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THE CONSEQUENCES OF CAFA: CHALLENGES AND OPPORTUNITIES FOR THE JUST, SPEEDY, AND INEXPENSIVE DETERMINATION OF CLASS AND MASS ACTIONS

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I. INTRODUCTION

Seven years after the enactment of the Class Action Fairness Act of 2005 ("CAFA"), the federal courts to which a myriad of formerly state court class actions have been removed under CAFA's exponential expansion of diversity jurisdiction for class and mass actions have begun to move past their threshold struggles with interpreting and implying the statute. These focused on whether CAFA was retroactive (the prevailing answer is "no"); whether and how to apply the statute's detailed, yet partially undefined and seemingly inconsistent exceptions for local controversies and largely intra-state disputes; and the challenge of comprehending what Congress had in mind with the "mass action" invented by the statute itself. The federal courts have now progressed to the real work of meeting the challenge of managing putative multistate and nationwide class actions, brought under one or a variety of state substantive laws, guided by the Federal Rules (in particular, Rule 23), but without a unifying body of federal substantive law, or a federal choice-of-law statute.

Rule 23, and its most recent amendments, predated the enactment of CAFA, and was designed and applied in an era in which the class actions adjudicated in the federal courts were there by virtue of federal subject matter jurisdiction: these cases arose under the securities and antitrust laws, the employment laws, and the civil rights statutes. Occasionally, the federal courts would face a class action involving only state law. Most often, if such an action were framed as a nationwide or multistate class action, the court's choice of law analysis would begin and end with the observation that a number of states had interests in the matter; the class was thus unmanageable as a nationwide class action (since it would involve the application of many states' laws); and the case should preferably proceed, in statewide components, in the underlying state courts.[1]

CAFA shifted the field of class action battle from state to federal court.[2] Swept away was the presumption that class actions asserting state claims could and would be adjudicated in state courts; now, such cases were frequently filed in, and more frequently removed to, the federal courts. The cynical view, among CAFA opponents, was that this was not merely a change of scene; it was designed to remove state law class actions to less favorable, more hostile federal courtrooms, where the cases would be denied certification,[3] or simply ignored. Certain aspects of the CAFA legislative history can be read to bear this out. Most obvious is the hostility to state courts' management of class actions. In this view, the purpose of CAFA was to transfer class actions from favorable or at least feasible state court environments to the alien world of federal court, where class action life was impossible.

The battle over CAFA enactment, which began with the first introduction of the bill in 2001 and ended with the enactment of CAFA in 2005, was bitter, partisan, and fueled by anecdotes which did not always have a firm foundation in fact. The bitter taste of the CAFA enactment process has lingered, and has tinged the litigation and commentary on what the statute meant to do, whether such a purpose was good, bad, or indifferent and how (depending upon one's viewpoint) CAFA could be promoted, resisted, subverted, or ignored in actual class action litigation in actual federal courts.

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1 The Seventh Circuit's *Bridgestone/Firestone* decision, 288 F.3d 1012 (7th Cir. 2002) exemplifies this approach. *See also In re Propulsid Prods. Liability Litig.*, 208 F.R.D. 133 (E.D.La. 2002).

2 For the view that state courts and nationwide marketing were inherent mismatch, *see* John H. Beisner & Jessica Davidson Miller, "*They're Making a Federal Case Out of It . . . In State Court*," 25 Harv. J.L. & Pub. Pol'y 143 (2001).

3 *See* Nicole Ochi, *Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA & MMTJA,* 41 Loy. L.A. L. Rev. 965, 1033 (2008).

Seven years, particularly in the world of litigation, is not an especially long period of time, and CAFA-related resentments are still fresh in the minds of many. It may modestly be proposed, however, that it is time to move on to address the task at hand: to work together, as advocates and jurists, to fulfill the command of the Federal Rules that applies to every case, under every claim for relief, that comes before the federal courts by any route: to secure its "just, speedy and inexpensive determination." Fed. R. Civ. P. 1. There is no Rule 1 exemption for Rule 23 class actions. Emergence from the weeds of contentious CAFA legislative history (which itself is controversial and inconsistent) to the clearer path of focus on the Act's express purposes themselves may illuminate the inquiry into CAFA's legitimate intent and guide us in effectuating its purposes.

II. TO REVIEW: A CAFA PRIMER

The United States has had, since its founding, a dual court system. As every law student learns, the state courts are considered courts of general jurisdiction, while the federal courts' jurisdiction is limited to actions arising under federal statutes (such as federal securities, employment, and antitrust laws) and actions raising "federal questions," *e.g.*, Constitutional issues. The one historical exception has been the federal courts' "diversity jurisdiction" over disputes between citizens of different states, involving a jurisdictional minimum in controversy: currently, $75,000, exclusive of interest and costs. Diversity jurisdiction was seen as an antidote to the bias an outsider might suffer in a "foreign" state court.

Many class actions do not arise under federal statutes or raise federal questions. Consumer fraud and tort actions are typically prosecuted under state common law or state consumer statutes. Diversity jurisdiction looks to the citizenship of the named parties, *e.g.*, the defendant and the class representatives. As a result, severe injury/unlawful death tort class actions could be brought in the federal courts, or "removed" by defendants from state to federal court. But "small claims" consumer class actions have typically proceeded in the state courts, because each class member did not have the requisite $75,000 in damages to trigger federal jurisdiction.

With the rise of nationwide marketing and distribution of standardized consumer goods and services, ranging from prescription drugs to debit cards, come an increase in tort and consumer class actions, arising (of necessity) under state law (outside the maritime realm since there is no federal substantive law of tort or common fund with a private right of action).

As a result of the increase in nationwide class actions asserting state law claims initiated in state courts, defendants complained of being peppered with multiple state court class suits over the same product or service. The federal court system can "centralize" such cases in a single court for consolidated treatment under 28 U.S.C. § 1407, the "multidistrict litigation" statute, but the state courts have no similar mechanism that allows transfer and centralization across state lines. Each state is, in many respects, a sovereign entity. Moreover, state courts have long been acknowledged to have the power to certify multistate or nationwide class actions, so long as a proper choice-of-law analysis is conducted, and class members are afforded due process, such as notice and the right to "opt-out" of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The situation in state courts, with overlapping or competing class actions. Thus, a defendant might face multiple state class actions asserting claims arising from the same product or cause of conduct, and claims arising from the nationwide marketing of a standard product had no sure means of being centralized in a single federal court.

This *status quo* was profoundly altered in February 2005, when Congress, in enacting the "Class Action Fairness Act Of 2005" (hereinafter known as "CAFA") in one fell swoop mandated a mass exodus of class action litigation from the states to the federal court system. CAFA's legislative version of a geographical cure for perceived abuses (a scourge on they system, in defendants' view, while largely mythical, in plaintiffs' view) was effected without any express change in substantive law, or any increased staffing or funding for the federal court system that is now charged with presiding over the vast majority of United States class action suits. This shift alone was predicted to have a profound impact on the speed and efficiency with which class action litigation is conducted in the United States. It was also anticipated (or feared), over time, to result in a commanding federal role in articulating, as well as applying, the state substantive law of torts and consumer rights, which as heretofore lacked a true federal common law.

In addition to these hopes or fears, CAFA was predicted to have unintended consequences on the nature of class action litigation in United States courts.

On February 18, 2005, the "Class Action Fairness Act of 2005" (CAFA) became law. CAFA was effective immediately, and greatly expanded federal diversity jurisdiction over class action cases. The Act's stated purpose 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." P.L. 109 2, § 2(b)(2). CAFA's new minimal diversity standards promise gradual and substantial growth of federal courts' responsibility over consumer class actions.

CAFA has two main sets of provisions. One set greatly expands original federal jurisdiction, as well as removal standards. The second set applies to class action settlements and requires, for the first time, notifications to state and federal governmental authorities within ten days of filing of a proposed settlement and restricts attorney fee components and other features of class action "coupon" settlements.

CAFA's minimal diversity provisions vest the federal courts with virtually plenary, though discretionary, diversity jurisdiction over most class actions, except for purely intrastate, local matters. As a practical matter, CAFA operates to vest the federal courts with diversity jurisdiction over most class actions, except for purely intrastate, local matters. As 28 U.S.C. § 1332(d) now provides:

> (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 defendants;
>
> (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.

28 U.S.C. § 1332(d), with several narrow exceptions, now gives district courts diversity jurisdiction over class actions in which any class member and any defendant are citizens of different states. CAFA also aggregates the claims of all class members to meet the new jurisdictional threshold of $5 million.

