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## The (Surprisingly) Prevalent Role of States in an Era of Federalized Class Actions

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## The (Surprisingly) Prevalent Role of States in an Era of Federalized Class Actions

Linda S. Mullenix\*

*In enacting the Class Action Fairness Act of 2005 (CAFA), Congress intended to expand access to the federal courts for interstate class actions by creating minimal diversity and removal jurisdiction. In Section 2 of the Act, "Findings and Purposes," Congress stated that class action abuses undermined "the concept of diversity jurisdiction as intended by the Framers of the United States Constitution" in that state courts kept cases of national importance out of federal court and sometimes demonstrated bias against out-of-state defendants. Congress stated that a purpose of CAFA was 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." As many commentators have suggested, CAFA was intended to federalize class action litigation. An historical examination of dual system complex litigation illustrates the extent to which federal courts have successfully (or unsuccessfully) intervened in pending parallel state court proceedings through application of abstention, the Anti-Injunction Act, preclusion, and Erie doctrines. In the post-CAFA era, however, class action and other complex litigation has been federalized in derogation of state enforcement efforts by providing defendants with more ready access to federal courts. Nonetheless, state courts have retained jurisdiction over an array of complex litigation. Despite the federal predisposition of CAFA, states have retained a role in addressing complex litigation aided by Supreme Court decisions recognizing the independent role of state courts in enforcing local legal norms. To a significant extent, state courts have been insulated from federal judicial encroachment on states' ability to handle complex litigation in its own courts, and state attorneys general have in various ways been empowered to pursue aggregate relief on behalf of state citizenry.*

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## INTRODUCTION

Discussions of complex litigation generally focus on ways in which federal courts address large scale, aggregative litigation.<sup>1</sup> Commentators, however, pay less attention to state courts as venues for resolving complex litigation<sup>2</sup> or the implications for federalism in responsibility for resolving complex disputes. Nonetheless, state courts routinely handle complex litigation, and every state but two has state class action rules.<sup>3</sup> Several states have consolidation statutes<sup>4</sup> that essentially replicate the federal multidistrict litigation statute.<sup>5</sup> These state statutes permit transfer and consolidation to one judicial district for the efficient disposition of aggregate litigation in one place.<sup>6</sup>

The existence of a dual court system complicates the ability of federal and state courts to address complex litigation. Notwithstanding these tensions, federal and state courts – through judicial interpretation and legislative initiatives – have developed means to preserve the public and private enforcement of complex litigation in state courts. Because parties typically forum shop strategically to maximize advantage, complex litigation engenders

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1. See generally, e.g., Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 *FORDHAM L. REV.* 87 (2018) (focusing on resolving federal complex litigation through federal multidistrict litigation statute); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible*, 82 *TUL. L. REV.* 2205 (2008) (focusing on federal resolution of complex litigation through multidistrict litigation or federal class litigation).

2. See, e.g., Guthrie T. Abbott & Pope S. Mallette, *Complex/Mass Tort Litigation in State Courts in Mississippi*, 63 *MISS. L.J.* 363 (1994) (discussing influx of complex mass tort cases in Mississippi and ways in which state courts addressing these cases).

3. See Linda S. Mullenix, *Should Mississippi Adopt a Class-Action Rule – Balancing the Equities: Ten Considerations that Mississippi Rulemakers Ought to Take into Account in Evaluating Whether to Adopt a State Class-Action Rule*, 24 *MISS. C. L. REV.* 217, 217 (2005). See generally LINDA S. MULLENIX, *STATE CLASS ACTIONS* (2006) (two-volume treatise on fifty state class action rules and practice). The two states lacking class action rules are Mississippi and Virginia.

4. See J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-removable State Actions in Multi-district Litigation*, 5 *J. TORT L.* 3, 11-12, nn.32-33 (2012) (reporting that New York, New Jersey, California, Colorado, Connecticut, Maryland, Massachusetts, Oklahoma, Pennsylvania, Rhode Island, Texas, Virginia, West Virginia, and Wisconsin all have developed intra-system mechanisms for coordinating related litigation; and that Illinois, Arizona, Indiana, Kansas, Missouri, Minnesota, Nevada, New Hampshire, North Dakota, Oregon, South Carolina, and Tennessee have more limited intra-state procedures for intra-state coordination).

5. 28 U.S.C. § 1407 (2018).

6. Glover, *supra* note 4.

fundamental issues of federalism and intersystem comity. When parties simultaneously file duplicative, overlapping cases in federal and state courts, the dual court system provokes tension between the courts for primacy over the litigation. When litigants invoke application of favorable state class action jurisprudence as against more restrictive federal standards, this invites convoluted *Erie* doctrinal issues.

Until the enactment of the Class Action Fairness Act of 2005 (CAFA),<sup>7</sup> plaintiffs' attorneys were able to strategically forum shop for advantageous state court forums, and defense attorneys had little recourse to avoid state court adjudication because state courts were more than happy to retain their jurisdiction to the derogation of federal courts. With the enactment of CAFA, commentators generally agreed that one of the motivating rationales for this legislation was to federalize class action practice, particularly regarding mass tort litigation.<sup>8</sup> A perhaps more cynical view of CAFA centered on the sponsors' intention to relocate class litigation in federal courts, avoiding so-called state judicial hellholes.<sup>9</sup> At the time of enactment, defense attorneys viewed federal courts as more favorable venues because of more restrictive federal class certification rulings.<sup>10</sup> To this end, CAFA created new federal jurisdiction for class actions<sup>11</sup> and provided for removal of state class action into federal court.<sup>12</sup> In "federalizing" complex class actions, the defense bar appreciated CAFA as a victory, and

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7. Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711-1715 (2018)).

8. See Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2525-26 (2008) (CAFA legislative history to federalize class actions); Alexandra D. Lahav, Review, *Are Class Actions Unconstitutional?*, 109 MICH. L. REV. 993, 1006 (2011) (discussing CAFA's federalization of state class actions). See generally Edward F. Sherman, *Class Action Fairness Act and the Federalization of Class Actions*, 238 F.R.D. 504 (2007).

9. Adam Feit, Note, *Tort Reform, One State at a Time: Recent Developments in Class Actions and Complex Litigation in New York, Illinois, Texas, and Florida*, 41 LOY. L.A. L. REV. 899, 901 (2008) (discussing so-called judicial hellholes); see Nicole Ochi, Note, *Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies after CAFA and MMTJA*, 41 LOY. L.A. L. REV. 965, 969 n.31 (2008) (citing AM. TORT REFORM ASS'N, JUDICIAL HELLHOLES 2007 (2007), <http://www.atra.org/reports/hellholes/report.pdf>) (describing abuses by state courts).

10. Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1887 (2008) ("Thus, CAFA did not so much save defendants from biased state courts as reward them with access to an alternative forum that they regarded as more favorable to their interests.").

11. 28 U.S.C. § 1332(d).

12. *Id.* § 1453.

plaintiffs' attorneys regarded CAFA as a setback for class action claimants.

The key contribution of this Article is to argue that although Congress through CAFA attempted to *federalize* complex class litigation, state courts nonetheless have continued to perform a significant role in addressing complex cases. Despite the federal predisposition of CAFA, states have retained a role in addressing complex litigation aided by Supreme Court decisions recognizing and upholding the independent role of state courts in maintaining and enforcing local legal norms.

In sum, although the received understanding of CAFA was to federalize complex class litigation, state courts nonetheless have continued to perform a role in addressing complex cases. To a significant extent, state courts have been insulated from federal judicial encroachment on states' ability to handle complex litigation in their own courts, and state attorneys general have in various ways been empowered to pursue aggregate relief on behalf of state citizenry.

More specifically, several factors have helped preserve the states' role in complex litigation. First, the Court has recognized and upheld the independent role of state courts in maintaining and enforcing local legal norms. Thus, the Court has upheld the legitimacy of state courts adjudicating state class litigation notwithstanding federal court repudiation of certification of the same litigation.<sup>13</sup> In so doing, the Court recognized principles of federalism and comity, signaled a non-interference stance with state class proceedings, and strengthened the independent role of state courts in complex litigation.

Second, a number of federal courts have rejected the primacy of federal courts in applying Rule 23 class certification standards in derogation of countervailing state statutes that would prohibit prosecution of the same class litigation in state court.<sup>14</sup>

Third, the Court recognized the role of state attorneys general in their *parens patriae* capacity under CAFA to retain and pursue

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13. See generally *Smith v. Bayer Corp.*, 564 U.S. 299 (2011).

14. See *infra* notes 149–152.

complex litigation on behalf of state citizenry, in spite of defense attempts to evade state court jurisdiction.<sup>15</sup>

Fourth, state attorneys general have the right to receive notice of federal class action settlements and to lodge comments or objections to pending settlements that might affect state constituents.<sup>16</sup> Thus, CAFA and the Court have given state attorneys general a relatively robust role in addressing complex litigation and afforded significant protection to state auspices in state enforcement efforts.

Fifth, CAFA itself carved out exceptions to its removal provisions, again recognizing the role of states in adjudicating complex litigation with exceptions to its removal provisions for both class and “mass” actions.<sup>17</sup> Thus, CAFA acknowledged the role that state courts might play in resolving completely local mass actions, which in turn has induced plaintiffs’ artful pleading to retain complex cases in state jurisdictions.

Sixth, the Court recently rebuffed defendants’ efforts to remove a covered securities class action from state to federal court.<sup>18</sup> Instead, the Court held that the Securities Litigation Uniform Standards Act of 1998 (SLUSA) did not strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only § 1933 Securities Act violations.<sup>19</sup> In enacting SLUSA, Congress did nothing to deprive state courts of jurisdiction over class actions based on federal law.

Finally, several federal appellate courts have agreed that state courts may maintain jurisdiction over defendants’ class action counterclaims asserted in state litigation.<sup>20</sup> In upholding traditional

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15. Mississippi *ex rel.* Hood v. AU Optronics Corp., 571 U.S. 161 (2014); see Loriann E. Fuhrer, *Federal Removal More Difficult in Actions Brought by State Attorneys General*, KEGLER BROWN HILL & RITTER (Aug. 12, 2014), <https://www.keglerbrown.com/publications/federal-removal-more-difficult-in-actions-brought-by-state-attorneys-general/> (noting that an increased obstacle to removal is bad news for corporate defendants who typically prefer to defend in federal court).

16. See 28 U.S.C. § 1715 (requiring notification of states’ attorneys general). See generally Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971 (2008).

17. 28 U.S.C. §§ 1453, 1332(d)(11)(B)(i).

18. Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 138 S. Ct. 1061 (2018).

19. *Id.*; see also Securities Litigation Uniform Standards Act of 1998 § 101(a), 15 U.S.C. § 77p(c) (2018).

20. See, e.g., Jackson v. Home Depot U.S.A., Inc., 880 F.3d 165, 167 (4th Cir. 2018), *aff’d*, 139 S. Ct. 1743 (2019); Tri-State Water Treatment, Inc. v. Bauer, 845 F.3d 350 (7th Cir. 2017);

removal principles, these courts have resisted corporate arguments that CAFA expanded removal jurisdiction to permit removal of class action counterclaims to federal court. In 2019, the Supreme Court definitively clarified that the general removal statute prohibits the removal of state-based class action counterclaims to federal court, a decision largely favorable to state court class action plaintiffs.<sup>21</sup>

Part I of this Article examines the private enforcement of complex litigation in state courts. This discussion first examines how federal courts historically – through the abstention doctrine<sup>22</sup> and the Anti-Injunction Act<sup>23</sup> – have acted or failed to preserve federal primacy over state court management of complex cases. Although there is a robust tradition of federal intervention in state parallel proceedings, in other instances federal courts have given deference to state proceedings. Against this historical backdrop, this Part discusses whether judicial interpretation of *Erie* doctrines support or challenge federalized class action litigation. This Part then analyzes how the Supreme Court more recently, through interpretation of preclusion doctrine, preserved the ability of states to pursue class litigation free from federal interference.

Part II explores the private enforcement of complex litigation in state courts by examining CAFA provisions creating so-called carve-outs for purely local cases that are not subject to removal into federal court.<sup>24</sup> As will be seen, these CAFA provisions have inspired artful pleading by plaintiffs who prefer to resolve complex cases in state courts. These plaintiffs have been successful at keeping their cases in state court under CAFA.

Part III turns attention to the public enforcement of large-scale litigation affecting the rights of state citizens. This discussion surveys the role of state attorneys general in protecting citizens

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*In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849 (6th Cir. 2012); *Palisades Collections L.L.C. v. Shorts*, 552 F.3d 327 (4th Cir. 2008); *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014 (9th Cir. 2007).

21. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019).

22. See generally *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (“*Moses Cone*” abstention); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (“*Colorado River*” abstention).

23. 28 U.S.C. § 2283 (2018); see also All Writs Act, 28 U.S.C. § 1651.

24. 28 U.S.C. §§ 1332(d)(4)(A), (B); see also *id.* § 1332(d)(3).



through *parens patriae* actions<sup>25</sup> and how the Court effectively saved these actions from federal removal through its interpretation of CAFA's mass action provisions.<sup>26</sup> In addition, this Part examines the ability of state attorneys general—as provided in CAFA—to receive notice and provide comment on pending federal class action settlements.<sup>27</sup>

Part IV examines the ability of state courts to retain jurisdiction over class actions alleging violations of the federal securities acts, and to resist attempts by defendants to remove such litigation to federal courts.

Part V explores the complex issues raised by a defendant's assertion of a class action counterclaim in state court litigation, and the ability of a third-party defendant sued in such a counterclaim to remove that class litigation to federal court. The problem of class action counterclaims, it will be seen, not only implicates thorny issues of statutory construction, but directly raises the same policy issues of fair and appropriate forums to adjudicate class litigation that animate CAFA's prescriptions. Again, these discussions reaffirm the conclusion that state courts still play a significant role in adjudicating certain types of complex litigation despite recent attempts to federalize complex class actions.

## I. RESTRAINING FEDERAL ENCROACHMENT ON STATE CLASS ACTIONS

### A. Background to Federal Intrusion into State Court Complex Litigation

Federal intrusion into state class action litigation rose to prominence in the 1980s and 1990s, when federal courts managing complex mass tort cases moved towards settlement models for resolving these massive litigations.<sup>28</sup> The American dual court

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25. See generally Margaret S. Thomas, *Parens Patriae and the States' Historic Police Power*, 69 SMU L. REV. 759 (2016) (historical survey of state attorneys general *parens patriae* enforcement powers).

26. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 161–63 (2014). See *supra* note 15 and accompanying text.

27. See *supra* note 16.

28. See generally *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (repudiating a nationwide settlement class of asbestos claims); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (same); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995) (approving settlement classes generally); *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989) (approving settlement class of Dalkon Shield claims).

system permits the institution of parallel and even duplicative litigation in state and federal courts. As mass tort cases emerged, entrepreneurial class action attorneys filed similar or exactly the same cases in both forums.<sup>29</sup>

The filing of parallel duplicative litigation arising out of the same events or transactions creates a host of problems for the dual court system and the litigants pursuing relief in either or both jurisdictions. In addition to the economic wastefulness inherent in pursuing the same duplicative litigation in two forums, parallel litigation further inspires some questionable litigation tactics, such as a race to judgment in one forum or the other. Regarding class litigation, the existence of parallel duplicative litigation can induce parties to engage in a race to class certification or settlement, precluding adjudication in the parallel forum.<sup>30</sup>

Moreover, the resolution of duplicative state and federal litigation through trial or settlement can result in inconsistent rulings, a consequence which offends our sense of substantive and procedural justice. This is especially problematic concerning injunctive relief, where inconsistent rulings from state and federal courts can create a quandary for liable defendants that may not know what standards apply to the actor's forward-looking conduct.

Finally, the problems of parallel duplicative mass tort litigation took on especial urgency in the 1990s when federal courts moved towards the settlement class model as the preferred vehicle for resolving the mass tort cases. In order to preserve pending federal mass tort settlements, judges turned to the Anti-Injunction Act<sup>31</sup> to shut down or forestall parallel state court settlements that might undermine a federal settlement.<sup>32</sup>

Thus, federal courts have two statutory and doctrinal means to preserve their primacy in massive complex litigation as against state enforcement in parallel proceedings: federal abstention

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29. See, e.g., *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982) (parallel duplicative lawsuits filed in both state and federal courts relating to claims arising from Hyatt Regency Skywalk collapse); see also *Schomber v. Jewel Cos.*, 614 F. Supp. 210 (N.D. Ill. 1985) (parallel mass tort salmonella litigation).

30. See *supra* note 29 and accompanying text.

31. See *supra* note 23.

32. E.g., *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993); *Federal Skywalk Cases*, 680 F.2d; *In re Joint E. and S. Dist. Asbestos Litig.*, 134 F.R.D. 32 (E. & S.D.N.Y. 1990).

doctrine and the Anti-Injunction Act.<sup>33</sup> Federal courts rarely have relied on abstention doctrines when confronted with parallel state litigation; however, when carefully applied to pending facts, federal courts have invoked abstention in deference to ongoing state proceedings.<sup>34</sup> In contrast to the sparse use of abstention doctrines to maintain or decline federal jurisdiction, federal courts frequently have turned to the Anti-Injunction Act to protect pending federal class settlements endangered by parallel state litigation. Thus, the Anti-Injunction Act has provided the most powerful vehicle for federal courts to encroach upon and restrain states' independent enforcement of complex litigation in their own courts.

### 1. Federal Abstention in Deference to State Complex Litigation

Federal courts have an unflagging obligation to exercise their rightly conferred jurisdiction.<sup>35</sup> The Supreme Court, however, has indicated that federal courts may under certain circumstances *abstain* – that is, decline to exercise their valid jurisdiction in deference to pending parallel state court proceedings.<sup>36</sup> Although abstention doctrine would seem to supply a ready source for federal retention of complex litigation, federal courts have not invoked abstention doctrine as a primary means to preserve their own jurisdiction. Instead, when federal courts carefully apply abstention doctrine, the courts may yield jurisdiction in deference to parallel complex litigation.<sup>37</sup>

The Illinois salmonella mass tort litigation is instructive.<sup>38</sup> The salmonella litigation arose out of individuals who contracted salmonellosis from drinking contaminated milk manufactured and distributed by the Jewel Companies and sold under the names of Hillfarm and Bluebrook. In the early 1980s, plaintiffs filed 143 individual lawsuits in the Circuit Court of Cook County, Illinois, and other state courts in Indiana, some of which were class actions.

