated basis pursuant to the federal courts' multidistrict litigation process as established by 28 U.S.C. §1407.")

[33] Whether forum shopping by plaintiffs is a bad thing is a debatable proposition. Arguably, it is the duty of plaintiffs' counsel to file a case in the jurisdiction and forum she believes will best protect the rights of her clients.

[34] William Gladstone, British politician (1809-1898).

[35] 131 S.Ct. 1740, 1748 (2011).

AT&T's contract banned *all* class actions and instead required customers to bring *individual claims* in a forced arbitration system designed by AT&T.[36] Some states, including California, banned as unconscionable most class action waivers in consumer contracts, particularly in the context of arbitration.[37] But the Court found the FAA broadly trumps state laws; under this ruling, class action bans may be upheld so long as they are part of an arbitration clause.[38]

Corporations have been hiding outright bans on class actions in the fine print of contracts. *Concepcion* has opened the floodgates: corporations, including Microsoft, Sony Playstation Network, Starbucks, Match.com, and Netflix, are adding class action bans to the mandatory arbitration provisions already contained in consumer contracts. Consumers frequently do not even know these bans exist; when they learn of such bans, they have little choice but to agree to the restrictions, leaving them with even less recourse to combat corporate wrongdoing.

VII. Conclusion

CAFA moved into federal courts claims where no federal law was or is at issue and where only state causes of action are typically involved. But the refusal of the courts to certify a class under one state's law or under multiple states' laws thwarts state consumer protection efforts and leaves no remedy for consumers.

[36] *See id.* at 1744.

[37] *See id.* at 1745, 46.

[38] *See id.* at 1748.

Mr. FRANKS. And, Mr. Beisner, we recognize you for 5 minutes, sir. And don't forget your microphone.

TESTIMONY OF JOHN H. BEISNER, PARTNER, SKADDEN, ARPS

Mr. BEISNER. Good morning, Chairman Franks, Ranking Member Nadler, and Members of the Subcommittee. Thank you for in-

viting me to testify here today about the Class Action Fairness Act and paths forward for improving Federal class action practice.

CAFA's success in reforming Federal class action practice, I believe, is undeniable. The law has accomplished each of its stated primary goals: one, assuring fair and prompt recoveries for class members with legitimate claims; two, restoring the intent of the Framers of the Constitution by authorizing Federal jurisdiction over interstate class actions of national importance; and, three, encouraging innovation on the part of American businesses.

Most importantly, CAFA has allowed a substantial number of class actions to be heard by Federal courts that otherwise would have proceeded in State courts. Many of those State courts were previously regarded as magnet jurisdictions because they allowed lax class certification standards and therefore attracted huge numbers of class actions.

One such magnet jurisdiction was Madison County, Illinois. Prior to CAFA, this small, otherwise quiet county was a hotbed of class action activity, with 177 class actions, many of them nationwide cases, filed in the 2 years before CAFA was enacted. In the 2 years following CAFA's enactment, only 16 class actions were filed in that county, representing an annualized decline of over 90 percent.

CAFA has also accomplished its stated goal of assuring fair and prompt recoveries for class members with legitimate claims. This important success of CAFA is largely attributed to increased scrutiny of coupon class actions that frequently offered class members only illusory benefits.

CAFA has also encouraged innovation by sounding the death knell for improper coercive nationwide class actions. Prior to CAFA, magnet State courts frequently certified nationwide class actions. And the way they did it—and I think this is important, because there have been many references to this point—the way they did it was by ignoring what the State laws were. The State court in Madison County, Illinois, frequently said, we don't care what the other States' laws are; we are going to apply Illinois law to all claims nationwide. And that was depriving consumers of access to justice under the laws of their home State, what their home State legislators had decided to do.

And the complaints about nationwide class actions not being certified by Federal courts, it is in respect of those principles that the applicable State laws should be applied. And the simple solution is to bring single State class actions, which is what most counsel are doing these days.

Now, like every piece of legislation, there have been a few bumps along the road in implementing the statute. A few courts have misconstrued the intent of the legislation. Most notably, some courts have ignored CAFA's presumption of Federal jurisdiction by imposing legal certainty-type obligations on defendants seeking to remove claims to Federal court. Some courts have also erred by applying CAFA's home State and local controversy exceptions to Federal jurisdiction, I believe, more broadly than Congress intended.

And some recent rulings by Federal courts and the Judicial Panel on Multidistrict Litigation have suggested that single State class actions may be remanded to State courts—I am sorry—be remanded to the originating transferor courts before class certifi-

cation is decided, I think undermining Congress' intent to have uniform decisions made in those cases, or at least consistent decisions.

Now, because CAFA was primarily a jurisdictional statute, there are a few troubling aspects of class action practice that were not addressed by the legislation and remain. One is that some Federal courts are not following the requirement that courts conduct a rigorous analysis of Rule 23 prerequisites to class certification. As Professor Redish has noted earlier, there are concerns about cypres settlements. And a small number of Federal courts, particularly in California, have endorsed extremely overbroad class actions in which many of the class members do not have Article III standing because they were not injured. These include cases in which a case is permitted to go forward even though the vast majority of class members never had a problem with the product or service at issue.

CAFA was a landmark piece of legislation, and I commend the Subcommittee for holding today's hearing. And thank you again for inviting me to speak.

Mr. FRANKS. Well, thank you, Mr. Beisner.

[The prepared statement of Mr. Beisner follows:]

Testimony of John H. Beisner[1]
On Behalf of the U.S. Chamber Institute for Legal Reform
Before the Subcommittee on the Constitution
of the Committee on the Judiciary
United States House Of Representatives

"Class Actions Seven Years After the Class Action Fairness Act"
June 1, 2012

Good morning Chairman Franks, Ranking Member Nadler and Members of the Subcommittee. Thank you for inviting me to testify today about the Class Action Fairness Act (CAFA) and the path forward to further improving federal class action practice.

Today, I am testifying on behalf of the U.S. Chamber Institute for Legal Reform (ILR), an affiliate of the U.S. Chamber of Commerce dedicated to making our nation's legal system simpler, fairer and faster for everyone. The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region. The Chamber founded ILR in 1998 to address the country's litigation explosion. ILR is the only national legal reform advocate to approach reform comprehensively, by working to improve not only the law, but also the legal climate.

Enactment of CAFA will long be remembered as a milestone in the crusade for a more just and more effective civil justice system. The statute set out to accomplish three primary goals: (1) to "assure fair and prompt recoveries for class members with legitimate claims"; (2) to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction"; and (3) to "benefit society by encouraging innovation and lowering consumer prices."[2] CAFA has successfully achieved these goals and more. CAFA's expansion of federal diversity jurisdiction has moved countless class actions of national importance from state to federal court. In the process, CAFA has eliminated magnet state-court jurisdictions that were once a haven for meritless and abusive class action lawsuits. Gone are the days of plaintiffs routinely bringing interstate class actions and relying on lax state-court class-certification standards (standards that ignored the due-process interests of both class members and defendants) in the hopes of certifying a class, only to coerce American businesses into unfair settlements that benefitted only class counsel. In most cases, plaintiffs must now comply with the dictates of Rule 23 of the Federal Rules of Civil Procedure, and their class proposals are subject to the Supreme Court's mandated "rigorous analysis" of Rule 23's factors. These factors are designed to establish a fair

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[1] John Beisner is co-head of the Mass Torts and Insurance Litigation Group at Skadden, Arps, Slate, Meagher & Flom LLP. He represents defendants in a number of areas, including the pharmaceutical, tobacco, automobile and financial-services industries. He has testified numerous times on class action and claims aggregation issues before the U.S. Senate and House Judiciary Committees (particularly with respect to the Class Action Fairness Act of 2005), and played an integral role in crafting that legislation.

[2] Pub. L. 109-2, § 2(b)(1)-(3).

mechanism for aggregate litigation that is faithful to the fundamental due-process interests of both class members and defendants. Simply put, by opening up federal courthouse doors to interstate class actions, CAFA has required plaintiffs to finally take the requirements of class certification seriously. And because more and more appellate courts have been willing to exercise discretionary appellate review of cases that are brought under CAFA, plaintiffs are finding it increasingly difficult to evade a federal forum – and the more rigorous application of class-certification standards that exists in most federal courts.[3]

While CAFA has been integral to improving the civil justice landscape in the United States, a small number of judicial rulings have ignored Congress's intent behind that landmark legislation, meriting further attention. From imposing a heightened "legal certainty" standard on defendants with respect to CAFA's amount-in-controversy requirement to ***broadly*** construing CAFA's ***narrow*** exceptions to federal jurisdiction, these rulings run afoul of CAFA's presumption in favor of federal jurisdiction. While these rulings only reflect the views of a minority of courts, Congress should consider addressing these rulings before a small number of imprudent decisions gain a bigger hold within the federal judiciary. Moreover, because CAFA was only a first step in reforming abusive class action practice, Congress should also assess certain troubling aspects of federal class action jurisprudence that were not affected by CAFA. These issues include: (1) efforts by a small number of federal courts to loosen the requirements of Rule 23; (2) the increasing use of *cy pres* settlements to support large fee payouts to class counsel; and (3) judicial approval of class actions that encompass substantial numbers of uninjured individuals (that is, persons who lack Article III standing). Finally, Congress should welcome recent developments in another area of the law, arbitration, which provides consumers and employees greater access to justice than reliance on a class action system that is still prone to abuse.

I. CAFA HAS PRODUCED IMPORTANT REFORMS FOR CLASS ACTION PRACTICE.

Since its enactment in 2005, CAFA has proven to be a very successful reform of a number of abusive class action practices. Congress sought to accomplish three specific goals in enacting CAFA: (1) to "assure fair and prompt recoveries for class members with legitimate claims"; (2) to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction"; and (3) to "benefit society by encouraging innovation and lowering consumer prices."[4] CAFA has met each of these goals. Most notably, the law has shifted a significant number of class actions to federal court that otherwise would have proceeded in state courts, many of which applied overly lax class-certification standards. The law has also resulted in more equitable class action settlements, as federal courts are generally reviewing such settlements with more rigor than did their state-court counterparts. And finally, the law has also encouraged innovation on the part of American businesses because they no longer need to fear being coerced into exorbitant settlements in the massive, frivolous nationwide class actions that were routinely certified in certain state courts prior to CAFA.

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[3] A review of the caselaw reveals over 100 cases in which federal appeals courts have interpreted CAFA.

[4] Pub. L. 109-2, § 2(b)(1)-(3).

A. CAFA Has Ensured That Truly Interstate Class Actions Are Litigated In Federal Court.

Traditionally, federal courts had diversity jurisdiction over a class action only if two conditions were satisfied: (1) all of the class representatives were citizens of a different state from all of the defendants; and (2) the amount in controversy for each named plaintiff exceeded $75,000. As a result, plaintiffs' attorneys would routinely bring frivolous class actions in state courts, particularly in so-called magnet jurisdictions (like Madison County, Illinois) that gained a reputation for applying weak class-certification standards. If one court denied certification, plaintiffs could file virtually identical claims in different state courts throughout the country in order to find a judge willing to certify their claims. This practice resulted in "judicial inefficiencies and contravene[d] the Supreme Court's anti-forum shopping policy."[5]

Fortunately, this trend has largely subsided as a result of CAFA's enactment. In the two years following CAFA's enactment, only 16 class actions were filed in Madison County, ***an annualized decline of more than 90 percent***, and studies by the Federal Judicial Center have shown an increase in federal court filings, making clear that the main locus of class actions has shifted to federal court.[6]

B. CAFA Has Tightened The Requirements For Class Settlements.

Another important contribution of CAFA has been heightened standards for class action settlements, which have resulted in the more equitable disposition of class claims. In particular, CAFA created new rules for reviewing coupon settlements – i.e., settlement agreements under which class members are compensated for their purported injuries with coupons, discounts or credits toward further purchases of the defendant's products or services. CAFA specifically requires a coupon settlement to be "fair, reasonable, and adequate," and places restrictions on attorneys' fees in such settlements. 28 U.S.C. § 1712. Although the "'fair, reasonable, and adequate' standard is identical to that contained in Rule 23(e)(2), . . . courts have interpreted section 1712(e) as imposing a heightened level of scrutiny in reviewing" coupon settlements.[7] Thus, federal courts – already more skeptical than state courts of so-called "sweetheart deals" – have generally taken even greater care in reviewing proposed coupon settlements since CAFA's enactment.[8]

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[5] Kalee DiFazio, *CAFA's Impact on Forum Shopping and the Manipulation of the Civil Justice System*, 17 Suffolk J. Trial & App. Adv. 133, 139 (2012).

[6] Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Council Advisory Committee on Civil Rules 1 (2008), http://www.uscourts.gov/uscourts/Rulesandpolicies/rules/fourth%20interim%20report%20class%20action.pdf.

[7] *Sobel v. Hertz Corp.*, 3:06-CV-00545-LRH-RAM, 2011 U.S. Dist. LEXIS 68984, at *20-21 (D. Nev. June 27, 2011) (citing cases).

[8] *See, e.g., id.* at *20-21; *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1069 (C.D. Cal. 2010) (employing "heightened level of scrutiny" in rejecting proposed class settlement); *see also Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006) ("[A]lthough this case is not covered by the Class Action Fairness Act . . . we note that in that statute Congress required heightened judicial scrutiny of coupon-based settlements based on its concern that in many cases 'counsel are awarded large fees, while leaving class members

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In one suit, for example, plaintiff consumers brought a putative class action against the defendant retailer alleging false advertising, breaches of contract and warranty, unfair business practices, and unjust enrichment, in connection with an air purifier and its alleged harmful emissions.[9] The parties had entered into a settlement providing class members with $19 coupons for use at the defendant's stores plus a guard to protect against emissions of allegedly defective air purifiers. Applying a "greater level of scrutiny" than was required pre-CAFA, the court rejected the settlement.[10] The court reasoned that the settlement was "not the product of informed, arms-length negotiations between effective Class Counsel and the Defendant."[11] Moreover, the court was troubled by the lack of sufficient information regarding the potential value of the litigation. The court therefore concluded that "[t]he proposed settlement, in which Class Counsel receive close to $2 million in fees and class members are given a $19 coupon, is below the range of recovery in which a settlement of this case may be considered fair."[12]

C. CAFA Has Encouraged Innovation By Putting An End To Improper, Coercive Nationwide Class Actions.

Finally, CAFA has virtually put an end to sprawling nationwide class actions that turn on varying state laws.[13] Prior to CAFA, magnet state courts routinely certified state law-based nationwide class actions in which judges applied the law of their state nationwide, in derogation of the laws of the states in which the class members resided. By contrast, federal courts have agreed with virtual unanimity that such class actions are improper.