As courts, counsel and affected litigants continue to apply CAFA, profound judicial challenges and opportunities will emerge. CAFA's embrace of minimal diversity imposes on the federal courts vast responsibility for consumer and business tort class action claims against corporate defendants. This is a significant change from long-standing dependence upon state laws, state regulations and state courts to regulate and police corporate conduct and remedy consumers fraud, deceptive conduct, and unfair business practices. Will the federal courts do better, or worse, than their state court predecessor in enforcing the letter and spirit of these state laws?

Since CAFA provided for no new judgeships, no additional staffing, and no new resources for the federal judiciary, CAFA was predicted to further increase the federal courts' already heavy burdens. As former Chief Justice Rehnquist explained in his State of the Judiciary Report, released January 1, 2005, at 2, "The continuing uncertainties and delays in the funding process, along with rising fixed costs that outpace any increased funding from Congress, have required many courts to impose hiring freezes, furloughs, and reductions in force."

Effective Date of CAFA and Effect on Pending Actions

For practitioners, an initial vexing question was CAFA's applicability to particular cases. It is now clear that the statute is not retroactive and applies instead only to cases filed, or very substantially amended, on or after February 18, 2005. Controversy over these issues arose from Section 9 of the statute which states: "The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act." In *Pritchett v. Office Depot*, 360 F. Supp. 2d 1176 (D. Colo. 2005), Office Depot had removed a Colorado certified wage and hour class action two weeks before trial, arguing that the removal itself "commenced" the action under CAFA. The trial court rejected Office Depot's construction and held that the term "commenced" referred to the original commencement of the action in a court of proper jurisdiction, whether that was in state or federal court.

Legislative Findings of CAFA Reaffirm and the Propriety of Class Actions While Enumerating Abuses Justifying Reform

Sections 2(a) and 2(b) of CAFA include Congressional findings and elucidated statutory purposes which reaffirm the importance and value of consumer class action claims, while citing a history of abuses justifying CAFA's substantial reforms. CAFA Section 2(a)(2)(4) specifically cautions judges to be alert to stop class action abuses and subsequent subsections enumerate them. The perceived abuses are many, and include unjustified awards made to certain plaintiffs at the expense of other class members. CAFA is intended to ensure that incentive payments are appropriate and should also protect against "buy-offs" where plaintiffs seek to obstruct legitimate class actions and/or selling class members' interests short, for example, with a reverse action. Section 2(a)(3)(C) states that "confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights."

While no provision of CAFA specifically addressed the content of class notices, the act fundamentally expanded notice by requiring notifications of proposed class action settlement to state and federal governmental officials. (Discussed below.) CAFA does not amend Rule 23 because 2003 amendments to Federal Rule of Civil Procedure 23 had already done so by, for example, specifically requiring notices to be clear, concise and easily understood.

Section 2(a)(4)(A) identified "keeping cases of national importance out of Federal court" as an abuse and CAFA reformed this area by eliminating the requirement of complete diversity, embracing minimal diversity and relaxing amount in controversy requirements. Section 2(a)(f)(B) identifies as an abuse "sometimes acting in ways that demonstrate bias against out-of-State defendants," and Section 2(a)(f)(C) identifies as an abuse "making judgments that impose their view of the law on other States and bind the rights of the residents of those States."

Dramatic Expansion of Diversity Jurisdiction of Federal Courts

Section 4 of CAFA amended 28 U.S.C. § 1332 and broadly expanded federal diversity jurisdiction. CAFA establishes federal diversity jurisdiction, with a few exceptions, over any action in which any one member of the class (whether a named plaintiff or an "absent" [unnamed] class member) has diverse citizenship from any one defendant, and where the aggregate amount in controversy exceeds $5 million. 28 U.S.C. § 1332(d)(2).

28 U.S.C. § 1332(d)(3) provides a discretionary single-state CAFA exception over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed or at least one significant defendant is a forum state resident if "principal injuries" were also suffered in the forum state and no other "similar" class action has been filed within the past three years. In determining whether to accept or declare jurisdiction over these cases, the courts are directed to consider: whether the claims implicate matters of national origin; involve application of the laws of states outside the forum; the existence of "distinct nexus" in the state; residency of the class; "interests of justice"; and totality of circumstances.

The term "primary defendant" is not defined in the statute.[4] The statute also does not allocate the burden of persuasion on the issue of federal-court jurisdiction, an important omission. Ordinarily, the party asserting federal jurisdiction has the burden of establishing the facts necessary to jurisdiction though 2003 Senate committee report indicates that the reverse may be true under CAFA.[5]

Under new 28 U.S.C. § 1332(d)(4), federal courts "shall decline to exercise jurisdiction," however, over a class action where greater than two-thirds of the class are citizens of the forum state.

§ 1332(d)(5)(A) exempts from CAFA any class action in which the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or the number of members of all

4 The Senate committee report (S.Rep. No. 108-123 (108th Cong., 1st Sess. July 31, 2003)) state, "[T]he Committee intends that the only parties that should be considered "primary defendants" are those defendants who are the real "targets" of the lawsuit – i.e., the defendants that would be expected to incur most of the loss if liability is found."

5 *Id.* at p. 44.

proposed plaintiff classes in the aggregate is less than 100. The governmental exception sensibly respects the Eleventh Amendment which bars suits in federal court for monetary relief, cases for the enforcement of state laws against state government agencies, and cases involving such intensely local interests that federal courts normally abstain.[6] Subsection 5(B)'s narrow exception for plaintiff classes less than 100 is undefined. The statute does not specify whether "the number of all proposed plaintiff classes in the aggregate" refers to a single lawsuit, or multiple lawsuits.

28 U.S.C. § 1332(d)(9) also excepts from CAFA all class action cases solely involving securities claims, as well as analogous claims, such as breach of fiduciary duty, which arise in the securities context. The purpose of this provision is to preserve the federal versus state court jurisdictional lines already drawn in the securities litigation class action context by the enactment of the Securities Litigation Uniform Standards Act of 1998.[7]

These exceptions ensure continuing vitality of state court class actions involving local injuries and defendants. Those states with many resident corporations are likely to see the continuing feasibility of state court class action claims, which are consciously protected by this section. An important feature of the "single-state exception" is that a class seeking more than $5 million can be composed exclusively of residents of a state, and all but one of the primary defendants may be both headquartered and incorporated within the state; however, federal court original (and removal) jurisdiction still exists if even one "primary defendant" (however future jurisprudence may define that term) is out-of-state.

"Mass Actions"

CAFA also treats certain "mass actions" as CAFA class actions for expanded federal diversity of jurisdiction purposes but limits MDL transfer and consolidation of such claims. "Mass action" is restrictively defined as "any civil action (except a civil action within the scope of section 1711(2)) 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…" except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

Exempted from the definition of 'mass action' are situations where all of the claims in the action arise from an event or occurrence in the State where the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State. Any mass action removed to Federal court pursuant to this subsection cannot thereafter be transferred to any other court pursuant to the MDL procedures, unless a majority of the plaintiffs in the action request such transfer.

A CAFA "mass action" is thus both a broader and narrower concept than a "mass tort," although the two could overlap. Most mass torts will not become removable "mass actions," because plaintiffs in mass torts are rarely intentionally joined (and can easily now avoid being joined) in groups of 100 or more.

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6 *See Pennhurst State School & Hospital v. Halderman* (1964) 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.").

7 S. Rep. No. 108-123 (108th Cong., 1st Sess., July 31, 2003) at 45.

There are important differences between the treatment of mass actions and class actions under the statute. Even if the aggregate $5 million jurisdictional requirement is met, no individual plaintiff's claim will stay in federal court unless more than $75,000 is at stake for that plaintiff. Subsection 11 does not apply to cases in which all of the claims arise from "an event or occurrence" in the forum state, resulting in injuries in that state or contiguous states. For example, if a local grocery sold locally produced bacteria-contaminated juice that sickened or killed consumers, a consolidated case would remain in state court if the plaintiffs were limited to residents of that state and adjoining states. Other cases could be filed for residents of non-contiguous states. If the defendant then moved to consolidate the cases, subsection 11 would not apply.

Notably, subsection 11 also does not apply to cases in which "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a state statute specifically authorizing such action." For example, this provision protects California Business and Professions Code Section 17200 et seq. claims, unless they are also plead as class claims.

Subsection 11 also does not apply to cases in which the claims are consolidated for pretrial proceedings only, and does not apply to cases in which the defendant moves to join the claims. Plaintiffs should therefore be able to keep "mass actions" in state court if they adhere to current practices, which typically avoid the filing of complaints seeking the joint trial of plaintiffs in numbers even remotely approaching 100.[8]

Expanded Removal, and New Rules of Appeal on Remand Orders

28 U.S.C. § 1453 now provides for removal rights coextensive with the expanded diversity jurisdiction rules, waives the former rules requiring consensus of defendants to remove and cancels the former one year limit on removal. Now, "A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants."