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33. *See supra* notes 22–23.

34. *Schomber*, 614 F. Supp. at 210.

35. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (“*Colorado River*” abstention).

36. *See generally* 17A MOORE’S FEDERAL PRACTICE ch. 122 (3d ed. 2010) (federal abstention doctrines).

37. *Schomber*, 614 F. Supp. at 210.

38. *Id.* The underlying Illinois state litigation is *In re Salmonella Litig.*, Master File No. 85 L 000000 (cited in *Schomber*, 614 F. Supp. at 213).

The Illinois cases were consolidated for discovery and other pretrial proceedings, and the plaintiffs' attorneys moved for class certification.<sup>39</sup>

After the plaintiffs filed the state court action different plaintiffs filed another identical salmonella class action in Illinois federal court, invoking the court's diversity jurisdiction.<sup>40</sup> The federal case was identical with the parallel state case, except for different federal plaintiffs. The defendant then moved the federal court to abstain from deciding the case—or at least from deciding plaintiff Schomber's class claims—out of deference to the pending Illinois state court proceedings,<sup>41</sup> citing *Colorado River* abstention doctrine.<sup>42</sup> Applying factors from *Colorado River* and *Moses H. Cone*, the federal court decided to abstain in favor of the pending Illinois class action.<sup>43</sup>

The federal court first found that the federal and state lawsuits were "parallel"—a predicate to invoking abstention doctrine. The court next held that federal abstention would help to avoid piecemeal litigation because the burden on the defendant to litigate in two fora would be great. Therefore, the court decided that the claims should be confined to a single forum.<sup>44</sup> Evaluating the order in which the parties obtained jurisdiction, the court noted that the state court, in the earlier action, had undertaken complex administrative procedures to oversee the action.<sup>45</sup> In contrast, the parties had undertaken almost no pretrial discovery in the federal

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39. *Schomber*, 614 F. Supp. at 213.

40. *Id.*; see 28 U.S.C. § 1332 (2018). The federal complaint was filed on May 3, 1985, after the pending state court actions. At this time, there was no special diversity provisions for class actions, which would be created as part of CAFA in 2005. The designated class representative in the federal action was Allison Schomber.

41. *Schomber*, 614 F. Supp. at 215.

42. *Id.*; see *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

43. *Schomber*, 614 F. Supp. at 215–18. The *Colorado River* factors included: (1) the desirability of avoiding piecemeal litigation, (2) the inconvenience of the federal forum, and (3) the order in which jurisdiction was obtained by the respective forums. The *Moses H. Cone* factors included (1) the presence or absence of federal law issues, and (2) the adequacy of the parallel state court litigation. The decision whether to abstain is within a court's discretion. *Id.*

44. *Id.* at 217.

45. *Id.* The court noted the state court consolidation of complaints; the assignment of one judge to oversee all pretrial proceedings; the organization of a committee of plaintiffs' attorneys to effectuate discovery and other pretrial proceedings; entry of protective orders; several contested hearings; and sanctions obtained against the defendant for failure to preserve evidence. *Id.*

court. Although the status of class certification was nascent in both forums, the federal court concluded that early class certification was more likely to occur in state court rather than in federal court.<sup>46</sup> The court further concluded that the absence of federal issues removed the one countervailing factor that would otherwise override concerns about avoiding piecemeal litigation.<sup>47</sup> The final factor in assessing the propriety of abstention—adequacy of the state forum—presented no reason to weigh against abstention.<sup>48</sup>

Few reported cases involve invocation of abstention doctrines to permit complex litigation to proceed in state court as opposed to federal court. However, the *Schomber* decision illustrates how a federal court, analyzing the *Colorado River* and *Moses H. Cone* abstention factors, could determine that federal abstention in favor of a pending parallel state class action was appropriate under the circumstances. While abstention doctrine is a path much less taken, federal courts more have frequently turned to the federal Anti-Injunction Act as a doctrinal means for interfering with—or restraining from interfering with—state class action litigation.

## 2. *The Anti-Injunction Act Constraints of State Court Enforcement*

The intersection of the Anti-Injunction Act and state enforcement proceedings in private complex litigation has an interesting history. The federal Anti-Injunction Act states that “[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgements.”<sup>49</sup> Generally, the Anti-Injunction Act embodies a strong federal policy against federal interference with state court proceedings.<sup>50</sup>

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46. *Id.* at 218.

47. *Id.*

48. *Id.* The court noted that the Illinois class action statute permitted class certification for classes that included out of state plaintiffs, so there was no disadvantage to proceeding under Illinois state law. The court also concluded that the class which the state plaintiffs sought to certify was in all materials respects identical to the class action in the federal complaint. *Id.*

49. 28 U.S.C. § 2283 (2018); *see also* All Writs Act, 28 U.S.C. § 1651.

50. *See generally* MOORE’S FEDERAL PRACTICE, *supra* note 36, at ch. 121 (Anti-Injunction Act and three exceptions to Anti-Injunction Act).

However, in the class action litigation arena, federal courts have invoked the Anti-Injunction Act both to restrain a federal court from interference with parallel state class litigation,<sup>51</sup> as well as to uphold federal courts direct interference with state complex litigation to protect pending federal settlements.<sup>52</sup> From an initial non-interference stance, federal courts completely reversed course in the mid-1980s to embrace a full-fledged exercise of federal authority to enjoin parallel state complex litigation.

The potential use of the Anti-Injunction Act to constrain federal class proceedings in favor of pending state proceedings arose in the early 1980s in the federal skywalk cases.<sup>53</sup> This litigation developed from the structural collapse of overhead skywalks at the Hyatt Regency hotel in Kansas City, Missouri in 1981. In the aftermath, injured claimants filed parallel class litigation in Missouri state and federal courts. The federal court issued a mandatory class certification order,<sup>54</sup> which two objecting plaintiffs petitioned the court to vacate in deference to the pending state litigation.<sup>55</sup> With denial of this motion, the objectors filed an appeal.<sup>56</sup>

The appellate court first examined its own jurisdiction to hear the objectors' interlocutory appeal.<sup>57</sup> The court concluded that it had appellate jurisdiction to review the trial judge's certification order under 28 U.S.C. § 1292(a)(1),<sup>58</sup> holding that the mandatory class certification order amounted to an injunction against the state court class proceedings.<sup>59</sup> The appellate court concluded that the

51. *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982)

52. *See, e.g., Carlough v. Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993); *In re Joint E. & S. Dist. Asbestos Litig.*, 134 F.R.D. 32 (E. & S.D.N.Y. 1990).

53. *See generally Federal Skywalk Cases*, 680 F.2d.

54. The court certified the class under Rule 23's "limited fund" class action, FED. R. CIV. P. 23(b)(1)(A)-(B). *Federal Skywalk Cases*, 680 F.2d at 1179.

55. *Federal Skywalk Cases*, 680 F.2d at 1177.

56. *Id.* at 1179.

57. At this time, Rule 23 had not been amended to provide a means for interlocutory appeal from class certification orders, which the Advisory Committee would add by amendment Rule 23(f) in 1998. Appeal of the *Federal Skywalk* class certification order was brought pursuant to 28 U.S.C. §§ 1292(a) and 1651 (mandamus). The judge had refused to certify his own order for interlocutory appeal under 28 U.S.C. § 1292(b). *See Federal Skywalk Cases*, 680 F.2d at 1177, 1179.

58. *Id.* at 1179-80. 28 U.S.C. § 1292(a)(1) (2018) provides, in part: "[T]he courts of appeals shall have jurisdiction of appeals from: Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions . . ."

59. *Federal Skywalk Cases*, 680 F.2d at 1179-80.

class certification order effectively enjoined the state court plaintiffs from prosecuting their state court actions for punitive damages.<sup>60</sup> The court found that the class certification order enjoined the state plaintiffs from pursuing their state actions on the issues of liability for compensatory and punitive damages and the amount of punitive damages, and that the district court had expressly prohibited class members from settling their punitive damage claims.<sup>61</sup>

Having concluded that the class certification order effectively operated as a federal injunction against state court proceedings, the appellate court next considered whether the federal class action “injunction” came within one of the three exceptions to the Anti-Injunction Act that would permit the federal enjoining of a state proceeding.<sup>62</sup> The court concluded that none of the Anti-Injunction Act’s exceptions applied to permit this intrusion into state class litigation.<sup>63</sup>

The federal litigants primarily relied on the Anti-Injunction Act’s “necessary in aid of jurisdiction” exception to argue in favor of allowing the federal class action to proceed.<sup>64</sup> They bolstered their argument with judicial concern for the efficient management of mass tort litigation—presumably in the federal forum.<sup>65</sup> Nonetheless, the appellate court rejected application of the “necessary in aid of jurisdiction” exception, holding that historically this exception applied only to constrain tandem *in rem* litigation. The court held that because the federal and state *Skywalk* cases were both actions *in personam* for compensatory and punitive damages, the “necessary in aid of jurisdiction” exception did not apply.<sup>66</sup> Consequently, the class certification order—as an injunction against state class proceedings—violated the Anti-Injunction Act and could not stand.<sup>67</sup>

The Eighth Circuit’s interpretation of the Anti-Injunction Act was a victory for state court plaintiffs, but commentators highly

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60. *Id.* at 1180.

61. *Id.*

62. *Id.* at 1181–84; *see supra* note 50 (exceptions to Anti-Injunction Act).

63. *Federal Skywalk Cases*, 680 F.2d at 1181–84.

64. *Id.* at 1182.

65. *Id.* at 1183.

66. *Id.*

67. *Id.* at 1184.

criticized the court's constricted view of the "necessary in aid of jurisdiction" exception.<sup>68</sup> By the mid-1980s, federal judges would chip away or reject the *Skywalk* Anti-Injunction holding and completely reverse course in order to maintain control over complex class litigation in federal courts.<sup>69</sup> The historical arc of the Anti-Injunction Act beginning in the mid-1980s illustrates a trend towards increasing federal exercise of power to the derogation of state private enforcement of complex litigation.

Judge Jack Weinstein's management of the New York personal injury asbestos mass tort litigation illustrates the federal doctrinal shift away from a narrow view of the Anti-Injunction Act as a

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68. See, e.g., Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 286 (1991) (noting that the Eighth Circuit's construction of the Anti-Injunction Act in the *Federal Skywalk* cases illustrated a narrow interpretation of the exceptions and "extreme concern for federalism"); Robert C. Gordon, *The Optimum Management of the Skywalks Mass Disaster Litigation by Use of the Federal Mandatory Class Action Device*, 52 UMKC L. REV. 215, 231-32 (1984) (noting articles describing Eight Circuit's decision as "'unreasonable,' 'untenable,' 'arcane,' 'obscure,' 'unnecessarily narrow,' and 'inequitable'"); Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 529, 548-50 (1987) (noting that application of Anti-Injunction Act exceptions defer to history, rather than well-reasoned thought).

69. See, e.g., *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 881-82 (11th Cir. 1989) (stating that a federal court has the power to enjoin a state court action in order to support the federal court's continuing jurisdiction over a class action and reasoning that extremely complex litigation is the equivalent of a "res"); *In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985) (enjoining a state court action that "threatened to frustrate" a federal proceeding of "substantial scope" which had already required expenditure of substantial time and was nearing a possible settlement); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 903 F. Supp. 16, 18 (W.D.N.C. 1995) (finding that the AIA prohibits federal courts from enjoining class members from continuing to pursue *in personam* state actions although the AIA would allow a federal court to bar the commencement of new state actions); *In re Asbestos Sch. Litig.*, No. 83-0268, 1991 U.S. Dist. LEXIS 5142, at \*6-9 (E.D. Pa. Apr. 16, 1991) (holding that where an ongoing class action suit had been in litigation for nine years and where progress was finally being made in federal court, the potential for resolution justified enjoining state court proceedings under the "in aid of jurisdiction" exception to the AIA). *But see In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 144-45 (3d Cir. 1998) (refusing to issue an injunction as necessary in aid of jurisdiction even though the federal court had previously rejected class certification and a settlement now being approved in state court); *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1298-99 (5th Cir. 1992) (refusing to interpret the "in aid of jurisdiction" exception so broadly as to allow injunctions with respect to all federal court class actions); *Standard Microsystems Corp. v. Texas Instruments Inc.*, 916 F.2d 58, 60 (2d Cir. 1990) (vacating the district court's injunction of a state court action as a violation of the AIA, even though the suit involved the same claims as the federal court action, and distinguishing *Baldwin* because here the federal court was not on the verge of settling a complex matter); *In re Ford Motor Co. Bronco II Prods. Litig.*, MDL-991, 1995 WL 489480, at \*3 (E.D. La. Aug. 15, 1995) (refusing to issue an injunction as necessary in aid of jurisdiction even though the federal court had previously rejected class certification and a settlement now being approved in state court).



constraint on federal courts' ability to interfere with parallel state complex litigation.<sup>70</sup> In the asbestos litigation, the parties accomplished a class-wide settlement agreement and the court conditionally certified a mandatory limited fund class pursuant to Federal Rule of Civil Procedure 23(b)(1)(B).<sup>71</sup> Judge Weinstein noted that the certification of the mandatory national class action would enjoin all pending cases, including those filed in state court, which implicated the Anti-Injunction Act.<sup>72</sup>

Unlike the Eighth Circuit in the *Skywalk* cases, Judge Weinstein viewed "the 'necessary in aid of jurisdiction' exception liberally 'to prevent a state court from . . . interfering with a federal court's flexibility and authority' to decide the case before it."<sup>73</sup> Citing an array of Second Circuit precedents,<sup>74</sup> Judge Weinstein held that a stay of state court proceedings was appropriate under the "necessary in aid of jurisdiction" exception where a federal court was on the verge of settling a complex matter and state court proceedings would undermine the federal court's ability to achieve that objective.<sup>75</sup>

Cognizant that courts historically interpreted the "necessary in aid of jurisdiction" exception as applying solely to parallel *in rem* actions, Judge Weinstein creatively concluded that the mandatory nature of the Rule 23(b)(1)(B) limited fund settlement was like a *res*, and that "under these circumstances, the *in rem* nature of the court's jurisdiction over the class action and the limited fund provides an additional ground for concluding that a stay of all existing

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70. See generally *In re Joint E. & S. Dist. Asbestos Litig.*, 134 F.R.D. 32 (E. & S.D.N.Y. 1990).

71. *Id.* at 33-36.

72. *Id.* at 36.

73. *Id.* at 37 (quoting *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970)).

74. *Id.* (citing *Standard Microsystems Corp. v. Texas Instruments Inc.*, 916 F.2d 58, 60 (2d Cir. 1990); *United States v. Int'l Bhd. of Teamsters*, 907 F.2d 277, 281 (2d Cir. 1990) (stay of state court proceedings appropriate to allow federal district judge to "legitimately assert comprehensive control over complex litigation"); *In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985) (a federal court can issue an injunction against actions in state court that would "frustrate the district court's efforts to craft a settlement").

75. Judge Weinstein further held that the All Writs Act, 28 U.S.C. § 1651 (2018), likewise provided federal courts with an affirmative grant of power to certify a nationwide class action and to stay pending federal and state cases brought on behalf of class members. *Joint E. & S. Dist. Asbestos Litig.*, 134 F.R.D. at 37.

proceedings is consistent with the Anti-Injunction Act.”<sup>76</sup> In so doing, Judge Weinstein reached a seeming contradictory conclusion from that of the Eighth Circuit in the *Skywalk* litigation.<sup>77</sup>

Judge Weinstein’s Anti-Injunction Act decision subsequently gained traction in other mass tort cases on the federal dockets.<sup>78</sup> After parties in the Pennsylvania federal district court reached a tentative nationwide Rule 23(b)(3) opt-out class settlement of asbestos claims, other plaintiffs filed a parallel class action in West Virginia state court naming the same defendants.<sup>79</sup> These plaintiffs sought a declaration that the proposed federal settlement was unenforceable and not entitled to full faith and credit in the West Virginia courts, and was not binding on the members of the purported West Virginia class. They further sought a declaration that they were adequate representatives with the authority to opt-out of the federal settlement on behalf of the entire West Virginia class.

Instead, relying on the “necessary in aid of jurisdiction” exception to the Anti-Injunction Act, the Pennsylvania district court granted a temporary restraining order and preliminary injunction enjoining the West Virginia plaintiffs and their attorneys from taking any further steps in the prosecution of their state claims, or from pursuing similar duplicative litigation in any other forum.<sup>80</sup>

The Third Circuit upheld this exercise of federal power,<sup>81</sup> noting that the prospect of federal settlement was imminent, as in other cases where federal courts had issued injunctions.<sup>82</sup> Moreover, the court found further justification for issuance of the injunction

76. *Joint E. & S. Dist. Asbestos Litig.*, 134 F.R.D. at 38. See also *Baldwin-United*, 770 F.2d at 337 (“[A] class action proceeding [was] so far advanced that it was the virtual equivalent of a res over which the district judge required full control.”).

77. Judge Weinstein distinguished and limited the *Skywalk* holding, suggesting that the ground for vacating the class certification in the *Skywalk* litigation was the absence of a limited fund: “Properly construed, *Skywalk* stands only for the proposition that where class certification is improper because no limited fund exists, a court cannot rely upon the ‘necessary in aid of jurisdiction’ exception to the Anti-Injunction Act to justify a stay of existing state proceedings.” *Joint E. & S. Dist. Asbestos Litig.*, 134 F.R.D. at 39.

78. See generally *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993).

79. *Id.* at 195–96.

80. *Id.* at 196.

