

CONSUMER CLASS ACTIONS AFTER CAFA

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TABLE OF CONTENTS

I. Introduction	304
II. Changes Wrought by CAFA	305
A. Overview	305
1. Consumer Class Action Bill of Rights.....	305
2. Coupon Settlements	305
3. Settlements in Which Plaintiffs Incur an Economic Loss	307
4. Ban on Greater Awards to Local Plaintiffs	307
5. Notice of Settlements	308
6. Expanded Federal Diversity Jurisdiction.....	310
7. Relaxed Removal Requirements	313
8. Expanded Appellate Jurisdiction.....	313
III. CAFA: A Reaction to Class Action Abuses	314
IV. How Courts Have Interpreted CAFA.....	316
A. Burden of Proof: Home-State and Local-Controversy Exceptions	316
B. CAFA’s Local-Controversy Exception	317
C. CAFA’s Permissive “Interests of Justice” Exception.....	318
D. Burden of Proof: Removal—Proving Federal Jurisdiction.....	320
E. Standard of Proof: Amount in Controversy.....	321
F. CAFA’s Effective Date: When Is a Class Action “Commenced”?	321
V. Life Under CAFA.....	323
A. Overview: The Sky is Not Falling on Consumer Class	

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Actions	323
B. Most Multi-State Class Actions Will Land in Federal Court	323
C. The Recipe for Remand	325
D. Multi-State Class Actions: CAFA Helps Certify Classes (Maybe).....	325
1. Overview	325
2. Deny Certification: The Pre-CAFA Trend.....	327
3. The CAFA Era Need for Certification	328
4. Choice of Law Under CAFA	332
5. Applying the Law of One State to a Nationwide Class: <i>Shutts</i> as a Guide	333
6. Cases Applying Multiple State Laws: The <i>Klaxon</i> Trend.....	335
7. CAFA and State Consumer Protection Laws	338
VI. Conclusion	339

I. INTRODUCTION

The Class Action Fairness Act (CAFA) became the law of the land on February 18, 2005.¹ The legislation ushered in a consumer bill of rights and greatly expanded federal diversity jurisdiction over class actions.² However, the extent of CAFA's reach into the field of consumer class actions is far from certain. Judicial wrangling over CAFA's interpretation has left the door open for many possible scenarios, including those that may be positive for plaintiffs. In all likelihood, CAFA will facilitate consumer class actions over the long term because CAFA has given federal courts a strong mandate to capture the benefits of beneficial class actions.

This Article examines CAFA's likely impact on consumer class actions. Part II discusses the changes brought by CAFA, emphasizing its effect on settlements and the expansion of federal jurisdiction over class actions. Part III briefly discusses the powerful forces behind CAFA, which, fortunately, failed to corrupt CAFA. Part IV outlines the hottest issues regarding CAFA's judicial interpretation, including the latest case law and analysis. Finally, this Article argues for a shift in federal jurisprudence that will result in increased certification of consumer class actions in federal courts.

1. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in various sections of 28 U.S.C.).

2. *Id.* § 2(b), 119 Stat. at 5.

II. CHANGES WROUGHT BY CAFA

A. Overview

CAFA made three major changes to federal class action procedure. First, a “consumer class action bill of rights” was enacted to regulate class action practice, including notice and coupon settlements.³ Second, CAFA expands federal diversity jurisdiction over class actions.⁴ Third, the removal requirements for class actions filed in state court have been relaxed.⁵

1. *Consumer Class Action Bill of Rights*

CAFA’s consumer class action bill of rights focuses on three types of settlements. First, CAFA regulates coupon settlements. Second, CAFA raises the bar for a court’s approval of settlements in which plaintiffs incur an economic loss. Third, CAFA bans settlements in which some plaintiffs receive a greater sum of damages merely because they live in greater proximity to where the action is filed. In addition to the other changes, CAFA changes the rules on class notice.

2. *Coupon Settlements*

CAFA sets forth new rules for the review of coupon settlements.⁶ Federal courts are instructed to scrutinize coupon settlements more closely. Among CAFA’s changes are: (1) a requirement that the settlement be “fair, reasonable, and adequate”; (2) restrictions on fees; and (3) the disbursement of unclaimed coupons to charitable or governmental organizations.⁷

Unfortunately, Congress never defined when a settlement is a coupon settlement. This omission will likely trigger a great deal of litigation in the future, and vigilant litigators have case law at their disposal to argue that a settlement is not a coupon settlement. For example, courts have yet to reach a consensus as to whether free minutes in a wireless provider class action amounts to a coupon deal.⁸

3. 28 U.S.C.A. §§ 1711–1715 (West 2006).

4. *Id.* § 1332(d).

5. *Id.* § 1453(c) (providing appellate jurisdiction).

6. These are settlements in which plaintiffs are compensated with coupons for products or services rather than monetary awards.

7. 28 U.S.C. § 1712.

8. See Gregory P. Joseph, *The Class Action Fairness Act of 2005: A*

The court must find that a settlement is “fair, reasonable, and adequate.”⁹ However, this does not provide a different standard for “substantive fairness” than the standard already used in Rule 23 jurisprudence. Congress seemed to believe that federal judges would apply this universal standard differently than state court judges, even though federal judges have signed off on many coupon deals. In short, coupon deals are still allowed, and the general rules favoring approval of settlements have not been significantly altered.

Attorneys’ fees in coupon settlements are also subject to greater scrutiny. Under CAFA, contingency fees are based on those coupons actually redeemed, not those merely distributed.¹⁰ The court may enlist experts to determine the redemption rate.¹¹ *Fears v. Wilhelmina Model Agency, Inc.* provides an example of post-CAFA fair-fee analysis.¹² In this case, plaintiffs’ counsel sought a fee award of one-third (a little over \$7 million) of the money claimed, plus expenses of nearly \$1.6 million.¹³ The amount of money actually redeemed by plaintiffs’ coupons was greater than the desired attorneys’ fee, but less than the lodestar calculation.¹⁴ The court found that a fair and appropriate fee was forty percent (a little under \$4 million) of the money actually redeemed, plus all claimed expenses.¹⁵

CAFA also addresses the issue of unredeemed coupons. Under the new rules, “a portion of the value of unclaimed coupons” may be disbursed to one or more governmental or charitable organizations.¹⁶ The parties must agree as to which organizations are beneficiaries and include that as part of the settlement. To the extent governmental entities may otherwise provide important objections to a court, some attention may need to be

Preliminary Analysis, 20 Toxics L. Rep. (BNA) 264, 274 (Mar. 10, 2005). Joseph notes that one court said free minutes do not constitute a coupon deal if the class member does not have to pay anything for it, ignoring the question of how this helps customers that might have switched. *Id.*

9. 28 U.S.C. § 1712(e).

10. *Id.* § 1712(a).

11. *Id.* § 1712(d).

12. *Fears v. Wilhelmina Model Agency, Inc.*, No. 02-Civ.4911(HB), 2005 WL 1041134 (S.D.N.Y. May 5, 2005).

13. *Id.* at *9.

14. *Id.* “The lodestar calculation is the product of the number of attorney hours ‘reasonably expended’ and a ‘reasonable hourly rate.’” *Dill v. City of Edmond*, 72 F. App’x 753, 757 (10th Cir. 2003) (quoting *Robinson v. City of Edmond*, 160 F.3d 1275, 1281 (10th Cir. 1998)).

15. *Fears*, 2005 WL 1041134, at *16.

16. 28 U.S.C. § 1712(e).

given to potential conflicts.

Congress not only allowed for coupon settlements under CAFA, but also created three potential loopholes for plaintiffs' attorneys to be compensated when nothing of material value is achieved for the class. First, if a company agrees to certain injunctive type relief, albeit meaningless, plaintiffs' attorneys remain eligible for millions of dollars in fees, despite the lack of real benefit to the class.¹⁷ Second, class counsel may also seek a lodestar fee independent of the coupon value.¹⁸ Third, given that the new removal rules allow a defendant to "wait and see," a defendant can still do coupon deals in state courts without federal fee restrictions applying.

3. *Settlements in Which Plaintiffs Incur an Economic Loss*

Courts are also restricted in their ability to approve settlements that would result in a net loss to class members—such as when the plaintiffs must pay attorney fees that exceed what they received in the settlement.¹⁹ It is hard to fathom how such deals could have been approved in the past or how serious of a problem this would be in practicality.

The interesting question is whether the provision eliminates burdensome or time consuming claims processes. For example, should a plaintiff have to gather voluminous information or fill out lengthy forms in order to receive a five dollar recovery? CAFA is unclear, but the answer is most likely no.