The removal of the one-year "safe harbor" in 28 U.S.C. § 1446(b) is an important change. If a complaint not meeting the requirements of CAFA is substantially amended at any time in a manner that then meets the requirements of CAFA, the defendant will have an opportunity to remove it.

The ability of any defendant to remove the case against the wishes of other defendants protects defendants with the most at stake, but also places disruptive power in the hands of any defendant, even one with little to lose.

28 U.S.C. § 1453(c) on Review of Remand Orders is an extraordinary provision significantly expanding appellate jurisdiction and reviewability of remand orders. Federal court orders remanding cases to state court are traditionally not subject to federal appellate review, because federal jurisdiction is lost upon grant of removal. CAFA reverses this. While CAFA eliminates interlocutory review of an order denying remand to the state court,

8 *See Tanoh v. Dow Chemical Co.*, 561 F.3d 945 (9th Cir. 2009). The court affirmed the remand to state court of seven actions, each naming fewer than 100 plaintiffs, that similarly alleged exposure to toxic chemicals (manufactured by defendant) while working on banana and pineapple plantations on the Ivory Coast, strictly construing CAFA's mass action language.

it expands the notion of situational federal jurisdiction by providing discretionary interlocutory review of a remand order, if the petition is filed within seven days after entry of the order.[9] There were early concerns that the filing of the petition – not the grant of review, or the filing of briefs – appeared to start a new 60-day period for decision. This narrow appellate window has consequences. If the court of appeals is untimely, "the appeal shall be denied." This reading was rejected by the Second Circuit in *DiTolla v. Doral Dental IPA of N.Y.*, 469 F.3d 271, 272 (2nd Cir. 2006).[10]

28 U.S.C. § 1453(d) again recognizes exceptions for securities claims; claims relating to the internal affairs or governance of a corporation or other form of business enterprise; or a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security.

"Consumer Class Action Bill of Rights": New Class Action Coupon Settlement Rules

Section 3 of CAFA entitled, "Consumer Class Action Bill of Rights" adds a new chapter of statutes on class actions to Title 28 of the United States Code. 28 U.S.C. § 1711 broadly defines basic class action terms, new Section 1712 closely controls attorney fee availability in coupon settlements, and § 1715 requires broad governmental notice of proposed settlements.

The statute uses the term "coupon" in its ordinary sense (although the term is not defined) and includes substantive new limits on attorney fee calculations in coupon settlements. The courts are encouraged, upon motion by any party, to receive expert testimony of actual value of the coupons actually redeemed. This section also explicitly empowers the Court to make cy pres distributions, to charitable or governmental organizations of remainder funds, none of which may be factored into attorney fee calculations. In Section 1712(b)(2), Congress expressly recognizes multipliers on lodestars as a means of providing a reasonable attorney's fee.

Settlement Rules Requiring Notification to Appropriate Federal and State Officials

In another major change, new 28 U.S.C. § 1715 requires notifications to appropriate Federal and State officials of any settlement of a class action. The "appropriate Federal official" means the Attorney General of the United States; or in any case involving depository institutions, the person with primary regulatory or supervisory responsibility. The "appropriate State official" means the person in the State with "primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State…"

Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant participating in the proposed settlement shall serve upon the appropriate Federal and State official – for each State in which class members reside – a notice of the proposed settlement consisting of the complaint; hearing notices; class notices; judgment and even, if feasible, "the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to

9 Fed. R. Civ. P. 6(a) may apply to this time period, excluding intermediate weekdays and holidays, but the safest course until this provision is definitively construed is to file the petition within seven calendar days.

10 The *DiTolla* court addressed this issue "nostra sponte," 469 F.3d at 274, and decided "…under the provision of CAFA requiring courts of appeals to 'complete all action' on appeals 'not later than 60 days after the date on which such appeal was filed…,' 28 U.S.C. § 1453(c)(2), we are not required to deny the appeal despite the fact that it was docketed more than 60 days prior to the time that a panel of this Court granted the petition to allow it." *Id.* At 272.

that State's appropriate State official; or if not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement."

The "10 days after a proposed settlement of a class action is filed in court" is clear language, but has caused some confusion, as it does not mesh precisely with standard practices in initiating the Rule 23(e) judicial approval process in class action settlements. This process starts with "preliminary approval," which may be sought informally, with the documentation of the proposed settlement submitted to, but not filed in, the Court. Under this procedure, the first settlement-related document filed in court may be the Order granting preliminary approval, which typically attaches the settlement agreement and forms of class notice.[11] Settlement proponents have learned to assure CAFA compliance by sending the available documentation – even if preliminary approval has not yet been granted – to attorneys general within ten days of the first filing of a settlement-related document in court.

Defendants bear the burden of complying with CAFA's government notification provisions. Defendants are required to identify the appropriate officials, gather the necessary papers and other information, determine the residence of class members, perform state-by-state calculations of the relief for class members, and make (duplicative) reports to the officials. Defendants also suffer the penalty for any mistakes in providing such notice: "opt outs" by any or all class members long after the time for normal "opt outs" has expired. Section 1712(e) does not impose any outer time limit on such "opt outs," and does not expressly require the class member "opting out" to return the member's share of the settlement proceeds.

The required calculations by Section 1714(b)(7)(A) or (B) may be difficult to perform in advance of the filing of proof-of-claim forms. Mailed notices to class members are frequently returned undelivered, and their current addresses then must be researched and identified.

Section 1714(b)(5) requires that all contemporaneous side agreements between class counsel and defense counsel be included in the notice. Section 1714(d) delays the grant of final approval until 90 days after the required notices have been given.

Section 1714 does not state what the notified officials are to do with this information. It creates no express statutory right of standing, objection, or intervention, but governmental officials will undoubtedly feel entitled and/or obligated to act or speak up, and may in some cases wield substantial influence on class settlements and proceedings.

As a practical matter, several strategies have already emerged from notice experts working to comply with CAFA's Attorney General/Regulator notice requirements. Todd B. Hilsee and Shannon R. Wheatman PhD, President and Notice Director respectively of Hilsoft Notifications in Souderton, Pennsylvania, describes their approach as follows:

> - As a general rule in large, nationwide or particularly significant class action settlements, all state Attorney Generals as well as the United States

11 What is often termed "preliminary approval" is more properly described as "preliminary fairness review," *see Manual for Complex Litigation, Fourth* (Federal Judicial Center 2004), § 21.632, and may occur informally in chambers, or in connection with a "first fairness hearing". For a comprehensive contemporary treatment of the procedures and standards for settlement-purposes class certification and approval of a proposed class action settlement under Rule 23(e), *see In re Heartland Payment Sys.*, 2012 U.S. Dist. LEXIS 37326 (S.D. Tex. 2012).

Attorney General can be sent notice packages. Otherwise, a settlement may face risks or challenges stemming from omission of notification of some states, a problem easy to avoid with nationwide notification.

- Defendants, who stand to lose res judicata effect with a failure to notify governmental officials, have the responsibility for determining which state regulators should receive notification.

- While seeking preliminary approval, Courts can be asked to "bless" or approve the CAFA notice issuance plan, to give the parties additional peace of mind.

- The required notice documents can all be burned onto CDs for each Attorney General and Regulator, which keeps production and distribution costs to a minimum and avoids burdening recipients with mountains of paper too vast to review. A concise cover letter accompanying the CDs can eloquently describe the notification purpose and contents and everything should be mailed registered mail, return receipt requested.

In addition to helping ensure satisfactory performance of the new governmental notification requirements, notice experts may also become helpful for providing evidence to courts on geographic and audience data to help courts resolve the "1/3 - 2/3" issues under removal provisions, particularly for classes where class member names and addresses are unavailable.

Judicial Conference Study of, and Report on, Class Action Settlements

CAFA Section 6 provides that within a year of CAFA's enactment, the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall prepare and transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report on class action settlements, with particular focus on best judicial practices regarding fairness to class members and appropriateness of fees given risks and results.

Early Appearance of CAFA in Federal Decisions

Other early decisions invoking CAFA include the following:

- *Holland v. Cole National Corp.*, 2005 U.S. Dist. LEXIS 9862 (W.D. Va. May 24, 2005). Amount in controversy diversity threshold not met under CAFA (plaintiff failed to allege that more than $5 million was in controversy).