In *Pilgrim*, for example, the court struck the class allegations in a putative nationwide class action asserting claims for consumer fraud and unjust enrichment, in a decision that was affirmed by the U.S. Court of Appeals for the Sixth Circuit.

The plaintiffs in *Pilgrim* alleged that they were "'tricked'" by "deceptive advertising" into "signing up for a program that promised them discounts on health care services," only to

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with coupons or other awards of little or no value'") (citation omitted).

9 *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1294-95 (S.D. Fla. 2007).

10 *Id.* at 1321.

11 *Id.* at 1323.

12 *Id.* at 1327.

13 *See, e.g.*, *Pilgrim v. Universal Health Card, LLC*, No. 5:09CV879, 2010 U.S. Dist. LEXIS 28298, at *9-11 (N.D. Ohio Mar. 25, 2010), *aff'd*, 660 F.3d at 947 ("in view of [the fact] that the consumer-protection laws of the affected States vary in material ways, no common legal issues favor a class-action approach to resolving this dispute"); *Nat'l Seating & Mobility, Inc. v. Parry*, No. C 10-02782 JSW, 2011 U.S. Dist. LEXIS 117920, at *12 (denying motion for class certification, reasoning that it could not "constitutionally apply Section 17200 to the Nationwide Rebate Class"); *Innovative Physical Therapy, Inc. v. MetLife Auto & Home*, No. 07-5446 (JAP), 2008 U.S. Dist. LEXIS 69377, at *25-27 (D.N.J. Aug. 26, 2008) (striking proposed nationwide contract class claims because plaintiffs' claims were governed by the varying laws of their home states, "render[ing] the action unmanageable").

discover that the program "offered them no tangible benefits."[14] The plaintiffs sued Pilgrim, purporting to represent a nationwide class of similarly situated individuals – and claiming relief under Ohio's consumer-fraud law and for unjust enrichment.[15] The defendant moved to strike the class allegations, arguing, among other things, that variations in state law precluded class treatment.

In granting the defendant's motion, the court rejected the plaintiffs' argument that Ohio law could govern the claims of every class member, explaining that Ohio's choice-of-law rules dictated that "the place [where] injury occurred usually controls" the question of which state's law governed a claim.[16] Turning to the substance of the fifty states' consumer-fraud and unjust-enrichment laws, the court concluded that the laws conflicted and that class resolution would thus require application of the law of each class member's home state.[17] The court concluded that the task of applying fifty states' laws "would make this case unmanageable as a class action" and therefore granted the motion to strike.[18]

The Sixth Circuit recently upheld the district court's ruling in *Pilgrim*, agreeing that the "consumer-protection laws of the State where each injury took place would govern [plaintiffs'] claims."[19] The Court of Appeals held that "[i]n view of this reality and in view of [the fact] that the consumer-protection laws of the affected States vary in material ways, no common legal issues favor a class-action approach to resolving this dispute."[20] As the court explained, "[i]f more than a few of the laws of the fifty states differ . . . the district judge would face an impossible task of instructing a jury on the relevant law."[21] *Pilgrim* is just one of many cases that may not have been removable before CAFA, in which courts have rejected nationwide

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14 2010 U.S. Dist. LEXIS 28298, at *2.

15 *Id.*

16 *Id.* at *7.

17 *Id.* at *10.

18 *Id.* at *11.

19 *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 947 (6th Cir. 2011).

20 *Id.*

21 *Id.* at 948 (internal quotation marks and citation omitted).

classes.[22] Thus, CAFA has had great success in achieving one of its primary goals: curtailing abusive nationwide class actions.[23]

II. SOME FEDERAL COURTS HAVE NOT FULLY EMBRACED CONGRESSIONAL INTENT WHEN INTERPRETING CAFA.

Although CAFA is a landmark piece of legislation that demonstrates how meaningful federal laws can contribute to a fairer civil justice landscape for American businesses, congressional intent has not been fulfilled by every court.

First, several federal courts have ignored CAFA's legislative history regarding federal jurisdiction over class actions. In enacting CAFA, Congress sought to establish a strong presumption in favor of federal jurisdiction over class actions of national importance. As one of the architects of CAFA explained on the House floor, in cases where "a Federal court is uncertain . . . the court should err in favor of exercising jurisdiction over the case."[24] However, several federal courts have declined to apply CAFA's presumption in favor of federal jurisdiction.[25] Indeed, some courts, including the Third and Ninth Circuits, have moved in the

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[22] *See, e.g.*, *Kennedy v. Natural Balance Pet Foods, Inc.*, 361 F. App'x 785, 787 (9th Cir. 2010) (affirming denial of certification of proposed nationwide class asserting consumer-fraud claims; "[u]nderstanding which law will apply before making a predominance determination is important when there are variations in applicable state law") (internal quotation marks and citation omitted); *Marshall v. H&R Block Tax Servs.*, 270 F.R.D. 400, 409 (S.D. Ill. 2010) ("Plaintiffs have not satisfied the predominance requirement of Rule 23(b)(3) and have not met their burden of outlining a manageable way for the Court to deal with the variations in state law claims."); *In re Digitek Prods. Liab. Litig.*, No. 2:08-md-01968, 2010 U.S. Dist. LEXIS 53610, at *167 (S.D. W. Va. May 25, 2010) ("A nationwide class, using the conflicting laws of the 50 states, would be entirely inappropriate as well."); *Alligood v. Taurus Int'l Mfg.*, No. 306-003, 2009 U.S. Dist. LEXIS 131371, at *12 (S.D. Ga. Mar. 4, 2009) (declining to certify nationwide class action where "[t]he laws among the states with regard to express and implied warranties differ substantially").

[23] 151 Cong. Rec. 730 (Statement by Rep. Jim Sensenbrenner) ("The sponsors believe that one of the significant problems posed by multistate class actions in State court is the tendency of some State courts to be less than respectful of the laws of other jurisdictions, applying the law of one State to an entire nationwide controversy and thereby ignoring the distinct and varying State laws that should apply to various claims included in the class, depending upon where they arose.").

[24] *Id.* at 726 (statement of Rep. Jim Sensenbrenner); *see also* Pub.L. 109-2, § 2(b)(2), 119 Stat. 4 (2005) (stating that one purpose of CAFA is to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction"); *see also* Hunter Twiford, III, et al., *CAFA's New 'Minimal Diversity' Standard for Interstate Class Actions Creates a Presumption That Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 Miss. C. L. Rev. 7, 53 (2005) (highlighting that "CAFA Section 2, 'Findings and Purposes,' . . . [reflects] the strong congressional policy seeking to limit class-action abuses in the state courts by allowing more interstate class actions to be maintained in the federal courts").

[25] *See, e.g.*, *Molina v. Lexmark Int'l, Inc.*, No. 08-04796 MMM (FMx), 2008 U.S. Dist. LEXIS 83014, at *11-12 (C.D. Cal. Sept. 30, 2008) ("If there is any doubt regarding the existence of federal jurisdiction, the court must resolve those doubts in favor of remanding the action to state court. . . . This is true even where CAFA provides the basis for removal.") (internal citations omitted); *Rodgers v. Cent. Locating Serv.*, 412 F. Supp. 2d 1171, 1177 (W.D. Wash. 2006) (declaring that CAFA "left intact the well-founded presumption against removal jurisdiction"); *Werner v. KPMG LLP*, 415 F. Supp. 2d 688, 694 (S.D. Tex. 2006) ("The text of CAFA says nothing about the burden of proof on removal . . . the textual silence on the burden of proof, which contrasts with Congress's express provisions changing a number of aspects of removal practice for cases that fall under CAFA leads this court to join those

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opposite direction by imposing a heightened "legal certainty" obligation on defendants with respect to the amount-in-controversy requirement.[26] Under this standard, the amount-in-controversy set forth in the complaint controls so long as it is claimed in good faith.[27] In other words, the only way a defendant can successfully remove a class action to federal court is to prove with "legal certainty" that the plaintiffs cannot recover below CAFA's $5 million jurisdictional amount.

While the Third and Ninth Circuits have grounded this strict standard in the presumption that a plaintiff is the master of his complaint, that approach contravenes Congress's intent in facilitating the removal of class actions to federal court. Indeed, Congress clearly intended in this context to overrule the sort of historical presumptions relied upon by the Third and Ninth Circuits in limiting CAFA's effects – court-created assumptions that have no clear statutory underpinnings. As made clear in the Senate Report, "there is no such presumption. In fact, the whole purpose of diversity jurisdiction is to preclude any such presumption by allowing state-law based claims to be removed from local courts to federal courts, so as to ensure that all parties can litigate on a level playing field and thereby protect interstate commerce interests."[28] Further, while these burden-of-proof issues have been percolating for many years, it was only in the wake of CAFA that these stringent standards against removal were adopted. In establishing these rigorous anti-removal standards, some courts have actually changed the law in a manner that is not consistent with clear legislative intent. And finally, the "legal certainty" standard "forces the defendant to establish 'the plaintiff's claim for him,'" undermining the defendant's own legal position.[29]

In contrast to the Third and Ninth Circuits, most other circuits have adopted a "preponderance of the evidence" test for establishing jurisdiction with respect to the amount in controversy under CAFA.[30] Under this standard, a defendant removing a class action from state to federal court must show that the amount in controversy "'more likely than not' exceeds the jurisdictional threshold."[31]

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holding that the party opposing remand continues to bear the burden . . ."); *Sullivan v. State Farm Fire & Cas. Ins. Co.*, No. 06-0004 SECTION "K" (1), 2006 U.S. Dist. LEXIS 95817, at *22 (E.D. La. Apr. 6, 2006) ("[T]his Court finds that despite CAFA's changes to traditional notions of federal court jurisdiction, the long-standing presumption against removal remains.").

[26] *See Frederico v. Home Depot*, 507 F.3d 188, 197 (3d Cir. 2007); *Campbell v. Vitran Express, Inc.*, No. 12-55052, 2012 U.S. App. LEXIS 4864, at *10 (9th Cir. Mar. 8, 2012).

[27] DiFazio, *supra* at 149.

[28] 109 S. Rep. 14.

[29] DiFazio, *supra* at 155-56.

[30] *See, e.g.*, *Hargis v. Access Capital Funding, LLC*, No. 11-1027, 2012 U.S. App. LEXIS 4474, at *7 (8th Cir. Mar. 5, 2012); *Blomberg v. Serv. Corp. Int'l*, 639 F.3d 761, 763 (7th Cir. 2011); *Berniard v. Dow Chem. Co.*, No. 10-30497, 2010 U.S. App. LEXIS 16515, at *8 (5th Cir. Aug. 6, 2010).

[31] DiFazio, *supra* at 147.

Complicating matters further, one Eleventh Circuit decision held that in a class action originally filed in federal court under CAFA, at least one individual plaintiff must allege a claim worth more than $75,000. In *Cappuccitti v. DirecTV, Inc.*, the plaintiff brought a putative class action in federal court under CAFA, seeking recovery of television subscriber fees that allegedly violated Georgia law. The plaintiff alleged minimal diversity and classwide damages in excess of $5 million.[32] Neither party disputed the court's jurisdiction under CAFA, but on review of the district court's denial of the defendant's motion to compel arbitration, the Eleventh Circuit *sua sponte* held that "jurisdiction under CAFA was absent from the moment [plaintiff] brought this case."[33] In so doing, the Court of Appeals treated CAFA's $5 million aggregate amount-in-controversy requirement as a supplement to the traditional $75,000 requirement.[34] This reasoning was deeply flawed because CAFA creates an express, independent basis for federal jurisdiction over class actions. Fortunately, the full Court of Appeals later vacated the panel's ruling, holding that "[t]here is no requirement in a class action brought originally or on removal under CAFA that any individual plaintiff's claim exceed $ 75,000."[35]

While the second *Cappuccitti* ruling reflects a positive development in the Eleventh Circuit, questions still remain as to whether and when defendants are able to rely on evidence outside the complaint in removing a case to federal court. For example, in *Thomas v. Bank of America Corp.*, the Eleventh Circuit determined that a defendant seeking to remove a putative mass action to federal court could not rely on evidence where "the complaint provided no information indicating the amount in controversy or the number of individuals in the alternative classes."[36] In that case, the plaintiff customer alleged that the defendant violated various state laws by selling a bundled insurance product – known as the Credit Protection Plus Plan – to ineligible individuals. After the defendant removed the case under CAFA's "mass action" provision, the district court remanded, finding that the defendant had failed to show that the $5,000,0000 jurisdictional amount-in-controversy requirement had been satisfied.[37] In support of removal, the defendant provided a declaration stating that "'[f]rom October 23, 2006 through June 30, 2008, Defendant enrolled 77,787 customers and collected a total of $ 4,825,809 in fees from customers in Georgia for the Credit Protection Plus plan.'"[38] The defendant argued that the $4.8 million figure, coupled with the plaintiff's pursuit of treble damages and attorneys' fees, satisfied the jurisdictional amount-in-controversy requirement.[39] The district court disagreed, concluding that the "$ 4.8 million figure did not accurately identify the amount in controversy because [plaintiff's] complaint did not allege that all of the Georgia Credit Protection Plus customers were entitled to relief for the entire amount of their Credit Production Plus fees."[40] As

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32 611 F.3d 1252, 1253 (11th Cir. 2010).

33 *Id.* at 1254.

34 *Id.* at 1255.

35 *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118, 1122 (11th Cir. 2010) (en banc).

36 570 F.3d 1280, 1282-83 (11th Cir. 2009) (per curiam)

37 *Id.* at 1281-82.

38 *Id.* at 1282 (citation omitted).