4. *Ban on Greater Awards to Local Plaintiffs*

CAFA also restricts approval of settlements that provide payment of a greater sum to one or more class members based solely on the fact that they live closer to the court than the other plaintiffs.²⁰ Again, this has not been a big problem. The interesting question concerns benefits such as unclaimed coupons being provided to a local governmental entity only.

17. *Id.* § 1712(b)(2), (c). Terms are not defined in the Act. Equitable benefits could include any number of things that arguably have less value to consumers than coupons. Changes in corporate governance and internal practices are easy to promise, cost almost nothing, but still enable a willing defendant to attempt to bribe plaintiffs' counsel.

18. *Id.* § 1712(b).

19. *Id.* § 1712(a).

20. *Id.* § 1714.

5. *Notice of Settlements*

To ensure greater scrutiny over settlements, CAFA provides for notice to certain state and federal officials.²¹ The official is usually the state or federal attorney general (depending on whether the cause of action is based on state or federal law), or the person who has the primary regulatory or supervisory responsibility with respect to the defendant.²² CAFA requires that all relevant information concerning the case be provided to these parties within ten days after a proposed settlement is filed in court.²³ A class member may choose not to be bound by a

21. *Id.* § 1715(b).

22. *Id.* § 1715(a).

23. Specifically, this information includes:

(1) a copy of the complaint and any materials filed with the complaint and any amended complaints . . . ;

(2) notice of any scheduled judicial hearing in the class action;

(3) any proposed or final notification to class members of—

(A)(i) the members' rights to request exclusion from the class action;
or

(ii) if no right to request exclusion exists, a statement that no such right exists; and

(B) a proposed settlement of a class action;

(4) any proposed or final class action settlement;

(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

(6) any final judgment or notice of dismissal;

(7) (A) 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 that State's appropriate State official; or

(B) if the provision of information under subparagraph (A) is 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; and

(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

Id. § 1715(b).

settlement if the member can show that this notice was not provided.²⁴

This notice requirement creates a change in the substantive law. The benefit of this requirement is that all regulators and stakeholders should be heard. However, in many cases, this requirement will possibly create a huge mess by injecting public policy concerns into the settlement of a private dispute.²⁵ For example, imagine the proposed settlement of a consumer fraud claim against an allegedly deceptive insurance product.²⁶ Is the attorney general (who has sole enforcement authority under state consumer fraud law) the individual with primary regulatory or supervisory responsibility? Or, is the state insurance commissioner (who regulates all insurance filings) primary? If the policy was sold in multiple states, are the regulatory actors in the insurer's home state primary or those in all states?²⁷ What information is relevant? How long do they have to review it? Do all of these politicians of various party affiliations and agendas need to agree? What if they disagree? Do these issues undercut the legal system's interest in promoting settlements of disputes? Does the court have to worry about the impact of the settlement on the defendant-carriers viability? Does this threaten to push judges further into the realm of public policy as opposed to their historic role umpiring disputes? Will these requirements spawn litigation within a settlement?

Although notice in many cases may be fairly simple to resolve, there is tremendous potential for abuse. There is also a risk that the possible benefits of a good class action settlement will be lost. For example, state or federal governments that typically opt out of class actions may insist on certain concessions that could benefit their own litigation. Yet if they are not bound by the judgment, why give them standing to push concerns of little value to the class?

24. *Id.* § 1715(e).

25. Turning courts into mini-legislatures potentially transforms judges from umpires into activists. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380, 424–31 (1982).

26. *E.g.*, *Hanson v. Acceleration Life Ins. Co.*, No. CIV A3-97-152, 2000 WL 33340298 (D.N.D. June 21, 2000) (approving class settlement); *Hanson v. Acceleration Life Ins. Co.*, No. CIV A3-97-152, 1999 WL 33283345 (D.N.D. Mar. 16, 1999) (certifying class action).

27. There is a lesser concern with the feasibility of such notice, given an appropriate definition of which regulators matter. Gina M. Intrepido, *Notice Expertise May Help Resolve CAFA Removal Issues, Notification to Officials*, 6 CLASS ACTION LITIG. REP. 759, 759–60 (2005).

6. *Expanded Federal Diversity Jurisdiction*

CAFA creates federal diversity jurisdiction over classes with 100 or more members if the matter in controversy is more than \$5 million and any one of the following is true:

(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.²⁸

At the same time, CAFA carved out several exceptions to this expansion of jurisdiction.²⁹ The bill provides for circumstances under which the courts must decline to exercise the available jurisdiction and circumstances under which the courts can, but need not, decline to exercise jurisdiction.³⁰

CAFA provides for a home-state exception. A federal court must decline jurisdiction if two-thirds or more of the proposed class and the primary defendants are “citizens of the State in which the action was originally filed.”³¹

CAFA also provides for a local controversy exception. A federal court must decline jurisdiction if all of the following criteria are met:

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

28. 28 U.S.C. § 1332(d)(2).

29. *See id.* § 1332(d)(9) (stating that jurisdiction does not exist when the diversity and amount in controversy requirements are satisfied but the only claims in the class action concern: (1) a covered security as defined under section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934; (2) the internal affairs or governance of a business enterprise that arises under the laws of the state in which the enterprise that arises is organized; or (3) the rights, duties, and obligations relating to any security that is defined under section 2(a)(1) of the Securities Act of 1933).

30. *See generally* Linda S. Mullenix & Paul D. Rheingold, *Impact of Class Action Fairness Law*, N.Y. L.J., Mar. 2005, at 5 (discussing the impact of CAFA on state and federal courts, attorney strategies, and general class action practices).

31. 28 U.S.C. § 1332(d)(4)(B).

2008]

Consumer Class Actions After CAFA

311

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.³²

A federal court may, “in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction” when between one-third and two-thirds of the class is from the state in which the action was originally filed and the “primary” defendants are also citizens of the state.³³ In exercising this discretion, the court considers:

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

32. *Id.* § 1332(d)(4)(A). The following class definition was found to be sufficient to preclude diversity jurisdiction under the “home state controversy” and “local controversy” exceptions: “All persons and entities who are citizens of the Commonwealth of Pennsylvania, who resided or did business in the Commonwealth of Pennsylvania, and who subscribed to Comcast’s high-speed internet system for service in Pennsylvania during the relevant time period.” *Schwartz v. Comcast Corp.*, No. Civ.A. 05-2340, 2005 WL 1799414, at *2 (E.D. Pa. July 28, 2005) (internal quotations omitted).

33. 28 U.S.C. § 1332(d)(3).

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, [one] or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.³⁴

Ultimately, the effect of these provisions is to move more class actions into federal court.³⁵ One study suggests that nearly forty percent of previous state class actions will be removed to federal court under CAFA.³⁶

CAFA also creates the opportunity for defendant forum shopping by allowing a defendant to induce a friendly plaintiff to file an action in a pro-business district. For example, in a case involving defective bulletproof vests for police officers, the “defendant attempted to moot various claims by doing a ‘friendly’ settlement in its home county” in Michigan.³⁷

When a coalition of private attorneys, attorneys general, and fraternal organizations intervened to object, the same defendant ran to rural Arkansas where they settled a national class action in state court. Ultimately, a state court in Oklahoma refused to find that the Arkansas decision on preliminary approval of the settlement was binding.³⁸

CAFA thus enables defendants to stay in favorable state courts or to shop for a more friendly state court. A defendant could shop a case to a friendly plaintiff’s attorney in a state court, or set up reverse auctions by

34. *Id.* § 1332(d)(3)(A)–(F).

35. See Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 n.4 (2005) (providing a corporate view of pro-business bias in federal courts).

36. Mullenix & Rheingold, *supra* note 30, at 6.

37. Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1652–53 (2006) (discussing *Nat’l Ass’n of Police Orgs., Inc. v. Second Chance Body Armor, Inc.*, No. 04-8018-NP (Cir. Ct. Antrim County, Mich. filed Mar. 3, 2004)).

38. *Id.* (footnotes omitted).

plaintiffs' attorneys in different state courts.³⁹ Litigators should anticipate such procedural maneuvering by defendants in a post-CAFA world.

7. *Relaxed Removal Requirements*

CAFA makes it easier for defendants to remove cases to already overburdened federal courts. The class action litigator should be cognizant of CAFA's relaxed removal rules and anticipate defendants using them. Specifically, CAFA eases constraints on the time in which removal must be sought, who must agree to removal, and the prerequisites regarding defendant citizenship.

CAFA allows defendants to avoid the time limitations usually imposed on removal of class actions. CAFA makes 28 U.S.C. § 1446(b), which requires removal within one year of the commencement of the action, inoperative.⁴⁰ This wait-and-see approach provides defendants with opportunities to both gauge their case in state court and significantly delay the proceedings.