- *Lander & Berkowitz, PC v. Transfirst Health Services*, 2005 U.S. Dist. LEXIS 9604 (E.D. Mo. May 19, 2005). Remand to state court granted. Court found that the date of enactment of CAFA (February 18, 2005, the day it was signed into law by the President, not passage on February 17, 2005) governs its application. Case filed in state court on February 17, 2005 was not therefore subject to CAFA jurisdictional expansion.

- In re *Lupron Marketing and Sales Practices Litigation* (MDL No. 1430), 2005 U.S. Dist. LEXIS 9027 (D. Mass. May 12, 2005). Dictum in the context of court approval of federal MDL class action settlement: "The Act essentially consolidates all class actions with multi-state constituencies in the federal courts." *Id.* at *13.

- *Fears v. Wilhelmina Model Agency, Inc.*, 2005 U.S. Dist. LEXIS 7961 (S.D.N.Y. May 5, 2005). CAFA invoked in context of attorney fee application to "provide clarity into congressional intent with respect to the way in which attorneys' fee should be awarded in class actions, and that insight is that attorneys' fees in class actions are to be crafted so as to be related to the claims filed." *Id.* at **31-32.

Holland v. Cole National Corp. is noteworthy because it involved plaintiffs who sought to retain, rather than escape, federal jurisdiction over their consumer fraud claims. *Holland* involved a proposed plaintiff consumer class alleging fraud in connection with purported 50% off sales of prescription eyeglasses. Much of the *Holland* decision is taken up with a substantive analysis, and ultimate dismissal, of plaintiffs' civil RICO claims. In short, the court found that, although plaintiffs' claims that they were unwittingly induced into buying a $35 extended warranty and lens care kit, which in turn rendered the total purchase price of the eyeglasses to be greater than the "50% Off" promotion promised, may have constituted consumer fraud, but "otherwise is a square peg in RICO's round statutory hole. Holland's hidden charge claim . . . is not of the criminal dimension and degree necessary to invoke RICO's stark remedies." 2005 U.S. Dist. LEXIS 9862, *2. Once dismissal of the RICO claims was established, the remaining counts failed as well. Plaintiff did not meet the threshold jurisdictional requirement for bringing a Magnusson-Moss Warranty Act claim in federal court, nor did it appear from the complaint that the amount in controversy had "the potential of exceeding $75,000.00." *Id.* at *3-5. The *Holland* case was filed prior to CAFA's enactment date, and was therefore governed by the "old" provisions of § 1332. Nonetheless, the *Holland* court took note of CAFA, observing that, under CAFA's expanded jurisdictional provision, "diversity of citizenship exists." *Id.* at 43. Named plaintiffs listed in the complaint included residents of Virginia, Texas, and Georgia. The defendants were Delaware corporations with their principal places of business in Ohio. *Id.*

However, plaintiffs flunked the amount in controversy threshold for federal diversity jurisdiction under both the old and new provisions of § 1332. "Although Holland meets the diversity requirements contained in the Act, it does not provide a basis for subject matter jurisdiction because Holland has failed to allege that more than $5 million is in controversy." As the *Holland* court noted, while CAFA "expands the subject matter jurisdiction to federal courts over class actions in which at least one plaintiff class member is diverse in citizenship from defendant and where the amount in controversy exceeds $5 million . . . ." *Id.* at *45-46, "although Holland's allegations meet the requirement of diversity of citizenship, plaintiff fails to allege that more than $5 million is in controversy regarding her common law fraud claims." *Id.* at *46. The *Holland* plaintiffs indeed alleged that there were "many thousands of class members located throughout the United States," and that defendants generated revenues of "more than $50 million per fiscal year through the sale of extended warranties. . . ." *Id.* However, the named plaintiff "fails to allege that she, or other members of her putative class, have injuries resulting from defendant's fraud totaling more than $5 million. Neither the amount of revenue nor the recitation of the possibility of 'many thousands' of plaintiffs is enough to meet the jurisdictional amount."

Id. As the *Holland* court concluded "as the sum claimed by plaintiff in her complaint determines the jurisdictional amount, and plaintiff has not alleged enough damages to meet the standards included in the recent amendments to 28 U.S.C. § 1332(d), plaintiff cannot subject matter jurisdiction under it." *Id.*

Accordingly, the United States Magistrate Judge writing in *Holland* concluded and recommended that the complaint be dismissed. *Holland* is thus an early and ironic example of plaintiffs who wished to bring and keep their claims in federal court, rebuffed for failure to plead jurisdiction, even under CAFA's greatly expanded federal jurisdictional opportunities.

The issue in *Lander and Berkowitz, P.C. v. Transfirst Healthservices, Inc.*, was the CAFA "gate" issue: Was CAFA's enactment date February 17, 2005, when the Act was passed by Congress, or was it February 18, 2005, when the President signed the Act into law? The issue is critical, because CAFA's Section 9 states that amendments made by the Act apply to any civil action commenced on or after the date of enactment of the Act. Defendant Transfirst Healthservices argued that it was Congress that enacted a law, not the President. Plaintiffs' response: Enactment is the process of making an act into a law, which can occur only when the President signs an act into law, or when Congress enacts a law over a Presidential veto. The *Lander* court, in a succinct opinion, held that "the date of enactment of the Act is February 18, 2005, the day when it was signed into law by the President." 2005 U.S. Dist. LEXIS 9604 at *2. The *Lander* court cited the Tenth Circuit's *Pritchett* decision in support, not surprisingly, but also added, to its otherwise terse and businesslike decision, the following musical authority:

> Although it is certainly not binding precedent, the parties may recall a popular episode of the television series "Schoolhouse Rock" titled I'm Just a Bill. In that episode, Bill sang, "I'm just a bill/Yes, I'm only a bill/And if they vote for me on Capitol Hill/Well, then I'm off to the White House/Where I'll wait in a line/With a lot of other bills/For the president to sign/And if he signs me, then I'll be a law/How I hope and pray that he will/But today I am still just a bill." (Emphasis added.) 2005 U.S. Dist. LEXIS 9604, *2, n. 1.

The *Lupron* decision was a thorough analysis of a proposed class action settlement in a prescription drug retail price inflation action. The *Lupron* decision's single reference to CAFA is nonetheless important, although it appears in a footnote. The *Lupron* litigation was apparently enlivened by strategic multi-jurisdictional filings, and a resulting competition between plaintiffs' counsel electing, respectively, to pursue their clients' claims in state versus federal court. State/federal competition has been a recurring challenge to our dual court system in complex antitrust, consumer, and mass tort litigation, since these cases frequently involve primarily or solely state law-based claims, federal jurisdiction (at least in the non-antitrust consumer, and personal injury contexts) is diversity jurisdiction, and state courts are sometimes seen as more favorable fora within which plaintiffs may proceed to trial more quickly, and with perhaps more favorable results. Such a complication was apparently a feature of the *Lupron* case, and was remarked upon by the court in response to mutual critiques by federal and state court attorneys of each others' performance and bona fides. As the *Lupron* court remarked:

> Bringing an end to unseemly attempts to exact advantage over class action defendants or lawyers representing competing plaintiffs' claims by exploiting the potential for conflict inherent in a federal system of

> coordinate sovereigns was a principal argument advanced by advocates of the Class Action Fairness Act of 2005. The Act essentially consolidates all class actions with multi-state constituencies in the federal courts. 2005 U.S. Dist. LEXIS 9027, *2, n. 10.

The decision in *Fears v. Wilhelmina Model Agency* also involved judicial approval of a class action settlement, and an attorneys' fees and costs application, in an action brought on behalf of a class of fashion models against their agencies, to resolve a price-fixing scheme. In evaluating the fee request, the court invoked CAFA as the new fashion in attorneys' fees principles, specifically, the provision of CAFA (which itself did not apply to the *Fears* case, which was commenced prior to its enactment) to limit the attorneys' fees to a reasonable percentage of the amount of the settlement actually claimed by class members. In referring to CAFA, the court incorporated the Congressional intent by the bill into its attorneys' fees gestalt, specifically citing to the Congressional Record:

> Congressional intent is also pretty clear in the more recent Class Action Fairness Act ("CAFA"). See Class Action Fairness Act of 2005, Pub. L. 109-2 (Feb. 18, 2005). There, the language used urges the calculation of attorneys' fees based on a percentage of the class claims. The legislation evidenced congressional desire to reform the tort system and limit exorbitant attorneys' fees. Congressional action was unequivocal; it expanded federal diversity jurisdiction, addressed unfair class settlements, inflated attorneys' fees, and state court class action abuses:
>
> Class actions were originally created to efficiently address a large number of similar claims by people suffering small harms. Today they are too often used to efficiently transfer the large fees to a small number of trial lawyers, with little benefit to the plaintiffs.
>
> 151 Cong. Rec. H723, H725 (2005) (statement of Rep. Sensenbrenner (Rep.-R.), Chair., H.R. Comm. on the Jud.). Members of both political parties shared this sentiment. See 151 Cong. Rec. H723, H727 (2005) (statement of Rep. Boucher (Rep.-D.), H.R. Comm. on the Jud.). Consequently an award of attorneys' fees in excess of the claims made by the class could contradict the clear public policy of awarding settlement funds to claimants and not attorneys. 2005 U.S. Dist. LEXIS 7961, **15-16.