39 *Id.*

40 *Id.*

a result, the court determined, there was "great uncertainty regarding the amount in controversy and the class size," favoring remand of the suit to state court.[41] The Court of Appeals affirmed, discounting the declaration filed in support of removal because "the complaint provided no information indicating the amount in controversy or the number of individuals in the alternative classes."[42] The *per curiam* ruling suggests that a defendant may not be able to supplement its notice of removal with evidence outside the complaint, at least in "mass action" cases where the complaint is silent regarding the amount in controversy or the number of individuals encompassed by the mass action.

In short, conflicts are developing among the circuits regarding a defendant's burden in satisfying the amount-in-controversy requirement under CAFA. These conflicts are largely a product of erroneous interpretations – or outright disregard – of the Congressional intent underlying CAFA. These discordant approaches could be reconciled by federal legislation reaffirming the presumption in favor of federal jurisdiction under CAFA. Absent such legislation, certain circuits could become havens for state class actions of national importance that would otherwise be litigated in federal court.

Second, while Congress established various exceptions to federal jurisdiction under CAFA, some courts have interpreted them more broadly than Congress intended. For example, some courts have construed the "home-state" exception quite broadly, which has given rise to a resurgence of state court class action activity in certain jurisdictions. Under the home-state-controversy exception, "[a] district court shall decline to exercise jurisdiction [where] . . . two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed."[43] In a class action in which greater than one-third but less than two-thirds of the class are citizens of the forum state, the district court "***may*** . . . decline to exercise jurisdiction" "in the interests of justice and looking at the totality of the circumstances."[44] Most courts have appropriately recognized that "the plaintiff has the burden of persuasion on the question whether the home-state . . . exception[] appl[ies]."[45] But while Congress intended this exception to be construed "narrowly" and in favor of exercising diversity jurisdiction, not all courts have followed congressional intent.

For example, in *Hirschbach v. NVE Bank*, the United States District Court for the District of New Jersey *sua sponte* remanded an action to state court under CAFA's home-state-controversy exception.[46] There, the plaintiff filed a consumer-fraud class action in New Jersey state court, alleging that the defendants, NVE Bank (a New Jersey state-chartered bank) and its holding company, issued certificates of deposit to the class members at competitive interest rates

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41 *Id.*

42 *Id.* at 1283.

43 28 U.S.C. § 1332(d)(4)(B).

44 28 U.S.C. § 1332(d)(3) (emphasis added).

45 *See Hart v. FedEx Ground Package Sys.*, 457 F.3d 675, 681-82 (7th Cir. 2006).

46 *Hirschbach v. NVE Bank*, 496 F. Supp. 2d 451 (D.N.J. 2007).

and then fraudulently applied lower-than-market interest rates to renewed certificates.[47] Plaintiff brought the class action in New Jersey state court and defined the class as "all persons who invested in a CD issued by NVE Bank at competitive market rates and renewed at least once by NVE Bank after the initial maturity date and have received or are receiving interest on their renewed CD at below competitive market rates."[48] NVE removed, asserting federal-question and CAFA jurisdiction. Plaintiff did not file a motion to remand, but the district court remanded the action back to state court *sua sponte*.

The court initially found that all of the *prima facie* CAFA removal elements were met – i.e., that the amount in controversy was present, that there was minimal diversity between the putative class and the defendants, and that the putative class contained at least 100 members.[49] However, instead of ending the inquiry there (given that the plaintiff had never contested defendant's removal), the court proceeded to examine whether the case fell within the home-state exception. The court was able to satisfy itself that at least one-third of the class was made up of New Jersey residents, which allowed the court to remand the action under the discretionary prong of the home-state exception.[50] After finding that at least one-third of the class was made up of New Jersey residents, the court noted that the case involved purely state-law claims and opted to remand the case back to state court.[51] Of course, remanding a case on the ground that it involves state-law claims effectively repeals CAFA, since the whole point of the legislation was to allow removal of cases in which federal claims were not asserted. In so doing, the court disregarded substantial precedent holding that the burden of establishing a CAFA exception rests with the plaintiff. The ruling thus sets a troubling precedent for *sua sponte* remands of class actions that otherwise satisfy CAFA's minimal-diversity and amount-in-controversy requirements.

CAFA also contains a provision known as the "local controversy" exception. Under this exception, federal jurisdiction is lacking if: (1) more than two-thirds of the proposed class members are citizens of the forum state; (2) the "principal injuries" resulting from the alleged conduct were incurred in the forum state; (3) no class action asserting similar factual allegations has been filed against any of the defendants in the preceding three years; and (4) at least one defendant is a forum-state citizen from whom "significant relief is sought" and whose alleged conduct is a "significant basis" of the claims.[52] Like the home-state exception, the local-controversy exception is to be narrowly construed. As one court succinctly explained, "CAFA's language favors federal jurisdiction over class actions and CAFA's legislative history suggests that Congress intended the local controversy exception to be a narrow one, with all doubts resolved 'in favor of exercising jurisdiction over the case.'"[53] While most courts have been

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47 *Id.* at 452-53.

48 *Id.*

49 *Id.* at 458.

50 *Id.* at 460-61.

51 *Id.*

52 28 U.S.C. § 1332(d)(4)(A).

53 *Evans v. Walter Indus.*, 449 F.3d 1159, 1163 (11th Cir. 2006) (quoting S. Rep. 109-14 at 42).

faithful to this construction, some have taken a different approach, making it easier for plaintiffs to evade federal jurisdiction.

A ruling by the Ninth Circuit last year threatens to significantly expand the ability of plaintiffs to avoid federal jurisdiction under the local-controversy exception. In *Coleman v. Estes Express Lines, Inc.*, the plaintiff brought a class action in California state court seeking recovery of unpaid overtime and other wages under California law. One of the defendants removed the case to federal court, and plaintiff moved to remand under the local-controversy exception.[54] The district court granted the motion, and the Court of Appeals affirmed. On appeal, the Ninth Circuit rejected the defendant's argument that a district court should consider extrinsic evidence in assessing whether the requirements of the local-controversy exception have been satisfied. The court held that an inquiry regarding the local-controversy exception is limited strictly to the complaint and therefore declined to consider a declaration submitted by the defendant.[55] Instead, because plaintiff's complaint "s[ought] sufficient relief against the [forum defendant]" and because the complaint "sufficiently allege[d] conduct of [that defendant] that forms a significant basis of the claims asserted," the Court of Appeals determined that the local-controversy exception had been satisfied.[56]

Similarly, in *Coffey v. Freeport McMoran Copper & Gold*, the Tenth Circuit affirmed a district court's order remanding a class action on the ground that one of the defendants was a forum-state citizen from whom "significant relief is sought." In that case, plaintiffs brought a putative class action in Oklahoma state court arising out of defendants' alleged contamination of their property through the operation of a smelter. One of the defendants was Blackwell Zinc Company, Inc. ("BZC"), which owned and operated the smelter for more than 50 years. After the defendants removed the case to federal court under CAFA, the plaintiffs moved to remand under the local-controversy exception, which the district court granted.[57] On appeal, defendants argued that the plaintiffs failed to show that BZC was a "defendant from whom significant relief is sought" by the class members. In particular, the defendants contended that this statutory language required the court to consider the defendant's ability to pay a judgment. Because BZC lacked the assets to satisfy any potential judgment, defendants reasoned that it could not qualify as a "defendant from whom significant relief is sought."[58] The Tenth Circuit disagreed, explaining that "[t]he statutory language is unambiguous, and a 'defendant from whom significant relief is sought' does not mean a 'defendant from whom significant relief may be obtained.'"[59] The court therefore upheld the lower court's ruling remanding the class action to state court.

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54 631 F.3d 1010, 1013 (9th Cir. 2011).

55 *Id.* at 1020.

56 *Id.*

57 581 F.3d 1240, 1244-45 (10th Cir. 2009).

58 *Id.*

59 *Id.* at 1245 (citation omitted).

The local-controversy and home-state exceptions reflect a bipartisan consensus that only truly local class actions should be litigated in state court. However, as the rulings summarized above demonstrate, some courts have taken these exceptions too far, applying them more broadly than Congress intended.

Third, some plaintiffs' counsel have also been able to flout congressional intent and "'game' the system by artificially structuring their suits so as to avoid federal jurisdiction" with respect to another category of cases removable under CAFA: "mass actions."[60] As the legislative history underlying CAFA makes clear, "[m]ass action cases function very much like class actions" and "are simply class actions in disguise. They involve a lot of people who want their claims adjudicated together, and they often result in the same abuses as class actions. In fact, sometimes the abuses are even worse because the lawyers seek to join claims that have little to do with each other and confuse a jury into awarding millions of dollars to individuals who have suffered no real injury."[61] Therefore, in addition to expanding federal jurisdiction over class actions, CAFA provides that federal courts have jurisdiction over mass actions, which are defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact . . . ."[62]

CAFA's mass action provision represents a "[c]ongressional attempt to address notorious joinder abuses at the state level."[63] Because Congress sought to define "class action" broadly to avoid "jurisdictional gamesmanship," it follows perforce that the "potentially more-abusive mass actions should be construed just as liberally."[64] However, some courts have not followed this line of reasoning. Indeed, employing a rigid interpretation of the mass action provision, some courts have gone so far as to hold that whether "plaintiffs have deliberately divided their cases in order to avoid the mass action threshold is ***irrelevant***."[65] Such an approach can hardly be reconciled with Congress's stated goals of eliminating "jurisdictional gamesmanship"[66] and the abuses presented by mass actions.[67]

For example, in *Tanoh*, the Ninth Circuit affirmed a lower court's order remanding the claims of 664 named plaintiffs to state court because the claims did not satisfy CAFA's

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60 *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 956 (9th Cir. 2009).

61 109 S. Rep. 14.

62 28 U.S.C. § 1332(d)(11)(B)(i).

63 Anthony Rollo & Gabriel A. Crowson, *Mapping the New Class Action Frontier - A Primer on the Class Action Fairness Act and Amended Federal Rule 23*, 59 Consumer Fin. L.Q. Rep. 11, 14 (2005).

64 *See* Jacob Durling, *Waltzing Through a Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act*, 83 U. Colo. L. Rev. 549, 569 (2012) (citing *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008)).

65 *Nunn v. Monsanto Co.*, No. 4:11-CV-1657 (CEJ), 2011 U.S. Dist. LEXIS 128375, at *4-5 (E.D. Mo. Nov. 7, 2011) (emphasis added).

66 109 S. Rep. 14.

67 *Id.*

jurisdictional requirements as a "mass action."[68] There, the 664 plaintiffs asserted tort claims arising out of their exposure to defendant's products containing an allegedly toxic chemical in ***seven*** separate lawsuits filed in state court in California.[69] Each lawsuit had fewer than 100 plaintiffs, none of whom appeared as plaintiffs in more than one of the suits. Further, none of the lawsuits asserted class claims.[70] However, Dow removed the cases to federal court, arguing, *inter alia*, that the seven individual lawsuits taken together constituted a "mass action" under CAFA.[71] The Ninth Circuit rejected Dow's argument, employing an unjustifiably strict interpretation of CAFA's statutory language defining a "mass action."[72] According to the Court of Appeals, the provision creating "mass actions" is a "narrow" one, which applies "only to civil actions in which the 'monetary relief claims of 100 or more persons are proposed to be tried jointly."[73] The court reasoned that because "none of the seven state court actions involve[d] the claims of one hundred or more plaintiffs, and neither the parties nor the trial court ha[d] proposed consolidating the actions for trial," the cases did not qualify as a "mass action."[74] In reaching this conclusion, the Ninth Circuit dismissed Dow's reliance on the Senate Report recounting CAFA's legislative history outright. The court explained that because the report was printed ten days after CAFA's passage into law, it is of "minimal, if any, value in discerning congressional intent."[75]

Fourth, recent rulings by federal courts and the Judicial Panel on Multidistrict Litigation ("JPML") threaten to create the sort of inconsistent class-certification rulings that Congress sought to eliminate by enacting CAFA. For example, in *In re Bisphenol-A (BPA) Polycarbonate Plastic Products Liability Litigation*, the judge presiding over the MDL litigation involving alleged use of BPA in baby bottles and sippy cups suggested that the issue of class certification is not appropriate for an MDL court once the issue is decided in selected bellwether cases or nationwide class actions. In denying plaintiffs' request to certify individual state-wide class actions, the court reasoned as follows:

> Plaintiffs essentially ask the undersigned to decide, for instance, that a class of Washington consumers should be certified for trial in the Western District of Washington. This issue affects only a few cases, and relates to the manner in which the case will be tried. It is not an issue that the undersigned should dictate to the

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68 561 F.3d 945.

69 *Id.* at 950-51.

70 *Id.*

71 *Id.* at 951.

72 *Id.* at 953-54.

73 *Id.* at 953 (quoting 28 U.S.C. § 1332(d)(11)(B)(i)).

74 *Id.*

75 *Id.* at 954 n.5.

> transferor courts, but is an issue that is more appropriately decided by the judges charged with presiding over the trial.[76]

Relying on the trial court's reasoning in *BPA*, the JPML recently remanded cases in an MDL proceeding for the purpose of resolving class certification. In *In re: Light Cigarettes Marketing & Sales Practices Litigation*, MDL No. 2068 (J.P.M.L. Apr. 16, 2012), the JPML had ordered centralization of a number of cases involving "share[d] factual issues as to whether Philip Morris and/or Altria engaged in deceptive marketing of their light cigarettes."[77] After the MDL judge ultimately denied class certification in four bellwether cases, he granted motions for a suggestion of remand in the remaining cases.[78] In remanding the actions, the JPML explained that "[w]hen we ordered centralization . . . the subject actions involved both putative nationwide and putative statewide classes."[79] However, "[t]he four actions here, which are the only ones still pending in the MDL, are brought on behalf of non-overlapping putative statewide classes, and each involves claims brought under the law of each plaintiff's respective state."[80] Ultimately, the court determined that because "each [remaining action] is brought on behalf of a unique putative statewide class," and "plaintiffs . . . have made reasonable arguments that the question of class certification in their actions implicates at least some unique legal issues," the issue of class certification would be best resolved by the respective transferor courts.[81]

The *BPA* and *Light Cigarettes* cases threaten to create an uncertain patchwork of class-certification rulings in future MDL proceedings. Remanding all remaining cases in an MDL proceeding to their transferor courts for purposes of class certification would encourage forum-shopping by offering plaintiffs a "heads-I-win-tails-you-lose" proposition. If they obtain class certification in their bellwether cases, plaintiffs will seek to have those rulings applied in all pending cases that are part of the MDL proceeding. However, if certification is denied, plaintiffs will simply pronounce the MDL proceeding complete and shop for new judges who they believe may be more sympathetic to their arguments. Such a result would contravene the policy justifications underlying CAFA and the statute creating the MDL system.