CAFA does away with the unanimous consent requirement for removal by allowing for just one defendant to request removal, without the consent of the other defendants.⁴¹

The limitations on in-state defendants are lifted under CAFA. Removal of class actions is no longer precluded by a defendant being a citizen of the state in which the action was originally filed.⁴²

8. *Expanded Appellate Jurisdiction*

CAFA affords both parties more opportunities to challenge orders granting or denying a motion to remand to state court. After a district court rules on a motion to remand, either party has seven days to appeal to a federal court of appeals, which may, but is not required to, accept the appeal.⁴³ Despite the potential for using the appeals process as a

39. See generally Justin Scheck, *The Gritty World of the 'Reverse Auction' Spreads*, NAT'L L.J., July 25, 2005, at 11.

40. 28 U.S.C.A. § 1453(b) (West 2006).

41. *Id.* This provision abandons the traditional diversity removal requirement of unanimous consent of all served defendants. *Id.* § 1446(a).

42. *Id.* § 1453(b). Traditionally, a defendant who wants to remove an action based upon diversity generally cannot do so if there is a "local defendant"—a defendant that is a citizen of the state in which the action was filed. *Id.* § 1441(b).

43. *Id.* § 1453(c)(1). This provision excepts class actions from the 28 U.S.C. § 1447 prohibition of review of remand orders. *Id.*

mechanism to delay, CAFA mandates that the appellate court complete all action on the appeal no later than sixty days after the appeal was filed.⁴⁴ Courts can, however, grant an extension of the sixty day period.⁴⁵

III. CAFA: A REACTION TO CLASS ACTION ABUSES

On its face, CAFA is an attempt by Congress to regulate class action abuses. These abuses, CAFA's supporters contend, are made possible and exacerbated by the inconsistency and inadequacy of state courts. However, CAFA contains language strongly endorsing the class action as a procedural mechanism. The legislative intent behind CAFA is to protect plaintiffs, not defendants. The litigator should point to this language when defendants attempt to construe CAFA as a godsend to defendants at the expense of plaintiffs. The positive is that the elimination of class action abuses means that, post-CAFA, class actions rules should be liberally construed.

The Senate Report accompanying the bill provides the clearest illustration of the official motivations behind CAFA.⁴⁶ The drafters wrote:

By now, there should be little debate about the numerous problems with our current class action system. A mounting stack of evidence reviewed by the Committee demonstrates that abuses are undermining the rights of both plaintiffs and defendants. One key reason for these problems is that most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements. The problem of inconsistent and inadequate judicial involvement is exacerbated in class actions because the lawyers who bring the lawsuits effectively control the litigation; their clients—the injured class members—typically are not consulted about what they wish to achieve in the litigation and how they wish it to proceed. In short, the clients are marginally relevant at best.⁴⁷

Note that this prefatory language does not assail plaintiffs or the “litigation crisis” as its motivation. When handling questions arising under CAFA, courts must be aware that CAFA is concerned with the class members first

44. *Id.* § 1453(c)(2).

45. *Id.* § 1453(c)(3).

46. *See* S. REP. NO. 109-14, at 4–5 (2005).

47. *Id.* at 4.

and foremost. Therefore, courts should be too.

CAFA is not hostile toward class actions generally. As the Senate Report notes:

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. As such, class actions are a valuable tool in our jurisprudential system. However, they are only beneficial when the class members are kept a priority throughout the process.⁴⁸

Therefore, judges who might view CAFA as an outlet to vent their personal biases against class actions should be gently reminded that this was not the intent of the drafters.

However, it would be remiss to ignore the powerful business interests supporting CAFA. Ultimately, CAFA will result in greater federalization of class action claims—with a more pro-business federal judiciary at the helm. According to Public Citizen, more than 100 major companies and trade associations had at least 475 lobbyists on Capitol Hill from 2000 through 2002 to promote their class action agenda.⁴⁹ Many of these lobbyists had connections to top government offices.⁵⁰ The twenty-nine corporations and business organizations that lobbied most fervently for class action legislation gave a total of \$49 million over the past three election cycles to influence elections.⁵¹ Debate in the House also suggests that many large corporations stood to benefit from this law. The testimony of Representative Conyers, who opposed CAFA, is particularly telling:

Now, you do not need to take my word for it. Let us just ask big business itself. The Nation's largest bank, Citicorp admits "the practical effect (of the bill will) be that many cases will never be heard. Federal judges facing overburdened dockets and ambiguities about applying State laws in a Federal court, often refuse to grant standing to class action plaintiffs."

48. *Id.*

49. PUBLIC CITIZEN, UNFAIRNESS INCORPORATED: THE CORPORATE CAMPAIGN AGAINST CONSUMER CLASS ACTIONS 1 (2003), <http://www.citizen.org/documents/ACF2B13.pdf>.

50. *Id.* at 2.

51. *Id.*

Forbes Magazine writes, “The legislation will . . . make it more difficult for plaintiffs to prevail, since . . . federal courts are . . . less open to considering . . . class action claims.”⁵²

Despite the behind-the-scenes motivations of CAFA, litigators must rely on its stated legislative intent, which is to protect the interests of the class members.

IV. HOW COURTS HAVE INTERPRETED CAFA

A. *Burden of Proof: Home-State and Local-Controversy Exceptions*

CAFA is also silent about the burden of proof needed to determine whether the local controversy exception applies. Recall that this exception invokes issues such as whether two-thirds of the class and the defendant are citizens of the state, whether significant relief is sought from the in-state defendant, whether said defendant’s conduct forms a significant part of the claim, whether the principal injuries occurred in the state, and whether another class action has been filed within three years.

The Fifth Circuit in *Frazier v. Pioneer Americas LLC*, held that once the removing defendant proves the amount in controversy and the existence of minimal diversity, the burden shifts to the plaintiff to prove that the home-state or local-controversy exceptions to federal jurisdiction apply.⁵³ In *Frazier*, the defendant successfully removed a class action to federal district court pursuant to CAFA.⁵⁴ After denial of plaintiff’s remand motion, plaintiff appealed.⁵⁵ The Fifth Circuit affirmed the denial, and held that plaintiffs carry the burden of proving the home-state and local-controversy exceptions, noting the “longstanding § 1441(a) doctrine placing the burden on plaintiffs to show exceptions to jurisdiction buttresses the clear congressional intent to do the same with CAFA.”⁵⁶

The Seventh Circuit also reached a similar conclusion. In *Hart v. FedEx Ground*, for example, the Seventh Circuit began its analysis by stating the general rule that the proponent of federal jurisdiction bears the burden of proving its existence.⁵⁷ The questions then turned to which party

52. 151 CONG. REC. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Conyers).

53. *Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 546 (5th Cir. 2006).

54. *Id.* at 544.

55. *Id.*

56. *Id.* at 546.

57. *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 679 (7th Cir.

bears the burden of proof to prove that the local-controversy exception applies. The court decided to follow the Eleventh and Fifth Circuits' reasoning in this approach.⁵⁸

B. CAFA's Local-Controversy Exception

Although the case law in this area is limited, recent decisions indicate that the federal judiciary might be adopting a narrow interpretation of the local-controversy exception. Recall that under this exception, a federal court must decline jurisdiction if at least two-thirds of the class and at least one defendant are state citizens—subject to significant relief, significant basis of claims, etc.⁵⁹

In *Evans v. Walter Industries, Inc.*, the Eleventh Circuit held that the local-controversy exception is to be narrowly construed.⁶⁰ According to the court, “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.’”⁶¹ Plaintiffs may be hard pressed to convince a court to adopt a broad or novel interpretation of the local controversy exception to achieve a remand.

A federal Louisiana case centered on the local-controversy exception’s requirement that “at least one defendant is a defendant from whom members of the putative class seek significant relief, whose alleged conduct forms a significant basis of the asserted claims, and who is a citizen of the state in which the action was filed.”⁶² Relying on legislative history, the court concluded that “whether a putative class seeks significant relief from an in-state defendant includes not only an assessment of how many members of the class were harmed by the defendant’s actions, but also a comparison of the relief sought between all defendants and each defendant’s ability to pay a potential judgment.”⁶³ In other words, significant relief may entail both the number of class members harmed by the defendants and the solvency of the defendants. This provision allows

2006); *see also* discussion *infra* Part IV.D.

58. *Hart*, 457 F.3d at 680.

59. 28 U.S.C.A. § 1332(d)(4)(A) (West 2006).

60. *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1163 (11th Cir. 2006) (quoting S. REP. NO. 109-14, at 42 (2005)).