The *Fears* total common fund was nearly $22 million, but the claims total was less than half that, approximately $9.34 million. 2005 U.S. Dist. LEXIS 7961, *15. The court, taking its cue from CAFA and other recent attorneys' fee awards decisions (*see* 2005 U.S. Dist. LEXIS 7961 at **30-31) decided to utilize the smaller, claims made number, in setting an attorneys' fee award of 40%. Mathematically, that award approximated 17% of the total common benefit. And the court's CAFA-derived rationale is clearly stated:

> As already discussed . . . public policy is easily constructed from an analysis of the PSLRA and the Class Action Fairness Act of 2005, along with much case law. Taken together, they provide clarity into congressional intent with respect to the way in which attorneys' fees should be awarded in class actions, and that insight is that attorneys' fees in class actions are to be crafted so as to be related to the claims filed. It is in this fashion that I have awarded attorneys' fees and believe it to be fair to all concerned. *Id.* at **31-32.

We thus see CAFA's early impact upon the federal judiciary: A not-unexpected mix of skepticism and support. The early flurry of litigation over the enactment date issue has come to pass as predicted, and that issue, courtesy of the Tenth Circuit, is now settled. The impact of CAFA on moderating attorneys' fees also displays early adherents. Also noteworthy is the *Holland* example of plaintiffs who will attempt to utilize CAFA, supposedly an anti-plaintiff initiative, to facilitate the prosecution of state law-based claims in the federal fora of their choosing.

In In re *Relafen Antitrust Litigation*, 2005 U.S. Dist. LEXIS 21630 (D. Mass. 9/28/05), Judge Young observed, in the context of a lengthy decision granting approval to application for a $75 million nationwide class action settlement and attorneys' fees in a litigation involving brand name prescription price manipulation, the impact of CAFA on the traditionally dual-jurisdictional nature of antitrust litigation. The federal antitrust statutes enable "direct purchasers" (*e.g.*, wholesalers) to sue under federal anti-competition and price fixing statutes. "Indirect purchasers," *e.g.*, consumers, have been relegated to the state courts. CAFA changes this landscape. As Judge Young observed: "The effect of this recent legislation, however, may not be quite what the drafters intended [causing] antitrust cases to…flood back into the federal court.…" 2005 U.S. Dist. Lexis 21530 at *101, n.25.

Exodus and Prophecies

Early analysis of available state and federal data by Public Citizen[12] indicated, in light of CAFA, that much the time-consuming and complex class action work now spread nationwide over 9,200 state trial judges would slowly shift to 678 sitting federal trial judges. In California alone, class action cases formerly spread over 1,498 California trial judges were projected to slowly shift to the 62 federal trial judges in California. More recent attempts to quantify the class action shift to federal courts confirm the view that the federal courts are where the class action action is.[13]

The optimistic view of CAFA was that it could lead to new levels of cooperation and discourse among federal and state governmental authorities and state courts. The governmental notification provisions give the United States and affected states, which in many cases may include most or all states, unprecedented opportunities to speak up and work to improve class action settlements. Similarly, it was suggested that, as federal courts increasingly became arbiters of the state substantive laws which apply to most consumer class actions, they would ask and rely upon state judges to serve as a special masters in the federal class actions, pursuant to Federal Rule of Civil Procedure 53, overseeing pre-trial issues, particularly those dependant on understanding and development of substantive state consumer and tort law. This author went so far as to express the hope, in an early CAFA article written for the Canadian bar, that "perhaps the best of the broad and rich state statutory and jurisprudential law of consumer protection and fair business practice that has been developed by State legislatures and courts will be adopted in an emerging federal common law of consumer protection." Cabraser, Vincent & doAmaral, "The Class action Fairness Act of 2005: The Federalization of U.S. Class Action Litigation" (2005). Much of the text of this section is adapted from that article.

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12 National Center for State Courts, State Court Caseload Statistics 2003, State Court Structure Charts. 2003 Judicial Business, Annual Report of the Director of the Administrative Office of the U.S. Courts, Table X-1A.

13 *See, e.g.*, Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. Pa. L. Rev. 1593, 1610 (2008) ("CAFA has increased not only the number of class action removals to federal court, but also the number of class action original filings in federal court.; 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, 1754 (2008) (analysis of class actions in federal courts "provides support for the conclusion that the federal courts have seen an increase in diversity removals and, especially, original proceedings in the post-CAFA period as a result of the expansion of the federal courts' diversity of citizenship jurisdiction"); BNA Class Action Litig. Rep. Feb. 24, 2012, at 225 (after CAFA's enactment, "[C]onsumer class action filings increased 577% in the district courts in the Ninth Circuit!").

Other optimistic predictions were that CAFA would largely amplify existing jurisprudential trends. Meritorious class action consumer and business tort claims would continue to be certified in the federal courts for litigation and settlement purposes, though increased scrutiny of class actions would likely have a culling effect, particularly upon claims at the margin. The point was made that, historically, federal and state courts have been equally likely – or unlikely – to certify litigation classes, only one in four of which is certified:

> Our data, however, lend little support to the view that state and federal courts differ greatly in how they resolve class actions. For example, state and federal courts were equally unlikely to certify cases filed as class actions. Both state and federal courts certified classes in fewer than one in four cases filed as class actions. Although state courts approved settlements awarding more money to the class than did federal courts, that difference was a product of the size of the class; individual class members on average were awarded more from settlements in federal courts than in state courts.

An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation, by Thomas E. Willging and Shannon R. Wheatman, Federal Judicial Center 2005; pp. 4-5.

The author spoke with (now subdued) anticipation that: "Those who look to the litigation process to enforce and protect consumers' rights to safe products, fair pricing, and honest business practices can only hope that the federal courts will respond with major new class action rulings and solutions required to federally adjudicate significant, nationwide consumer harms and both inter- and intra-state business torts formerly handled in the states' court systems." Supreme Court decisions on points of law under other rules and statutes – Rule 23 in *Dukes*[14] and the Federal Arbitration Act in *Concepcion*[15] – not directly linked to CAFA have temporarily dampened such hopes.

Yet the challenge of CAFA, embodied in its express purposes, remains: to federalize class actions not to eliminate them, but to utilize them as national vehicles to vindicate national rights and interests held by the makers, marketers, and users, of the goods and services that constitute our national economy. The dual goals of CAFA: to protect and promote competition and innovation by makers, and to preserve consumers' active roles in protecting themselves and each other to ensure the resulting services and products are honest and safe (by prompt adjudication of legitimate claims), are meant to be reconciled, not nullified, by CAFA. Those who declare, in victory or defeat, that CAFA was a decisive partisan battle that corporations won and consumers lost, must be proven wrong. Lawmaking can be a fraught and partisan process, but one side's bill, when enacted, becomes a law for all the people.

14 *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011).
15 *AT&T Mobility LLC v. Concepcion*, ___, U.S. ___, 131 S. Ct. 1740 (2011).

III. RECONCILING LEGISLATED INTENT, EXPRESS STATUTORY PURPOSE, AND FEDERAL RULES PRINCIPLES

As *Tanoh v. Dow Chemical Co.*, 561 F.3d 945, 952 (9th Circuit 2009), observed,

> Congress enacted CAFA in 2005 to "assure fair and prompt recoveries for class members with legitimate claims; [2] restore the intent of the framers . . . by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and [2] benefit society by encouraging innovation and lowering consumer prices."

CAFA § 2,119 stat. at 5.

Other appellate courts have similarly noted these express statutory aims.[16]

The enactment of CAFA has sometimes been perceived, by plaintiffs' advocates, as a victory for defendants because it moves the class action playing field to a venue that both plaintiffs and defendants frequently (mis)perceive as inherently tilted against plaintiffs. Thus, the transfer of a case to federal court may be misapprehended, by both sides, as a defendant's victory. The federal courts have disabused litigants of this notion, and of the corollary that Congress, in enacting CAFA, has somehow conferred upon defendants a right to favorable (anti-class) treatment that operates upon removal to federal court.