81. *Id.* at 202–04 (citing *In re Asbestos Sch. Litig.*, No. 83-0268, 1991 U.S. Dist. LEXIS 5142 (E.D. Pa. Apr. 16, 1991), *aff’d mem.*, 950 F.2d 723 (3d Cir. 1991)). The court also relied on the All Writs Act, 28 U.S.C. § 1651 (2018). *Carlough*, 10 F.3d at 202–03.

82. *Id.* at 203.

against the state court class proceedings, concluding that the West Virginia plaintiffs were not requesting relief strictly parallel to the federal plaintiffs. Instead of seeking compensatory damages for their injuries, the West Virginia plaintiffs were using the state court lawsuit to “challenge the propriety of the federal class action:” in other words, “as a preemptive strike against the viability of the federal suit.”<sup>83</sup> In addition, the West Virginia plaintiffs were attempting to use the state class action to obtain state court rulings regarding the state class members’ rights “to opt out of the federal action.”<sup>84</sup> Given the “mature” phase of the federal settlement proceedings, and to avoid confusion and havoc, the Third Circuit upheld the issuance of the injunction against the state class proceedings.<sup>85</sup>

*B. Shady Grove and Federalizing Class Action Litigation:  
Erie Implications*

In 2010, the Court in *Shady Grove* was confronted with a complicated issue challenging the ability of federal courts to apply federal class action jurisprudence in a diversity class action, as opposed to state law pursuant to *Erie* principles.<sup>86</sup> In a famously

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83. *Id.*

84. *Id.*

85. *Id.* at 204. The court held:

At this mature phase of the settlement proceedings and after years of pre-trial negotiation, a mass opting out of West Virginia plaintiffs clearly would be disruptive to the district court’s ongoing settlement management and would jeopardize the settlement’s fruition. In addition, mass opting out presents a likelihood that the members of the West Virginia class will be confused as to their membership status in the dueling lawsuits. All members of the [West Virginia] class are only now receiving notice of the federal suit. A declaration by the West Virginia court at this time that all West Virginia members of the federal class are now in the West Virginia suit (and we make no comment as to the legal authority of the West Virginia court to so rule) could cause havoc.

....

We find it difficult to imagine a more detrimental effect upon the district court’s ability to effectuate the settlement of this complex and far-reaching matter than would occur if the West Virginia state court was permitted to make a determination regarding the validity of the federal settlement.

*Id.*

86. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

complicated array of decisions,<sup>87</sup> Justice Scalia's plurality opinion concluded that under *Erie* principles a federal court's authority to apply federal Rule 23 class certification standards preempted a New York state statute that prohibited class status for suits seeking statutory interest penalties.<sup>88</sup>

*Shady Grove* arose in the court's diversity jurisdiction and the insurance defendant asked the court to dismiss the federal class action because it was prohibited under New York law. The district court granted the dismissal, which the Second Circuit upheld.<sup>89</sup> Finding that the New York provision conflicted with Rule 23, the plurality held that Rule 23 applied as a valid exercise of authority under the Rules Enabling Act<sup>90</sup> in derogation of the different standard under New York state law.<sup>91</sup>

Construing the *Shady Grove* facts as an *Erie* problem, the Court's plurality made scant reference to principles of comity or federalism integral to the *Bayer* appeal, or for that matter, *Erie* doctrine. The plurality understood, however, that in "keeping the federal-court door open to class actions that cannot proceed in state court" this would induce forum shopping.<sup>92</sup> Nonetheless, the plurality came down on the side of favoring uniform federal procedure:

But divergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say intended) result of a uniform system of federal procedure. Congress itself has created the possibility that the same case may follow a different course if filed in federal instead of state court. The short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping. To hold otherwise would

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87. *Shady Grove*, 559 U.S. at 395. There was no majority decision in *Shady Grove*. Four Justices formed the plurality opinion: Chief Justice Roberts, Justices Thomas, Sotomayor, and Scalia. Justice Stevens concurred in the judgment and concurred in part. Four Justices dissented: Justices Ginsburg, Kennedy, Breyer, and Alito.

88. *Id.* at 398–99. See N.Y. C.P.L.R. § 901(b) (McKinney 1975) (precluding actions to recover penalties from proceeding as a class action).

89. *Shady Grove*, 559 U.S. at 397–98.

90. *Id.* at 406–11. See 28 U.S.C. §§ 2071, 2072(b) (2018) (Rules Enabling Act conferring rulemaking authority on federal courts provided that the rules not abridge, enlarge, or modify substantive rights).

91. *Shady Grove*, 559 U.S. at 406–11.

92. *Id.* at 415.

be to “disembowel either the Constitution’s grant of power over federal procedure” or Congress’s exercise of it.<sup>93</sup>

In contrast, the *Shady Grove* dissenters<sup>94</sup> contended that in diversity cases federal courts had to apply some state procedural rules that functioned as a part of the state’s definition of substantive rights and remedies. Writing for the dissenters, Justice Ginsburg construed the New York statute as a manifestation of New York’s legislative interest in cabining available remedies. Therefore, the dissenters would have upheld the federal court’s dismissal of the litigation.

The dissenting opinion manifests a more robust concern for issues of federalism and comity in the class action litigation arena, and is littered with multiple pronouncements indicating that state interests in diversity cases “warrant our respectful consideration.”<sup>95</sup> Citing Justice Harlan, Justice Ginsburg pointed out that *Erie* doctrine was “one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal system.”<sup>96</sup> Thus, in parsing *Erie* doctrine, Justice Ginsburg concluded that Rule 23 and the New York statute did not conflict, giving rise to no preemption problem.<sup>97</sup> In her view, the plurality failed to engage in this threshold inquiry whether the federal rule and the state statute conflicted. Had the Court done this, “it would not have read Rule 23 to collide with New York’s legitimate interest in keeping certain monetary awards reasonably bounded.”<sup>98</sup>

Justice Ginsburg pointed to several *Erie* decisions where the Court counseled federal courts to interpret the federal rules with

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93. *Id.* at 415–16 (citation omitted).

94. *Id.* at 447 (Ginsburg, J., dissenting).

95. *Id.* at 443.

96. *Id.* at 437–38 (citing *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring)).

97. *Id.* at 445–46.

98. *Id.* at 437. The dissent also stated that

“[b]y finding a conflict without considering whether Rule 23 rationally should be read to avoid any collision, the Court unwisely and unnecessarily retreats from the federalism principles undergirding *Erie*. Had the Court reflected on the respect for state regulatory interests endorsed in our decisions, it would have found no cause to interpret Rule 23 so woodenly—and every reason not to do so.

*Id.* at 451.

sensitivity to important state interests, and to avoid conflict with important state regulatory policies.<sup>99</sup> She indicated that she “would continue to interpret Federal Rules with awareness of, and sensitivity to, important state regulatory policies.”<sup>100</sup> In conclusion, Justice Ginsburg noted the irony inspired by enactment of CAFA, which opened the door to state-based class actions to be removed to federal courts. In so doing, Congress envisioned fewer – and not more – class actions overall. Thus, “Congress surely never anticipated that CAFA would make federal courts a mecca for suits of the kind *Shady Grove* has launched: class actions seeking state-created penalties for claims arising under state law – claims that would be barred from class treatment in the [s]tate’s own courts.”<sup>101</sup>

*C. The Class Action Fairness Act, Smith v. Bayer,  
and Non-Preclusion of Class Certification Decisions*

The influx of the massive complex class litigation on federal and state court dockets in the late 1970s and early 1980s inspired a crisis mentality, inspiring numerous institutional studies and reform proposals.<sup>102</sup> After a decade of adventuresome and creative judicial case management of mass tort cases during this period,<sup>103</sup> including efforts at joint federal-state coordination of these cases,<sup>104</sup> federal

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99. *Id.* at 442. Justice Ginsburg suggested that the Court had “veer[ed] away” from this approach, in favor of a mechanical reading of the federal rules, which was “insensitive to state interests and productive of discord.” *Id.* at 442–43; see also *id.* at 457–58 (“We have long recognized the impropriety of displacing, in a diversity action, state-law limitations on state-created remedies.”).

100. *Id.* at 437.

101. *Id.* at 459.

102. See, e.g., MARK A. PETERSON & MOLLY SELVIN, RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES (1988); SPECIAL COMM. ON THE TORT LIAB. SYS., AM. BAR ASS’N, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW (1984); Am. Bar Ass’n, *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195 (1986); AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994).

103. See Alexandra D. Lahav, *Mass Tort Class Actions – Past, Present, and Future*, 92 N.Y.U. L. REV. 998, 1008 (2017) (commenting on the early period of adventuresome management innovations by district courts in handling mass tort cases); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 522 (2013) (commenting on adventuresome efforts by federal courts in the 1980s to resolve mass tort class litigation).

104. See, e.g., William W. Schwarzer et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending*

courts reversed course in a landmark series of decisions that signaled antipathy towards resolving mass tort class litigation in federal courts.<sup>105</sup> The federal courts indicated that the proposed mass tort litigations could not satisfy the Rule 23 requirements, especially the predominance criterion because of the presence of highly individualized issues of causation, liability, and proof. In addition, these proposed nationwide mass tort cases implicated complex choice of law issues, as well as Seventh Amendment relitigation problems.<sup>106</sup>

At the end of the 20th century, the Supreme Court further buttressed this federal hostility to sweeping classwide remedies, rejecting two landmark nationwide asbestos class settlements.<sup>107</sup> Given the federal courts' manifest lack of receptivity towards adjudicating class litigation, plaintiffs' attorneys instead turned to state courts as the forums of choice for pursuing resolution of complex class litigation.<sup>108</sup>

Between 1995 and 2005, state courts became the plaintiffs' forums of choice for class certification and settlement. Several state court venues that embraced liberal certification and settlement standards proved especially receptive to class litigation, becoming magnet courts for forum-shopping litigants.<sup>109</sup> In turn, the defense

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in *State and Federal Courts*, 73 TEX. L. REV. 1529 (1995); William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992).

105. See *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1090 (6th Cir. 1996) (decertification of nationwide class of penile implant claimants); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 737 (5th Cir. 1996) (reversal of certification of nationwide class action of nicotine-addicted claimants); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995) (reversing certification of nationwide HIV tainted blood products class).

106. See generally *Shady Grove*, 559 U.S. 393.

107. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods, Inc. v Windsor*, 521 U.S. 591 (1997); see also Lahav, *supra* note 103, at 1007-08 (decisions in *Fibreboard* and *Amchem* closed off possibility of mass tort settlements).

108. See 3 DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY § 22.12 (4th ed. 2018) ("The reluctance of federal courts to certify such classes over the next decade, the move by plaintiffs to state court for class action certification, the enactment of the Class Action Fairness Act (CAFA) removing many state court class actions to federal court, all contributed to the reduced likelihood that a Rule 23(b)(3) class will be certified for a mass tort class.").

109. A. Benjamin Spencer, *Anti-Federalist Procedure*, 64 WASH. & LEE L. REV. 233, 245 (2007) (describing legislative history to CAFA and need to combat plaintiffs' lawyers' ability to game the system to keep nationwide class litigation in state courts); John Stevens, Note, *Securing "Steady, Upright and Impartial Administration of the Laws" – The Federalist-Based*

bar protested against what it deemed the defendants' consignment to plaintiff-favoring judicial hellholes and the ability of plaintiffs' attorneys to "game the system" and keep class litigation in favorable state courts.<sup>110</sup> During this decade, defense interests united to promote Congress to enact federal legislation to redress the perceived pro-plaintiff imbalance in forum opportunities.<sup>111</sup> This legislative initiative succeeded in the 2005 enactment of the Class Action Fairness Act.<sup>112</sup>

CAFA created a new federal diversity jurisdiction provision in Rule 23 for class actions and added a new statutory provision for state class actions to be removed to federal court.<sup>113</sup> Pursuant to CAFA, a proposed class has to embrace at least 100 claimants with an aggregated amount in controversy in excess of \$5 million. CAFA further authorized jurisdiction over class actions that satisfied minimal diversity requirements.<sup>114</sup> In addition to the original diversity provisions, CAFA also enacted new removal provisions for state class actions.<sup>115</sup> These removal provisions eliminated the general removal requirement that all defendants agree to the removal, and they eliminated the one-year removal deadline.<sup>116</sup>

CAFA's enactment heralded a return of class litigation back to federal courts, because for the first time Rule 23 explicitly created a rule basis for diversity class actions and enhanced the federal forum opportunity by requiring only minimal diversity among the parties to the litigation.<sup>117</sup> The new removal statute similarly facilitated the removal of state class actions to federal court by relieving the removing defendants of certain requirements in the general

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*Imperative For Class Action Reform*, 3 GEO. J. LAW & PUB. POL'Y 361, 367 (2005) (describing plaintiffs' manipulative behavior to accomplish questionable class certifications and settlements in state courts).

110. See S. REP. NO. 109-14, at 14 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 11.

111. *Class Action Fairness Act of 2001: Hearing on H.R. 2341 Before the H. Comm. on the Judiciary*, 107th Cong. 49 (2002) (testimony of John Beisner, defense attorney involved in drafting CAFA legislation).

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

113. 28 U.S.C. § 1453 (2018).

114. *Id.* § 1332(d).

115. *Id.* § 1453.

116. *Id.* § 1453(b).

117. *Id.* § 1332(d).



removal statutes, such as the requirement that all defendants consent to the removal.<sup>118</sup>

In the broader context of dual-system federalism, CAFA represented a rebalancing of power and authority over complex litigation in favor of federal forums. In practical terms, CAFA represented a victory for defense interests and a setback for the plaintiffs' class action bar. While academic scholars focused on CAFA's implications for theories of federalism,<sup>119</sup> attorneys viewed CAFA less in abstract conceptual notions of federalism and more in the strategic ramifications for controlling litigation outcomes.

Against this background, then, the Supreme Court's 2011 decision in *Smith v. Bayer Corp.*,<sup>120</sup> in which the Court returned power to state courts in the conduct of their class litigation, proved something of a surprise, especially following the Court's decision in *Shady Grove* in the preceding year. Although CAFA signaled the opening of a new era of federalized complex litigation, the Supreme Court in 2011 threw a surprising "lifeline" to state courts in their ability to retain independent authority over class action litigation.<sup>121</sup> The Court's *Bayer* decision presents an interesting contrast to *Shady Grove*.

In *Bayer*, a unanimous Court held that a West Virginia state court retained the ability to determine whether a West Virginia class action was suitable for class certification under state rules, notwithstanding that a Minnesota federal district judge had denied class certification in a parallel class action brought against the same defendant.<sup>122</sup>

The *Bayer* litigation returned to the vexing problem of parallel, duplicative class litigation in federal and state courts. While CAFA enabled defendants to remove state class litigation to federal court,

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118. *Id.* § 1453.

119. See, e.g., David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247 (2007) (discussing federalism implications of CAFA); Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929 (2008) (discussing federalism implications of CAFA).

120. *Smith v. Bayer Corp.*, 564 U.S. 299 (2011).

121. See generally Mark Moller, *The New Class Action Federalism*, 48 AKRON L. REV. 861, 866-74 (2015) (characterizing the Court's decision in *Smith v. Bayer* as "The Roberts Court Throws Federalism a Lifeline").

122. *Bayer*, 564 U.S. at 302.

it did not completely forestall the institution and pursuit of state class litigation. Hence, although the defense bar had gained a forum-strategic advantage through CAFA, this advantage would be lost if plaintiffs could simply circumvent the consequences of an adverse federal certification by filing in a more plaintiff-friendly state court. Whereas federal courts had developed a substantial Anti-Injunction Act jurisprudence relating to state court litigation in deference to pending federal class settlements,<sup>123</sup> the courts had not developed a similar doctrinal approach to class certification decisions.

Although the Court touched on the underlying federalism concerns in *Bayer* only in passing, the *Bayer* litigation provides an interesting illustration of the intersection of federalism concerns with complex litigation that parties pursue in a dual-court system. George McCollins sued the Bayer Corporation in West Virginia state court alleging various state law claims arising from Bayer's sale of the prescription drug Baycol. The plaintiff contended that Bayer violated the West Virginia consumer protection statute and express and implied warranties in selling him a defective product. He asked the state court to certify a class action of West Virginia residents pursuant to West Virginia's Rule of Civil Procedure 23.<sup>124</sup>

Shortly after McCollins filed his lawsuit, another plaintiff, Keith Smith, sued Bayer in a different West Virginia state court alleging claims similar to McCollins's action. Smith also requested the court to certify a West Virginia class under the West Virginia class action rule. Bayer then removed McCollins's case to the District Court for the Southern District of West Virginia based on diversity jurisdiction.<sup>125</sup> After removal to federal court, McCollins's case was transferred to the District of Minnesota, which was overseeing a multidistrict consolidation of *Baycol* litigation in federal courts.<sup>126</sup> Bayer was unable to remove Smith's case to federal court because Smith had joined several non-diverse defendants in his lawsuit, thereby defeating a federal court's diversity jurisdiction and

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123. See Andrea R. Lucas, Note, *Balancing Comity with the Protection of Preclusion: The Scope of the Relitigation Exception to the Anti-Injunction Act*, 97 VA. L. REV. 1475, 1478-90 (2011) (historical interpretation and application of the Anti-Injunction Act relitigation exception); *supra* notes 49-84.

124. *Bayer*, 564 U.S. at 303.

125. *Id.*; see 28 U.S.C. §§ 1332, 1441 (2018) (diversity and removal jurisdiction statutes).

126. *Bayer*, 564 U.S. at 303; see 28 U.S.C. § 1407 (multidistrict litigation statute).

frustrating removal.<sup>127</sup> Smith's suit remained in West Virginia state court.