61. *Id.*

62. *Robinson v. Cheetah Transp.*, No. Civ.A. 06-0005, 2006 WL 468820, at *3 (W.D. La. Feb. 27, 2006).

63. *Id.*

courts, if so inclined, to conclude that a party without deep pockets may not assume the role as one from which significant relief is sought.

C. *CAFA's Permissive "Interests of Justice" Exception*

Recall that under § 1332(d)(3), a court may decline to exercise jurisdiction when between one-third and two-thirds of the class is from the state and the defendants are citizens of the state.⁶⁴ Courts considering this option are told to weigh various factors, including the nature of the claims, the motivations of the party pleading the class action, and the connection of the forum to the class and claims, as well as others.⁶⁵

Interestingly, there has been no case law sorting through the six factors. However, the insight of Louisiana federal district Judge Sarah Vance is illuminating:

Apparently, the six statutory factors are supposed to help the court sort this issue out. The statute does not give any guidance on how to weigh or apply the factors.

Factor (A) is whether the claims "involve matters of national or interstate interest." If they do, this consideration would seem to favor the exercise of jurisdiction. Factor (B) is whether the governing law is that of the original forum or the laws of other states. Presumably, if the local law of the original forum applies, this factor would favor allowing the state court to handle the matter. Factor (C) is whether the class action was pleaded to avoid federal jurisdiction. This factor goes to gerrymandered class definitions. Deciding how to apply this factor may prove challenging, since plaintiffs are ordinarily permitted to decide which claims to assert and against whom to assert them. The Senate Judiciary Committee Report suggests that the court look to whether the plaintiffs have proposed a "natural" class, or "a class that encompasses all of the people and claims that one would expect to include in a class action." If the court concludes that plaintiffs have pleaded an artfully defined class to avoid federal jurisdiction, this factor would favor the exercise of federal jurisdiction.

Factor (D) is whether the original forum has a distinct nexus with the class members, the alleged harm, or the defendants. There is no statutory definition of "distinct nexus," but at a

64. 28 U.S.C.A. § 1332(d)(3) (West 2006).

65. *Id.* § 1332(d)(3)(A)–(F).

minimum, a distinct nexus requires something more than that one-third of the class members be citizens of the home state of the primary defendants. This follows because the statute requires more than one-third of the class members and the primary defendants to be from the original forum even to get to this inquiry. If the only nexus is that one-third of the class members and the primary defendants are from the original forum, the court would be required to exercise jurisdiction. The legislative history suggests that a court might find a distinct nexus if a “majority of proposed class members and the defendant reside” in the original forum.

Factor (E) requires the court to examine the geographic distribution of the class members. This factor asks whether the number of class members who are citizens of the original forum is substantially larger than the number from any other state and whether the citizenship of the other proposed class members is dispersed among a substantial number of states. CAFA does not specify how this factor should be applied, but the thrust of the analysis under the multifactor test is to distinguish cases that are predominantly local from those that are interstate in character. Under that criterion, if the answer to both factor (E) questions is “yes,” that is, the number of in-state class members is substantially larger and the rest of the class is widely dispersed, this factor would favor declining jurisdiction. Consistent with this view, the Senate Judiciary Committee Report suggests that if all of the class members who are not from the forum are widely dispersed among other states, the interest of the forum state may be preeminent. The Report also suggests that the existence of a concentration of out-of-state plaintiffs in a small number of states favors a federal forum because several states besides the original forum would have a strong interest in the controversy.

Finally, factor (F) inquires whether one or more class actions asserting the same or similar claims by the same or other persons were filed during the past three years. The other class actions need not have been brought by the same plaintiffs or against the same defendants. Presumably, the presence of other class actions would militate toward the exercise of federal jurisdiction.⁶⁶

66. Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1617, 1625–27 (2006) (footnotes omitted).

D. *Burden of Proof: Removal—Proving Federal Jurisdiction*

A hotly contested issue centers on the burden of proof in a motion to remove a case to federal court. Defendants have sought to create case law that says, in effect, that CAFA's new minimal diversity standard for interstate class actions creates a presumption that jurisdiction exists.⁶⁷

In *Berry v. American Express Publishing Corp.*, a federal district court in California relied on the judiciary committee report to find that the burden of removal lies with the party opposing removal.⁶⁸ According to that court, "the failure to address the burden of proof in the statute reflects the Legislature's expectation that the clear statements in the Senate Report would be sufficient to shift the burden of proof."⁶⁹

Appellate courts, however, have rejected this reasoning. In *Miedema v. Maytag Corp.*, the defendant appealed a federal district court's decision to grant a motion to remand to the Eleventh Circuit.⁷⁰ The court sharply disagreed with the defendant's argument that the district court "erred by applying the traditional rule that the removing defendant bears the burden of establishing subject matter jurisdiction."⁷¹

The court further rejected the defendant's argument that any doubts about the amount in controversy should be resolved in favor of finding jurisdiction. The court stated, "[a]s with the burden of proof, CAFA itself is silent on the matter. The rule of construing removal statutes strictly and resolving doubts in favor of remand, however, is well-established."⁷²

While the Fifth Circuit has yet to rule on this issue, the Seventh and Ninth Circuits have adopted positions similar to the Eleventh Circuit.⁷³ A

67. See, e.g., H. 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, 9–10 (2005).

68. *Berry v. Am. Express Publ'g. Corp.*, 381 F. Supp. 2d 1118, 1122 (C.D. Cal. 2005).

69. *Id.*

70. *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1325–26 (11th Cir. 2006).

71. *Id.* at 1327–28.

72. *Id.* at 1328.

73. See *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 686 (9th Cir. 2006) (per curiam) ("CAFA's silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction."); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (holding that CAFA's "naked legislative history" does not alter the well-established

CAFA practitioner will certainly face this issue and should remember the words of Judge Vance: “Although CAFA was no doubt intended to liberalize removal for cases within its scope by eliminating some of the statutory limitations on removal, there is nothing in the statute itself to suggest that Congress intended to upset the more basic, longstanding principles that underlie removal jurisdiction.”⁷⁴

E. *Standard of Proof: Amount in Controversy*

Courts have interpreted CAFA as not changing the standard of proof in determining the amount in controversy.

Although it seems straightforward, determining whether CAFA’s \$5 million amount-in-controversy requirement is satisfied is no trifling matter. Although the case law is limited, most courts take a two step approach. First, the burden of showing that the amount-in-controversy is met is placed on the defendant. Next, courts determine if the defendant has met the burden by examining whether the defendant has met the pre-CAFA burden for establishing the jurisdictional minimum.

In *Fiore v. First American Title Insurance Co.*, an Illinois federal court placed the burden on the removing defendant and then proceeded to examine “whether Defendant has shown by a reasonable probability that the stakes here exceed the statutory minimum of \$5,000,000.”⁷⁵ The court adopted the pre-CAFA reasonable probability standard used in the Seventh Circuit.⁷⁶

F. *CAFA’s Effective Date: When Is a Class Action “Commenced”?*

CAFA only applies to class actions “commenced” on or after February 18, 2005.⁷⁷ Circuit courts have generally interpreted “commenced” to mean the date on which the action was originally filed in state court.⁷⁸ Litigators must be aware, however, that what constitutes

rule that a proponent of subject matter jurisdiction bears the burden of persuasion on the amount in controversy).

74. Vance, *supra* note 66, at 1639–40.

75. *Fiore v. First Am. Title Ins. Co.*, No. 05-CV-474-DRH, 2005 WL 3434074, at *2 (S.D. Ill. Dec. 13, 2005).

76. *See id.* (citing *Brill*, 427 F.3d at 449).

77. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 9, 119 Stat. 4, 14.

78. *See, e.g.*, *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 686–89 (9th Cir. 2005); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1094–97 (10th Cir. 2005); *Pfizer, Inc. v. Lott*, 417 F.3d 725, 726 (7th Cir. 2005).

commencement of an action is determined by that state's own laws and rules of procedure.⁷⁹ Thus, defendants cannot remove a case on CAFA grounds if the action was filed in state court before February 18, 2005. However, some courts have carved out exceptions, and the class action litigator must be vigilant.