As the Eighth Circuit tartly noted in *Plubell v. Merck*, 434 F.3d at 1073, in remanding a Missouri statewide consumer class action, brought to assert Missouri's statutory consumer fraud claims:

> Merck claims that it is prejudiced because CAFA confers a right to be in federal court. However, nothing in CAFA grants such a right. According to CAFA, its purposes are to: "(1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for Federal court jurisdiction of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices." . . . The first purpose relates only to plaintiffs, while the second and third purposes speak to society-at-large's benefits, not to defendants'. While some defendants may benefit by having their cases in federal instead of state court, this is not a stated purpose of the Act.

This principle bears repeating, because internalizing it enables litigants and courts to maintain a correct and balanced view of the statute and its goals, and, more importantly, to act accordingly: The express statutory purpose of CAFA is not to benefit defendants per se. It is to enable litigation to reflect the contemporary economic and social realities of the nationwide marketing, promotion and sale of goods and services, to speed recoveries by

16 "Section 2(b) of CAFA states that '[t]he purposes of this Act are to (1) assure fair and prompt recoveries for class members with legitimate claims; (2) 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) benefits society by encouraging innovation and lowering consumer prices.' 28 U.S.C. § 1711 note." *Morgan v. Gay*, 471 F.3d 469, 473 (3rd Circuit 2006); accord, *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1330 (11th Circuit 2006). *Plubell v. Merck & Co.*, 434 F.3d 1070, 1073 (8th Circuit 2006).

those with legitimate claims arising from wrongdoing or defect in such goods and services, and to benefit society-at-large in the process. CAFA's stated purposes harmonize to a remarkable degree, with the overarching principles of the federal rules, as laid down in Fed. R. Civ. P. 1. These purposes also recognize the underlying truth of our free market system, founded on our social contract: Everyone benefits from the innovation and lower prices the proper operation of our free market system is intended and expected to deliver, and federal court management and adjudication of the "interstate cases of national importance" that arise when freely marketed products and services are alleged to cause injury or damage best promotes the shared societal interest in better, newer, safer, and more honestly marketed products and services, at lower prices. It recognizes that producers and consumers are not natural enemies, struggling in the Hobbesian stateless wilderness of each against all.

IV. NECESSITY AS THE MOTHER OF A CHOICE OF LAW REVIVAL

As technology advances, and corporate ability to mass-produce and distribute products nationally increases, the legal framework of state laws governing these companies is becoming increasingly obsolete and inadequate, in the absence of the predictable power to apply them nationwide through the predictable operation of choice-of-law rules. Corporations are creatures of state law, but now operate far beyond the provincial bounds our framers could have envisioned for them. As a practical matter, in the absence of a substantive federal law to regulate corporate marketing behavior, and given the reluctance of courts to apply an appropriate state's law to the nationwide harm a product defect or dishonest marketing has inflicted, major corporations may now effectively operate both beyond the reach of the states historically charged with regulating them, in a free zone devoid of systematic federal regulation.

CAFA brings such suits into federal court, to promote a nationwide solution, but provides no ready-made substantive legal framework. CAFA is a procedural statute, but lacks what would seem to be an elementary procedural predicate: a standard choice-of-law doctrine. "Because most products are mass produced and mass distributed, without any clear sense of where in the national market they might end up, the need for federal uniformity would seem especially pressing."[17] The question of choice of law inevitably arises when these products prove defective across multiple states. The basic choices have been to choose one state's law to apply to the entire class, or, in the alternative, to apply the laws of every state with an interest in the litigation. The former approach has the *imprimatur* of the United States Supreme Court as a Constitutionally permissible solution.[18]

In *Phillips Petroleum Co. v. Shutts*, the Supreme Court defined the constitutional minimum choice-of-law analysis that must be conducted before a court may apply the law of its own forum state (or that of any other single state) to a nationwide class: the presence of "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[19] In essence, the *Shutts* rule provides that the choice of a default law – that is, a forum's own law – is constitutionally acceptable so long as it meets its minimum contacts test. Notwithstanding permission from our highest court, in the nationwide class action context, federal courts have been reluctant to take advantage of the *Shutts* rule, and have frequently denied class certification, as inherently unmanageable, upon recognizing that multiple states might have

17 Samuel Issacharoff and Catherine M. Sharkey, "Backdoor Federalization," 53 UCLA L. Rev. 1353, 1385 (2006). Instead of designing different products according to the laws of the destination state, manufacturers tend to design uniform products that conform to the laws of the state with the most stringent requirements. *Id.*

18 *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

19 472 U.S. at 818.

an interest in the controversy. This identification of multiple interests is, of course, only the first step in a multi-phase choice of law analysis, but many courts have been reluctant to go farther. Prior to CAFA's enactment, this reluctance made some sense: The state court system was always available to entertain statewide class actions, and state courts were, presumably, both more familiar and more comfortable with their own native laws. The high-water marks of this dispersive attitude was the Seventh Circuit's decision in In re *Bridgestone/Firestone*.[20] In *Bridgestone/Firestone*, the Seventh Circuit condemned nationwide classes as excrescences of "central planning," and declared what was interpreted as a one-law, one-class rule, "no class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of [Rule] 23(a), (b)(3)."[21] The alternative preferred by the Seventh Circuit in *Bridgestone/Firestone* was a series of decentralized, single-state classes (or individual cases), through which the litigation would eventually mature, as a process of multiple trials in multiple places gradually revealed the merits and value of the case.

One would think that CAFA spelled the end of the *Bridgestone/Firestone* regime: it was designed to eliminate the proliferation of statewide or nationwide classes in the state courts themselves. But CAFA lacked a uniform choice-of-law provision that would have armed the federal courts in choosing an appropriate state law to govern the new cases before them.[22] One solution would have been to articulate the *Phillips Petroleum v. Shutts* Constitutional choice-of-law standard in the CAFA statute itself.[23] A more specific amendment was actually proposed as an amendment to CAFA, by Senators Dianne Feinstein and Jeff Bingaman. They proposed an amendment to CAFA that attempted to resolve the conflict-of-law problem, which "if left uncorrected, could leave many properly filed multistate consumer class actions without a forum."[24] The amendment would have given courts two options: (1) to apply the substantive law of one state to all class members; or (2) to make a concerted effort to utilize subclasses.[25] By providing federal judges with this framework, the proposed amendment would have provided a feasible alternative to the denial of class certification altogether in the mere presence of complex choice-of-law issues. This amendment, and many others fell victim to the CAFA "no amendment" rule. CAFA became law without a choice-of-law provision.

Not all courts have avoided the responsibility to make a principled and complete choice-of-law analysis in the context of considering the certification of a nationwide class proceeding under state law. The complexity of the choice-of-law analysis, however, is most complex where it is most needed, and frequently called for: in multidistrict litigation. The Judicial Panel sends cases to a single forum to facilitate the consistence determination of class issues. In doing so, however, it places transferee courts in the position of conducting not one, but two layered choice-of-law analyses.

It is a matter of long-settled law that a federal court hearing a case solely on diversity must apply the choice-of-law rule of the state in which it sits.[26] So far, so good. However, when multiple cases are transferred from district courts in multiple states to a single MDL transferee court, that court must frequently consider not only the choice-of-law

20 *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002).
21 288 F.3d at 1015.
22 Timothy Kerr "Cleaning Up One Mess To Create Another: Duplicative Class Actions, Federal Courts' Injunctive Power, and the Class Action Fairness Act of 2005," 29 Hamline L. Rev. 218, 223 (2006).
23 *See* Elizabeth J. Cabraser "The Manageable Nationwide Class: A Choice-of-Law Legacy of *Phillips Petroleum Co. v. Shutts*," 74 U.N.K.C.L. Rev. 543 (2006).
24 151 Cong. Rec. S1157-02, S1167 (Daily ed. Feb. 9, 2005) (Statement of Sen. Bingamen).
25 *Id.* at 1166.
26 *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

rule of the state in which it is situated, but the choice-of-law rules of the transferor courts' forum states, as well. Frequently, these choice-of-law rules themselves differ. The exercise of conducting and completing a choice-of-law analysis in such circumstances is possible, and has been accomplished, but is demanding and results in such extended decisions as In re *Mercedes-Benz Tele Aid Contract Litigation* (MDL No. 1914), 267 F.R.D. 46 (D.N.J. 2009) (choice-of-law analysis and resulting nationwide class certification under New Jersey law); 267 F.R.D. 113 (D.N.J. 2010) (motion for decertification denied).