The Minnesota federal court first decided McCollins's motion to certify a class of West Virginia Baycol purchasers, before consideration of class certification in state court. The federal court declined to certify the proposed class on two grounds. First, construing West Virginia law, the court concluded that the case could not be certified because each individual class member would have to show actual injury to recover for the claimant's use of Baycol. Second, the court determined that individual issues predominated over common issues, therefore failing to satisfy the Rule 23(b)(3) predominance requirement for class certification.<sup>128</sup>

Bayer then requested that the Minnesota federal court enjoin the West Virginia state court from hearing Smith's motion for class certification, arguing that Smith's case was identical to the proposed West Virginia *Baycol* class action that the federal court declined to certify. The district court granted Bayer's motion, concluding that the restraining order was appropriate in order to protect its judgment in the McCollins lawsuit, relying on the third "relitigation exception" to the Anti-Injunction Act.<sup>129</sup>

Thus, the *Bayer* litigation shifted judicial concern from the settlement arena to the Anti-Injunction Act's authority to empower federal courts to intervene in pending state class certification proceedings, a much earlier stage in class litigation. This inquiry focused on a different Anti-Injunction Act exception than the "in aid of jurisdiction" provision that courts invoked to protect federal settlements. Similar to the line of cases upholding federal court authority to enjoin pending state class litigation to protect settlement class agreements, the district court concluded that the relitigation exception authorized interference with the West Virginia court's ability to certify a class action.

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127. *Bayer*, 564 U.S. at 303.

128. *Id.* at 304; see FED. R. CIV. P. 23(b)(3) (predominance requirement). The court also dismissed McCollins's claims on the merits, for his failure to show actual physical injury from his use of Baycol. *Bayer*, 564 U.S. at 304.

129. *Bayer*, 564 U.S. at 302-03. The "relitigation exception" is the third exception to the Anti-Injunction Act, which permits a federal court to enjoin a state court proceeding to "protect or effectuate [the federal court's] judgments." See 28 U.S.C. § 2283; *supra* notes 49-50.

The Eighth Circuit Court of Appeals affirmed the district court's order.<sup>130</sup> The court held that the Anti-Injunction Act's relitigation exception authorized the federal injunction because issue preclusion rules barred Smith from seeking certification of his state class action. The court reasoned that Smith was invoking a similar class action rule and the same legal theories to seek certification of the same class as McCollins. The state court class certification issue was sufficiently identical to the federal certification issue to warrant preclusion. In addition, the court found that McCollins's and Smith's interests were aligned, and therefore Smith was bound by the federal court's judgment.<sup>131</sup>

The Supreme Court reversed. Citing recent precedent,<sup>132</sup> the Court acknowledged that the relitigation exception authorized federal courts to prevent state litigation of a claim or issue that was previously presented to and decided by a federal court.<sup>133</sup> However, the Court further suggested that a federal court could enjoin a state court proceeding "only if preclusion is clear beyond peradventure."<sup>134</sup> Hence, the Court's evaluation of the lower courts' propriety in issuing the injunction against West Virginia state court proceedings devolved into a convoluted discussion of the requirements of preclusion doctrine.<sup>135</sup>

The Court rejected the Eighth Circuit's reliance on the near-identity of the text of the federal and West Virginia class action rules as the basis for concluding that issue preclusion was appropriate under the relitigation exception. The Court noted:

That was the right place to start, but not to end. Federal and state courts, after all, can and do apply identically worded procedural provisions in widely varying ways. If a State's procedural provision tracks the language of a Federal Rule, but a state court interprets that provision in a manner federal courts have not, then the state

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130. *In re Baycol Prods. Litig.*, 593 F.3d 716, 719 (8th Cir. 2010).

131. *Bayer*, 564 U.S. at 305.

132. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988).

133. *Bayer*, 564 U.S. at 306; see *Chick Kam Choo*, 486 U.S. at 147.

134. *Bayer*, 564 U.S. at 307. The Court noted that "[d]eciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court (here, the one in West Virginia). So issuing an injunction under the relitigation exception is resorting to heavy artillery." *Id.*

135. *Id.* at 308-17.

court is using a different standard and thus deciding a different issue.<sup>136</sup>

With this nod towards federal deference to state court proceedings, the Court pointed out that “the West Virginia Supreme Court has gone some way toward resolving the matter before us by declaring its independence from federal courts’ interpretation of the Federal Rules – and particularly of Rule 23.”<sup>137</sup> The Court observed that in other pharmaceutical class litigation, the West Virginia Supreme Court had eschewed the litigants’ reliance on federal class certification precedents, seeking “to avoid having [their] legal analysis of [their] Rules ‘amount to nothing more than Pavlovian responses to federal decisional law.’”<sup>138</sup> Moreover, the West Virginia Supreme Court’s approach to the Rule 23(b)(3) predominance requirement differed from that of federal jurisprudence; therefore, a state court using the state standard would most likely decide a class certification decision differently than an earlier federal court determining the same issue.<sup>139</sup> The Court held that a federal and state court could apply different law, and a federal court’s determination of one issue does not preclude the state court’s determination of another. “It then goes without saying that the federal court may not issue an injunction.”<sup>140</sup>

The Court further rejected the federal court’s binding Smith to the federal class certification judgment as a nonparty to that litigation.<sup>141</sup> The Court observed that the doctrine rejecting nonparty preclusion countered Bayer’s policy argument relating to dual-system class litigation. Bayer contended that reversal of the

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136. *Id.* at 309–10. The Court continued: “So a federal court considering whether the relitigation exception applies should examine whether state law parallels its federal counterpart. But as suggested earlier, the federal court must resolve any uncertainty on that score by leaving the question of preclusion to the state courts.” *Id.* (citation omitted).

137. *Id.* at 310.

138. *Id.* at 310–11 (citing *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 61 (W. Va. 2003) (class certification in pharmaceutical mass tort approved)).

139. *Id.*

140. *Id.* at 312.

141. *Id.* at 314–15. The Court concluded that the federal denial of class certification could not bind Smith, a nonparty to the rejected class. The Court determined that because Federal Rule 23 requirements were not satisfied, no properly conducted class action existed at any time during the dual class proceedings. In absence of certification under Rule 23, the precondition for binding Smith to the federal decision was not met. The Court noted that the weight of scholarly authority agreed that an uncertified class action could not bind proposed class members. *Id.* at 316 n.11.

Eight Circuit's decision would encourage serial relitigation of class certification decisions, with unsuccessful federal litigants decamping to more receptive state courts in order to obtain class certification.<sup>142</sup> The Court concluded that "principles of *stare decisis* and comity among courts [would] mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs[.]" but that the right approach did not lie in binding nonparties to a judgment.<sup>143</sup>

Finally, the Court noted that congressional enactment of CAFA largely abated the issues raised by the *Bayer* dual-court litigation. CAFA was not in effect when McCollins and Smith filed their West Virginia class actions. Because CAFA created a minimal diversity jurisdiction statute for class litigation, if CAFA had been in effect then, Bayer could have removed Smith's class action to federal court where it would have been transferred to the Minnesota MDL for a unified class certification decision.<sup>144</sup>

Thus, the Court's *Bayer* holding was narrowly confined to its pre-CAFA facts and of limited doctrinal import for future post-CAFA litigation. In deciding *Bayer*, the Court clearly focused on articulating preclusion doctrine,<sup>145</sup> paying less attention to issues (or policy concerns) presented by dual-court class litigation. The Court clearly thought the nub of the problem lay in appropriate application of preclusion doctrine, suggesting that litigants who were disgruntled with the Court's holding could seek congressional modification of established preclusion doctrine.<sup>146</sup>

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142. *Id.* at 316 ("Bayer warns that under our approach class counsel can repeatedly try to certify the same class 'by the simple expedient of changing the named plaintiff in the caption of the complaint.'").

143. *Id.* at 317.

144. *Id.*

145. A good deal of scholarly commentary on the *Bayer* decision likewise focused on the implications of preclusion doctrine as applied to class litigation. See generally Richard D. Freer, *Preclusion and the Denial of Class Certification: Avoiding the "Death by a Thousand Cuts,"* 99 IOWA L. REV. BULL. 85 (2014); Martin H. Redish & Megan B. Kiernan, *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action,* 99 IOWA L. REV. 1659 (2014).

146. *Bayer*, 564 U.S. at 318 n.12 ("[N]othing in our holding today forecloses legislation to modify established principles of preclusion should Congress decide that CAFA does not sufficiently prevent relitigation of class certification motions. Nor does this opinion at all address the permissibility of a change in the Federal Rules of Civil Procedure pertaining to this question.").

Notably, the Court made only passing reference to principles of federalism, offhandedly suggesting that “[f]inally, we would expect federal courts to apply principles of comity to each other’s class certification decisions when addressing a common dispute.”<sup>147</sup> In spite of its relatively under-developed discussion of federalism concerns, the Court reiterated that in evaluating Anti-Injunction Act issues, the Court for more than forty years consistently had maintained that “[a]ny doubts . . . should be resolved in favor of permitting the state courts to proceed.”<sup>148</sup> The Court concluded that the *Bayer* litigation did not strike the Court as even a close issue because the issues in the federal and state lawsuits differed because the relevant legal standards differed. Moreover, the mere proposal of a class in the federal action could not bind parties who were not parties there.<sup>149</sup>

Although the Court’s *Bayer* decision is cabined by its unique time-bound facts,<sup>150</sup> it nonetheless reflects the Court’s deferential mindset towards the role of independent state class litigation in a dual court system.<sup>151</sup> Significantly, *Bayer* was a unanimous decision, suggesting that the issues relating to dual-court class litigation were not resolved along liberal-conservative ideological lines.<sup>152</sup> The Court’s deferential attitude, rhetorically grounded in principles of comity,<sup>153</sup> marks a departure from the appellate courts’ Anti-Injunction Act “necessary in aid of jurisdiction” line of decisions. Whereas the appellate courts had weaponized the Anti-Injunction Act to permit intervention in parallel state class litigation, the Court

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147. *Id.* at 317.

148. *Id.* at 318 (alterations in original) (quoting *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs*, 398 U. S. 281, 297 (1970)).

149. *Id.* at 318.

150. See Tobias Barrington Wolff, *Multiple Attempts at Class Certification*, 99 IOWA L. REV. BULL. 137, 138, 142–44 (2014) (criticizing the Court’s decision in *Bayer*; suggesting unresolved broader questions of preclusion doctrine, federal common law, and due process constraints).

151. See Mallori Allen, Note, *Classing Up the Relitigation Exception?: Federalism, Injunctions, and Class Actions in Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), 37 S. ILL. U. L.J. 219, 232–36 (2012) (arguing that *Bayer* decision still has importance in post-CAFA environment because class actions can still remain in state courts).

152. Court watchers might have anticipated that the Court’s conservative wing would have decided in favor of the Eighth Circuit’s order restraining relitigation of the class certification decision (the argument advanced by the defendant Bayer), while the Court’s liberal wing would have favored the independent ability of the West Virginia state courts to decide the class certification anew.

153. See Lucas, *supra* note 123, at 1513–18 (arguing in favor of narrow interpretation of the Anti-Injunction relitigation exception in the interests of comity and federalism).

in *Bayer* constrained the use of the Anti-Injunction Act for this purpose. Instead, the Court reiterated its longstanding understanding of the Anti-Injunction Act as a restriction on federal interference with state court proceedings.

In hindsight, it is somewhat difficult to comprehend why the Court granted certiorari and decided the appeal in *Bayer*. With the enactment of CAFA, the certification issue presented in *Bayer* became a self-correcting problem. Indeed, the Court recognized this in its closing remarks.<sup>154</sup> Simply stated, in the post-CAFA litigation world, the problem presented in *Bayer* is unlikely to be replicated and the Court need not have decided the case. Post-CAFA, minimally diverse state class actions such as Smith's are now subject to removal, thereby obviating the need for a federal injunction against a proposed state class certification because the state class action would no longer be present in state court. Apart from the opportunity to expound on preclusion doctrine, the Court's *Bayer* decision seems an occasion to endorse doctrines of comity and federalism regarding dual system class litigation.

In both *Shady Grove* and *Bayer*, the defendants acted in rational self-interest based on their understanding of the advantages or disadvantages of federal class action jurisprudence compared to underlying state law. Although the Court in these cases located the issues in federalism concerns, the litigants were motivated less by abstract federalism concepts than outcome-driven strategy. The federal defendant's request for dismissal in *Shady Grove* was intended to avoid federal certification standards (that would have permitted certification) in deference to more restrictive state class standards (that would have prohibited the class proceeding). Thus, the *Shady Grove* defendant desired application of state law to avoid federal class proceedings. In *Bayer*, on the other hand, the federal defendant—having successfully defeated class certification under federal standards—sought to enjoin the West Virginia court from proceeding precisely because the more liberal West Virginia class certification standards would have allowed the class to proceed in

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154. *See id.*



state court.<sup>155</sup> The *Bayer* defendant, then, desired application of federal law to avoid state class proceedings.

Whereas the *Shady Grove* Court preempted state law based on its understanding of *Erie* doctrine as applied to conflicting federal and state rules, the *Bayer* Court one year later acknowledged that the differing class certification standards required the Minnesota federal court to yield to the West Virginia state court. In *Shady Grove*, the Court parsed *Erie* doctrine to give primacy to federal adjudication of class litigation unfettered by countervailing state law; in *Bayer*, the Court parsed preclusion doctrine to reach the opposite result.

The *Shady Grove* plurality opinion by no means settled the issue of conflicting class certification standards in a dual-court system—the problem of inconsistent federal and state class standards persists. Indeed, the *Shady Grove* dissenting and concurring opinions provided courts with alternative grounds to give primacy to state law regarding class litigation, and several federal courts have so ruled. For example, several states have consumer protection statutes that prohibit plaintiffs from pursuing class action relief under those laws.<sup>156</sup> In addressing whether a federal court should apply Rule 23 to disallow the actions, some federal courts have followed Justice Scalia’s plurality opinion to preempt state law provisions that disallow class action treatment of certain types of claims.<sup>157</sup> However, other courts have concluded that state statutes differ from the statutes in *Shady Grove* and its progeny, instead defining substantive rights (or what a consumer needs to prove in

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155. For an excellent discussion of the political and ideological implications of the *Shady Grove* opinions, and the seemingly inexplicable alignment of liberal and conservative Justices either supporting or rejecting federal class proceedings over more restrictive state class litigation statutes, see Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act After Shady Grove*, 86 NOTRE DAME L. REV. 1131, 1178–79 (2011).

156. See *Wilson v. Volkswagen Grp. of Am., Inc.*, No. 17-23033-Civ-Scola, 2018 WL 4623539, at \*12 (S.D. Fla. Sept. 26, 2018) (citing the consumer protection laws of Ohio and Utah as examples); see also *Delgado v. Ocwen Loan Servicing, L.L.C.*, No. 13-CV-4427 (NGG) (ST), 2017 WL 5201079, at \*7 (E.D.N.Y. Nov. 9, 2017) (consumer protection statutes of Alabama, Georgia, and Tennessee explicitly prohibit class actions to enforce terms).

157. See *Lisk v. Lumber One Wood Preserving, L.L.C.*, 792 F.3d 1331, 1335 (11th Cir. 2015) (upholding application of Rule 23 to permit class proceedings in federal court; prohibition of private class claims under Alabama Deceptive Trade Practices Act superseded by Rule 23, much like state statute under review in *Shady Grove*); *Fejzulai v. Sam’s W., Inc.*, 205 F. Supp. 3d 723, 726 (D.S.C. 2016) (citing *Shady Grove*).

order to succeed on a claim).<sup>158</sup> In these cases, courts have held that requiring a plaintiff to proceed in federal court would illegitimately abridge, enlarge, or modify a substantive state law right, and “federal rules cannot displace a State’s definition of its own rights and remedies.”<sup>159</sup>

## II. KEEPING COMPLEX LITIGATION IN STATE COURT: THE CAFA CARVE-OUTS FOR STATE COMPLEX LITIGATION

The Supreme Court preserved a role for state courts in managing certain complex cases by disallowing removal of certain of these cases to federal court under CAFA’s mass action provision.<sup>160</sup> In addition, Congress in CAFA legislatively carved out a role for state courts to adjudicate certain complex cases of a purely local character. Thus, contrary to the notion that CAFA completely federalized class litigation, the statutory scheme recognized a role for state courts in resolving local controversies. Congress, then, desired to immunize some types of dispute from federal intrusion.

### A. *The CAFA Carve-Out Provisions for Home State and Purely Local Actions*

Generally, CAFA created new federal diversity jurisdiction for class actions.<sup>161</sup> Although CAFA created new opportunities for defendants to originally file class litigation in federal court or to remove class actions from state court, the CAFA statutory scheme fashioned three exceptions to removal by which a district court could decline to exercise jurisdiction: (1) the home state exception,<sup>162</sup> (2) the local controversy exception,<sup>163</sup> and (3) the discretionary

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158. *Wilson*, 2018 WL 4623539, at \*13; *see also Delgado*, 2017 WL 5201079, at \*10. In *Delgado*, the court followed Justice Stevens’ concurring *Shady Grove* opinion and applied the class action bar incorporated in the Alabama, Georgia and Tennessee consumer protection laws over Rule 23. The court “conclude[d] that the specific inclusion of a class action bar in the Alabama (and Tennessee and Georgia) consumer protection laws evinces a desire by the state legislature to limit not only the form of the action but also the remedies available, placing those bars squarely within Justice Stevens’ concurrence.” *Id.*

159. *Wilson*, 2018 WL 4623539, at \*13 (quoting *Beal ex rel Putnam v. Walgreen Co.*, 408 F. App’x 898, 902 n.2 (6th Cir. 2010)).

160. *See infra* notes 169–183 and accompanying discussion.

161. 28 U.S.C. § 1332(d) (2018).

162. *Id.* § 1332(d)(4)(B).