In *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, the plaintiff filed its complaint in state court a few days before CAFA took effect.⁸⁰ Rather than attaching summonses to the complaint, the plaintiff included a note to the clerk that they were not ready but would be completed within a week.⁸¹ The plaintiff filed the summons several weeks later, well after CAFA had taken effect.⁸² Applying Alabama law, the court found that commencement occurs when the “complaint has been filed and there has been a *bona fide* effort to have it served.”⁸³ When the court found that there was not a *bona fide* effort, it held that the action was “commenced” after CAFA took effect.⁸⁴

Similarly, in *Dinkel v. General Motors Corp.*, a federal court applied Kansas procedural rules and held that an action is commenced under CAFA at the time of service if the defendant is not served within ninety days of filing.⁸⁵

The Fifth Circuit in *Braud v. Transport Service Co. of Illinois* held that the post-CAFA addition of a new defendant to a pre-CAFA action commences the action under CAFA.⁸⁶ In *Braud*, the appellate court applied Louisiana law regarding commencement of a suit and held that “amendments that add a defendant ‘commence’ the civil action as to the added party.”⁸⁷

Furthermore, the court found that the plaintiff's dismissal against the new defendant after removal warrants a remand only if the dismissal is

79. See, e.g., *Herb v. Pitcairn*, 324 U.S. 117, 120 (1945) (“Whether any case is pending in the Illinois courts is . . . determined by Illinois law . . .”).

80. *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 455 F. Supp. 2d 1317, 1321 (M.D. Ala. 2005).

81. *Id.* at 1320.

82. *Id.* at 1321.

83. *Id.* at 1322 (quoting *Greer v. Skilcraft*, 704 F. Supp. 1570, 1583 (N.D. Ala. 1989)).

84. *Id.* at 1322–23.

85. *Dinkel v. Gen. Motors Corp.*, 400 F. Supp. 2d 289, 292 (D. Me. 2005).

86. *Braud v. Transp. Serv. Co. of Ill.*, 445 F.3d 801 (5th Cir. 2006).

87. *Id.* at 804.

made for a legitimate purpose.⁸⁸ According to the court, “[w]hen a plaintiff amends his complaint after removal in a way that destroys diversity, a district court must consider the reasons behind the amendment in determining whether remand is proper. If the plaintiff amended simply to destroy diversity, the district court should not remand.”⁸⁹

V. LIFE UNDER CAFA

A. *Overview: The Sky is Not Falling on Consumer Class Actions*

The marketplace has changed dramatically in the last half century. Large scale corporations have ended the days of the local market. With the dawn of the information age, nationwide mass marketing and distribution have become the norm. Despite the nationalization of the marketplace, its regulation has been primarily a state rather than federal endeavor. Other than specific federal laws dealing with racketeering and securities regulation, it has been state consumer protection acts and common law that have been at the forefront of marketplace regulation. Thus, the federalization of nationwide consumer class actions has tremendous policy implications.

Many CAFA proponents and opponents alike shared the belief that CAFA’s effect would be that “most class-action lawsuits would be heard in a Federal district court rather than a state court.”⁹⁰ Given CAFA’s discretionary remand provisions, and a federal judiciary wary of increasing its workload, it is probable that only multi-state actions will be significantly impacted by CAFA. Furthermore, CAFA will likely make it easier for plaintiffs to certify classes in federal court. Plaintiffs’ attorneys, if possible, should choose causes of action under which the variations in state law are as small as possible to ensure certification.

B. *Most Multi-State Class Actions Will Land in Federal Court*

Despite the home state, local controversy, and discretionary exceptions to federal jurisdiction, CAFA will undoubtedly reroute nearly all multi-state class actions from state to federal court. As CAFA’s

88. *Id.* at 808.

89. *Id.* at 808–09 (quoting *Schillinger v. Union Pac. R.R.*, 425 F.3d 330, 334 (7th Cir. 2005)).

90. Letter from Dan L. Crippen, Dir., Cong. Budget Office, to F. James Sensenbrenner, Jr., Chairman, Comm. on the Judiciary, U.S. House of Representatives (Mar. 11, 2002), *reprinted in* H.R. REP. NO. 107-370, at 27–28 (2002).

opponents noted in a letter to the Senate Judiciary Committee, “the effect of the class action provisions of [CAFA] would be to move virtually all class action litigation into the Federal courts”⁹¹ One commentator puts the effect of the CAFA provisions clearly: besides a handful of cases “where a class is defined to include only citizens of a particular state, there may be [only a] few cases where class members will be so concentrated in individual states that the two-thirds requirement could be met.”⁹²

Furthermore, once a case is filed in federal court, defendants are given ample opportunity to delay the action. A federal judge contemplating a removed case will also have to contend with “other class actions, consolidated cases, or individual lawsuits arising out of the same legal and factual basis as the action proposed for certification.”⁹³ Indeed, counsel should be prepared to address this issue because the *Manual for Complex Litigation* instructs the district judge to “direct counsel to identify the names of all similar cases in other courts, their stage of pretrial preparation, and the assigned judges.”⁹⁴

Defendants will seize this opportunity to petition the court to transfer the case to a single federal district court under the multidistrict litigation (MDL) procedure.⁹⁵ Under this procedure, a defendant asks a district court to stay its decision on whether to remand a case or certify a class (in deference to a decision by the Judicial Panel on Multidistrict Litigation) to create an MDL proceeding or to transfer the case to an MDL proceeding.⁹⁶ The case then gets bogged down in procedural wrangling and can be delayed for a long time. Plaintiffs’ attorneys should bring the inefficiency of having a different court decide remand issues to the court’s attention to try to avoid this “MDL injunction.”⁹⁷

91. S. REP. NO. 109-14, at 92 (2005).

92. Scott L. Nelson, *The Class Action Fairness Act of 2005: An Analysis*, 2005 A.B.A. SEC. LITIG. 7 (2005).

93. Holly Kershell, Comment, *An Approach to Certification Issues in Multi-State Diversity Class Actions in Federal Court after the Class Action Fairness Act of 2005*, 40 U.S.F. L. REV. 769, 775 (2006).

94. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.312 (2004).

95. See 28 U.S.C.A. § 1407 (West 2006).

96. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.15 (2004) (“If transfer to a [MDL] proceeding is likely, it is usually best to defer certification until the MDL Panel acts. A delay in deciding certification might also be appropriate if other cases in state or federal court are at a more advanced stage in the litigation.” (citation omitted)).

97. For further discussion on MDL transfer delays, see Allan Kanner, *The Problem of Multidistrict Litigation Injunctions*, 4 Class Action Rep. 487 (BNA) (May

C. *The Recipe for Remand*

The home-state and local-controversy exceptions are rather straightforward, except that litigation over the citizenship of the different parties involved might occur. Regarding the local-controversy exception, a question may arise as to whether the relief sought from the conduct committed by the in-state defendant was significant. Would a local sales person or agent be considered a significant in-state defendant? While a small amount of case law exists, a practitioner should heed the analysis of a Louisiana federal district court that focused on the number of plaintiffs harmed by the in-state defendant and the defendant's ability to pay the relief sought.⁹⁸

CAFA's discretionary exception will create far more controversy among litigants. Plaintiffs' attorneys should focus on the permissive exception CAFA gives federal judges to decline to hear a case over which it would otherwise have jurisdiction. Federal courts are often congested, so docket-minded judges might seek to remand claims when they have the power to do so.⁹⁹

As noted in the statute and above, the court considers many factors.¹⁰⁰ If attorneys seeking to avoid federal court meet the "between one-third and two-thirds" requirement, they should keep the above criteria in mind when framing the case. Issue certification is an important tool through which the attorney should ensure that state law claims affecting local interests are at the forefront of the case.

D. *Multi-State Class Actions: CAFA Helps Certify Classes (Maybe)*

1. *Overview*

While CAFA will undoubtedly shift multi-state actions from state courts to federal courts, it should make it easier to get a class certified once it arrives there. Whether this shift in class certification jurisprudence occurs largely depends on the advocacy given to it by the plaintiffs' bar.

In order to certify a class under Rule 23(b)(3), plaintiffs must show

22, 2003), *reprinted in* 18 *Toxics L. Rep.* (BNA) 487 (2003).

98. *Robinson v. Cheetah Transp.*, No. Civ.A. 06-0005, 2006 WL 468820, at *3 (W.D. La. Feb. 27, 2006).

99. *See* Allan Kanner, *Daubert and the Disappearing Jury Trial* 69 *U. PITT. L. REV.* (forthcoming 2008).

100. *See* 28 U.S.C.A. § 1332(d)(3)(A)–(F) (West 2006).

that “questions of law or fact common to class members predominate over any questions affecting only individual members.”¹⁰¹ This raises problems for plaintiffs seeking to certify a nationwide class based on numerous state law claims.¹⁰² By placing nationwide class actions in federal courts, CAFA has applied a federal mode of analysis to this problem. The question remaining for the courts is whether CAFA leaves courts to their pre-CAFA principles, or whether CAFA alters those principles. Given CAFA’s strong endorsement of class actions and legislative intent, courts might adopt a flexible approach to this problem, easing the ability to certify a nationwide class action.