In the *Mercedes-Benz* litigation, the MDL transferee court was required to apply the choice-of-law rules of six different states, in managing a motion for class certification that would have affected the ten separate actions transferred to it. The court thus was required to attain and apply a familiarity not only with New Jersey's choice-of-law doctrine, but those of California, Illinois, Missouri, New Jersey, New York and Washington.[27] Four of these states followed the "most significant relationship" test laid out in the Restatement (Second) of Conflicts of Laws. California had a somewhat different test.

Arguably, prior to CAFA, the *Mercedes-Benz* transferee court may have been tempted to do what other MDL courts did in pre-CAFA days: stop the process at the point at which it realized that multiple states' choice-of-law doctrines, or at least multiple states' interests in seeing their respective laws applied – would be involved in the analysis.[28]

That the Mercedes-Benz court did not shrink from this task, particularly when faced with serial attacks on class certification opposition, a 23(f) appellate petition, and multiple motions for decertification, is to its credit. However, this does not change the fact that this task was far more difficult, or at least tedious, than it should be. There should be some mechanism, by statute or rule, that could assist courts in making the choice that the Constitution permits them to do: to select a law or laws to govern multistate or nationwide disputes so as to decide common questions of fact in a consistent, non-repetitive and conclusive manner.

Choice-of-law is a perennial least-favorite law school subject, and one that engenders confusion, resistance, and resentment among practitioners and jurists alike. In the absence of a federal substantive law of consumer fraud or product liability, the choice from among multiple states' laws cannot be avoided. It is certainly not avoided in non-class disputes which come before the federal courts on the basis of diversity. To avoid the exercise because an action is a class action rather than an individual case suggests that the procedural, and perhaps the substantive, rights of the parties are being abridged because of a choice or an effort by one side to proceed under a particular Federal Rule. There is thus, on the part of courts, a necessity to grapple with the choice-of-law labyrinth that exists under the present law, and to develop, by virtue of increased experience in conducting choice-of-law analyses, a dependable jurisprudence of choice-of-law in the nationwide state-law-based class action context. The *Mercedes-Benz* decisions of Judge Debevoise are one example, but more are needed.

27 267 F.R.D. at 119.
28 *See e.g.*, *In re Propulsid.*

V. CAFA AND *ERIE*: THE CHALLENGE OF PRESERVING STATE SUBSTANTIVE LAW IN THE FEDERAL REALM

Cases over which the federal courts have diversity jurisdiction have engendered a long established culture of deference by federal courts to state substantive law. The federal common law is constrained by reference to federal statutes. Federal courts are not free to alter or enhance the state statutory and common law that governs the state law claims that come before them. State substantive law is intended to govern state claims in federal courtrooms. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

This is frequently a difficult task. The development of the common law is an ongoing process, and is not equally advanced or detailed in every substantive area in every state. Federal courts are thus often called upon to make an "*Erie* guess" – to discern how the highest court of a state would rule on a matter it has not yet decided. An *Erie* guess cannot be a wild guess, nor do federal courts have an unfettered license to create. "When making an *Erie* guess, our task is to attempt to predict state law, not to create or modify it." *SMI Owen Steel Co. v. Marsh USA, Inc.*, 520 F.3d 432, 445 (5th Cir. 2008).[29]

Federal courts frequently confront a gap in the substantive state law – or at least the absence of a definitive articulation of a specific legal point by a state's highest court. They have accordingly developed a hierarchy of deference, but with built in discretion. Federal courts "defer to intermediate state appellate court decisions unless convinced by other persuasive data that the highest court of the state would decide otherwise." *First Nat'l Bank of Durant v. Trans Terra Corp.*, 142 F.3d 802, 809 (5th Cir. 1998).

Prior to the enactment of CAFA, federal courts often voiced reluctance to certify classes that were dependent on state law, on grounds of *Erie* deference – or at least concern over making an *Erie* guess with broad ramifications – explicitly leaving to state courts responsibility for both the class certification decisions, and the articulation of the appropriate substantive law. A prominent example of this stance is the Fifth Circuit's decision reversing nationwide class certification in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). Among the array of reasons articulated by the *Castano* court for its rejection of the class are the following "manageability problems" invoked to defeat Rule 23(b)(3) certification:

> [D]ifficult choice of law determinations, subclassing of eight claims with variations in state law, *Erie* guesses, notice to millions of class members, further subclassing to take account of transient plaintiffs . . . .[30]

The *Castano* court's deference to state substantive law extended to an express prescription for the maturation of the mass tort claims: utilization of the decentralized state court system for multiple adjudications (and perhaps statewide classes), a theme consistent with the decentralized preference expressed by the Seventh Circuit in *Bridgestone/Firestone* and *Rhone-Poulenc*:[31]

> Through individual adjudication, the plaintiffs can winnow their claims to the strongest causes of action. The result will be an easier choice of

29 This oft-cited formula was coined in *United Parcel Service, Inc. v. Weben Indus., Inc.*, 794 F.2d 1005, 1008 (5th Cir. 1986).
30 84 F.3d at 747.
31 *In re Rhone-Poulenc Rorer*, 51 F.3d 1293 (7th Cir. 1995).

> law inquiry and a less complicated predominance inquiry. State courts can address the more novel of the plaintiffs' claims, making the federal court's *Erie* guesses less complicated. It is far more desirable to allow state courts to apply and develop their own law than to have a federal court apply a kind of Esperanto [jury] instruction.[32]

The passage of CAFA largely extinguished the opportunity for state courts to do what *Castano* deemed more desirable: to develop their own law in the mass action/class action context. This opportunity is gone because the class action (and purported "mass action") cases are now in federal court – the very court that *cannot* innovate and extend the substantive law governing the claims themselves. The state courts, as laboratories of innovation, have been closed in the very cases most needful of such an approach.

Federal courts, long reluctant to make "difficult choice of law determinations" must now do so. Federal courts can no longer punt on "complicated" *Erie* guesses. These uncomfortable tasks can no longer be avoided, except by the expedient of simply denying class certification in every case that may involve multiple states' laws – the precise population of mass actions that CAFA redirects to federal courts for a national solution.

The challenge of fidelity to state substantive law will only become more difficult as time passes, as the state court systems that formerly developed substantive law in the context of the class actions they handled will no longer be doing so. Gaps will widen, and *Erie* guesses will have fewer appellate decisions, and few state jurisprudential data, to guide them.

CAFA has placed a two-layered task in the care of the federal courts:

1. To engage in difficult choice-of-law determinations and decide which state or states' laws will govern the substantive issues in the class actions that come before them, in order to decide whether to certify such classes, on which issues, and whether to cast them as statewide or nationwide classes; and

2. To faithfully apply the substantive law of the state whose law they have chosen.

In short, federal courts, post-CAFA, must do more and more of the state courts' most important and challenging work – the management of state law class and mass actions – with less and less guidance from state substantive law, which will have fewer and fewer opportunities to develop in the class action/complex litigation context.

VI. THE MDL EFFECT

By some accounts, we are living in a post-class action world of aggregate litigation, a realm of Rule 23 alternatives: quasi-class actions, consolidations, aggregations and MDLs. It is a complex litigation landscape in which experimentation with anything but class actions appears to be case management fair game. There is some truth to this, at least from the practitioners' eye view, but it may be that we are litigating through a transitional period, as courts attempt to adjust to the new paradigm of state law cases in the federal courts, of

32 84 F.3d at 750, quoting *Rhone-Poulenc*, 51 F.3d at 1300.

defendants' antipathy toward class certification (unless and until it is time to settle the case), and of uncertainty as to the appellate viability of classes certified for purposes of trial.

One thing is especially certain: More cases are coming into federal courts as components of "MDLs" (multidistrict litigation centralized in one federal district under 28 U.S.C. § 1407) than by any other means. Increasingly these MDLs are comprised of state law personal injury tort claims (not likely candidates for class treatment under current trends) and state law consumer claims (routine candidates for class treatment under many states' consumer fraud acts). The latter category of MDL aggregate, termed "Sales and Marketing Practices Litigation" in the nomenclature of the Judicial Panel on Multidistrict Litigation, makes up an increasing part of the Panel's docket. In the January 2012 MDL hearing docket, for example, 4 out of 17 total cases were "Sales and Marketing Practices" litigation. That is, the Panel transferred and centralized to a single federal forum multiple class actions asserting non-personal injury consumer fraud claims for economic loss, in which individual damages are usually small, and claims are brought under statutes designed to facilitate consumer redress and deter unfair business practices. There is no exact federal statutory corollary, although sometimes such claims intersect with federal Civil RICO claims, or even antitrust violations.