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76 276 F.R.D. 336, 339 (W.D. Mo. 2011.)

77 Skadden has served as counsel for Philip Morris USA Inc. in the *Light Cigarettes* litigation.

78 *In re: Light Cigarettes Mktg. & Sales Practices Litig.*, MDL No. 2068 (J.P.M.L. Apr. 16, 2012)

79 *Id.*

80 *Id.*

81 *Id.*

III. SEVERAL ASPECTS OF CLASS ACTION PROCEDURE WERE NOT ADDRESSED IN CAFA AND CRY OUT FOR REFORM.

CAFA had a limited purpose – i.e., to allow more interstate class actions into federal court. While this purpose has largely been fulfilled, some other abusive aspects of federal class action practice that harm consumers, businesses, and the economy as a whole, were not addressed by CAFA and still need reform. In particular, some federal courts have resisted the trend set by the Supreme Court requiring careful scrutiny of the Rule 23 prerequisites to class certification. In addition, some courts have permitted most of the benefits obtained in consumer class actions to flow to class counsel rather than the class members. And finally, some federal courts (primarily in California) are allowing class actions to encompass individuals who were not injured by the defendant's alleged conduct and therefore lack Article III standing to sue on their own.

A. Some Courts Are Failing To Undertake A "Rigorous Analysis" Of The Rule 23 Prerequisites To Class Certification.

In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court reversed an *en banc* ruling of the U.S. Court of Appeals for the Ninth Circuit, terminating a sprawling nationwide class action that encompassed 1.5 million female Wal-Mart employees who alleged discrimination and sought injunctive relief, declaratory relief and back pay. In its ruling, the Court confirmed that analysis of the class action requirements under Rule 23 must be "rigorous."[82] In reversing the Ninth Circuit's ruling, the High Court explained that "Rule 23 does not set forth a mere pleading standard."[83] To the contrary, the Court held, a plaintiff must "affirmatively demonstrate his compliance with the Rule."[84] Therefore, the plaintiff must "prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc."[85]

Most federal courts across the nation have taken heed of this key holding of *Dukes*, employing a "rigorous analysis" of the Rule 23 requirements for class certification.[86] But *Dukes* is not a panacea to lax certification standards, as some courts appear to be resisting the import of the Supreme Court's pronouncements. For example, in *Johnson v. General Mills, Inc.*, a federal judge in California denied a motion to decertify in a class action involving alleged misrepresentations regarding yogurt products.[87] The plaintiff asserted consumer-fraud claims

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[82] 131 S. Ct. 2541, 2551 (2011).

[83] *Id.*

[84] *Id.*

[85] *Id.*; *see also In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 312 (3d Cir. 2008) (class certification "calls for the district court's ***rigorous*** assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial") (emphasis added).

[86] *See, e.g.*, *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, No. 08-1967-MD-W-ODS, 2011 U.S. Dist. LEXIS 73375, at *6 (W.D. Mo. July 5, 2011) (conducting a "rigorous analysis," which required that it "look|| behind the pleadings and ascertain|| the nature of Plaintiffs' claims as well as the nature of the evidence"); *Scott v. First Am. Title Ins. Co.*, No. 07-52-DLB-CJS, 2011 U.S. Dist. LEXIS 98710, at *19 (E.D. Ky. Aug. 31, 2011) (describing *Dukes* as a "landmark decision" that has strengthened the requirements for class certification).

[87] *Johnson v. General Mills, Inc.*, 276 F.R.D. 519 (C.D. Cal. 2011).

under California law, alleging that defendant misrepresented the ameliorative effects of the yogurt products on the human digestive system.[88] The court granted plaintiffs' motion for class certification before the Supreme Court decided *Dukes*. In the aftermath of *Dukes*, the defendants moved to decertify the class, arguing that a class action in the *Johnson* case "denies them of their due process right to defend the individual aspects of the class claims on a case-by-case basis."[89] The defendants specifically contended that the reliance and causation requirements of California's consumer-protection statutes could not be "resolved 'in one stroke,'" as required under *Dukes* for class certification to be proper.[90] After all, many class members presumably continue to buy the same yogurt to this day, despite the allegations in their suit that they were misled. The court rejected the defendant's arguments, however, opining that "*Wal-Mart* does not mandate that every element of a cause of action must be common."[91] Distinguishing *Johnson* from *Dukes*, the California federal judge proceeded to deny the defendants' motion, concluding that "[t]he requirement of predominance in Rule 23(b)(3) itself implies that a court may certify a class even though there will, at some point, be issues that must be determined individually."[92]

The *Johnson* ruling cannot be reconciled with *Dukes*. After all, in *Johnson*, the question of reliance – i.e., whether each class member relied on the digestive health message in deciding to purchase the yogurt product – generated answers that varied from class member to class member. As *Dukes* makes clear, it is not enough that a ***question*** be "common" to the class. Rather, a classwide proceeding is only proper if it will "'generate common ***answers*** apt to drive the resolution of the litigation.'"[93] The *Johnson* case essentially runs afoul of this key principle, moving backwards to a time where courts had previously looked for common questions without going further to determine whether those questions had common answers.

In the wake of *Dukes*, some commentators have sided with decisions like the one in *Johnson*, expressing concern that most federal courts have become too restrictive in evaluating class-certification proposals. According to these commentators, applying heightened standards to class action proposals is inconsistent with plaintiffs' right to bring class actions.[94] But there is no such right. As the Supreme Court has noted time and again, "[t]he class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"[95] Consistent with this principle, claims are rarely suited to be

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88 *Id.* at 520.

89 *Id.*

90 *Id.* at 521-22.

91 *Id.*

92 *Id.* at 522.

93 *Dukes*, 131 S. Ct. at 2551(emphasis added) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

94 *See, e.g.*, Erwin Chemerinsky, *Closing the Courthouse Doors*, 14 GREEN BAG 2D 375, 378-80 (2011) (opining that "[t]he result [of *Dukes*] is that it will be very difficult for employment discrimination claims to be litigated as a class action").

95 *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

litigated on a collective basis. Thus, legal commentators and courts critical of *Dukes* and its progeny should not be surprised that American courts are applying greater scrutiny to class action proposals and ultimately certifying fewer claims.

In sum, rulings like *Johnson* will no doubt be relied upon by some district courts that seek to limit *Dukes* and resist heightened standards for class certification. The result could be a small but troubling group of magnet ***federal*** jurisdictions that employ lax class-certification standards reminiscent of those followed by state courts, which were a driving impetus behind the passage of CAFA in the first place.

B. Some Consumer Class Actions Still Provide No Benefit To Class Members.

There is still an ongoing problem, even in federal court, of class counsel – as opposed to actual class members – reaping the benefits of the class device. This can be seen in fee-focused class settlements, as well as *cy pres* settlements that do not deliver any direct benefit to the purportedly injured class members.

Because most of the money designed to compensate class members in class action settlements goes unclaimed, some courts have resorted to *cy pres*, the practice of distributing unclaimed settlement money in class actions to third-party charities. While the use of *cy pres* in class action settlements has benefited numerous organizations, ranging from art schools to law schools and from the American Red Cross to legal aid societies, the practice is troubling when there is no effort to compensate the actual class members because in such cases, the supposed "relief" fails to provide any real benefit to the purportedly injured class members. After all, "[t]here is no indirect benefit to the class from the defendant's giving the money to someone else."[96] Thus, it is questionable whether most *cy pres* distributions "effectuate . . . the interests of [the] silent class members."[97]

This is particularly true because in many cases, the primary purpose of *cy pres* components of class settlements is to justify attorneys' fees by inflating the size of the "class award," which includes any *cy pres* distribution.[98] Thus, *cy pres* provides class counsel with an easy mechanism to generate high legal fees without having to devise settlements that confer actual benefits on the absent class members. It also diminishes any incentive to identify class members since the lawyer will receive the same amount of fees even if participation is negligible. For this reason, *cy pres* settlements create a potential for conflicts of interest between the financial interests of class counsel and the rights and interests of the absent class members. These concerns have led some jurists, including Judge Edith Jones of the Fifth Circuit, to reject *cy pres* altogether in favor of returning any unclaimed funds to the defendant.[99] There are other approaches to mitigating the problems associated with *cy pres* settlements as well. Specifically,

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96 *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

97 *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308-09 (9th Cir. 1990).

98 *See* 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions §§ 14:5-6 (4th ed. 2002).

99 *See Klier v. Elf Atochem N. Am., Inc.*, 653 F.3d 468, 481-82 (5th Cir. 2011) (Jones, J., concurring) ("district courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations").

the fees awarded to class counsel in ***all class action settlements*** should be tied to the value of money and benefits actually redeemed by the injured class members – not the theoretical value of the *cy pres* remedy. Such a restriction would be consistent with the intent behind CAFA, which mandates that any portion of plaintiffs' counsel's fees that is based on the value of coupons awarded to class members "shall be based on the value to class members of the coupons that are redeemed," rather than the theoretical value of the coupons available to class members. It makes little sense to require a relationship between class counsel's fees and the benefits directly obtained by class members in coupon settlements, while not imposing the same requirement in *cy pres* settlements – where the benefits realized by class members are even more tenuous.

The disconnect between *cy pres* settlements and the benefits obtained by the supposedly injured class members was illustrated in a recent case decided by the First Circuit. In *In re Lupron Marketing & Sales Practices Litigation*, plaintiffs had alleged that the defendant improperly billed Medicare for free samples of the medication Lupron. The district court had approved a class settlement totaling $150 million, of which $40 million was allocated to consumers. The settlement provided that any unclaimed money from the settlement pool would be distributed to third-party charities at the discretion of the trial court.[100] After $11.4 million went unclaimed, the district court decided to distribute this money to the Dana Farber/Harvard Cancer Center to promote cancer research.[101] A small group of class members objected and ultimately appealed to the First Circuit, which upheld the *cy pres* distribution. In affirming the lower court's ruling, the First Circuit determined that the district court did not abuse its discretion in declining to create a supplemental consumer claims process to find more class members, finding it "prohibitively expensive, time-consuming" and unlikely to "recruit [more than] [a] few new claimants."[102] While the First Circuit upheld the *cy pres* award, it nonetheless expressed its "unease with federal judges being put in the role of distributing cy pres funds at their discretion."[103] As the Court of Appeals appropriately recognized, "[d]istribution of funds at the discretion of the court is not a traditional Article III function."[104] "Moreover," the court cautioned, "having judges decide how to distribute cy pres awards both taxes judicial resources and risks creating the appearance of judicial impropriety."[105] While the First Circuit's recognition of these concerns surrounding *cy pres* settlements is admirable, its disposition of the *Lupron* case will likely encourage – rather than discourage – the use of *cy pres* within the First Circuit.

A recent class action settlement involving AOL is also illustrative. The AOL case arose out of the defendant's alleged practice of inserting third-party advertising in emails sent through

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100 Nos. 10-2494; 11-1329, 2012 U.S. App. LEXIS 8263, at *7-8 (1st Cir. Apr. 24, 2012).

101 *Id.* at *13.

102 *Id.* at *25.

103 *Id.* at *2-3, *44-45.

104 *Id.* at *45.

105 *Id.* at *46.

its free email service.[106] Plaintiffs commenced a putative class action and asserted claims for, *inter alia*, violation of the Electronic Communications Privacy Act, unjust enrichment and violation of various consumer-protection statutes under California law.[107] Under the terms of the settlement, the class was to receive no money, while the class attorneys would be paid $320,000.[108] In addition to awarding zero compensation to the class members, the settlement included a payment of $25,000 to each of: (1) the Legal Aid Foundation of Los Angeles; (2) the Federal Judicial Center Foundation; and (3) the Boys and Girls Club of Los Angeles and Santa Monica. In his appellate brief, objector Darren McKinney argued that the *cy pres* distribution was too remote and failed to provide any direct benefit to the aggrieved class members because none of the recipient charities in the AOL case had any logical relationship to the plaintiff class or the asserted claims. The Ninth Circuit recently reversed the district court's order approving the *cy pres* settlement. In so doing, the Court of Appeals recognized that "the *cy pres* doctrine – unbridled by a driving nexus between the plaintiff class and the *cy pres* beneficiaries – poses many nascent dangers to the fairness of the distribution process."[109] According to the court, the proposed *cy pres* distribution fell far short of applicable legal standards in several core respects: (1) it was unrelated to the objectives of the statutes at issue in the underlying litigation; (2) it did not target the plaintiff class; and (3) there was no guarantee that any class members would actually benefit from the distribution.[110] The appellate court therefore reversed the lower court's ruling.

In sum, there is little evidence that consumers in many negative-value class action lawsuits are receiving any real benefits. Rather, class counsel continue to press for fee-based settlements that are virtually all for their own benefit. This is another fruitful area of consideration for future class action reform.

C. Some Federal Courts Are Certifying Classes Encompassing Persons Who Have Not Been Injured.

As CAFA has shifted the majority of consumer class action activity to federal court, many federal judges have confronted the question whether such class actions can consist of individuals lacking Article III standing. Although courts are still split on the question of absent-class-member standing, more and more judges are recognizing that "[i]mplicit in Rule 23 is the requirement that the plaintiff and the class they seek to represent have standing."[111] As these courts have explained, "class definitions should be tailored to exclude putative class members

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106 *See Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011).

107 *Id.* at 1036.

108 *Id.*

109 *Id.* at 1038.

110 *Id.* at 1040.