Since *Amchem Products, Inc. v. Windsor*, federal courts have often denied class certification on the grounds that competing state laws undermine Rule 23(b)(3)’s concern for case manageability.¹⁰³ As a result, plaintiffs have sought to certify classes in state courts perceived as less hostile to class certification.¹⁰⁴

CAFA, by transferring multistate actions from state to federal court, has instilled in the federal courts a responsibility to analyze the laws of multiple states. No longer is it appropriate to summarily deny certification on the grounds that multiple state laws are involved. Defendants opposing class certification in federal court must contend with CAFA’s strong endorsement of class actions.

The presence of multiple state laws can be overcome. As one district court noted in a pre-CAFA diversity case:

This is not to suggest that I believe that managing this litigation is wholly without difficulty, as it most assuredly is not. But, at this point,

101. FED. R. CIV. P. 23(b)(3).

102. See, e.g., *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001) (“A nationwide class in what is fundamentally a breach-of-warranty action, coupled with a claim of fraud, poses serious problems about choice of law, the manageability of the suit, and thus the propriety of class certification.”); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 742 (5th Cir. 1996) (decertifying a class because “the district court did not properly consider how variations in state law affect predominance”); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (“If 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, yet another reason why class certification would not be the appropriate course of action.”).

103. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

104. Joel S. Feldman, *Class Certification Issues for Non-Federal Question Class Actions—Defense Perspective*, in CLASS ACTION LITIGATION: PROSECUTION & DEFENSE STRATEGIES POST-CAFA 2005 221, 231 (2005).

I believe that the management problems can be overcome. Notwithstanding the difficulty, “the proposed class action appears superior to the only existing alternative, which is repetitive individual litigation.”¹⁰⁵

It is important that district courts are made aware of the various case management tools available to help them meet their CAFA-era obligations.

2. Deny Certification: The Pre-CAFA Trend

Before CAFA, most multi-state class actions were heard in state courts. The pre-CAFA complete diversity and amount-in-controversy requirements allowed a litigator seeking to avoid federal court to do so with relative ease. Also, federal courts often denied certification of multi-state diversity actions merely because they required the application of laws from multiple states.¹⁰⁶

This era began with *Phillips Petroleum Co. v. Shutts*, in which the Supreme Court held that the application of a state law to a class violated due process when only three percent of the class had a connection to the state.¹⁰⁷ *Shutts* involved a class action brought by gas company investors to recover interest on royalties that was suspended pending administrative approval of a gas price increase.¹⁰⁸ The Court found that the application of Kansas law to the class violated due process—insofar as it conflicted with the law of other applicable states—because 99% of the gas leases and 97% of the investors involved did not have any connection to Kansas.¹⁰⁹

Twelve years later in *Amchem*, the Court tacitly approved, albeit in dicta, the Third Circuit’s contention that applying the laws of multiple states makes a class action unmanageable.¹¹⁰ As the Third Circuit noted, state laws vary greatly on a “whole range of issues raised by plaintiffs’ claims: viability of future claims; availability of causes of action . . . ; causation; the type of proof necessary to prove asbestos exposure; statutes of limitations; joint and several liability; and comparative/contributory

105. *In re Asbestos Sch. Litig.*, 104 F.R.D. 422, 434 (E.D. Pa. 1984) (quoting *Wolgin v. Magic Marker Corp.*, 82 F.R.D. 168, 179 (E.D. Pa. 1979) (footnote omitted)).

106. S. REP. NO. 109-14, at 86 (2005).

107. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814–15, 822–23 (1985).

108. *Id.* at 800.

109. *Id.* at 814–15, 822–23.

110. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609–10 (1997).

negligence.”¹¹¹

Although it would solve manageability concerns, federal courts are wary to apply the law of one state to a nationwide class. This is particularly true in the area of consumer class actions. As one federal court observed, “state consumer protection acts are designed to protect the residents of the states in which the statutes are promulgated.”¹¹² Otherwise, federal judges would proclaim that all states have an equal interest and therefore the laws of all states would apply, thus making the matter unmanageable.¹¹³

The result in consumer litigation has been the refusal to certify classes. In the wake of *Amchem*, federal courts often refuse to certify a class for the mere reason that the laws of multiple states must be applied. As the CAFA Senate Report notes, “six Circuit Courts and 26 District Courts have consistently denied certification of multi-state consumer cases.”¹¹⁴

The *Manual for Complex Litigation* notes this trend, stating that “[d]ifferences in applicable law and the number of divergent interests may lead a court to decline to certify a class.”¹¹⁵ Recent pre-CAFA cases support this proposition. As the Seventh Circuit remarked, “[n]o 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](b)(3).”¹¹⁶

District courts have broad discretion in certifying a class, and the party seeking certification of the class bears the burden of proof.¹¹⁷ It is therefore up to plaintiffs’ lawyers to argue that a strict rule favoring non-certification for all actions containing multiple state laws is inappropriate after CAFA.

3. *The CAFA Era Need for Certification*

By eliminating state courts as an alternative, the federalization of

111. *Georgine v. Amchem Prods. Inc.*, 83 F.3d 610, 627 (3d Cir. 1996).

112. *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 216 (E.D. Pa. 2000).

113. *See, e.g., In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 142–43 (E.D. La. 2002).

114. S. REP. NO. 109-14, at 86 (2005).

115. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.222 (2004).

116. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002). The Seventh Circuit is probably the most hostile circuit to multi-state class actions.

117. *Spence v. Glock*, 227 F.3d 308, 310 (5th Cir. 2000).

nationwide class actions has stripped federal courts of their pre-CAFA ability to avoid nationwide class certification and management.¹¹⁸

Prior to CAFA, federal courts often refused to certify multi-state actions for the sole reason that they involved the laws of multiple states.¹¹⁹ In the post-CAFA era, however, this rule is no longer appropriate. First, because state courts are no longer an alternative forum for multi-state class actions, federal courts have the responsibility of being the sole arbiter of such actions.¹²⁰ Second, CAFA contains language strongly supporting class actions.¹²¹ Third, the application of the rigid rule will discriminate against citizens of less populous states and undermine the entire public policy behind class actions. Finally, the rigid rule also harms defendants by increasing their litigation costs and exposing them to multiple concurrent suits.

CAFA has created a new responsibility for federal courts. By forcing many multi-state class actions to federal courts, the state court alternative has been extinguished. Prior to CAFA, federal judicial hostility toward multi-state class actions merely created incentives for plaintiffs' lawyers to file in state court. Now, with that door having been shut by CAFA, such hostility would signal the death of the multi-state class action mechanism. For the reasons described below, this is neither the intent of CAFA nor is it desirable on any policy grounds.

As noted above, the legislative purpose behind CAFA is to cure class actions, not extinguish them. CAFA lauds class actions as "an important and valuable part of the legal system."¹²² The stated purpose of the law is to promote "fair and prompt recoveries for class members with legitimate claims."¹²³ Plaintiffs seeking to certify a class in federal court can look for support to CAFA's stated purpose of "providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction."¹²⁴ Clearly, the intent of the legislature in moving multi-state class actions was not to kill them, but instead bring them under federal

118. Elizabeth J. Cabraser, *The Manageable Nationwide Class: A Choice-of-Law Legacy of Phillips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 543, 547 (2006).

119. *Id.* at 552–53.

120. *Id.* at 546.

121. *Id.* at 548–49.

122. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(1), 119 Stat. 4, 4.

123. *Id.* § 2(b)(1), 119 Stat. at 5.

124. *Id.* § 2(b)(2), 119 Stat. at 5.

management.

The language favoring certification is particularly strong regarding consumer class actions. One of the stated purposes of CAFA is to “benefit society by encouraging innovation and lowering consumer prices.”¹²⁵ While CAFA’s concealed purpose might be to benefit business at the expense of consumers, plaintiffs can point to its enumerated purpose of protecting consumers when arguing to certify and manage a nationwide consumer class action lawsuit.

When making these arguments, plaintiffs’ attorneys need to be aware of the language found in the Senate Report accompanying CAFA, which, unlike the statute itself, is overtly hostile to class actions at various points. Specifically, the Report expresses “distaste” toward a more liberal standard for certifying class actions than the federal *Amchem* standard. A portion of the Report states:

Numerous state courts have trampled on these federalism principles, all in an effort to certify classes that should not be certified.

A premise of the Class Action Fairness Act is that this problem can be corrected by expanding federal jurisdiction over interstate class actions, the theory being that federal courts will not engage in “false federalism” games. But what proof is there that the federal courts will not similarly botch these critical choice-of-law issues?