163. *Id.* § 1332(d)(4)(A).

jurisdiction of district courts.<sup>164</sup> These exceptions set forth a complicated and confusing array of requirements by which federal courts were required to decline removal jurisdiction – or by exercise of discretion – were permitted to remand class actions originally filed in state court.<sup>165</sup>

The home state and local controversy exceptions are mandatory; if the statutory criteria are satisfied, then a district court must decline jurisdiction and remand a removed class action to state court. The home state exception provides that a district court shall decline to exercise jurisdiction when “two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.”<sup>166</sup>

The local controversy exception sets forth a more complicated schema of criteria. To come within the local controversy exception, more than two-thirds of proposed class members must be citizens of the state; at least one defendant must be a citizen of the state; the defendant’s conduct needs to have formed a significant basis for the claims; the class members’ principal injuries should have occurred where the action is filed; and plaintiffs should not have filed another class action asserting the same or similar allegations during the previous three years.<sup>167</sup>

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164. *Id.* § 1332(d)(3).

165. See Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1527 (2008) (“CAFA’s exceptions, or some of them, are numbingly complicated and, as already observed, well calculated to keep lawyers and courts busy for years in work that advances the cause of substantive justice not one wit.”).

166. 28 U.S.C. § 1332(d)(4)(B).

167. *Id.* §1332(d)(4)(A). To satisfy the local controversy exception, “(i) a class action” must meet the following criteria:

- “(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; 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

In addition to the home state and local controversy exceptions, CAFA provided federal courts with discretionary authority to decline jurisdiction over removed class actions.<sup>168</sup> Similar to CAFA's other jurisdictional exceptions, the discretionary criteria are cumbersome and unartfully drafted:

[a] district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction . . . 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.<sup>169</sup>

In evaluating the "totality of the circumstances," CAFA enumerates six factors that a federal court must consider.<sup>170</sup>

Not surprisingly, CAFA's removal provisions engendered a raft of appellate litigation, largely centered on issues relating to allocation of burdens of proof,<sup>171</sup> satisfaction of the amount in

(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."

*Id.*

168. *Id.* § 1332(d)(3).

169. *Id.*

170. *Id.* A federal court must consider these factors:

"(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;

(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

(E) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed."

*Id.*

171. See generally Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553 (2008) (discussing controversies over allocation of burdens of proof in CAFA removal exceptions); Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. 409 (2008) (discussing CAFA's allocation and shifting of burdens of proof for removal jurisdiction).

controversy requirements,<sup>172</sup> artful drafting to evade removal,<sup>173</sup> the definition of citizenship,<sup>174</sup> the definition of the primary or significant defendant,<sup>175</sup> and other issues.<sup>176</sup> However, notwithstanding the myriad problems engendered by CAFA's complicated home state and local controversy removal exceptions, federal courts have declined their jurisdiction and remanded class litigation to originating state courts.

Class litigation engendered by the events surrounding Hurricane Katrina illustrate how federal courts, applying CAFA exceptions, may remand litigation to state court.<sup>177</sup> In the aftermath of Hurricane Katrina's landfall in New Orleans, class representative Preston filed a class action in Civil District Court for the Parish of Orleans, a state court. The action was brought on behalf of patients and relatives of deceased patients against Tenet Health Systems Memorial Medical Center and LifeCare Management Services LLC. Preston alleged that Memorial, the owner and operator of the hospital, acted negligently in failing to design and maintain the premises in a manner to avoid power loss in the hospital building. Preston asserted claims for intentional misconduct, reverse patient dumping, and involuntary euthanization. In addition, the petition alleged that Memorial and LifeCare failed to develop and implement an evacuation plan for its patients. Because the

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172. See generally *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81 (2014) (CAFA removal petition need not include evidentiary support for amount-in-controversy allegations); *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013) (stipulation to amount-in-controversy could not bind class members for purpose of CAFA jurisdiction).

173. See generally Marc S. Werner, Note, *The Viability and Strategic Significance of Class Action Alternatives Under CAFA's Mass Action Provisions*, 103 GEO. L.J. 465, 468-96 (2015) (discussing artful pleading under CAFA).

174. See generally Tim Barham, Note, *Class Action Water Crisis: Resolving Flint's New Split Over CAFA's Local Controversy Exception*, 70 BAYLOR L. REV. 149 (2018) (discussing Sixth Circuit's decision allowing for presumed citizenship of class members in state where action brought).

175. See generally Amanda Coney, Comment, *Defining "Primary Defendants" in the Class Action Fairness Act of 2005*, 67 LA. L. REV. 903 (2007) (discussing problems in defining primary or significant defendant for CAFA jurisdiction).

176. See generally Gina M. Intrepido, *Notice Expertise May Help Resolve CAFA Removal Issues*, 6 CLASS ACTION LITIG. REP. 759 (2005) (discussing practical problems of identifying class members' citizenship for purposes of removal requirements and use of experts to resolve this issue).

177. See *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 804 (5th Cir. 2007) (affirming district court's order remanding class litigation to Louisiana state court).

defendants failed to timely evacuate the facility after Hurricane Katrina, this led to the death and injuries of hospital patients.<sup>178</sup>

LifeCare filed a notice of removal, but Memorial never consented to the removal. After removal to the Federal District Court for Louisiana, Preston moved to remand the litigation under CAFA's local controversy exception. The district court granted Preston's remand petition under CAFA's local controversy exception, home state exception, and the discretionary jurisdiction provision.<sup>179</sup>

On appeal, the Fifth Circuit affirmed the district court's application of the CAFA removal exceptions.<sup>180</sup> The court indicated that "Congress crafted CAFA to exclude" from removal "only a narrow category of truly localized controversies."<sup>181</sup> To this end, CAFA provided district courts with the ability to ferret out the "controversy that uniquely affects a particular locality to the exclusion of all others."<sup>182</sup> The court concluded that the Hurricane Katrina litigation "symbolizes a quintessential example of Congress' intent to carve-out exceptions to CAFA's expansive grant of federal jurisdiction when our courts confront a truly localized controversy."<sup>183</sup>

The court noted that CAFA's discretionary jurisdiction provision provided a particularly well-suited framework affecting the jurisdictional issue. The court enumerated the ways in which the litigation especially fit within the requirements for discretionary remand: (1) a nexus existed between the Louisiana forum, the defendants, and the proposed class, (2) the defendants were citizens of Louisiana, (3) the plaintiffs alleged that the defendants committed acts in Louisiana that caused injuries and deaths to patients hospitalized in New Orleans, Louisiana, and (4) the claims involved negligence governed by state law.<sup>184</sup> In addition, Memorial did not challenge that the lawsuit fulfilled the general requirements for CAFA removal, that is, that the class contained the requisite number of class members, there was minimal diversity

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178. *Id.* at 808.

179. *Id.* at 808-09.

180. *Id.* at 808.

181. *Id.* at 812.

182. *Id.* (citing *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006)).

183. *Id.* at 823.

184. *Id.* at 812.

between plaintiffs and defendants, and the proposed action satisfied the aggregate amount in controversy.<sup>185</sup>

Instead, Memorial challenged the requirement that greater than one-third of the putative class members were Louisiana citizens at the time of Preston's filing the class petition. Memorial argued that failing to satisfy that citizenship requirement, the action was ineligible for discretionary remand to state court.<sup>186</sup> Establishing the putative citizenship of the class members in the wake of the hurricane proved to be a difficult enterprise, compounded by lost records and dispersion of claimants to other states.<sup>187</sup> Nonetheless, after a lengthy discursive analysis of the legal standards relating to citizenship and evidentiary proof, the appellate court concluded that based on the record as a whole, the district court made a reasonable assumption that at least one-third of the class members were Louisiana citizens at the time of filing of the lawsuit.<sup>188</sup>

After addressing and rejecting Memorial's challenges to the citizenship, composition, and size of the proposed class, the appellate court upheld the remand based on an analysis of the statutory factors for determining whether remand was in the interest of justice.<sup>189</sup> The court concluded that the litigation did not affect national interest as contemplated by CAFA; the majority of claims were governed by Louisiana law; and there was a distinct nexus between the Louisiana forum and the class members, the alleged harm, and the defendants.<sup>190</sup> The court further found that, based on its citizenship analysis, the "number of citizens of the State in which the action was originally filed . . . 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."<sup>191</sup> Finally, the court noted that the record did not indicate that the plaintiffs had intentionally pleaded the case to avoid federal jurisdiction, and the defendants did not assert such an objection.<sup>192</sup>

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185. *Id.*

186. *Id.*

187. *Id.* at 812-20.

188. *Id.* at 818.

189. *Id.* at 822-23.

190. *Id.*

191. *Id.* at 823 (quoting 28 U.S.C. § 1332(d)(E)(3) (2018)).

192. *Id.* at 822-23.

Similar to the citizenship challenge that defendants raised in the Hurricane Katrina litigation, the problem of defining citizenship for application of the CAFA exceptions has vexed the federal courts. All three of the CAFA exceptions involve a determination of a state class member's citizenship. Courts generally agree that the party seeking remand to state court carries the burden of proving a CAFA exception.<sup>193</sup> In addition, most courts have agreed that the definition of "citizenship" for CAFA purposes is the same as it is for diversity jurisdiction purposes, meaning a person's domicile with an intent to remain.<sup>194</sup>

Federal courts that have applied a strict understanding of citizenship in the context of the CAFA exceptions have impeded the ability of plaintiffs to keep certain class litigation in state forums. The problem of establishing citizenship for CAFA purposes is especially problematic in litigation where evidentiary proof is difficult or impossible to obtain, as the Hurricane Katrina litigation illustrated. Nonetheless, some federal courts have departed from this narrow interpretation of citizenship requirements and instead have permitted remand based on a presumption of residency and domicile.<sup>195</sup>

Thus, at least some federal courts have liberally construed the requirements of CAFA's local controversy exception to mandate remand to state court.<sup>196</sup> The Sixth Circuit upheld remand of class litigation brought on behalf of residents and property owners in Flint, Michigan, relating to contamination of their water supply. The plaintiffs alleged professional negligence against Lockwood, Andrews, & Newman, Inc. of Texas and its Michigan affiliate, Lockwood, Andrews, & Newman, P.C. (Lockwood Michigan), the civil engineering firms the city engaged to rehabilitate and provide quality control to Flint's water supply.<sup>197</sup> The plaintiffs alleged that the defendants knew the water treatment facility needed upgrades for lead contamination treatment, yet they did not ensure that the

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193. See, e.g., *Mason v. Lockwood, Andrews, & Newman, P.C.*, 842 F.3d 383, 388–89 (6th Cir. 2016).

194. E.g., *id.* at 389–90 (reasoning that citizenship is co-extensive with a person's domicile).

195. See *id.*

196. *Id.* (affirming district court decision to presume class citizenship based on residency). See generally Barham, *supra* note 174 (discussing the Flint, Michigan, water contamination litigation).

197. *Mason*, 842 F.3d at 386, 388.



proper safeguards were in place—a failure that caused widespread personal injuries and property damage due to the contaminated water supply.<sup>198</sup>

The defendants removed the litigation to federal court, and in response, the plaintiffs asserted that the district court was obligated to decline jurisdiction under CAFA's local controversy exception.<sup>199</sup> The district court granted the motion to remand. On appeal, the issue before the court was whether the local controversy exception was properly applied.<sup>200</sup> The defendants contended that two of the local controversy exception's requirements were not met: (1) that Lockwood Michigan was not a defendant whose conduct formed a significant basis for the claims alleged by the plaintiffs, and (2) that plaintiffs had not produced evidence establishing that greater than two-thirds of the proposed class were citizens of Michigan.<sup>201</sup>

The appellate court affirmed the remand, applying a presumption of residency that satisfied the local controversy citizenship requirement. Although virtually all federal courts have rejected a residency-domicile presumption in the context of the local controversy exception, the Sixth Circuit permitted the presumption for two reasons: (1) CAFA's local controversy exception was not jurisdictional, and (2) the residency-domicile presumption applied because of the difficulties in proving the domicile of a mass of individuals.<sup>202</sup>

In the context of judicial restrictive rulings, it is difficult to assess the efficacy of CAFA's home state and local controversy exceptions as a means of preserving the domain of state courts to adjudicate class litigation. Nevertheless, some federal courts apparently have eschewed formalism in favor of a holistic view of the essential nature of complex disputes, as well as the practical difficulties plaintiffs face in carrying burdens of proof on CAFA removal, especially regarding the citizenship of class members. In so doing, these courts have conserved a role for state courts to maintain jurisdiction over class litigation originally filed there.

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198. *Id.* at 388.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 392.

III. KEEPING COMPLEX LITIGATION IN STATE COURT:  
PRESERVING THE ROLE OF STATES' ATTORNEYS GENERAL

Federal courts have vacillated in their approach to dual-system complex litigation based on their varying interpretations of abstention doctrines, the Anti-Injunction Act, and *Erie* principles. In the context of this otherwise muddled landscape, the Supreme Court effectively bolstered the state role in protecting citizens involved in aggregate litigation by preserving state *parens patriae* actions from removal to federal court.<sup>203</sup> If Congress intended to federalize class action litigation post-CAFA, then the Court carved out a distinct role for state attorneys general in pursuing aggregate relief in state forums, notwithstanding CAFA.

The enactment of CAFA set the stage for conflict between federal and state jurisdiction over *parens patriae* actions by creating a removal opportunity for "mass actions."<sup>204</sup> CAFA defined a mass action as any civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."<sup>205</sup> CAFA created new minimal diversity jurisdiction for class and mass actions in which the aggregate amount in controversy exceeded \$5 million.<sup>206</sup> However, unlike a class action, a federal court could exert jurisdiction in a mass action only over those plaintiffs whose claims individually satisfied the \$75,000 amount-in-controversy requirement.<sup>207</sup> Through artful pleading then, plaintiffs could successfully keep aggregate litigation in state court by pleading that individual claims amounted to less than \$75,000.

CAFA's creation of new federal jurisdiction for "mass actions" was driven by the same policy considerations that animated enactment of CAFA: defendants' desire to avoid large-scale aggregate litigation in plaintiff-favoring state forums.<sup>208</sup> The

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203. See generally *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161 (2014).

204. See 28 U.S.C. §§ 1332(d)(11)(A)-(B)(i) (2018) (mass action removable under §§ 1332(d)(2)-(10), 1453).

205. *Id.* § 1332(d)(11)(B)(i).

206. *Id.* § 1332(d)(2), (6), (11)(A).

207. *Id.* § 1332(d)(11)(B)(i).

208. See Werner, *supra* note 173, at 471 (noting fears of CAFA's proponents that plaintiffs' attorneys could subvert CAFA's goals by bringing aggregate lawsuits through joinder rules or other procedural alternatives, thus circumventing federal jurisdiction; noting

defense bar recognized that creating removal jurisdiction for state-based class actions would not completely address the problems members of the defense bar faced in state court because plaintiffs could evade removal simply by joining numerous claimants in an action that was not denominated as a class action.<sup>209</sup> In addition, defendants were vulnerable to aggregate litigation in state courts that lacked class action rules, such as Mississippi, but nonetheless permitted large-scale joinder of parties.<sup>210</sup> From the defense perspective, a mass action was functionally the equivalent of a class action: if a mass action walked like a class action duck and quacked like a class action duck, then it was a class action duck.<sup>211</sup>

CAFA's mass action provision swiftly created tension with state *parens patriae* actions, wherein state attorneys general brought actions representing the interests of groups of citizens. In response to *parens patriae* actions, defendants sought removal under CAFA's mass action provisions, contending that state *parens patriae* actions satisfied CAFA's mass action requirements and were simply class actions in disguise. The CAFA challenges to removal of state *parens patriae* actions engendered a split among federal authorities. The Fifth Circuit held that *parens patriae* actions were mass actions subject to removal,<sup>212</sup> while the Second,<sup>213</sup> Fourth,<sup>214</sup> Seventh,<sup>215</sup> and Ninth Circuits<sup>216</sup> held that *parens patriae* actions had only one plaintiff—the state—and therefore fell short of the mass action requirement of at least 100 claimants.<sup>217</sup> Resolving this conflict, the Court in 2014 rejected the Fifth Circuit's conclusion and agreed with the majority of federal courts that state *parens patriae* actions were not CAFA mass actions subject to removal.<sup>218</sup>

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the particular threat raised by lenient Mississippi rules permitting joinder of large numbers of claimants in absence of a state class action rule).

209. *Id.*

210. *Id.*

211. See 151 CONG. REC. 1641–42 (2005) (statement of Sen. Lott) (suggesting that mass actions are class actions in disguise and should be subject to removal the same as class actions).

212. *Louisiana ex rel. Caldwell v. Allstate Ins.*, 536 F.3d 418, 430, 432 (5th Cir. 2008) (relying on CAFA's overarching purpose in extending federal court jurisdiction and removing class action look-alikes).

213. *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 219–20 (2d Cir. 2013).

214. *AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 394 (4th Cir. 2012).

215. *LG Display Co. v. Madigan*, 665 F.3d 768, 772–74 (7th Cir. 2011).

216. *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 670–72 (9th Cir. 2012).

217. *Id.* at 672.

218. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 176 (2014).

A. Mississippi *ex rel.* Hood v. AU Optronics:  
*Saving State Parens Patriae Actions*

The *Hood parens patriae* litigation arose in Mississippi, one of the few states lacking a class action rule. The Mississippi Attorney General brought a *parens patriae* lawsuit on behalf of Mississippi citizens who purchased liquid crystal display panels from manufacturers, sellers, and distributors of these panels. The state AG alleged that the defendants engaged in a price-fixing scheme in violation of the Mississippi Consumer Protection Act and the Mississippi Antitrust Act.<sup>219</sup> The AG sought injunctive relief, civil penalties, attorney's fees, and restitution for its own purchases of LCD products and for the purchases of its citizens.<sup>220</sup>

The defendants filed a notice of removal, arguing that the AG's action was either a class action or a mass action subject to CAFA removal. The district court first held that the AG's action did not qualify as a class action under Federal Rule of Civil Procedure 23. However, relying on Fifth Circuit precedent,<sup>221</sup> the court held that the AG's action qualified as a mass action because it was a civil action in which monetary claims of 100 or more persons were proposed to be tried jointly on the grounds that the plaintiffs' claims involved common questions of law or fact.<sup>222</sup> The Fifth Circuit agreed that under its *Caldwell* precedent, the Mississippi AG's action qualified as a mass action subject to removal.<sup>223</sup>

In a unanimous decision, the Supreme Court reversed, applying a statutory construction analysis to CAFA's text.<sup>224</sup> The

219. *Id.* at 166.