111 *In re Copper Antitrust Litig.*, 196 F.R.D. 348, 353 (W.D. Wis. 2000); *see also, e.g.*, *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *In re Light Cigarettes Mktg. & Sales Practices Litig.*, 271 F.R.D. 402, 418-19 (D. Me. 2010); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006).

who lack standing"[112] because "Article III still does not give individuals without standing a right to sue."[113]

This principle was at play in *In re Light Cigarettes Marketing & Sales Practices Litigation*. There, the plaintiffs brought a putative class action against defendant manufacturers of light cigarettes. The plaintiffs sought to certify multiple classes of light cigarette purchasers, who were allegedly deceived by defendants regarding the health risks of light cigarettes. Plaintiffs asserted claims for consumer fraud under the laws of California, the District of Columbia, Illinois and Maine.[114] The court found that "[r]egardless of the specific requirements of the [California and Washington consumer-fraud statutes] . . . this Court's jurisdiction is limited by Article III standing."[115] In so holding, the court relied on the principle that the "filing of suit as a class action does not relax th[e] standing requirement."[116] While class members need not make "individual showings of standing," the court explained, federal courts are powerless to certify class actions "that contain[] members lacking Article III standing."[117] The court then concluded that the proposed class would encompass a multitude of members lacking Article III standing because the proposed class definition included class members who were aware that light cigarettes were not healthier than other cigarettes despite the alleged misrepresentations to the contrary.[118] (It was this ruling that prompted several plaintiffs to seek to dismantle the MDL proceeding, as discussed above.)

Despite a clear trend toward disallowing purported class actions comprised of uninjured class members, some courts have resisted this trend, particularly in California. This resistance has been based largely on confusion stemming from the California Supreme Court's seminal ruling in *In re Tobacco II Cases*. In that case, which involved allegations of fraudulent advertising by tobacco companies, the California Supreme Court interpreted the "injury in fact" and causation requirements under California's Unfair Competition Law ("UCL"), which had been established by a 2004 voter referendum ("Proposition 64"). After passage of Proposition 64, the trial court decertified the class, concluding that the voter-approved measure required plaintiffs to prove that each class member satisfied the injury and causation requirements for standing. The California Court of Appeal affirmed.[119] California's highest court reversed,

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112 *Burdick v. Union Sec. Ins. Co.*, No. CV 07-4028 ABC (JCx), 2009 U.S. Dist. LEXIS 121768, at *10 (C.D. Cal. Dec. 9, 2009) (citing cases).

113 271 F.R.D. at 419.

114 *Id.* at 405-07.

115 *Id.* at 418.

116 *Id.* at 419.

117 *Id.*

118 *Id.* at 420; *see also, e.g.*, *Avritt*, 615 F.3d at 1034 (affirming lower court's order denying class certification and making clear that Article III standing principles apply to absent class members because a "named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves").

119 46 Cal. 4th 298, 311 (2009).

however, holding that the "injury in fact" and causation requirements for standing only apply to the named plaintiffs in a putative class action brought under the UCL.[120]

In the wake of *Tobacco II*, a number of federal courts have struggled with the question of how causation, injury and reliance affect the class-certification inquiry under the UCL. While many of those courts have concluded that *Tobacco II* does ***not*** eliminate the need for individualized inquiries regarding causation, reliance and injury in class actions brought under the UCL,[121] a number of other courts, including the Ninth Circuit, have held to the contrary. While these latter courts purport to be following applicable state laws, the end result is litigation proceeding as to classes containing uninjured parties, which runs afoul of rudimentary Article III standing principles.

For example, the Ninth Circuit's recent decision in *Stearns v. Ticketmaster Corp.*, may portend a wave of consumer class actions in California encompassing uninjured class members. In that case, the Ninth Circuit reversed a district court's denial of class certification in a case involving an allegedly deceptive internet scheme perpetrated by Ticketmaster and other companies. The plaintiff in *Stearns* asserted claims under, *inter alia*, California's UCL, alleging that defendants fraudulently induced class members to unknowingly sign up for fee-based rewards programs that resulted in charges to their credit cards or deductions from their bank accounts.[122] The district court denied class certification, determining that "individual issues predominated . . . because individualized proof of reliance and causation would be required."[123] However, the Court of Appeals reversed, employing a literal and liberal interpretation of *Tobacco II*, which was decided after the district court issued its ruling. The court relied on the *Tobacco II* court's statement that "'relief under the UCL is available without individualized proof of deception, reliance and injury.'"[124] As part of its analysis, the Ninth Circuit rejected the plaintiff's Article III argument that the class lacked standing, holding that only a named plaintiff's standing is relevant to the class-certification inquiry. According to the court, "[i]n a class action, standing is satisfied if at least one named plaintiff meets the requirements" of Article III.[125]

Stearns is already having a significant impact on many lower courts within the Ninth Circuit.[126] Thus, federal courts in California will likely continue to approve overly broad class

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[120] *Id.* at 324-26.

[121] *See Webb v. Carter's Inc.*, 272 F.R.D. 489, 497-98 (C.D. Cal. 2011) (denying motion for class certification with respect to UCL claims in light of individualized questions concerning absent-class-member standing).

[122] 655 F.3d 1013, 1017-18 (9th Cir. 2011).

[123] *Id.* at 1020.

[124] *Id.* (quoting *In re Tobacco II Cases*, 207 P.3d 20, 35 (Cal. 2009)).

[125] *Id.* at 1021; *see also, e.g.*, *Chavez v. Blue Sky Nat. Bev. Co.*, 268 F.R.D. 365, 376 (N.D. Cal. 2010) ("the court notes that in *In re Tobacco II Cases* the California Supreme Court concluded after a reasoned analysis that unnamed class members in an action under the . . . UCL . . . , are not required to establish standing").

[126] *See, e.g.*, *Guido v. L'Oreal, USA, Inc.*, Nos. 11-1067 CAS (JCx), 11-5465 CAS (JCx), 2012 U.S. Dist. LEXIS 65200, at *12-13 (C.D. Cal. May 7, 2012) (quoting *Stearns*, 655 F.3d at 1021); *see, e.g.*, *Ralston v. Mortg. Investors Group, Inc.*, No. 5:08-cv-00536-JF (PSG), 2012 U.S. Dist. LEXIS 24324, at *34 n.5 (N.D. Cal. Feb. 27,

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action proposals that encompass uninjured class members. Not only does such a result conflict with fundamental constitutional principles of standing, but it also runs counter to the substantive tort requirement that a plaintiff must be injured in order to recover.[127] This requirement does not disappear merely because class, rather than individual, relief is sought. Rather, as made clear in *Dukes*, the "Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'"[128] Thus, allowing a class to proceed even though it encompasses many individuals without injury contravenes Article III, as well as the Rules Enabling Act by threatening liability to individuals only because they availed themselves of the class action device.

IV. INCREASED ENFORCEABILITY OF ARBITRATION AGREEMENTS PROVIDES CONSUMERS AND EMPLOYEES WITH A FAIR AND COST-EFFECTIVE MEANS OF DISPUTE RESOLUTION.

In the face of these concerns, it is important to note that recent developments in another area of the law – arbitration – have provided consumers and employees with far better access to justice than a class action system that remains prone to abuse.

Last year, in *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court made it easier for consumers and employees to obtain justice through arbitration when it held that the Federal Arbitration Act ("FAA") preempts California state law deeming class action waivers in consumer arbitration agreements unconscionable. In that case, which arose under a cell phone contract that required arbitration for all disputes and required claims to be brought in an "individual capacity," the Supreme Court determined that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[129] As part of its analysis, the Court recognized that under AT&T's arbitration agreement, "aggrieved customers who filed claims would be essentially guaranteed to be made whole" and that the putative class members "were better off under their

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2012) (rejecting "argu[ment] that many putative class members lack Article III standing" because "[t]he Ninth Circuit recently clarified the relevant standard in *Stearns*: 'In a class action, standing is satisfied if at least one named plaintiff meets the requirements . . . . Thus, we consider ***only*** whether ***at least one*** named plaintiff satisfies the standing requirements.'") (quoting *Stearns*, 655 F.3d at 1021) (emphasis added); *Montanez v. Gerber Childrenswear, LLC*, No. 09-7420 DSF (DTBx), 2011 U.S. Dist. LEXIS 150942, at *2-3 (C.D. Cal. Dec. 15, 2011) (defendant's absent-class-member standing argument is "foreclosed by the recent case of Stearns"); *Bruno v. Quten Research Inst., LLC*, No. 11-00173 DOC(Ex), 2011 U.S. Dist. LEXIS 132323, at *18 (C.D. Cal. Nov. 14, 2011) (relying on *Stearns* in concluding that "where the class representative has established standing and defendants argue that class certification is inappropriate because unnamed class members' claims would require individualized analysis of injury . . . a court should analyze these arguments through Rule 23 and not by examining the Article III standing of the . . . unnamed class members"); *Schramm v. JPMorgan Chase Bank, N.A.*, No. CV09-09442 JAK (FFMx), 2011 U.S. Dist. LEXIS 122440, at *25 (C.D. Cal. Oct. 19, 2011) ("class certification can be determined without a more in-depth inquiry into the standing of individual unnamed class members") (citing *Stearns*, 655 F.3d at 1021).

127 *See In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002) ("No injury, no tort, is an ingredient of every state's law.").

128 *Dukes*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)).

129 131 S. Ct. 1740, 1748 (2011).

arbitration agreement with AT&T than they would have been as participants in a class action, which could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars."[130] Applying *Concepcion*, multiple courts have appropriately precluded class actions from moving forward on the ground that federal law requires the enforcement of agreements to arbitrate on an individual basis.[131] In so doing, these courts have "reaffirm[ed] that arbitration is the preferred method for resolving disputes under our legal system"[132] and facilitated access to a more effective and robust means of recovery for those seeking resolution of their grievances with a business.

Concepcion preserves the availability of arbitration as a fair and efficient dispute resolution system for the vast majority of disputes and claims that ordinary consumers and employees are likely to have – claims that are not subject to resolution on a class basis because they are individualized and that will not attract attorney interest because they are too small. In such cases, arbitration provides a means for obtaining resolution by a fair decisionmaker of a large number of claims that otherwise would go unremedied.

The evidence is clear that arbitration is far cheaper than going to court. For example, under the American Arbitration Association's consumer procedures, consumers cannot be asked to pay more than $125 in total arbitration fees,[133] and many businesses pay all arbitration fees, fully subsidizing the claims of their customers. Moreover, as confirmed by recent studies, arbitration generally produces more favorable outcomes for consumers than class actions.[134] For example, consumers win relief in 53 percent of the cases they file in arbitrations before the American Arbitration Association.[135] In addition, studies demonstrate that consumers frequently settle arbitration to their satisfaction.[136] And finally, arbitration saves litigation costs for all parties.[137] As Supreme Court Justice Stephen Breyer has noted, without arbitration, "the typical

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130 *Id.* at 1753.

131 *See, e.g.*, *Kilgore v. Keybank*, 673 F.3d 947, 962 (9th Cir. 2012) ("[W]e are not free to ignore *Concepcion*'s holding that state public policy cannot trump the FAA when that policy prohibits the arbitration of a 'particular type of claim.'") (citation omitted); *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 232 (3d Cir. 2012) ("even if the agreement explicitly waived [plaintiff's] right to pursue class actions, the Pennsylvania law prohibiting class action waivers is surely preempted by the FAA under *Concepcion*").

132 Laetitia L. Cheltenham, *Consumer Financial Protection Bureau: The Consumer Financial Protection Bureau and Class Action Waivers after AT&T v. Concepcion*, 16 N.C. Banking Inst. 273, 288 (2012) (internal quotation marks and citation omitted).

133 American Arbitration Association, *Employment Arbitration Rules and Mediation Procedures*, http://www.adr.org/sp.asp?id=32904.

134 *See* Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, DISP. RESOL. MAG. 34 (Fall 2008).

135 Christopher Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 Ohio St. J. On Disp. Resol. 843, 845

136 *See, e.g.*, NASD, Dispute Resolution Statistics. http://www.finra.org/ArbitrationMediation/About FINRADR/Statistics/.

137 *See, e.g.*, William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, Disp. Resol. J., Oct.-Dec. 1995, at 40, 44 (explaining that in one study from 1995, lawyers who represent employer defendants estimated their clients' cost of lawyers' fees, expenses, and court

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consumer who has only a small damage claim (who seeks, say, the value of only a defective refrigerator or television set) [would be left] without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery."[138]

Some commentators have criticized the Supreme Court's ruling as depriving consumers of the ability to employ the class action device in courts. But this criticism is unfounded, particularly since most class actions do not offer consumers any real benefits. As several recent class settlements have demonstrated, purportedly injured class members are often given the short end of the stick when class actions are resolved. These consumers would have a better chance of obtaining meaningful recoveries through arbitration than through class actions, as the Supreme Court found in *Concepcion.*

CONCLUSION

CAFA has played a vital role in class action procedure throughout the nation. Most notably, it has helped shift countless interstate class actions into federal court, away from magnet state-court jurisdictions that routinely employ lax class-certification standards and exhibit bias towards out-of-state defendants. The result is more rigorous scrutiny of class action proposals, which in turn has led to a fairer and more just class action landscape. However, while the objectives underlying CAFA have largely been advanced, some courts have strayed from Congress's intentions. Congress should act now and nip these problem areas in the bud to ensure that they do not influence those courts that have been faithful to CAFA. Moreover, recognizing that CAFA had a limited purpose – to expand federal jurisdiction over class actions of national importance – Congress should begin to consider other potentially problematic areas of federal class action jurisprudence that were not addressed by CAFA. I appreciate the Subcommittee allowing me to testify today and I look forward to answering any questions that the members of the subcommittee may have.

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costs averaged $96,000 in litigation and only $20,000 in arbitration); ABA Section of Litigation Task Force on ADR Effectiveness, Survey on Arbitration 19 (August 2003), http://www.abanet.org/litigation/taskforces/adr/surveyreport.pdf (summarizing survey in which over 56% of lawyers said arbitration is more cost effective than litigation, while under 14% said litigation is more effective than arbitration and the remaining 30% said that cost effectiveness of the two processes is the same).

[138] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

Mr. FRANKS. And I will now recognize myself for 5 minutes for questions.

Professor Redish, I will begin with you, sir. You certainly come to the Committee with unimpeachable credentials. And I will therefore just ask an overarching question here at the beginning, and that is, given all of the challenges and all of the information that

you have related to these types of court and jurisdictional issues, what would you say to Congress collectively would be the most important things we could do to improve or fix the system as it is now? What changes would we make, if you had the power to be Republicans and Democrats at the same time—and I probably would warn you not to try. But, please.