Despite the fairly recent use of the Rule 23 mechanism to resolve some large scale personal injury mass torts, such as the *Diet Drugs* litigation, which was certified, in part, for litigation purposes under Rule 23(b)(2)/(b)(3) and settlement under Rule 23(b)(3),[33] "The *Zyprexa* and *Ephedra* settlements, as well as the more recent *Guidant* and *Vioxx* settlements, suggest that the MDL process was supplemented and perhaps displaced by the class action device as a procedural mechanism for large settlements." Thomas E. Willging & Emery G. Lee III, "From Class Actions to Multidistrict Consolidations: Aggregate Mass Tort Litigation After Ortiz," 58 *U. Kan. L. Rev.* 775, 801 (2010. This is one aspect of the "MDL effect."

MDLs and class actions retain a symbiotic relationship in many complex litigation settings. MDL transfer does not itself vest a Transferee Court with trial jurisdiction over transferred cases; MDL centralization is limited by statute to pretrial proceedings. One such pretrial proceeding is the class certification process, and the Panel regularly invokes the need to "prevent inconsistent pretrial rulings on class certification" as a basis for transfer and centralization." (*See, e.g.*, recent Transfer Orders on the Judicial Panel's website, jpml.uscourts.gov, including March 7, 2012 Transfer Order in *In re: Colgate-Palmolive Softsoap Antibacterial Hand Soap Marketing and Sales Practices Litigation*, MDL No. 2320.) A court to whom "suits were transferred under MDL for pretrial management" may still dispose of all transferred cases via a comprehensive nationwide class action settlement of claims arising under many states' laws, eliminating the need for multiple transferor courts to deal with statewide class cases or individual suits. *See In re: Heartland Payment Systems, Inc. Consumer Data Security Breach Litigation (MDL No. 2046)*, 2012 U.S. Dist LEXIS 37326, *30 (S.D. Tex 2012).

A more thorough exploration of class actions in MDL proceedings is beyond the purview of this article. For analyses of the options facing MDL courts in the class certification context, *see* John Beisner, "Class Action in MDL Proceedings: When is the Court's Job Done?" (The Sedona Conference® 2012). A recent (April 16, 2012) *Remand Order* by the Judicial Panel on Multidistrict Litigation in In re *Light Cigarettes Marketing*

33 *See In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524 (3d Cir. 2009 (for an account of the litigation and settlement of class claims.

and Sales Practices Litigation (MDL No. 2068) illustrates circumstances in which the MDL transferee court may not complete the class certification process in all the cases transferred to it, deferring to the transferor courts who will try such cases: when separate, non-overlapping, statewide classes (the type of cases most likely to stay in state courts prior to CAFA) are MDL components. In *Light Cigarettes*, the Court utilized a "bellwether" class certification process to rule on, and deny, class certification for four states. It appearing unlikely there would be bellwether classes certified or tried in the MDL, plaintiffs in four remaining statewide putative class actions moved for and obtained remand back to their respective transferor courts. *See* In re *Light Cigarette Marking and Sales Practices Litigation*, 2012 U.S. Dist. LEXIS 55458 (JPML 2012).

Whatever the fate of the individual mass tort actions or centralized class actions after they are transferred to a single federal judge for coordinated case management, the fact of MDL centralization has cast them as an aggregate. Hence the growing judicial recognition that, whether Rule 23 has ever expressly invoked, such aggregates, in terms of the judicial supervising role at least, are "quasi class actions,"[34] in function if not in name. The phenomenon is so widespread that the American Law Institute's *Principles of the Law of Aggregate Litigation* (2010)devotes much of what was originally considered as a guide to class actions to the ethical and managerial uses of other aggregate litigation forms.

Just as class actions began, long before the enactment of modern Rule 23, as creatures of equity,[35] contemporary MDLs, as quasi class actions, are considered to be "subject to the general equitable power of the court" merge them through completion. *Zyprexa*, 467 F. Supp. 2d at 262. One concern is that this power is exercised without the framework of a clear-cut rule, such as Rule 23, which has clearly defined roles for named plaintiffs, absent class members, defendants, counsel, and the court. There is some indication that, in the context of class certification for settlement purposes at least, this traditional procedural framework, with its robust jurisprudential resources, may yet be superior, within the meaning of Rule 23(b)(3), to other emerging or experimental alternatives for fairly and efficiently adjudicating the controversy.[36]

The refusal of some courts to certify settlement classes has led a number of recent mass actions to settle outside of the class action process. The highly publicized multidistrict Vioxx and Zyprexa settlements are examples of non-class mass settlement.[37] The concurring opinion of Judge Scirica in *Sullivan v. DB Investments, Inc.* relates this phenomenon to the *Amchem* decision, opining that the Supreme Court's opinion has led "some practitioners to avoid the class action device," and noting that "some observers believe there has been a shift in mass personal injury claims to aggregate non-class settlements."[38] Judge Scirica seems to view this avoidance as a problem – perhaps one that a return to formal class action settlements would solve.

> [The increase in large non-class settlements] is significant, for outside the federal rules governing class actions, there is no prescribed independent review of the structural and substantive fairness of a settlement including

34 *See In re Xyprexa Prods. Liability Litig.* (MDL No. 1596), 451 F. Supp. 2d 458, 477 (E.D.N.Y. 2006); 671 F. Supp. 2d 397 (E.D.N.Y. 2009) (the sine qua non of a quasi class action is enforced judicial control of counsel conduct and attorney fees).
35 *See* Geoffrey C. Hazard, "An Historical Analysis of the Binding Effect of Class Suits," 146 U. Pa. L. Rev. 1849, 1861-65 (1998).
36 *See, e.g.*, *Sullivan v DB Invs., Inc.*, 667 F.3d 273, 334 (3d Cir. 2011) (Scirica, J. concurring).
37 *See, e.g.*, Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 Geo. Wash. L. Rev. 506 & n.5, 513 (2011) (describing settlements).
38 *Sullivan*, 667 F.3d 273, 333 (3d Cir. 2011) (Scirica, J., concurring).

evaluation of attorneys' fees, potential conflicts of interest, and counsel's allocation of settlement funds among class members.[39]

The increasing tendency of MDL courts to label the assembly of cases before them as "quasi class actions" invoke the Rule 23 infrastructure to fill a perceived gap in judicial equitable or supervising power may signal a move back to Rule 23 for mass tort settlement purposes. There have been renewed calls for the addition of a settlement class pursuant to Rule 23, to more clearly enable the class settlement of cases that could not be tried as class actions.[40] Indeed, there is a growing feeling that application of the procedural advantages, protections and certainties of formal class settlement to cases that are problematic or controversial as trial-purposes class actions would be facilitated by adding an express "settlement class" category to Rule 23.[41]

VII. CONCLUSION

The task of delivering upon CAFA's stated promises is a profound challenge. The CAFA statute itself did not supply many of the tools some would consider necessary, or at least useful, for its implementation. There is no uniform choice of law provision; there is no federal common law of consumer fraud or fair marketing practices; and there is no express provision that facilitates collaboration between the federal and state court systems as federal courts struggle to find, to know, and to apply state common and statutory law, with deference and fidelity to the states themselves. We can continue to view CAFA with cynicism and sarcasm, and thus enable it to fulfill what some had hoped or feared were its short term partisan, polarized purposes. Or we can take the statute at its words, and work to develop case management techniques with the tools at hand (the federal rules and available choice-of-law doctrines) to recognize the express and legitimate purposes of the statute itself, and to realize them in our federal courts. To do so will work a truly transformational reform, and will achieve in truth what some have lampooned CAFA for invoking with irony: class action fairness.

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39 667 F.3d at 304.

40 *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 620 (1997), provided a partial solution, stating, "Whether trial would present intractable management problems . . . is not a consideration when settlement-only certification is requested, for the proposal is that there be no trial." While more recent decisions have built upon *Amchem* to increase the potential for class settlements in cases that might resist practicable class trials, *see, e.g.*, *Sullivan v. D.B. Indus., Inc.*, 667 F.3d 273 (3d Cir. 2011), *Amchem* has been perceived by others as a barrier to mass tort class settlements.

41 In 1996 the Advisory Committee proposed a fourth type of class under Rule 23(b), essentially a Rule 23(b)(4) "settlement class." The proposed rule provided that "the parties to a settlement [may] request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision b(3) might not be met for purposes of trial. As noted in Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811, 819 (2010), the majority of contemporary certified class actions have been certified expressly for settlement purposes: "68% of the federal [class action] settlements in 2006 and 2007 were settlement classes."