In reality, there is ample evidence that the federal courts will not engage in the “false federalism” that is so rampant in state court class actions.¹²⁶

The defense bar’s attempt to invoke the vitriolic rambling of the Senate Judiciary Committee before the less agitated judicial branch has generally failed.¹²⁷ The Eleventh Circuit refused to give the CAFA Senate Report much force, finding it contained few parallels to the law that was actually passed. The court noted, “[w]hile a committee report may ordinarily be used to interpret unclear language contained in a statute, a committee report cannot serve as an independent statutory source having the force of law.”¹²⁸

125. *Id.* § 2(b)(3), 119 Stat. at 5.

126. S. REP. NO. 109-14, at 62 (2005) (footnote omitted).

127. *See* Kanner, *supra* note 37, at 1652–53.

128. *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328 (11th Cir. 2006) (emphasis removed) (quoting *United States v. Thigpen*, 4 F.3d 1573, 1577 (11th Cir. 1993)); *see*

If federal courts refuse to certify nationwide class actions, plaintiffs' lawyers will file concurrent actions in multiple states to keep cases in state courts.¹²⁹ Unfortunately, in order to maintain the litigation, attorneys will choose the most populous states.¹³⁰ Because half of the United States' population is found in just nine states, the effect would be to deny class action protection to less populous states.¹³¹ Given CAFA's strong endorsement of class actions, this is certainly not the intent behind the law. Courts must be made aware of the discriminatory consequences of applying *Amchem* to a CAFA landscape.

The policy arguments behind expanding certification opportunities at the federal level are particularly strong for consumer class actions. Many consumer fraud cases involve claims that are too small to litigate individually, making the class action the only mechanism to receive compensation. As the Supreme Court recalled in *Amchem*:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.¹³²

Moreover, the strict application of *Amchem* with CAFA also harms defendants. As plaintiffs' lawyers file concurrent suits in multiple states, defendants will see soaring litigation costs as they are required to defend multiple suits rather than one. Federal judges who might be apt to believe CAFA is a pro-defendant law should be made aware of the negative consequences for defendants if classes are denied certification because of the mere presence of multiple state laws.

Furthermore, as noted below, nothing in CAFA weakens the

also Rural Electrification Admin. v. Cent. La. Elec. Co., 354 F.2d 859, 865 (5th Cir. 1966) ("Certainly, the demands of Congressional Committees do not have the force of law."). Therefore, "'courts have no authority to enforce principles gleaned solely from legislative history that has no statutory reference point.'" *Miedema*, 450 F.3d at 1328 (emphasis omitted) (quoting *Thigpen*, 4 F.3d at 1577).

129. Kershell, *supra* note 93, at 781.

130. *Id.*

131. *Id.* (citing U.S. Census Bureau, Census 2000, Ranking of Tables for States: 1990 and 2000, <http://www.census.gov/population/cen2000/phc-t2/tab01.txt>).

132. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

reasoning in *Shutts*, in which the Supreme Court held that state courts could potentially exercise nationwide jurisdiction under one state's substantive law.¹³³ The defense bar has been active in pushing the position that CAFA has not changed anything regarding class certification analysis.¹³⁴ It is imperative for plaintiffs' lawyers to start advocating the position that CAFA has changed class certification jurisprudence.

4. *Choice of Law Under CAFA*

Two cases collide in CAFA choice-of-law jurisprudence: *Klaxon v. Stentor Electric Manufacturing Co.*¹³⁵ and *Shutts*.¹³⁶

In *Klaxon*, the Court considered whether, in a diversity case, "the federal courts must follow conflict of laws rules prevailing in the states in which they sit."¹³⁷ Applying *Erie* to the conflict-of-laws issue, the Court held that "[t]he conflict of laws rules to be applied by the [sitting] federal court . . . must conform to those prevailing in [the forum state's] state courts."¹³⁸

In *Shutts*, the Supreme Court approved state court power to certify nationwide classes, but also created a standard for state courts before they could apply any particular state law to the class.¹³⁹ The court must first find "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."¹⁴⁰

The question thus arises: In a federal diversity case, should federal courts follow the *Klaxon* standard and apply a state choice-of-law analysis or apply the *Shutts* "significant contacts and state interest" standard? There is no clear answer at this point, but "this issue will surely receive

133. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822–23 (1985).

134. See, e.g., Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661, 683 (2006) (arguing that CAFA is based on an "affirmative expectation that the federal court sometimes will decide the class certification question differently from the relevant state court—in particular, that it sometimes will do so on choice-of-law grounds").

135. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

136. *Shutts*, 472 U.S. 797.

137. *Klaxon*, 313 U.S. at 494.

138. *Id.* at 496. (applying the doctrine set forth in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74–77 (1938)).

139. *Shutts*, 472 U.S. at 821.

140. *Id.* at 818 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

significant attention.”¹⁴¹ For the time being, it makes sense for courts choosing to apply multiple state laws to rely on *Klaxon*, while courts choosing to apply the law of one state to use *Shutts*.

In this sense, a court refusing to apply one state law to a nationwide class because the arrangement fails *Shutts* should then turn to *Klaxon* and use the choice-of-law principles of the forum state to manage the nationwide class relying on several state’s laws. Plaintiffs’ attorneys must look at which arrangement—the *Shutts*-one-state-law or the *Klaxon*-multiple-state-laws—is more beneficial to the class when framing their case for the court.

5. *Applying the Law of One State to a Nationwide Class: Shutts as a Guide*

It is still possible under CAFA to certify a nationwide class based upon one state’s law. Federal courts can look to *Shutts* as a model for determining if it is appropriate to apply one state’s laws to an entire class.

Before CAFA, the presence of multiple state laws encouraged federal courts to dismiss an action. *Shutts* is key in arguing that this trend no longer applies in a CAFA world, as one state law might be chosen or such laws might be grouped. As Columbia Law Professor Elizabeth Cabraser notes:

If a defendant persists in objecting that a proposed class action is unmanageable because the laws of multiple states would have to be applied to the class members’ claims, the obvious counter-argument is that Congress, through CAFA, has mitigated the choice-of-law problem by the very act of providing for removal to a federal court, which is bound to assure that state interests are constitutionally balanced, and state law is permissibly chosen, under the *Shutts* rule.¹⁴²

Recall that *Shutts* created a standard for the application of one state’s law to a nationwide class. The court must first find “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”¹⁴³ CAFA

141. 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, 596 (2006).

142. Cabraser, *supra* note 118, at 552.

143. *Shutts*, 472 U.S. at 818 (quoting *Hague*, 449 U.S. at 312–13 (1981)).

included no choice-of-law rule. *Shutts*, although applying to state courts, should guide the federal judiciary in their choice-of-law analysis.

In a recent case, *Franchise Tax Board of California v. Hyatt*, the Supreme Court reaffirmed the *Shutts* standard and protected a state trial court, which properly applied *Shutts*, from reversal on review.¹⁴⁴ This further bolsters the argument that *Shutts* ought to serve as the standard for determining constitutional due process for the federal district courts.

Post-CAFA courts have applied *Shutts* to federal district courts. Such was the case in *In re St. Jude Medical, Inc.*, in which the Eighth Circuit explained the test for applying the law of one state to a nationwide consumer class action.¹⁴⁵ According to the court, the district court must “conduct a thorough conflicts-of-law analysis with respect to each plaintiff class member before applying” the law of one state.¹⁴⁶ The court cited *Shutts*, noting “[t]he Supreme Court has held an individualized choice-of-law analysis must be applied to each plaintiff’s claim in a class action.”¹⁴⁷

The *St. Jude* court, again citing *Shutts*, explained the procedure for federal district courts. First, “we must . . . decide whether any conflicts [of law] actually exist.”¹⁴⁸ In nationwide consumer class actions, this is generally presumed, as “[s]tate consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state’s law to sales in other states with different rules.”¹⁴⁹ Second, “for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”¹⁵⁰

This second step of the *Shutts* analysis is the bread and butter of a conflict of law dispute. The easiest way to satisfy this standard is when the injury occurred or was within the power of the state.

In *Hyatt*, one of two major conflict-of-laws decisions by the Supreme

144. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 494–95 (2003).

145. *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005).

146. *Id.* As a threshold matter, the court also noted that the laws of Minnesota, whose statutes were being applied nationally, “permit ‘any person’ to bring suit thereunder.” *Id.* at 1119.

147. *Id.* at 1120 (citing *Shutts*, 472 U.S. at 822–23).

148. *Id.* (citing *Shutts*, 472 U.S. at 816).

149. *Id.* (quoting *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002)).