Mr. REDISH. Mr. Chairman, I think there are two vitally important reforms that could cure many of the significant problems to which I pointed.

The first, and the simplest I think, would be to insert into the certification process an additional requirement that shockingly doesn't appear there, which is that before a court certifies a class action, it must assure itself that a victory would significantly benefit the members of the class. If the court cannot be convinced by the parties seeking to bring the class proceeding that a victory will be able to distribute funds to injured individuals, then there is no business for that case being certified as a class in the first place.

And the second major change, both to assure that due process rights of litigants to be able to control their own litigation when their claims are of significant value and to prevent the class from turning into this cardboard-cutout, faux class action, where their claims aren't of significant value, would be to abandon the opt-out process, where—I call it "Book of the Month Club service"—by inertia, by doing nothing, you are a member of the class, but require somebody to make the affirmative decision that he or she wants to participate as a passive class member. In that sense, we will be bringing the class action procedure back within the framework of the Federal rules. It will then be a true aggregation device and not a manipulator of the underlying substantive law.

Mr. FRANKS. That sounds frighteningly logical to me. Yes, sir.

Let me turn to you, Mr. Beisner. As I mentioned in my opening statement, Federal law is supposed to be applied uniformly, of course, in all Federal courts. In your written testimony, however, you point out that certain Federal appeals courts are applying CAFA's provisions in significantly differing ways.

How big a problem is this? And should Congress get involved to fix this issue, or do we just leave it to the Supreme Court to sort it out?

Mr. BEISNER. I think that it is a significant problem. And I think, as you noted in your opening statement, it has resulted, to some extent, in counsel favoring certain circuits over others in bringing class actions to start with.

I do think that there are a number of circuit splits that are out there on CAFA issues—that is, circumstances in which the circuits are divided. Some of those have been presented to the Supreme Court. So far, it has not concluded to hear those cases, which is of course the Court's prerogative. But some of them, I think, are causing significant issues and preventing the full intent of the statute being fulfilled.

Mr. FRANKS. I might go ahead to ask you then generally the same question I did Professor Redish, and that is, if you could do any one or two things to improve the system as it is, what would be your recipe?

Mr. BEISNER. I think that two things would be important.

One is an effort to find ways for this system to be more transparent. One of the things that greatly concerns me is a reference to consumer class actions. Because if you peek behind the curtain about what really happens in those cases, to the extent that any money moves at the end of those cases it is normally between the defendant and the attorneys, primarily, in the lawsuit. And although I am not going to sit here and say that there is no class action that benefits consumers—I acknowledge that there are some instances where that occurs. But in many, many cases, the benefit to consumers in these class actions is very hard to find.

The second thing I would note is—and this is along the lines of what Professor Redish noted earlier—I think that we need to recognize that the class action is a very powerful device. An attorney can walk into court and say, I am here to represent millions of people in this lawsuit. Has he or she asked any of them whether they want to be represented in this particular lawsuit? No, you just go in and do it. And it seems to me that some provisions that provide assurances up front that there are actually people out there interested in this lawsuit—not just the lawyer, who has, potentially, profit motives for being there—would be interesting.

I know, for example, years ago, back in 1966, Congress passed the Magnuson-Moss Warranty Act, a landmark piece of legislation, and it authorized the bringing of consumer class actions dealing with products and warranties in Federal court. One of the requirements they put in there is, if you are going to bring a class action, you have to have 100 named plaintiffs. The lawyer has to go out there, and so there must be some interest in consumers, because I have 100 people who are willing to be part of this lawsuit. And it was a way of sort of testing the waters to make sure that there was real class interest in the lawsuit.

Mr. FRANKS. Again, the logic seems to be breaking out all over the place here.

And I would now recognize Mr. Nadler for 5 minutes.

Mr. NADLER. Thank you.

Mr. Sobol, you testified that Federal courts, once cases are removed from State courts, routinely deny certification of multi-State cases when multiple State laws are at play because of manageability concerns. Do you have recommendations for what we could do help with this problem?

Mr. SOBOL. I think it is important to draw a distinction——

Mr. NADLER. Before that, actually, let me—why is this a terrible problem?

Mr. SOBOL. The reason it is a terrible problem is that the vast majority of consumer rights are based upon State laws, not Federal laws. You cannot recover under most Federal laws any type of consumer remedy. Instead, you must rely upon State law.

Now, if you bring a State law case, therefore, you either bring a State law case—and this is important to draw a distinction between what Mr. Beisner said. A case can either be on behalf of all the States in the country for one class, or, alternatively, you might have, as we used to have, State actions, State by State by State, for the residents in that State, on the basis of that State's law—50 State cases.

Now, if those 50 separate cases or 24 or whatever number of cases get removed to Federal court, invariably they will be sent a single judge, by reason of the operation of the Judicial Panel on Multidistrict. And you then give one Federal judge the task of performing what a couple of dozen State court judges——

Mr. NADLER. Let me just hurry this along. And they will find that unmanageable and decertify.

Mr. SOBOL. And then they say it is unmanageable——

Mr. NADLER. And decertify.

Mr. SOBOL [continuing]. So they don't certify.

Mr. NADLER. And what is the result to the litigant? He has no opportunity in State or Federal court, and there is no forum for his rights at all?

Mr. SOBOL. And is left high and dry.

Mr. NADLER. And there is no forum to vindicate his rights under State law at all.

Mr. SOBOL. No forum.

Mr. NADLER. Thank you.

Mr. Beisner, you just heard that exchange. Mr. Sobol testified that Federal judges routinely deny class certification and have removed cases that raise issues under multiple State laws based on the arguments of the Federal rules of commonality and that manageability requirements cannot be met.

How often have you made that argument or something similar on behalf of a client?

Mr. BEISNER. Let me state that that is not the way it is happening anymore. I think Mr. Sobol——

Mr. NADLER. Anymore? It happened but it is no longer happening?

Mr. BEISNER. Before CAFA was——

Mr. NADLER. No, under CAFA.

Mr. BEISNER. Under CAFA? Under CAFA, what is happening is that people, as Mr. Sobol is describing, are bringing class actions on a single State basis. As he said, Indiana residents, class action is brought on behalf of Indiana residents. It is true, they are——

Mr. NADLER. It is then removed to Federal court.

Mr. BEISNER. Removed to Federal court, they are brought before an MDL judge. And the judge is looking at those cases individually and deciding certification in those cases.

Mr. NADLER. But wait a minute, wait a minute. Isn't it true that, in many cases, the Indiana case is brought and the Illinois case is brought and the New York case is brought, they are brought before the same judge combined, and then dismissed on the grounds of unmanageability?

Mr. BEISNER. No, that is not true.

Mr. NADLER. That is not true?

Mr. BEISNER. There is no manageability issue in those cases, because only one State law is applied to the law of the single State.

Mr. NADLER. Would you comment on that, Mr. Sobol?

Mr. SOBOL. I differ considerably with Mr. Beisner on that.

The practical reality, both in what happens in front of the judges and what happens before you even file the pleadings, is that the judges say, "This is too much. I am not in a position to sit on a multiple State court case. I don't have the time, I don't have the

attention, I don't have the law clerks to make 12 or 13 or 24 separate class certification decisions. Pick your State, or let's find one State's law, let's try it that way if we can, or find a Federal law"——

Mr. NADLER. Why can't that be done?

Mr. SOBOL. Well, first, there are no Federal laws that you can do it. And then when you try it under a single State law, then you are butchering the fact that there are separate rights for the——

Mr. NADLER. So that doesn't happen, and the case gets dismissed on manageability.

Mr. SOBOL. Right.

Mr. NADLER. Is that what happened in the *Wal-Mart* case?

Mr. SOBOL. I didn't hear you?

Mr. NADLER. Oh, never mind. Never mind on that.

What should we do to solve that problem, Mr. Sobol, aside from repealing CAFA entirely, but within CAFA?

Mr. SOBOL. Right. The specific issue that we are talking about is the ability of consumers to bring a single State class action in that State's courts. If CAFA permitted those cases to stay in State court, you would get rid of the significant problem of denying consumers access to the protection of their State laws.

Mr. NADLER. And what about—let me ask you a different question on same thing. That would be logical, but let's assume that for some reason Congress chose not to the do that. What would you think of a provision that said that if a Federal court denied certification on the grounds of unmanageability because too many States were involved, that the State could be unremoved back to State court?

Mr. SOBOL. That would be another way to deal with it. Of course, you are talking years down the road, rather than having the ability to do it then, because you are not going to find that ruling for, as a practical matter, 2, 3, 4 years down the road.

Another solution would be to have an alteration to the civil rules of procedure that say that you don't deny manageability on the basis of the fact that you have multiple State laws. You are still burdening the Federal judiciary with a task that is——

Mr. NADLER. That amendment was rejected in this Committee when Mr. Conyers and I offered it 7 years ago. On the floor, not in the Committee—I am sorry.

Thank you very much. My time has expired.

Mr. FRANKS. Thank you, Mr. Nadler.

And I now recognize the distinguished gentleman from Iowa, Mr. King.

Mr. KING. Thank you, Mr. Chairman. I appreciate being recognized and the testimony of the witnesses and the professional opinion that you bring to the hearing here today.

I am listening to this testimony and this discussion, and I am thinking about the class action lawsuits that stand out in my mind. And some of them may or may not fit into the category of this discussion here today. I am thinking of the Pigford Farms issue as one—and I think you would all be familiar with that case—on down through the *Love* case, the *Keepseagle* case, the *Garcia* case.

And I am interested in an opinion of each of you gentlemen as to whether the executive branch should be legally allowed to enter

into a de facto class action agreement without the oversight of Congress.

And I turn first to the gentleman, Mr. Redish.

Mr. REDISH. Congressman, that creates a very sensitive question of separation of powers. I believe the executive branch has the authority to enforce the law as it sees fit. And if we are talking about the exercise of authority in an individual case, to vest supervisory authority in Congress could be seen as undermining the executive power.

So my tentative response would be, I think that is not only appropriate, it may well be constitutionally required. But I haven't studied the issue closely, so I wouldn't like to commit myself irrevocably on that.

Mr. KING. Okay. Mr. Sobol?

Mr. SOBOL. I can make my remarks brief, for I have no opinion on that subject. As far as I know, there are no procedural safeguards that need to be added to that situation, and I would leave it at that. Thank you.

Mr. KING. Mr. Beisner?

Mr. BEISNER. I am familiar with those cases, but I am much in the boat of Professor Redish. I am not sure I am in a position to offer an opinion on that, not having studied it all that carefully.

Mr. KING. I might take the opportunity to offer an opinion myself, but I think I would like a follow-up question instead. And that is, you are aware of the judgment fund that the Department of Justice maintains, Mr. Beisner?

Mr. BEISNER. Yes.

Mr. KING. And do you have any idea what is in the judgment fund?

Mr. BEISNER. No, I don't.

Mr. KING. Does the public have access to the amount of that judgement fund, to your knowledge?

Mr. BEISNER. I am not aware if they do.

Mr. KING. Does anyone on the panel know if there is public access to the amount in the judgment fund of the Department of Justice?

Mr. SOBOL. Don't know.

Mr. REDISH. No.

Mr. KING. Neither of the witnesses do.

And are each of you aware that the Department of Justice occasionally reaches into the judgment fund and pays out in a de facto class action suit? And I am speaking specifically of the *Garcia* case.

And I would ask Mr. Beisner first. Are you aware of that?

Mr. BEISNER. I am not aware of that.

Mr. KING. Okay.

Are any of the witnesses familiar with the Pigford Farms issue? I am putting you all on the spot here.

All right. I will make my brief statement on that, and then I do have a follow-up question, and I will change the subject a little bit. I can see what I have broached here this morning.

But my statement is this, that I have watched class action lawsuits be blown out of proportion to the original claimants, out of proportion to the original definition. I watched the Pigford Farms issue come through this Judiciary Committee and an attempt to

pass a Pigford 2, which did finally pass this House, but the same version did not pass the Senate. I saw Barack Obama be elected as President, and then I saw the Secretary of Agriculture, Tom Vilsack, team up with Attorney General Holder and go negotiate with the Black farmers and hand them another $1.25 billion on top of the $100 million that was authorized within the 2008 Farm Bill that was designated to be the total sum to resolve any outstanding claims on Pigford.

So we have seen the executive branch go outside the directive of the Congress and reach into a slush fund of the Department of Agriculture for Pigford. We are watching them reach into this judgment fund in the Justice Department for Garcia and perhaps others. And I am very troubled by this lack of formal oversight for de facto class action suits and actual class action lawsuits.

But I would pose this question also, as I promised I would change the subject, and pop this one up. And I would start first with Mr. Redish. And that is, the term "fairness" was something that—well, I should actually go to Mr. Beisner, I am running out of time.

You use the term "fairness." Can you define that for me? It always confuses me when I hear that word. Marilyn and I have raised more than one child. We know there is no such thing as fair. How do you deal with that in the legal arena?

Mr. BEISNER. I think the important thing to me in that regard is that both sides get a fair hearing in court, that both sides have the ability to present their viewpoints. And I think that the law providing Federal court jurisdiction certainly has achieved that.

Mr. KING. But that is not really a definition, is it, Mr. Beisner?

Mr. BEISNER. I think——

Mr. KING. How does the court define it? Is there a legal definition that would help someone who has a blurry understanding of this word "fair"? It seems like it is a utility word that can be used in any circumstance, and it is always unfair to the other person.

Mr. BEISNER. I think it is grounded in the due process clause of the Constitution, which I think underlies Rule 23. And I think the notion is that you have a procedural device here, the class action, which puts enormous power in the hands of those who are bringing the lawsuit and often invites a lot of corner-cutting. And I think that, in this context, the notion of fairness is to ensure that you don't get that sort of corner-cutting in the lawsuit.

Mr. KING. There is no word "fair" in the Constitution.

Mr. BEISNER. There is what?

Mr. KING. The word "fair" doesn't exist in the Constitution or any of the amendments, correct?

Mr. BEISNER. It doesn't exist in the Constitution, but I think in the class action context the underpinnings of that word lie in the due process——

Mr. KING. It is a long definition, I grant you that.