220. *Id.*

221. Louisiana *ex rel.* Caldwell v. Allstate Ins., 536 F.3d 418 (5th Cir. 2008).

222. CAFA defines a mass action as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i) (2018). In addition, CAFA specifies that federal jurisdiction over mass actions shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirement of \$75,000. *Id.*

223. Mississippi *ex rel.* Hood v. AU Optronics Corp., 701 F.3d 796, 799–800 (5th Cir. 2012), *rev'd*, 571 U.S. 161 (2014). A concurring judge noted that after the Fifth Circuit's *Caldwell* decision, three other appellate courts had concluded that similar state AG *parens patriae* actions were not mass actions suitable for removal under CAFA. *Id.* at 805 (Elrod, J., concurring).

224. *Hood*, 571 U.S. at 161–68. The Court stated that the issue presented on appeal "is whether a suit filed by a State as the sole plaintiff constitutes a 'mass action' under CAFA where it includes a claim for restitution based on injuries suffered by the State's citizens." *Id.* at 164.

Court held that because the State of Mississippi was the only named plaintiff in the action, the case was not a mass action as defined by CAFA's plain text.<sup>225</sup> The Court rejected the defendants' contention that CAFA's mass action provision referred to the number of real parties in interest to the claims, regardless of whether those persons are named or unnamed. Instead, the Court pointed out that in defining what type of litigation constituted a mass action, the statute stated "100 or more persons," and not "100 or more named or unnamed real parties in interest."<sup>226</sup> In addition, CAFA's text supplied additional support by referring to "plaintiffs" as the parties who were proposed to join their claims in a single trial.<sup>227</sup> The defendants offered no reason to believe that Congress intended to extend the real party in interest inquiry to CAFA's jurisdictional requirements.<sup>228</sup>

The Court concluded that the term "plaintiff" was "among the most commonly understood of legal terms of art: It means a 'party who brings a civil suit in a court of law.'"<sup>229</sup> It did not mean any named or unnamed person whom a lawsuit might benefit. Construing legislative intent in enacting CAFA, the Court noted that Congress focused on persons who were actually proposing to join together as named plaintiffs. Thus, "[r]equiring district courts to pierce the pleadings to identify unnamed persons interested in the suit would run afoul of that intent."<sup>230</sup>

The Court also rejected, as administratively unfeasible, the notion that a federal district court would be tasked with identifying claimants in the mass action whose claims were for less than \$75,000.<sup>231</sup> Even assuming that it was possible to sever such persons and remand their claims to state court, "much of the State's lawsuit could proceed in state court after all, simultaneously with the newly severed parallel federal action."<sup>232</sup>

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225. *Id.* at 164.

226. *Id.* at 169.

227. *Id.* at 169-72.

228. *Id.* at 173-75.

229. *Id.* at 170.

230. *Id.* at 176.

231. *Id.* at 171-72 (indicating that this requirement raised the prospect of an administrative "nightmare" for federal courts to ascertain, based on evidentiary hearings, which claims were worth more or less than the \$75,000 jurisdictional threshold for federal adjudication).

232. *Id.* at 172.

*Hood* was a clear victory for state attorneys general in their capacity to pursue aggregate litigation in state court, free from federal interference by way of removal under CAFA's mass action provisions.<sup>233</sup> Indeed, as one scholar noted, an impressive forty-six state AGs filed amici briefs in *Hood* urging the Court to narrowly construe CAFA's mass action provision in order to retain state jurisdiction over complex litigation.<sup>234</sup> More expansively, commentators have suggested that the *Hood* decision is a victory for consumers and likely to encourage more *parens patriae* actions, in some instances with state AGs partnering with private plaintiffs' attorneys to resolve these complex cases.<sup>235</sup>

*B. The Role of State Attorneys General  
in Reviewing Federal Class Settlements*

While the Court in *Hood* narrowly interpreted CAFA's mass action provision to preserve a role for state AG *parens patriae* actions, the CAFA statute explicitly recognizes a role for state AG participation in reviewing federal class action settlements.<sup>236</sup> This state AG participation is effectuated through a CAFA provision that requires settling defendants to notify appropriate federal and state officials of the pending federal class action settlement. The relevant federal official is the U.S. Attorney General. The relevant state officials are those who have "primary regulatory or supervisory responsibility with respect to the defendant, or who

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233. See, e.g., Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 320 (2014) (commenting favorably on *Hood* as relatively unencumbered means for state attorneys general to hold defendants accountable for injuries to state citizens); Thomas, *supra* note 25, at 763 (stating that the Court recognized the role of state courts in adjudicating mass tort litigation and that the decision "seems likely to accelerate the rise of *parens patriae* suits as an alternative to class actions"); Patrick Hayden, Comment, *Parens Patriae, the Class Action Fairness Act, and the Path Forward: The Implications of Mississippi ex rel. Hood v. AU Optronics Corp.*, 124 YALE L.J. 563, 564 (2014) (suggesting that the Court's decision in *Hood* signaled "an apparent tolerance of litigation strategies designed to maneuver around CAFA and resist removal to federal court").

234. Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1810 (2018).

235. Georgene Vairo, *Is the Class Action Really Dead? Is That Good or Bad for Class Members?*, 64 EMORY L.J. 477, 524 (2014) (noting impact for consumers and fact that private plaintiffs' attorneys are frequently hired to assist state attorneys general in prosecuting consumer class litigation in state AG proceedings).

236. 28 U.S.C. § 1715 (2018). See generally Sharkey, *supra* note 16 (discussing CAFA notice provision history and impact).

licenses or otherwise authorizes the defendant to conduct business in the State," or, by default, the attorney general of any state in which any class member lives.<sup>237</sup>

Whether a CAFA notice is sent to state officials depends on if a proposed settlement impacts its citizens and not on the state's membership in the class. The CAFA notice requirement is triggered when parties to a federal class action have filed a proposed settlement, which a federal judge must approve in a fairness hearing.<sup>238</sup> Prior to receiving approval for the proposed settlement, defense counsel must inform the court of its compliance with the CAFA notice provisions by showing that the defendant has provided notice to the appropriate official of every state in which class members reside.<sup>239</sup> Appropriate notice to state officials includes copies of the complaint, class notice, proposed settlement, and other pertinent materials.<sup>240</sup>

The CAFA notice provision is "intended to give states a role in ensuring that [their] citizens are equitably compensated in class action settlements."<sup>241</sup> Congress intended the CAFA notice requirement to enable states to safeguard their citizens' interests, rather than their own. The Senate Judiciary Committee Report for CAFA indicates that the notice requirement "provides an additional mechanism to safeguard plaintiff class members' rights by requiring that notice of class action settlements be sent to appropriate state and federal officials, so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."<sup>242</sup>

A judge's order giving final approval of a proposed settlement may not be issued until ninety days after appropriate notification

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237. 28 U.S.C. § 1715(a)(2).

238. *Id.* § 1715(b).

239. *Id.*

240. *Id.* § 1715 (b)(1)-(8).

241. *California v. Intelligender, L.L.C.*, 771 F.3d 1169, 1173 (9th Cir. 2014); *see id.* at 1172 ("CAFA expressly provides that the defendant in a class action must provide notice to the appropriate state official of any proposed settlement, presumably so that the state may comment upon or object to the settlement's approval, if the State believes the terms inadequately protect state citizens.").

242. S. REP. NO. 109-14, at 5 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 6; *see also id.* at 35 ("[N]otifying appropriate state and federal officials of proposed class action settlements will provide a check against inequitable settlements in these cases.").

to state and federal officials,<sup>243</sup> which provides officials time to act if they wish to respond with comments or objections to the proposed settlement.<sup>244</sup> If a defendant fails to comply with the notice provision, a class member can choose not to be bound by the settlement agreement.<sup>245</sup> In response to CAFA notification of pending federal settlements, state officials may file objections to the settlements<sup>246</sup> or choose to file public lawsuits on their own.<sup>247</sup>

Although there are reported instances where state officials have filed objections to federal class action settlements or filed reactive class litigation based on the same claims, the overwhelming majority of cases indicate that federal and state officials rarely comment or object to pending federal class settlements.<sup>248</sup> This raises the question of whether the CAFA notice provision is little more than a paper tiger, particularly in effectuating congressional intent to protect state citizens' interests in class action settlements. The reasons for this apparent state lassitude in commenting on or objecting to federal class action settlements remain unexplored. Nonetheless, there is statutory authority for state officials to engage in the federal class action arena to protect state interest.

#### IV. KEEPING COMPLEX LITIGATION IN STATE COURT: SECURITIES CLASS LITIGATION UNDER SLUSA

The Court recently preserved states' ability to adjudicate class actions alleging only securities violations of the 1933 Securities Act,<sup>249</sup> reaffirming the capacity of state courts to resolve federal

243. 28 U.S.C. § 1715(d).

244. *See, e.g.,* Harrison v. E.I. DuPont de Nemours & Co., No. 5:13-cv-01180-BLF, 2018 WL 5292057, at \*2-3 (N.D. Cal. Oct. 22, 2018) (finding CAFA notice properly provided to federal and state officials and no comments or objections to proposed settlement received by court).

245. 28 U.S.C. § 1715(e)(1); *see In re Flonase Antitrust Litig.*, No. 08-3301, 2015 WL 9273274, at \*5-6 (E.D. Pa. Dec. 21, 2015) (finding Louisiana's receipt of the CAFA Notice insufficient to unequivocally demonstrate that the State was aware that it was a class member and voluntarily chose to have its claims resolved by the Settlement Agreement).

246. Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 449 (2018) (citing Response Brief Amicus Curiae of the Attorneys General of Alaska et al. in Opposition to the Proposed Second Amended Settlement Agreement and Release, *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292 (S.D. Fla. 2007) (No. 05-21251-CIV)).

247. *Id.* (discussing *California v. IntelliGender, L.L.C.*, 771 F.3d 1169 (9th Cir. 2014)).

248. Westlaw search federal case database, search "CAFA notice" w/75 "1715."

249. Securities Exchange Act of 1933, 15 U.S.C. § 77 (2018).



claims.<sup>250</sup> In so holding, the Court resolved and clarified a long-simmering controversy concerning the jurisdictional provisions of the 1933 Securities Act, the Private Securities Litigation Reform Act of 1995 (PSLRA),<sup>251</sup> and the Securities Litigation Uniform Standards Act of 1998 (SLUSA).<sup>252</sup> The Court unanimously held that SLUSA did not strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only 1933 Act violations and did not authorize removing such suits from state to federal court.<sup>253</sup>

The controversy concerning whether states are the appropriate forum for adjudicating securities class action arose as a consequence of a complicated, intersecting set of statutes governing securities litigation. Congress enacted the Private Securities Litigation Reform Act of 1995 in response to perceived abuses of securities class action lawsuits. The PSLRA instituted numerous substantive and procedural reforms of securities litigation.<sup>254</sup> Congress's intention in enacting the PSLRA was to federalize securities class litigation and to tighten up the requirements for pursuing such litigation<sup>255</sup> as well as limiting remedies available in these cases. As such, enactment of the PSLRA was part of the class action reform efforts sought by corporate defense interests and paralleled the restrictive federal class action jurisprudence emerging in the mid-1990s.

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250. *Cyan, Inc. v. Beaver County Emps. Ret. Fund*, 138 S. Ct. 1061 (2018).

251. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

252. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in 15 U.S.C. § 77 (2018)). See generally Mitchell A. Lowenthal & Shiwon Choe, *State Courts Lack Jurisdiction to Hear Securities Act Class Actions, but the Frequent Failure to Ask the Right Question Too Often Produces the Wrong Answer*, 17 U. PA. J. BUS. L. 739 (2015) (describing the conflict among federal courts concerning whether federal securities class actions can proceed in state court or must be adjudicated in federal court); Steven J. Roeder, *The Seventh Circuit Widens a Split Among the Circuits on SLUSA Preemption of State Class Actions*, DEF. COUNS. J., Jan. 2018, at 1, 1 ("SLUSA bars state law breach of contract and breach of fiduciary duty class actions that look much different than the standard securities cases SLUSA was intended to preempt and prevent."); Trevor M. Cutaiar, Comment, *Are Securities Act of 1933 Claims Filed in State Court Removable Under the Class Action Fairness Act of 2005? A Proposed Resolution to a Statutory Conflict*, 55 LOY. L. REV. 559 (2009) (discussing conflict between CAFA removal provision and non-removable provision of the Securities Act).

253. *Cyan*, 138 S. Ct. at 1078.

254. See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

255. *Cyan*, 138 S. Ct. at 1067.

In reaction, and to evade the various PSLRA reforms, many plaintiffs subsequently shifted their securities class litigation from federal to state courts.<sup>256</sup> In 1998, Congress amended the PSLRA with enactment of the Securities Litigation Uniform Standards Act of 1998. The general purpose of the SLUSA was to address the unintended consequence of the PSLRA,<sup>257</sup> and to stem the shift from federal to state courts. SLUSA was aimed at requiring that significant securities class actions be litigated in federal court, subject to the requirements of the PSLRA.<sup>258</sup>

After Congressional enactment of SLUSA, federal courts issued conflicting decisions concerning whether securities litigation could proceed in state court or were required to be adjudicated in federal court.<sup>259</sup> The debate centered on whether cases alleging “exclusively federal securities class action claims” under the Securities Act of 1933 and that contained no pendent state law claims could proceed in state court or were required to be litigated in federal court. Generally, courts agreed that state court class actions that alleged both Securities Act claims and state law claims should proceed in federal court. But federal courts divided over whether exclusively federal securities class actions that alleged no state law claims could proceed in state court (where these class actions would not be subject to the PSLRA’s requirements) or whether they could only proceed in federal court (where they would be subject to the PSLRA’s requirements).<sup>260</sup>

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256. *Dabit*, 547 U.S. at 82.

257. *Id.*; see also *Cyan*, 138 S. Ct. at 1067.

258. See: *Hearing on S. 1260 Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous. & Urban Affairs*, 105th Cong. 2 (1997) (statement of Sen. Phil Gramm, Chairman, Subcomm. on Sec. of S. Comm. on Banking, Hous. & Urban Affairs) (“We held a hearing earlier this year to take a look at how the [PSLRA] was being received and how it was working. We discovered from that hearing that a new loophole was being exploited, that what was occurring is that there has been a shift of these lawsuits into State courts. So Senator Dodd and I thought about this, looked at it, and decided to introduce a bill that basically says that for class action suits, and class action suits only, where you are dealing with a stock that is traded nationally, so there is clearly an overriding national interest, that those suits have to be filed in Federal court.”).

259. See Lowenthal & Choe, *supra* note 252, at 742–43 nn.6–8 (cataloging the conflicting trial and appellate decisions on whether SLUSA permitted or prohibited removal of state-initiated securities class litigation).

260. *Id.*

In 2018, the Supreme Court resolved this debate in *Cyan, Inc. v. Beaver County Employees Retirement Fund*.<sup>261</sup> *Cyan*, a telecommunications company, involved a stereotypical securities class action litigation. Three pension funds and an individual investor purchased *Cyan* stock shares in an initial public offering. When their shares declined in value, the investors brought a class action lawsuit in California Superior Court. Their complaint alleged that *Cyan*'s offering documents contained material misstatements, in violation of the Securities Act of 1933, and did not assert any state-based claims.<sup>262</sup>

*Cyan* moved to dismiss the lawsuit for lack of subject matter jurisdiction. *Cyan* contended that SLUSA stripped state courts of the power to adjudicate 1933 Act claims in "covered class actions." In response, the plaintiffs argued that SLUSA left intact state court jurisdiction over all lawsuits, including "covered class actions" that alleged only 1933 Act claims. The California Superior Court agreed with the plaintiffs and state appellate courts denied review of that ruling.<sup>263</sup>

On appeal, the Supreme Court sought to bring conceptual order among the multiple statutory provisions relating to federal and state court jurisdiction over securities class litigation, engaging in an exhaustive exercise of statutory construction. First, the Court noted that in enacting the Securities and Exchange Act of 1933, Congress created private rights of action for securities violations, authorizing concurrent state and federal jurisdiction over such lawsuits,<sup>264</sup> and barred removal of securities actions from state to federal court.<sup>265</sup> In the Securities Exchange Act of 1934—which related not to the issuance of stock, but to its subsequent trading—Congress provided exclusive jurisdiction over securities violations in federal court. Thus, a plaintiff could not go to state court to litigate a 1934 claim.<sup>266</sup> In 1995, the PSLRA made substantive and procedural changes to the 1933 and 1934 Acts, which applied in state and federal courts.<sup>267</sup>

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261. *Cyan*, 138 S. Ct. at 1078.

262. *Id.* at 1068.

263. *Id.* at 1061.

264. *Id.* at 1066 (citing Securities Act of 1933, ch. 38, 48 Stat. 86).

265. *Id.* (citing Securities Act of 1933, ch. 38, 48 Stat. 87).

266. *Id.* at 1066 (citing Securities Exchange Act of 1934, ch. 404, 48 Stat. 902-03).

267. *Id.* at 1066-67.