150. *Id.* (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

Court since *Shutts*,¹⁵¹ a California resident moved to Nevada where he later sued the California tax board for tortiously harassing him with an audit.¹⁵² The Supreme Court had to decide whether the Nevada court's use of Nevada's substantive law was constitutionally permissible.¹⁵³ The Court found a significant state contact with the action, noting "the plaintiff claims to have suffered injury in Nevada while a resident there; and it is undisputed that at least some of the conduct alleged to be tortious occurred in Nevada."¹⁵⁴ This contact created a state interest, the Court noted, because "[f]ew matters could be deemed more appropriately the concern of the state in which [an] injury occurs or more completely within its power."¹⁵⁵

6. Cases Applying Multiple State Laws: The Klaxon Trend

Even if a federal judge refuses to apply the law of one state to the entire class, this does not mean that the case is unmanageable. Class certification can still be achieved for the nationwide class by applying multiple state laws.

As noted above, federal courts have a new responsibility to adjudicate nationwide class actions. In some cases, federal courts will insist on using the laws of multiple states. *Klaxon* likely applies to courts choosing this option, and, in fact, this has been the recent trend.

It is not enough to argue that class certification jurisprudence has changed, but that the alternative world of managing multi-state class actions is possible. Courts should be made aware not only of the negative consequences of denying certification, but also of the tools available to help certify a multi-state class.

Before deciding on certification, a judge must "make whatever factual

151. The other being *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988).

152. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 490-91 (2003).

153. *Id.* at 494.

154. *Id.* at 495.

155. *Id.* (quoting *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 503 (1939)). In *Pacific Employers*, the Supreme Court expanded on the "injury occurring within its power" concept to include the place where a contract was made. *Pacific Employers*, 306 U.S. at 503 ("There this Court sustained the award by California of the compensation provided by its own statute for employees where the contract of employment was made within the state, although the injury occurred in Alaska, whose statute also provided compensation for the injury." (citing *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532 (1935))).

and legal inquiries are necessary under Rule 23.”¹⁵⁶ In undertaking this analysis, the court should bear in mind the factors espoused by Rule 23(b)(3):

(A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the likely difficulties in managing a class action.¹⁵⁷

Counsel, too, should be familiar with these factors and how they apply to the case, because an evidentiary hearing is often required for a judge to examine these issues.¹⁵⁸ Generally, “[t]he parties should submit a statement of stipulated facts and identify disputed facts relevant to Rule 23 issues”¹⁵⁹ It is at this stage, therefore, that plaintiffs’ counsel can offer its argument as to how CAFA has altered class certification jurisprudence.

In addition, plaintiffs’ counsel might want to use this opportunity to provide the judge with a roadmap to manageability of multi-state actions. As the *Manual for Complex Litigation* notes, “[i]f the parties have submitted a trial plan to aid the judge in determining whether certification standards are met, the certification hearing provides an opportunity to examine the plan and its feasibility.”¹⁶⁰

In developing a case management plan when multiple state claims are involved, counsel should first identify the states from which the laws will be drawn. Following *Klaxon*, federal court applies the choice-of-law provision of the state in which the federal court is located. In the area of consumer protection, most states use a contacts-based, interest-based, or *lex loci delicti* (place of the harm) standard.

Second, courts and counsel should examine “how issues are likely to play out in the context of the case to see what individual issues are likely to arise, and what state law differences are irrelevant and may be ignored.”¹⁶¹ A case plan should be submitted that deals with the variations of the

156. Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001).

157. FED. R. CIV. P. 23(b)(3).

158. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.21 (2004).

159. *Id.*

160. *Id.*

161. *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 84 (D. Mass. 2005).

remaining state laws in a manageable fashion.

In *In re Pharmaceutical Industry Average Wholesale Price Litigation (AWP)*, an MDL court applied Massachusetts choice-of-law rules to certify a nationwide consumer class action.¹⁶² *AWP* involved a consumer class action against pharmaceutical companies alleging that the defendants fraudulently inflated drug prices by misstating average wholesale prices of their drugs in industry publications.¹⁶³ Although the court did not need to apply *Klaxon* because the parties agreed to use Massachusetts law,¹⁶⁴ the application of forum state choice-of-law rules is the essence of *Klaxon*. While the *AWP* court found that the home state of the consumer is more related to the fraud than the defendant's place of business,¹⁶⁵ the court rejected the pre-CAFA trend of refusing to certify a class due to the great variance of state consumer laws.¹⁶⁶ The court admonished the defendants for expecting the pre-CAFA trend to apply in a post-CAFA world:

Having smelled victory on the choice-of-law issue, defendants expect a knock-dead punch on their argument that the differences among the state consumer laws are so significant that they cause individual issues to predominate. Indeed, in a double-dare at oral argument, they waxed that no court in the nation has successfully certified a nationwide consumer class for litigation (as opposed to settlement) purposes.¹⁶⁷

The *AWP* court, perhaps recognizing the new CAFA-era responsibility of federal courts in adjudicating nationwide class actions, decided to take the defendant's "double-dare." While "the burden is on plaintiffs to demonstrate 'through an extensive analysis' that grouping is feasible,"¹⁶⁸ the court noted that "[i]f the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the

162. *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 82–85 (D. Mass. 2005).

163. *Id.* at 65.

164. *Id.* at 82.

165. *Id.* at 83. ("The conclusion that the home state of the consumer has a more significant relationship to the alleged fraud than the place of business of the defendant is in accordance with the principles of Restatement § 6, since state consumer protection statutes are designed to protect consumers rather than to regulate corporate conduct." (footnote omitted)).

166. *See id.* at 83–85.

167. *Id.* at 83.

168. *Id.* at 84 (citing *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 742 (5th Cir. 1996)).

dominant legal standards can be appropriate.”¹⁶⁹ The *AWP* court then engaged in a state-by-state analysis, and certified a significant portion of the plaintiff’s proposed class.¹⁷⁰

The *AWP* decision is significant in that it represents the new CAFA-era approach that federal courts should take regarding class certification of nationwide consumer class actions.

7. *CAFA and State Consumer Protection Laws*

States are aggressive in protecting their citizens from fraud and deceptive trade practices, as all fifty states have statutes complementing federal law in the protection against fraud. Such laws usually provide for the prosecution of fraud while creating a cause of action for the aggrieved party.

The application of CAFA to these statutes depends on whether the state statute allows or forbids the class action mechanism within the consumer fraud cause of action. States expressly allowing class actions in consumer protection statutes include: Connecticut, Idaho, Indiana, Kansas, Massachusetts, Michigan, Missouri, New Mexico, Ohio, and Utah.¹⁷¹ States expressly denying the class action in its consumer statutes include: Alabama, Georgia, Louisiana, Mississippi, and Montana.¹⁷²

The practitioner seeking to certify a nationwide class invoking state consumer law(s) invariably must face choice-of-law issues. Failure to convince a federal court that a class containing members from multiple states with different consumer protection laws is manageable can result in a denial of certification.

It is important to note that most state consumer laws can be lumped into only a few different categories, which the federal judiciary has recognized. In *Hanlon v. Chrysler Corp.*, the Ninth Circuit affirmed a nationwide consumer class action settlement for defective door latches.¹⁷³ In applying *Amchem*’s class certification standard, the court observed the following regarding the state laws on warranty and consumer fraud:

169. *Id.* at 83–84 (quoting *Klay v. Humana, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004)).

170. *Id.* at 84–85.

171. Emilia L. Sweeney & Rudy A. Englund, *The Class Action Fairness Act’s Impact on State Consumer Protection Laws*, 72 DEF. COUNS. J. 233, 235 (2005).

172. *Id.*

173. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998).

[T]here is no structural conflict of interest based on variations in state law, for the named representatives include individuals from each state, and the differences in state remedies are not sufficiently substantial so as to warrant the creation of subclasses. Representatives of other potential subclasses are included among the named representatives, including owners of every minivan model. However, even if the named representatives did not include a broad cross-section of claimants, the prospects for irreparable conflict of interest are minimal in this case because of the relatively small differences in damages and potential remedies.¹⁷⁴

VI. CONCLUSION

Consumer class actions in the CAFA-era can be summarized as follows. A class action is more likely to end up in federal court, but not necessarily so. Even if such an action is in federal court, it will not be as hard to get a class certified as it was before CAFA. It is possible under *Shutts* to apply one state's law to an entire class, and if that fails it is still possible to form a manageable class with multiple state laws through *Klaxon*.

CAFA has changed the landscape of consumer class actions as most of them will now land in federal court. But with this expansion of federal jurisdiction comes a greater responsibility for the federal judiciary to certify and adjudicate claims. An additional responsibility lies with the plaintiffs' attorney, to put forth the most convincing arguments possible in this crucial time of CAFA's construction.

174. *Id.* at 1021.