And I thank you for your response, all the witnesses.

And I yield back.

Mr. FRANKS. Thank you, Mr. King.

And I now recognize Mr. Scott for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

First of all, the Pigford case, just to make a note about it, that was a case of well-documented historic discrimination against African American farmers that went on for years and years. And, thankfully, with the Pigford decisions, some of them have gotten compensation.

Mr. Sobol, can a lawyer walk into court without any clients?

Mr. SOBOL. No, sir.

Mr. SCOTT. Thank you.

And, as you are aware, justice delayed is justice denied. If a State class action is filed and a removal action takes place when the case should stay in State court, how much time is wasted going to Federal court to try to get a removal that is subsequently denied and the case remains in State court? How much time is wasted in that process?

Mr. SOBOL. Typically, a very considerable amount of time. More often than not, it is going to take at least several months to have a removal petition heard.

More commonly, though, for class actions, you will end up having to be brought into the multidistrict panel process, wait months for a hearing there, have the case go to the multidistrict judge, and then have removal issues heard there. Those issues are sometimes deferred for years while the court sits on the remaining Federal court cases.

So a long, long time.

Mr. SCOTT. And if it ultimately goes back to the State court, years could be wasted?

Mr. SOBOL. Yes.

Mr. SCOTT. Now, if the desire is just to waste time, how often do Rule 11 sanctions get applied to that situation?

Mr. SOBOL. Rarely.

Mr. SCOTT. Ever?

Mr. SOBOL. I would say, in my experience, never.

Mr. SCOTT. How often do class actions get caught up in multidistrict litigation where there may be commonality but State laws differ, comparative versus contributory negligence, for example, that would dictate different outcomes? How often do cases that could be resolved expeditiously in State court get caught up in that, where you have multiyear expensive litigation that is often at a very inconvenient forum? I guess if you are in the east coast, you may just have the unfortunate situation that it is assigned to a judge on the west coast.

Mr. SOBOL. Since CAFA, the vast majority of cases get removed or filed in Federal Court, and they get delayed at a very considerable period of time. And the State case—as opposed to what a State case would do, which is, classically, it would move along at a relatively swift pace, unencumbered by these extra procedural issues.

Mr. SCOTT. Thank you.

Now, Professor Redish and Mr. Beisner, you have both talked about these coupons. One has said it is not big enough to make a difference, and the other said these things are illusory.

A lot of times, the only way you can bring a case for which there are even nominal damages—for example, if a bank is miscalculating interest for a few cents a month, nobody can bring that case. Nobody can bring a case if a grocery store scanner is miscalculating

the amount owed. The only way you can bring the case and stop it is to bring a class action and get an injunction.

Now, if you do not have coupons, is your suggestion that you not be able to bring the case at all? Or that if you have a class action, people would be entitled to reasonable compensation; say, you have a couple of million people involved, everybody gets a couple hundred dollars? I mean, when is your suggestion alternative to the coupons?

Mr. REDISH. Well, Congressman, my understanding is that CAFA pretty much did away, at least in the Federal system, with the use of coupons in any event. And what has developed as an alternative to that is the use of this cy-pres doctrine whereby the bulk of the funds awarded will never, as a practical matter, be distributed to the actual victims, those whose legal rights have been violated, and instead——

Mr. SCOTT. But their legal rights are vindicated with an injunction. You get the people to stop doing it.

Mr. REDISH. Well, if we are talking about an injunction class action under the (b)(2) category, that might well be sufficient, real relief.

My concern is that we have a bilateral process with those whose rights have been violated, those who have allegedly violated them, and some kind of meaningful relief, whether it is compensatory or, if appropriate, injunctive, being awarded. But if that is not feasible, the idea of just bringing the proceeding as some sort of generic deterrent is a dramatic change in the underlying substantive law.

Mr. SCOTT. Mr. Sobol, can you say a word about the workload in the Federal Court and what this has done to it?

Mr. SOBOL. I couldn't hear you.

Mr. SCOTT. The workload in the Federal Courts?

Mr. SOBOL. The Federal judiciary is very much overworked. Particularly those judges who get MDL cases tend to be the most overworked and the most qualified judges. It is very difficult for them to sit on an MDL case and be expected to handle a dozen or two dozen or three dozen separate State court cases.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. FRANKS. Well, this has been enlightening to me, if no one else.

I appreciate all of you for coming. I appreciate the witnesses for your very insightful testimony, and appreciate the Members for being here.

And, without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward on and ask the witnesses to respond as promptly as they can so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days within which to submit any additional materials for inclusion in the record.

And, with that, again, I sincerely thank the witnesses, and I thank the Members and observers. And this hearing is now adjourned.

[Whereupon, at 10:35 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Northwestern Law

Martin H. Redish
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June 26, 2012

Trent Franks, Chairman
Constitution Subcommittee
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Re: Response to Questions for the Record

Dear Congressman Franks:

Thank you for your letter of June 13, 2012, requesting my responses to two Questions for the Record as a follow-up to my testimony before your Subcommittee on June 1 on the topic, "Class Actions Seven Years After the Class Action Fairness Act." I was honored to be asked to testify before your Subcommittee, and hope that my testimony proved helpful.

I am happy to respond to your Questions for the Record. I will answer them in the order they were asked.

1. Proposed Legislative Revisions in Class Action Procedure

Your first question asks about my proposals for legislative revision, the principles that support these revisions and the reasons why I consider them necessary. While there are no doubt a variety of ways in which current class action procedure might be legislatively improved, I believe there are four vitally important structural changes which are essential to ensuring that the class action procedure stays within constitutional bounds, does not become an instrument of harassment, and does not bring about a foundational change in underlying substantive law. These suggested legislative changes are as follows:

1. The certification requirements of Rule 23(a) need to be expanded to include the following inquiry as a prerequisite to certification: whether there is legitimate reason to believe that a substantial portion of the absent class members will receive meaningful relief as a result of an award in favor of the class or a settlement agreed upon by the parties. Absent such a finding, the proposed class should not be certified, even if it is deemed to satisfy all of the remaining requirements for certification.

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2. Significant limitations must be imposed on cy pres relief in class actions. Such relief should be prohibited or, at the very least, substantially restricted.

3. The process by which injured victims become members of a certified class needs to be significantly revised. More specifically, the current opt-out system for class actions certified under Rule 23(b)(3) (pursuant to which an absent party becomes a member of a class merely by failing to formally remove himself from the class) needs to be replaced with an opt-in system, in which a party becomes a member of the class only by affirmatively manifesting her desire to do so.

4. Congress needs to seriously consider creating an exception to the Anti-Injunction Act, 28 U.S.C. § 2283 authorizing federal courts, under certain circumstances, to enjoin parties from pursuing parallel class actions in state court. This revision would enable federal courts to prevent the inefficiencies and harassment caused by the problems that result from sequential forum shopping in the class action context and overlapping class actions. While this legislative alternative is not free from question or concern, if those difficulties can be successfully avoided this legislative strategy would do a great deal to alleviate the significant harms caused by multiple class proceedings.

I have explained my reasons for a number of these suggestions in my book, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* (Stanford University Press; 2009), as well as in subsequent scholarly writings. However, in this letter I will provide a summary of the basis for my belief that these changes should represent the core of any class action reform movement.

At the outset, it is important to emphasize that my goal has never been to destroy the modern class action. To the contrary, as I wrote in my book, "in no way am I opposed to the existence of a class action procedure. To the contrary, the class action represents an innovative means of resolving major legal problems that might otherwise overwhelm the judicial system. In doing so, however, it should not be permitted to overwhelm our nation's normative and constitutional commitments to democratic accountability, separation of powers, procedural due process, or individual autonomy." (Redish, supra, at ix).

There are two basic ways in which the modern class action threatens core values of constitutional democracy. Initially, current class action procedure threatens to undermine what can be properly labeled "macro" democratic values (i.e, values inherent in the democratic system) by employing procedure as a means of furtively altering the DNA of the underlying substantive law, in violation of both our constitutional system of separation of powers and the express directives of the Rules Enabling Act, pursuant to which the Federal Rules of Civil Procedure are promulgated. Secondly, the modern class action threatens core "micro" democratic values (i.e., the due process rights of individual litigants) by throwing potentially significant obstacles in the way of a claimant's ability to protect her rights. My four suggested legislative alterations in modern class action procedure are each designed to avoid one or both of these political or constitutional pathologies.

I have already covered in some detail in both my written and oral testimony the rationales for my first two proposed legislative revisions, designed to prevent what I have described as "faux" class actions. Such proceedings improperly employ a form of procedural alchemy designed to transform the remedial element of underlying substantive law through the "magic" of a Federal Rule of Civil Procedure from the compensatory framework legislatively established by Congress into the equivalent of a bounty hunter model or imposition of a civil fine.

Insertion of the certification requirement that the court find that a successful class proceeding will in fact benefit the bulk of the absent class members might at first seem to be a superfluous addition, since common sense should dictate that a successful proceeding will naturally benefit all or most of the victims on whose behalf suit was brought in the first place. Unfortunately, as I demonstrated in my written and oral testimony before your Subcommittee, development of the faux class action and resort to extensive use of cy pres awards has all too often led to a very different result. Indeed, all too often the only participants in the process *not* benefited by a successful outcome are the absent class members. As I explained in my prior testimony, these pathological practices need to be stopped by congressional action.

In this response to your supplemental questions, I will first focus on the reasons for my opposition to the widespread use of an opt-out procedure to determine class membership in class proceedings. I will then explain the reasons for my support for legislation to reduce the problems caused by multiple class proceedings.

The opt-out procedure substantially facilitates both the macro and micro pathologies described above. On the macro level, the opt-out procedure serves as a catalyst for the prevalence of the faux class action, because of the enormous inertia in favor of inclusion in the class inherent in the opt-out procedure. Because an individual may avoid inclusion in the class only by affirmatively removing herself from the class proceeding, it should be expected that individuals will often become class members without even realizing that they are doing so. True, in recent years notice to absent class members has been made more understandable than in previous years, but it is difficult to believe that all those who receive the notice—many of whom have never had prior contact with the legal system--take the time to read it carefully, and even if they do it seems likely that many quickly forget about it once they have read it. In short, as what is no doubt an intended result of the use of an opt-out procedure, many absent class members will never have made the initial decision to sue, will be unaware they are members of a class, and (especially if the amount of their individual claim is small and/or there is great difficulty in filing for the claim) may well never see a penny of the amount they are owed. Yet the presence of these "cardboard cut-outs" of a class will be used by plaintiffs' attorneys to justify certification, which in turn will give rise to a large class-wide award or settlement based on the number of victims claimed to be in the class—whether or not they are in any real sense a part of the proceeding. The final pathology caused by such cardboard cut-out classes is that their failure to claim the amount owed them will be used as justification for the specious and

unconstitutional award of cy pres relief to some charity which has never been injured by defendant's behavior and which previously had absolutely no connection to the lawsuit.

My two previous recommendations for legislative reform (i.e., modification of the certification prerequisites to include a requirement of a finding that meaningful recovery by class members would follow successful resolution of the class proceeding and prohibition of cy pres awards) are designed largely to prevent the backdoor perversion of applicable substantive law through the process of class action certification. Legislative transformation of the opt-out process to one that requires an absent class member to make an affirmative choice to join the proceeding will similarly aid in deterrence of the faux class action pathology. Unlike my prior two legislative recommendations, however, legislative transformation of the process to an opt-in procedure would also help to protect the individual due process rights of claimants where the individual claims of class members are large enough to economically justify individual suit (what Professor John Coffee refers to as "Type A" claims, as opposed to the "Type B" claims, which are of an insufficient amount to make individual suit practicable).[1] Where the individual class member claims are sufficiently large to make individual suit practicable, the Fifth Amendment due process right of a claimant to decide how best (or even if) to legally vindicate those claims takes on special importance. Forced membership in a class proceeding would disrupt the individual's exercise of her constitutional right to make these litigation choices. Opt-out revokes this right because of total inaction by the claimant. In virtually no other litigation context are constitutional rights deemed waived by an individual's complete failure to take any action whatsoever.[2] Requiring opt-in, then, would go a long way towards assuring that an absent class member has made the conscious choice to waive her due process right to control the litigation of her legally protected interests.

In my book on class actions, I suggested that ideally it would be advisable to permit use of an opt-out procedure when and only when it would be reasonable to infer, ex ante, that a claimant's inaction was intended to reflect the desire to become part of the class action procedure. I suggested there that in the case of what Professor Coffee refers to as "Type B" claims (i.e., claims too small to justify individual suit), opt-out would make some sense, because otherwise the claimant would, as a practical matter, have no chance to recover. However, while a dichotomy between Type A and Type B claims would make sense in theory, I do not see any practical way that such a dichotomy could be drawn by generally applicable rule or legislation, or efficiently implemented in individual lawsuits. It would require a court to determine which class members' claims fell into which category, often an impossible task and at the very least, one that would be prohibitively burdensome. This

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[1] John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 904-06 (1987).

[2] While certain constitutional rights, such as the Seventh Amendment right to jury trial, may be waived by failure to assert it in a timely manner, waiver will take place only after the right holder has done something affirmatively to participate in the proceeding, such as filing a pleading. The one possible exception is default judgment, where a defendant loses her due process right to defend simply by a total failure to act. However, this is an extreme situation easily distinguishable from all other contexts, because absent inference of such a waiver we would be left with the impossible situation in which a defendant could prevent suit simply by failing to respond to service of process.

would be especially true in what Professor Coffee refers to as "Type C" classes, which involve a mixture of Type A and Type B claims. While conceivably some classes will readily be identifiable as Type B classes, it would still probably be difficult to frame legislation which implemented this dichotomy in a way that would avoid potentially burdensome satellite litigation, which would in turn complicate what is already a complex and time consuming process. Hence while the dichotomy between Type A and Type B classes, makes sense purely as a matter of legal theory, any attempt to impose this dichotomy legislatively would almost surely constitute a cure far worse than the disease it is attempting to prevent. We are, then, likely left with an either-or choice between employing an opt-in or opt-out procedure. That is not a difficult choice to make: opt-out has facilitated too many class action pathologies to justify its continued use.