The Court noted that Congress's enactment of SLUSA was intended to remedy the unintended consequence of plaintiffs pursuing security class litigation in state court. Turning to the issue presented by SLUSA, the Court first addressed the SLUSA prohibition of security "covered class actions" based on state law.<sup>268</sup> The Court noted that according to SLUSA's definitions, a "covered class action" embraced a class action where damages were sought on behalf of more than fifty persons.<sup>269</sup> Second, the Court concluded that SLUSA completely disallowed, in both state and federal courts, sizable class actions that were founded on state law and alleged dishonest practices respecting a nationally traded security's purchase or sale.<sup>270</sup> Third, the Court concluded that any such covered actions removed to federal court were subject to dismissal.<sup>271</sup>

Nonetheless, the Court determined that two additional SLUSA conforming amendments<sup>272</sup> did nothing to deprive state court jurisdiction to decide class actions brought under the 1933 Act, and therefore state court jurisdiction over 1933 Act claims "continues undisturbed."<sup>273</sup> Construing SLUSA's various limitations and conforming amendments, the Court concluded that SLUSA barred certain securities class actions based on state law, and authorized removal of those actions to be dismissed by a federal court. "But the section says nothing, and so does nothing, to deprive state courts of jurisdiction over class actions based on *federal* law."<sup>274</sup> Moreover, the Court rejected Cyan's attempt to bar state court jurisdiction based on SLUSA's legislative history.<sup>275</sup> The Court pointed out that federal 1933 Act claims litigated in state courts would necessarily have to apply the PSLRA's substantive reforms.<sup>276</sup>

Summarizing its statutory scorecard, the Court indicated that pursuant to its reading of SLUSA: (1) all covered class actions must proceed under federal law, (2) most (i.e., those alleging 1934 Act claims) must proceed in federal court, and (3) some (i.e., those

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268. *Id.* at 1067 (citing 15 U.S.C. § 77p(b) (2018)).

269. *Id.* (citing 15 U.S.C. § 77p(f)(2)).

270. *Id.* at 1067-68 (citing 15 U.S.C. § 77p(c)).

271. *Id.* at 1068.

272. 15 U.S.C. § 77v(a).

273. *Cyan*, 138 S. Ct. at 1069.

274. *Id.*

275. *Id.* at 1072-73 (even assuming clear text can ever give way to purpose, Cyan would need some monster arguments on this score to create doubts about SLUSA's meaning).

276. *Id.* at 1073.

alleging 1933 Act claims) may proceed in state court.<sup>277</sup> The Court declined to speculate why Congress declined to require 1933 Act class actions be brought in federal courts: “[P]erhaps it was because of the long and unusually pronounced tradition of according authority to state courts over 1933 Act litigation.”<sup>278</sup> Finally, the Court rejected the Government’s reading of SLUSA that would permit removal of 1933 Act class litigation to federal court. The Court concluded that under the SLUSA statutory scheme, only state-law class actions alleging security misconduct were subject to removal. Conversely, federal lawsuits alleging only 1933 Act claims remain subject to the 1933 Act’s ban on removal.<sup>279</sup>

The Court’s *Cyan* decision is noteworthy for several reasons. Significantly, it evidences yet another recent Court decision reaffirming state court authority to adjudicate class action claims, free from federal intrusion by way of removal jurisdiction. Although the Court indicated that the 1933 Act claims, as tried in state court, would be subject to federal PSLRA standards, the *Cyan* decision nonetheless represented a victory for plaintiffs seeking to vindicate their class rights in a state rather than a federal forum. Moreover—similar to the *Bayer* and *Hood* decisions—a unanimous Court agreed on the *Cyan* holdings and results. The Court’s unanimity in giving deference to state forums, in this cluster of cases, belies the prevalent narrative of a conservative, pro-corporate Court lacking sympathy for class action plaintiffs. None of the Justices dissented or offered fractured concurring opinions; all approved state courts as appropriate jurisdictions to resolve mass claims. Notably, the defendants in *Bayer*, *Hood*, and *Cyan* all lost their appeals to retain their class action advantage of their forum-shopping in the federal arena.

#### V. KEEPING COMPLEX LITIGATION IN STATE COURTS: DEFENDANT CLASS ACTION COUNTERCLAIMS

##### A. *The Problem of the Defendant Counterclaim Class Action*

In a procedural complication that perhaps only procedural wonks could appreciate, yet another means for retaining state

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<sup>277</sup>. *Id.*

<sup>278</sup>. *Id.*

<sup>279</sup>. *Id.* at 1075–78.

jurisdiction over class litigation arises when a defendant asserts a class counterclaim in state court.<sup>280</sup> This interesting situation arises in the following scenario: a plaintiff files an individual lawsuit against a defendant in state court, and the defendant responds by asserting a class action counterclaim against the plaintiff. In this setting, may the subject of the counterclaim remove the case to federal court under CAFA, or may the state court retain jurisdiction over the counterclaim class action?<sup>281</sup>

Federal removal jurisdiction refers to a defendant's right to remove a case from state court to federal court when a plaintiff sues the defendant in state court.<sup>282</sup> The defendant's right of removal is a longstanding right, traceable to principles of federalism embedded in the American dual court system. The defendant's right of removal respects both a plaintiff's original choice of forum counterbalanced by a defendant's right to a neutral, non-biased forum.

A defendant may remove a case from state to federal court provided that the defendant can demonstrate a valid basis for federal court jurisdiction, either in the court's federal question or diversity jurisdiction. Removal is governed by a statutory scheme. The general removal statute—28 U.S.C. § 1441(a)—provides that “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the [appropriate] district court of the United States.”<sup>283</sup>

A defendant may remove a state case within a federal court's diversity jurisdiction only if no defendant is a citizen of the state in which the plaintiff brought the action.<sup>284</sup> This limitation derives

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280. See generally Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. ST. U. L. REV. 193 (2007) (definitive article on the possibility of state defendant counterclaim class actions). Tidmarsh concludes that defendant class action counterclaims should not be removable under CAFA, thereby ensuring “some wading room for state courts to contribute to the development of the law of class actions.” *Id.* at 196.

281. See generally *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019). A portion of the following discussion and analysis is derived from Linda S. Mullenix, *Just Who Is a Defendant? Third-Party Counterclaim Defendants' Removal Rights Under CAFA*, PREVIEW U.S. SUP. CT. CASES, Jan. 7, 2019, at 33.

282. 28 U.S.C. § 1441(a) (2018).

283. *Id.*

284. *Id.* § 1441(b)(2).

from the underlying rationale for diversity jurisdiction, which is to protect a defendant from in-state bias. Therefore, if a defendant is a citizen of the state in which the plaintiff sues, the presumed bias against out-of-state defendants is not present. In addition, if a state lawsuit entails both state and federal claims, the removal statutes permit a defendant or defendants to remove the entire case to federal court.<sup>285</sup> When a plaintiff sues multiple defendants, all the defendants must be notified and agree to the removal.<sup>286</sup>

Congress provided a special removal provision for state-based class actions in CAFA. Pursuant to this provision, any defendant sued in a state class action has the right to remove the class action to federal court.<sup>287</sup> The language of the CAFA removal statute differs from the general removal statutes in three significant ways. First, the CAFA removal provision allows for removal by “any defendant” sued in a state class action, rather than by “the defendant or the defendants” authorized by 28 U.S.C. § 1441(a).<sup>288</sup> Second, in multiple defendant cases, CAFA does not require that all the defendants consent to removal to federal court.<sup>289</sup> Third, CAFA permits removal to federal court even where one or more of the defendants is a citizen of the state where the plaintiff sues.<sup>290</sup>

Courts generally respect and defer to a plaintiff’s original choice of forum. In *Shamrock Oil & Gas Corp. v. Sheets*, the Court affirmed that removal was a defendant’s right solely, and not a plaintiff’s right.<sup>291</sup> This common-sense conclusion was based on the fact that plaintiffs originally may choose where to bring their lawsuits, and if plaintiffs wanted to sue in federal court, they could make that choice initially. The purpose behind the removal statute, then, was to level the litigation playing field by permitting a defendant sued in state court to counterbalance the plaintiff’s choice of forum. In addition, the removal statute is intended to address the problem of in-state bias against out-of-state defendants sued in state court.

The *Shamrock Oil* Court further emphasized that removal was a defendant’s right, especially when a defendant might assert a

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285. *Id.* § 1441(c).

286. *Id.* § 1446(b)(2)(a).

287. *Id.* § 1453(b).

288. *Id.*

289. *Id.*

290. *Id.*

291. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 105 (1941).

counterclaim against a plaintiff.<sup>292</sup> Even though the defendant's counterclaim might present an arguable basis for federal court jurisdiction, the Court held that under these circumstances a plaintiff sued in the counterclaim could not then remove the case to federal court.<sup>293</sup> Because the plaintiff originally could choose the forum, it made no sense to allow plaintiffs two bites at the apple: to sue first in state court and then to change minds and seek removal to federal court if a defendant asserted a counterclaim against the original plaintiff.

Since the Court's *Shamrock Oil* decision, lower federal courts consistently have upheld the doctrine that plaintiffs may not remove a case in response to a defendant's assertion of a counterclaim, which is a plain application of the *Shamrock Oil* holding. However, the *Shamrock Oil* Court was not faced with—and therefore did not address—the problem of the removability of a state court case when a third-party is impleaded into a lawsuit as a consequence of a defendant asserting a counterclaim against this new defendant who was never named as a plaintiff or a defendant in the original action. This is precisely the problem presented by the appeal in *Home Depot Inc. v. Jackson* that recently came before the Court.<sup>294</sup>

For more than 50 years, based on the *Shamrock Oil* precedent, federal courts have refused to permit third-party defendants sued in a state court counterclaim to remove the case to federal court. And, building on these precedents, the Fourth, Sixth, Seventh, and Ninth Circuits have similarly refused to permit a third-party counterclaim defendant sued in a class action to remove the case under the CAFA removal provision, § 1453(b).<sup>295</sup>

The *Home Depot* litigation illustrates the complexity of the class counterclaim removal issue raised in the context of the CAFA. As such, the case not only involves the complex interplay of numerous statutory provisions but implicates the policy reasons behind CAFA's enactment. A decision refusing to permit a class counterclaim to be removed to federal court enhances the

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292. *Id.*

293. *Id.* at 106–08.

294. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019).

295. *See, e.g.*, *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350 (7th Cir. 2017); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849 (6th Cir. 2012); *Palisades Collections L.L.C. v. Shorts*, 552 F.3d 327 (4th Cir. 2008); *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014 (9th Cir. 2007).



independent ability of state courts to adjudicate class litigation, which generally will favor the plaintiffs pursuing the class litigation. In contrast, a decision upholding removal of class action counterclaims pursuant to CAFA generally will favor the corporate defendants subject to such class counterclaims.

*B. Preserving State Court Jurisdiction:  
Home Depot U.S.A. v. Jackson*

In *Home Depot U.S.A. v. Jackson*, the Court in a 5-4 decision held that the general removal statute does not permit removal to federal court by a third-party counterclaim defendant who is sued in state court.<sup>296</sup> The Court's liberal Justices—clearly favoring the plaintiff's ability to keep its consumer class action case in state court—were joined by Justice Thomas to form the prevailing majority.<sup>297</sup> The Court's conservative cohort—Justices Alito, Gorsuch, Kavanaugh, and Chief Justice Roberts—filed a lengthy dissenting opinion arguing that CAFA had essentially expanded removal jurisdiction to cover the removal situation of a third-party counterclaim defendant.<sup>298</sup> The dissenters noted that the majority's decision effectively undercut and defeated CAFA's main underlying policy rationale, which is to protect class action defendants against unfavorable state court forums.

*1. The problem of the third-party counterclaim defendant*

The underlying facts in *Home Depot* demonstrate how an individual state court action can be transformed by a defendant's class action counterclaim into a battle over forum selection. In June 2016, Citibank N.A. sued George Jackson in North Carolina state court alleging that Jackson failed to pay for a water treatment system Jackson purchased using a Citibank credit card.<sup>299</sup> Jackson purchased the water treatment system from Carolina Water Systems, in coordination with Home Depot U.S.A., Inc., which provided the water system and arranged for installment. In addition, Home Depot arranged for financing by offering Jackson a

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296. See generally *Home Depot*, 139 S. Ct. 1743.

297. *Id.* at 1745–51.

298. *Id.* at 1751–65.

299. *Jackson v. Home Depot U.S.A., Inc.*, 880 F.3d 165, 167 (4th Cir. 2018), *aff'd*, 139 S. Ct. 1743 (2019).

Home Depot–branded credit card issued by Citibank. Citibank serviced the credit card debt.<sup>300</sup>

In August 2016, Jackson answered Citibank’s complaint and asserted a class action counterclaim against Home Depot and CWS, as third-party defendants.<sup>301</sup> The putative class consisted of approximately 286 people who had purchased water systems from Home Depot and CWS in North Carolina. Jackson’s counterclaim was grounded in consumer fraud claims under North Carolina state law. Jackson alleged that the third-party defendants engaged in unfair and deceptive trade practices about the water treatment systems, and that Citibank was jointly and severally liable because Home Depot sold or assigned the transaction to Citibank.<sup>302</sup> In September 2016, Citibank voluntarily dismissed its collection claims against Jackson, leaving Home Depot and CWS as the only third-party defendants to Jackson’s counterclaim.<sup>303</sup>

In October 2016, Home Depot filed a notice of removal in the federal district court for Western District of North Carolina, under CAFA.<sup>304</sup> CAFA permits “any defendant” to remove a state class action to federal court.<sup>305</sup> Home Depot also filed a motion asking the federal court to realign the parties and to designate Jackson as the plaintiff and Home Depot and CWS as defendants. Jackson then filed a motion to remand the case back to North Carolina state court and amended his complaint to remove any reference to Citibank.<sup>306</sup>

In March 2017, the federal district court denied Home Depot’s motion to realign the parties and granted Jackson’s motion to remand the case to state court,<sup>307</sup> relying on Fourth Circuit precedent in *Palisades Collections LLC v. Shorts*.<sup>308</sup> The court indicated that because Home Depot was not an original defendant in Citibank’s collection lawsuit against Jackson, Home Depot did not have a right to remove the class action to federal court.

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300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. See *Citibank, N.A. v. Jackson*, No. 3:16-CV-00712-GCM, 2017 WL 1091367, at \*2–4 (W.D.N.C. Mar. 21, 2017) (citing *Palisades Collections L.L.C. v. Shorts*, 552 F.3d 327 (4th Cir. 2008)), *aff’d*, 880 F.3d 165 (4th Cir. 2018), *aff’d*, 139 S. Ct. 1743 (2019).

The Fourth Circuit affirmed the district court's orders.<sup>309</sup> Relying on *Shamrock Oil*, the appellate court held that removal under 28 U.S.C. § 1441(a) did not permit removal by a defendant to a claim asserted as a counterclaim.<sup>310</sup> In addition, the court rejected Home Depot's argument that CAFA expanded the class of defendants who can remove a case to federal court to include a third-party defendant to a counterclaim.<sup>311</sup>

The Fourth Circuit concluded that Congress, in enacting CAFA, used the well-established meaning of the term "defendant" to describe the parties entitled to removal, and this did not include removal by parties facing counterclaims.<sup>312</sup> The court noted that all other circuit courts to consider the issue under CAFA had similarly decided that CAFA did not expand the right of removal under these circumstances.<sup>313</sup> The court also affirmed the district court's refusal to realign the parties, concluding that no party to the litigation was attempting to evade limits on diversity jurisdiction.<sup>314</sup>

## 2. Arguments to the Supreme Court

On appeal, the parties' arguments to the Supreme Court are worth canvassing, in light of how closely the majority and dissenting opinions subsequently tracked and adopted those same arguments. The issues that confronted the Supreme Court concerned how courts should characterize an involuntary third-party defendant who is sued in a class action counterclaim in order to apply the general removal statute, the CAFA removal provision, and the *Shamrock Oil* holding on non-removable counterclaims. Home Depot essentially asked the Court to determine who exactly is a defendant for removal purposes. Home Depot contended, as against prevailing circuit law, that a third-party class action counterclaim defendant was a defendant under the general and CAFA removal provisions, and that circuit courts had misinterpreted and misapplied the *Shamrock Oil* holding.<sup>315</sup>

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309. *Jackson*, 880 F.3d at 167.

310. *Id.* at 167-68.

311. *Id.* at 168-69.

312. *Id.*

313. *Id.* at 169.

314. *Id.* at 170, 172-73.

315. Brief for Petitioner at 2-3, 11-12, *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019) (No. 17-1471), 2018 WL 5920364.

Home Depot argued that it unquestionably was a defendant in the underlying litigation, and that it was involuntarily brought into the litigation by the original defendant Jackson when Jackson chose to assert a consumer class action counterclaim against Citibank. Home Depot pointed out that it never was a plaintiff in the lawsuit. Therefore, the Court should not extend the *Shamrock Oil* original-plaintiff exception (regarding non-removability of counterclaims) to prohibit removal by a third-party counterclaim defendant such as itself. Home Depot argued that the *Shamrock Oil* decision set forth a limitation on removability based on an original-plaintiff rule, not an original-defendant rule. A third-party defendant to a counterclaim “is not a plaintiff under any definition of that word.”<sup>316</sup>

Home Depot contended that the text, structure, and history of the general removal statutes dictate that a third-party defendant that was involuntarily brought into a lawsuit as a consequence of a counterclaim was a defendant that should be able to avail itself of the general removal provisions. Home Depot pointed to the statutory language stating that “a defendant or defendants” may remove a state case to federal court.<sup>317</sup>

Home Depot asked the Court to clarify that a third-party defendant—a party that was a defendant to a counterclaim but was not a plaintiff in any capacity—has the same removal rights as any other defendant in the case. Construing the language of § 1441(a), Home Depot noted that the general removal statute was unambiguous in conferring removal rights on defendants. Nothing in the statutory language suggested that a third-party counterclaim defendant in a state court action should not be treated as a defendant who was entitled to remove a case.<sup>318</sup>

Moreover, consistent with the rationales for removal, if a third-party was an out-of-state defendant, that party should be entitled to removal even if the basis is a counterclaim. Thus, Home Depot maintained that the same local bias concerns that animated the Framers to provide defendants with a removal right should logically extend to protect out-of-state third-party defendants.<sup>319</sup>

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316. *Id.* at 15–31.

317. *Id.* at 13.

318. *Id.* at 17.

319. *Id.* at 24–32.