My final legislative recommendation is designed to avoid the problems of inefficiency and harassment that flow from serial forum shopping in the class action context. Under current standards, plaintiffs' class action attorneys are allowed to go from state jurisdiction to state jurisdiction seeking class action treatment once their request for certification for what amounts to a virtually identical class has already been denied in federal court, as long as they use different named plaintiffs.[3] In *Smith v. Bayer Corp.,* 131 S. Ct. 2368 (2011), the Supreme Court found that the current version of the Anti-Injunction Act prohibits such an injunction. This is something that lies within Congress's power to remedy through legislative action.

To a certain extent, the problems caused by serial class action forum shopping and overlapping classes may have been lessened by enactment of the Class Action Fairness Act of 2005. However, my suspicion is that the problem still exists (as the very fact of the *Bayer* case illustrates). Therefore if my suspicion proves to be correct, Congress should consider legislation to vest in a federal court which has already denied certification the authority to enjoin a subsequent effort by the same plaintiffs' attorneys to seek certification for what is substantially the same class in a state court employing substantially the same certification standards.[4] Congress should also consider allowing a federal court before which plaintiffs' attorneys are seeking certification to enjoin those attorneys from simultaneously seeking certification in a state court.

It is important to note that such legislation would require modification of traditional preclusion rules in the unique context of the class action proceeding. In order to

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[3] Overlapping class actions can also arise when plaintiffs' attorneys simultaneously file proceedings seeking class certification over what amounts to the same lawsuit in state and federal court. Though in these cases the attorneys are not seeking a second bite at the apple following denial of certification, the inefficiencies caused by the duplication of effort inherent in such a practice are serious in their own right. See Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigation Unit,* 50 U.Pitt. L. Rev. 809, 832-33 (1989); Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem,* 75 N.D. L. Rev. 1347, 1348 (2000).

[4] It is arguable that such legislation should include even state courts which employ a lesser standard for certification, but for present purposes I confine my recommendation to a situation where the state court employs identical or essentially identical certification standards.

accomplish its goal, a preclusion rule enforcing a denial of certification must extend well beyond the individual named plaintiffs in the first action. In the traditional single action model, imposition of a preclusive bar solely on the named parties constitutes a fair and effective means of avoiding future waste or harassment. In contrast, in the normal class action context precluding only the individual named plaintiffs will be completely ineffective, for in such a situation the named plaintiff is generally fungible with countless other members of the class, usually represented by the same group of attorneys. Thus it is essential that any legislation recognize that it is the attorneys bringing the class proceeding, not the named parties, who stand as the real parties in interest.

Enabling a federal court to extend the preclusive impact of certification denial beyond the named plaintiffs does not violate the procedural due process rights of the named plaintiffs in the subsequent action. A denial of class certification never deprives a future litigant of the chance to litigate his individual claim. At most, future plaintiffs would be denied the right to employ a particular procedural device which is untied to his ability to protect his legal rights.

I must acknowledge that, as many defenders of current class action procedure will no doubt respond to these proposals, adoption of my proposed legislative reforms would likely result in the retrenchment of the modern class action as a convenient device to police corporate and governmental wrongdoing through private litigation. But to the extent this is true, my simple response is that neither the American democratic system nor its constitutional structure has as its primary purpose the achievement of convenience. Rather, our complex intersecting structure of majoritarian and countermajoritarian directives was designed to attain and protect goals of individual liberty to protect one's rights through resort to governmental process and to assure democratic accountability of major policy choices. Neither the Constitution nor the Rules Enabling Act permits the rulemaking process to be perverted into a furtive means of indirectly altering underlying substantive law in a manner nowhere contemplated in the Constitution. Yet that is exactly what takes place as a result of modern class action procedure. If the compensatory remedial model often employed by Congress as a means of policing and enforcing its prohibitions on corporate wrongdoing ultimately prove ineffective, the answer is not to allow the unaccountable and unrepresentative rulemaking process to impose indirect modifications of existing law, but to ask those who are representative of and accountable to the electorate to develop alternative means of enforcing their proscriptions on corporate wrongdoing. Our democratic system allows us no other option--nor should it.

2. Possible Interference with the Process Set Out in the Rules Enabling Act

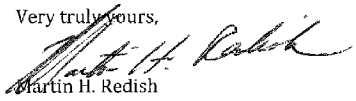
Your second question asks if I believe that implementation of the reforms of class action procedure which I have suggested (or, I assume, *any* legislatively imposed reforms of class action procedure) would improperly interfere with the Rules Enabling Act process. My short answer to that question is this: not only would such legislative action be permitted under the Rules Enabling Act process, it is actually called for by the democratic process to which our nation is morally and constitutionally committed.

The basic premise of American democracy, as already noted in my answer to your first question, is that sub-constitutional policy choices are, in the first instance, to be made by those who are representative of and accountable to the electorate. After all, every school child learns that our nation fought a revolution largely in support of the precept, "no taxation without representation." While the Framers most certainly did not adopt a form of direct democratic rule, the driving moral force behind our entire system is that as long as the countermajoritarian Constitution does not preempt such policy choices, socioeconomic choices are to be made by the people's elected representatives. Yet under the process set out in the Rules Enabling Act, choices which seem superficially procedural but which nevertheless will have a dramatic impact on moral, social and economic policy are made ultimately by the one branch of government intentionally insulated from both representation and accountability—the Supreme Court. Moreover, that Court is confined by the case-or-controversy requirement of Article III to the creation of law purely as an incident to the resolution of live disputes. Yet through the rulemaking process, the Court is making fundamental policy choices (for example, the nature of class action procedure, the demands of pleading, or the availability of discovery) which will inevitably impact life outside the four walls of the courthouse in important ways. It is for these reasons that it is morally incumbent on Congress to exercise democratic leadership on issues, such as class actions, where important interests extending well beyond matters of procedural housekeeping, are at stake.

At the very least, one can safely conclude that there is nothing untoward about the congressional decision to modify or even overrule rulemaking choices. It was, after all, Congress which created the rulemaking process in the first place with its promulgation of the Rules Enabling Act in 1934. There is nothing legally improper in any way in Congress choosing to preempt the process when it deems such action sufficiently important. Indeed, it is far too late in the process for anyone to seriously challenge the appropriateness of congressional action of this kind. Congress's decision in 1995 to enact the Private Securities Litigation Reform Act, which effectively removed securities litigation from the control of the Federal Rules of Civil Procedure, provides sufficient precedent for congressional authority to modify or preempt the results of the rulemaking process.

I hope you find these answers to be helpful. Please let me know if I can be of any assistance in the future as your Subcommittee considers specific proposals for legislative reform.

Very truly yours,



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June 27, 2012

Sarah Vance
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Dear Ms. Vance:

Below are my responses to the questions for the record submitted by the Constitution Subcommittee of the Judiciary Committee.

1. **Q:** Mr. Sobol claimed in his testimony that the Class Action Fairness Act has created a catch-22 for class actions brought under state consumer protection laws. He asserted that federal courts are refusing to certify consumer protection claims under CAFA because multiple state laws are at issue. According to Mr. Sobol, this leaves consumers unable to gain redress under state consumer protection laws. Can you comment on this claim? Is it true that CAFA is outright preventing plaintiffs from bringing class actions under the state consumer protection laws?

A: The notion that CAFA is leaving consumers without any means to obtain redress under state consumer protection laws is unfounded. To the contrary, federal courts often certify consumer class actions that are brought under a single state's laws. For example, in *Pella v. Saltzman*, the U.S. Court of Appeals for the Seventh Circuit affirmed the certification of several statewide consumer-fraud classes in a case arising out of a window manufacturer's alleged failure to disclose a design

defect that caused wood to rot.[1] Similarly, in *Johns v. Bayer Corp.*, the U.S. District Court for the Southern District of California certified consumer-fraud claims under California's Unfair Competition Law and Consumer Legal Remedies Act stemming from Bayer's allegedly deceptive marketing of certain vitamin products.[2] And in *Fitzpatrick v. General Mills, Inc.*, the U.S. Court of Appeals for the Eleventh Circuit held that consumer-fraud claims arising out of allegedly deceptive marketing of a yogurt product could be certified for class treatment.[3]

What federal courts have almost uniformly refused to certify are ***nationwide*** consumer-protection actions. And with good reason. Federal courts generally recognize that such class actions cannot be tried under a single state's laws without contravening important federalism principles because state consumer-protection laws vary in "material ways."[4] In addition, these courts have also recognized that there is no practical way for one jury to understand the differences among the 50 states' laws and issue 50 different verdicts based on the nuances of various state consumer-protection laws. One of the key goals of CAFA was putting an end to improperly certified ***nationwide*** classes, but that has not stopped plaintiffs from pursuing statewide consumer-protection claims, which are being vigorously litigated in federal courts across the country.

2. **Q:** My understanding is that there is a growing trend of state attorneys general utilizing their *parens patriae* authority to litigate cases that amount to class actions and that the Class Action Fairness Act does not cover those types of cases. Have you seen such a trend, and if so, is that an area in which it would be appropriate for Congress to legislate and clarify CAFA? Additionally, if you have noticed this trend, are these cases always brought by state attorneys general themselves or are they often brought by attorneys in private practice on behalf of state attorneys general?

A: Over the last couple of years, there has been a significant increase in the number of state attorney general ("AG") lawsuits brought against various industries, particularly pharmaceutical companies. Many lawsuits that are brought by AGs are *parens patriae* cases – i.e., suits in which the AG seeks to enforce state laws by suing

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[1] *Pella v. Saltzman*, 606 F.3d 391 (7th Cir. 2010).

[2] *Johns v. Bayer Corp.*, 2012 U.S. Dist. LEXIS 13410 (S.D. Cal. Feb. 3, 2012).

[3] *Fitzpatrick v. General Mills, Inc.*, 635 F.3d 1279, 1282-83 (11th Cir. 2011),

[4] *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 947 (6th Cir. 2011).

in its sovereign capacity on behalf of the state's citizens. These suits are typically brought under state consumer-protection statutes and seek to recover money on behalf of the states' citizens.

Courts have disagreed as to whether such suits are removable under CAFA. For example, while the Fifth Circuit has held that such actions may be removed under CAFA, the Fourth, Seventh and Ninth Circuits have reached the opposite conclusion.[5] However, these lawsuits, which often seek monetary relief on behalf of large populations of state citizens, are essentially class actions in disguise. Moreover, AGs are increasingly farming out these lawsuits to outside counsel to litigate on a contingency-fee basis. The result of these arrangements is that the prospect of a large fee may end up driving the litigation, which makes cases more difficult to resolve and injects private interests into cases nominally brought to serve the public. Thus, these lawsuits, which present the same problems and potential abuses as ordinary class actions, should be removable under CAFA, and given the disagreement among the courts on the matter, this is an issue that could benefit from clarification by Congress.

3. Q: During the hearing, Professor Redish commented on two vitally important reforms that he believes could cure many of the significant problems with the class action system: (1) to require federal courts, as part of the class certification process, to assess whether a victory would significantly benefit members of the class,

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[5] *Compare Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 430 (5th Cir. 2008) (holding that *parens patriae* price-fixing suit under the Louisiana Monopolies Act was properly removed to federal court under CAFA's "mass action" provision because Louisiana policyholders were the real parties in interest with respect to the damages sought by the Attorney General and, thus, the suit was a "representative" one on their behalf and subject to removal under CAFA), *with West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 177 (4th Cir. 2011) ("[W]e conclude that because the action before us was not brought under Federal Rule of Civil Procedure 23 or a 'similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action,' . . . the district court did not err in remanding this case") (quoting CAFA); *LG Display Co. v. Madigan*, 665 F.3d 768, 772 (7th Cir. 2011) (denying petition for leave to appeal remand of *parens patriae* action because such a suit "does not impose any of the familiar Rule 23 constraints. The [Illinois Antitrust Act, or 'IAA'] does not impose, for example, requirements for adequacy, numerosity, commonality, or typicality. Procedurally, Rule 23 and the IAA are entirely different beasts."); *Wash. State v. Chimei Innolux Corp.*, 659 F.3d 843, 848-49 (9th Cir. 2011) (concluding "that *parens patriae* lawsuits are not class actions within the meaning of CAFA"); *Illinois v. AU Optronics Corp.*, 794 F. Supp. 2d 845, 858 (N.D. Ill. 2011) ("[B]ecause (1) the case was not filed as a class action under Rule 23 (or a state equivalent) and (2) the case instead is a parens patriae suit brought under the IAA, it is both in form and substance distinct from an action brought under Rule 23 or a state class action statute.").

and (2) to eliminate opt-out class actions. Could you please comment on Professor Redish's proposal?

A: CAFA has gone a long way toward addressing many of the problems that were previously posed by inequitable settlements. In particular, heightened requirements for class settlements in the coupon context have facilitated settlements that are more equitable and just for those truly aggrieved by a defendant's misconduct.

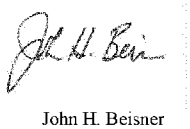
However, Professor Redish is right that more needs to be done. Action should be taken to ensure that the class device is used to benefit members of the class rather than enrich class counsel. As I pointed out in my testimony, more and more courts are using *cy pres* as a means to distribute unclaimed settlement funds. Such an approach has the primary effect of increasing attorneys' fees since such fees are dependent on the overall size of the "class award," which includes any *cy pres* distribution. As a result, there is little incentive for class counsel to devise remedies that actually provide any direct benefit to aggrieved class members. One way to reform this practice is to require fees awarded to class counsel in ***all*** class-action settlements to be tied to the value of money and benefits actually redeemed by the injured class members – not the theoretical value of the *cy pres* remedy. This requirement is already in place with respect to fees in coupon cases. As I explained in my testimony, if such a requirement applies to coupon settlements, the rationale behind applying it in the *cy pres* context is even stronger where the benefits realized by class members are even more tenuous.

In addition, as I explained in my testimony, some federal courts are continuing to apply class-certification standards that fall short of the "rigorous analysis" required by *Wal-Mart Stores, Inc. v. Dukes* and its progeny. The goal must be to prevent the growth of magnet federal jurisdictions that employ lax class-certification standards reminiscent of those followed by state courts, which were a driving impetus behind the passage of CAFA in the first place.

* * *

Please let me know if you have additional questions.

Sincerely,



John H. Beisner

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