In addition, Home Depot maintained that Congress intentionally expanded the notion of who could remove a case to federal court when it enacted CAFA, by choosing to designate that “any defendant” could exercise the right of removal of a state-based class action. Home Depot suggested that because a third-party defendant qualified as a defendant for the purposes of the general removal statute, a third-party defendant therefore also came within the CAFA language permitting removal by “any defendant.” Simply put, Home Depot stated that its argument “boils down to this: ‘any defendant’ means any defendant.”<sup>320</sup>

At length, Home Depot rehearsed the CAFA legislative history generally, noting that Congress intended to relieve defendants from abusive state class action litigation and provide defendants sued in state courts the ability to remove these cases into federal court. To this end, Congress deliberately liberalized CAFA removal provisions in § 1453 to enable class action defendants to remove more easily than under the general removal statutes. Thus, to endorse a rule that prohibited third-party class action counterclaim defendants from removing state class actions to federal court significantly undermined the purposes of CAFA.<sup>321</sup>

Home Depot pointed out that the prevailing circuit court holdings that deny removal to third-party class action counterclaim defendants had encouraged gamesmanship on the part of class action lawyers. Thus, in order to evade the CAFA removal provisions, some plaintiffs’ attorneys had hit upon the stratagem of filing state class actions as counterclaims, thereby evading CAFA removal. As a consequence of this misinterpretation of *Shamrock Oil*, Home Depot argued, it had been left stuck defending against a consumer class action in state court, without any right of removal, and against its will.<sup>322</sup>

In response, Jackson simply argued that CAFA did not create an exception to *Shamrock Oil*’s longstanding rule that prohibits a counterclaim defendant from removing a case to federal court.<sup>323</sup> Initially, Jackson pointed out that every circuit court that had

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320. *Id.* at 13.

321. *Id.* at 32–45.

322. *Id.* at 41–45.

323. Brief for Respondent at 14, *Home Depot U.S.A. v. Jackson*, 139 S. Ct. 1743 (2019) (No. 17-1471), 2018 WL 6584716.

considered this same issue has decided there was no right of removal, and therefore there was no conflict among the circuit courts that justified the Supreme Court re-examining this removal issue. In addition, Jackson noted that the Court had denied certiorari on this same issue three times in recent years, including an appeal by Home Depot just the year prior in another similar case.<sup>324</sup>

Jackson argued that four circuit courts, in eight decisions relating to CAFA removal in the thirteen years since CAFA's enactment, have correctly construed CAFA to bar removal by counterclaim defendants.<sup>325</sup> Jackson noted that the appellate decisions on this narrow issue had been remarkable in their consistency, holding that the term "defendant" in CAFA means the same thing as in *Shamrock Oil* and its progeny.<sup>326</sup> Moreover, the Respondent suggested that a circuit split was unlikely to develop given that the courts had found Home Depot's arguments to be unpersuasive and were likely to continue to do so.<sup>327</sup>

Jackson's response to Home Depot's arguments was chiefly grounded in principles of careful statutory construction. In rebuttal to Home Depot's contention that Congress's use of the term "any defendant" in CAFA extended the removal right to counterclaim defendants, Jackson argued that in using the word "any," Congress intended to eliminate the judicially recognized rule that all defendants must consent to removal.<sup>328</sup> However, there was no indication that Congress intended to alter the traditional rule that only an original defendant may remove a case to federal court. Hence, Jackson contended that Home Depot was attempting to give the word "any" a meaning it cannot bear, and the word "any" cannot be used to change the meaning of the word "defendant."<sup>329</sup>

Furthermore, Jackson found additional support for his statutory construction argument in CAFA's express statement that class actions are to be removed in accordance with the removal provision

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324. Respondent's Brief in Opposition at 1, *Home Depot*, 139 S. Ct. 1743 (No. 17-1471), 2018 WL 3199156; see also *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350 (7th Cir. 2017), cert. denied, 137 S. Ct. 2138.

325. Respondent's Brief in Opposition, *supra* note 324, at 6, 11.

326. *Id.* at 11.

327. Brief for Respondent, *supra* note 323, at 37-38.

328. *Id.* at 37.

329. *Id.* at 38.

in § 1446. Section 1446 sets forth technical procedures for removal. This provision echoes § 1441(a) and *Shamrock Oil* in referring to removal by “[a] defendant or defendants.” Thus, argued Jackson, it would be incoherent to give the word “defendant” as used in CAFA a more expansive meaning when CAFA itself incorporates by reference procedures that apply to traditional classes of defendants. Nothing in the statutory language of CAFA called for a different construction of the term defendant than is used in the pre-existing removal statutes.<sup>330</sup>

Jackson further claimed that the nub of the issue presented was not really the scope of the Court’s *Shamrock Oil* holding. Jackson noted that Home Depot had not asked the Court to overrule *Shamrock Oil*, and had disavowed any intention to challenge the correctness of the *Shamrock Oil* ruling that precludes third-party counter-defendant’s removal rights under § 1441.<sup>331</sup> Instead, Jackson suggested that the only question was whether Congress altered the understanding of the word “defendant” (as used in § 1441) when Congress enacted CAFA. This issue, Jackson remarked, was an issue of congressional intent, and not the scope of *Shamrock Oil*’s holding.<sup>332</sup>

In response to Home Depot’s policy arguments, Jackson countered that Home Depot’s forecasts of gamesmanship and parade of horrors consisted largely of chimerical monsters.<sup>333</sup> Jackson noted that in contrast to Home Depot’s exaggerated claims, the reality was that in more than a dozen years since CAFA’s enactment, the issue concerning the removability of class counterclaims had produced only eight appellate cases in four circuits. This paucity of cases, Jackson suggested, was a mere drop in the bucket compared to the hundreds of cases filed in state court and removed under CAFA.<sup>334</sup>

Moreover, Jackson submitted, the scarcity of cases raising this issue might be explained by the fact that consumers and their lawyers have little or no control over where they may be sued, or more likely will lack the resources to pursue class action

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330. *Id.* at 29–30.

331. *Id.* at 14.

332. *Id.*

333. *Id.* at 24.

334. *Id.* at 24–25.

counterclaims.<sup>335</sup> Thus, “[s]peculation that ‘wily’ class action lawyers are lulling corporate plaintiffs into suing their clients in so-called ‘magnet jurisdictions’ to generate non-removable class actions is unrealistic, to say the least.”<sup>336</sup>

Finally, Jackson suggested that Home Depot and those amici who shared its belief that the courts’ interpretations of the CAFA removal provision created a loophole that undermined its purposes, have a remedy: they should take their complaint to Congress to amend CAFA to expressly permit counterclaim defendant removal.<sup>337</sup>

### C. The Court’s Home Depot Opinions: Saving State Court Jurisdiction

The Court in *Home Depot* issued a split 5-4 decision. The Court’s majority opinion, authored by Justice Thomas, largely tracked Jackson’s arguments, narrowly construing both the statutory language of the general removal statute and its historical application. Similarly, the dissenting opinion, authored by Justice Alito, closely adopted Home Depot’s arguments on appeal. *Home Depot*, then, was a victory for both plaintiffs’ class action lawyers and state courts to retain jurisdiction over state class actions.

Justice Thomas’s majority opinion, construing both the general removal statute, 28 U.S.C. § 1441(a) and the CAFA removal provision, 28 U.S.C. § 1453(b), concluded that the term “defendant” refers only to a party that an original plaintiff sues, and not to any other type of defendant.<sup>338</sup> Considering the phrase “defendant or the defendants” in the structure of the removal statutes, as well as the Court’s precedents, the majority held that § 1441(a) does not permit removal by a counterclaim defendant, including parties who are brought into the litigation for the first time by a counterclaim.<sup>339</sup>

The majority noted that the removal statutes apply to civil actions, not to claims—citing precedent for the proposition that

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335. *Id.* at 25.

336. Linda S. Mullenix, *Just Who is a Defendant? Third-Party Counterclaim Defendants’ Removal Rights Under CAFA*, PUB. L. & LEGAL THEORY RESEARCH PAPER SERIES, No. 581 (2019), <http://ssrn.com/abstract=3311178>.

337. Brief for Respondent, *supra* note 323, at 26.

338. *Home Depot U.S.A. v. Jackson*, 139 S. Ct. 1743, 1745–46 (2019).

339. *Id.* at 1748.



counterclaims cannot serve as the basis for federal court jurisdiction.<sup>340</sup> The Court held that § 1441(a) does not permit removal based on a counterclaim at all, because a counterclaim is irrelevant to whether a district court has original jurisdiction over a civil action.<sup>341</sup> In addition, the Court analyzed the use of the term “defendant” in related procedural contexts and concluded that Congress did not intend for the term “defendant or defendants” in the general removal statute to include third-party counterclaim defendants.<sup>342</sup> Finally, the majority cited its decision in *Shamrock Oil* to further undergird its conclusion that third-party counterclaim defendants were not defendants who could remove under § 1441(a).<sup>343</sup>

Regarding Home Depot’s contention that the language in CAFA’s removal provision § 1453(b) – referring to removability by “‘any defendant’ to a ‘class action’” – the majority indicated that it agreed with Jackson’s interpretation and not Home Depot’s more expansive view.<sup>344</sup> The Court held that, interpreting the general removal and CAFA removal provisions together, the CAFA removal provision, like § 1441(a), did not permit third-party counterclaim removal.<sup>345</sup> Carefully parsing CAFA’s various removal provisions and statutory language, the Court concluded that nothing in the CAFA removal provisions altered § 1441(a)’s limitation on who can remove. Further, the Court indicated that this suggested that Congress intended to keep the removability limitation to original defendants in place.<sup>346</sup>

Finally, the majority agreed that if Home Depot did not like the majority’s interpretation, because it enabled a tactic to prevent removal, this result was a consequence of the statute that Congress wrote.<sup>347</sup> Thus, the majority opinion concluded with an invitation to Congress to amend the statute, if Congress shared the dissenting Justice’s disapproval of the majority’s holdings.<sup>348</sup>

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340. *Id.*

341. *Id.*

342. *Id.* at 1749 (referencing FED. R. CIV. P. 12, 14).

343. *Id.*

344. *Id.* at 1750 (although the majority admitted this was a “closer question”).

345. *Id.* at 1751.

346. *Id.* at 1750.

347. *Id.* at 1751.

348. *Id.*

At the very outset of his dissenting opinion, Justice Alito made oblique reference to the underlying purposes of CAFA; that is, Congress's concern with unfavorable, plaintiff-biased state court forums for the resolution of class action litigation. Thus, he noted, "The rule of law requires neutral forums for resolving disputes. Courts are designed to provide just that. But our legal system takes seriously the risk that for certain cases, some neutral forums might be more neutral than others."<sup>349</sup> Building on this foundational principle, Justice Alito noted that the general removal statute ensured that defendants get an equal chance to choose a federal forum.<sup>350</sup>

The dissenting opinion largely focuses on CAFA's language that permits removal "by *any* defendant," and largely tracks the statutory exegesis advanced by Home Depot. The dissenting opinion goes to great lengths to attempt to rationalize and integrate the removal provisions consistently, invoking canons of statutory construction, dictionary definitions, and judicial precedent,<sup>351</sup> including a limited reading of the scope of the *Shamrock Oil* decision (so as not to apply at all to counterclaim defendants).<sup>352</sup>

Apart from the lengthy analyses in statutory construction, much of the dissent resorts to the underlying purpose of CAFA that framed the dissenting opinion's opening passages. Thus, the opinion rehearses the history of CAFA and other Congressional initiatives to curb perceived abuses of class action litigation.<sup>353</sup> Commenting on Congress's intent in enacting CAFA, Justice Alito noted that Congress was concerned that state courts were biased against class action defendants and had passed CAFA to facilitate removal of state class actions to federal court, "by any defendant."<sup>354</sup>

Hence, the dissenting Justices contended that both original defendants and third-party counterclaim defendants were

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349. *Id.* at 1751 (Alito, J., dissenting).

350. *Id.*

351. *Id.* at 1755-61.

352. *Id.* at 1761-62 (contending that *Shamrock Oil* says nothing about the removability of counterclaim defendants, and therefore has no application to Home Depot's case). In addition, Justice Alito also rejected the majority's reliance on the so-called well-pleaded complaint rule for its conclusions. Justice Alito suggested that the well-pleaded complaint rule was based on policy concerns that did not arise in the context of the Home Depot litigation. *Id.* at 1763-64.

353. *Id.* at 1752-54.

354. *Id.* at 1751.

“defendants” under both the general and CAFA removal statutes.<sup>355</sup> Both kinds of parties were defendants to legal claims and neither chose to be in state court. “Both might face bias there, and with it the potential for crippling unjust losses.”<sup>356</sup> The majority opinion, Justice Alito asserted, “reads an irrational distinction into both [the] removal laws and flouts their plain meaning, a meaning that context confirms and today’s majority simply ignores.”<sup>357</sup>

In concluding his CAFA discussion, Justice Alito noted that by conflating the definition of “defendant” in both the general and CAFA removal statutes, courts had created a loophole tactic that permitted plaintiffs to raise a class action claim as a counterclaim and hope that CAFA would not authorize removal. This loophole tactic, Justice Alito suggested, subverted CAFA’s evident aims.<sup>358</sup>

*D. The Implications of Home Depot  
for Federal-State Class Action Litigation*

The significance of the *Home Depot* decision lays in its policy implications for litigation gamesmanship. In their arguments to the Court, both Home Depot and Jackson spelled out the potential implications of the Court’s decision. It remains to be seen whether the prophesying by either party will be realized in the years to come. One may expect that while plaintiffs’ attorneys welcome the opportunity to pursue class litigation in state court immune from CAFA removal, this opportunity may be cabined by the unique circumstances that give rise to the situation in which a plaintiff asserts a class action counterclaim against a third-party defendant.

Home Depot argued that class action plaintiffs’ attorneys, who prefer to litigate class actions in favorable state court forums, have seized upon the tactic of making their class actions removal-proof by asserting class claims as counterclaims. Home Depot contended

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355. *Id.* at 1751–52.

356. *Id.* at 1752.

357. *Id.*

358. *Id.* at 1755. Justice Alito protested:

“I can think of no rational purpose for this limit on which defendants may remove. Even respondent does not try to defend its rationality, suggesting instead that it simply reflects a legislative compromise. Yet there is no evidence that anyone thought of this potential loophole before CAFA was enacted, and it is hard to believe that any of CAFA’s would-be opponents agreed to vote for it in exchange for this way of keeping some cases in state court.”

*Id.*

that because of this constricted view of who constitutes a defendant for removal purposes, it was unable to remove the class action counterclaim by which it was involuntarily brought into the litigation. Home Depot complains that it was unfairly stuck in a state court forum not of its choosing.

In addition, corporate defendants clearly prefer to adjudicate class claims in more favorable federal forums. Home Depot pointed out that the risks for financial institutions are similarly high. Thus, according to Home Depot, financial institutions will now think twice about bringing individual collection actions in state court, only to find themselves subject to non-removable class action counterclaims. It remains to be seen if corporate defendants will restrain from bringing collection actions in state court under the fear of retaliatory consumer class counterclaims. Home Depot's concern about strategic pleading to evade CAFA was supported by an array of defense-oriented organizations that filed amicus briefs on behalf of Home Depot.<sup>359</sup>

Jackson, however, countered that these hypothesized scenarios were largely over-stated, as evidenced by the scarcity of actual cases where counterclaim defendants in state class litigation have been denied removal to federal court. We will have to wait to see if there is a proliferation of consumer class action counterclaims brought when a plaintiff (or financial institution) sues an original defendant in state court.

Finally, it may come to pass that a Congress will heed the majority's suggestion that, if Congress does not like the result in *Home Depot*, it can go back to the legislative drawing board to clarify whether third-party counterclaim defendants may remove class actions against defendants sued in state court.

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359. See, e.g., Brief of DRI—The Voice of the Def. Bar as *Amicus Curiae* in Support of Petitioner, *Home Depot*, 139 S.Ct. 1743 (No. 17-1471), 2018 WL 6062446; Brief of the Prod. Liab. Advisory Council, Inc. as *Amicus Curiae* in Support of Petitioner, *Home Depot*, 139 S.Ct. 1743 (No. 17-1471), 2018 WL 2427598; Brief for Amici Curiae Retail Litig. Ctr., Inc., Chamber of Commerce of the U.S., and the Prod. Liab. Advisory Council, Inc. in Support of Petitioner, *Home Depot*, 139 S.Ct. 1743 (No. 17-1471), 2018 WL 6040478; Brief for Amici Curiae Retail Litig. Ctr., Inc. and Chamber of Commerce of the U.S. in Support of Petitioner, *Home Depot*, 139 S.Ct. 1743 (No. 17-1471), 2018 WL 2412127; Brief of Wash. Legal Found. and Allied Educ. Found. as *Amici Curiae* in Support of Petitioner, *Home Depot*, 139 S.Ct. 1743 (No. 17-1471), 2018 WL 6040477.

## CONCLUSION

The prevailing post-CAFA narrative posits we live in an era of federalized class actions. While there is some empirical evidence to support this thesis,<sup>360</sup> other scholarly studies suggest that the class action landscape is perhaps more complicated.<sup>361</sup> In addition, the post-CAFA narrative incorporates a kind of procedural conspiracy theory, suggesting that in the twenty-first century a corporate-favoring Congress and a conservative Court have indirectly colluded to suppress class litigation.<sup>362</sup> In this telling, Congress and the Court, in behest of their corporate sponsors, have pursued an anti-plaintiff, pro-corporate class action agenda through legislation and judicial fiat. The greatest manifestation of this agenda, then, was CAFA itself, with the goal of federalizing class litigation in federal court for the purpose of subverting and defeating class litigation.<sup>363</sup>

And yet in the fifteen years since CAFA's enactment, states have maintained a role in private and public complex or aggregate litigation enforcement. It is simply not true that all class litigation has been effectively federalized; a more nuanced appreciation of dual court system litigation is in order. While many federal courts historically have intervened in state proceedings to protect pending federal class settlements, courts have not always applied abstention, Anti-Injunction, and *Erie* doctrines in derogation of state court litigation.

Contrary to the prevalent notion that the Court ideologically favors corporate defendants in class litigation, the Court instead

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360. See generally 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 (2008) (documenting an uptick of removal filings post-CAFA).

361. See Steven S. Gensler, *The Other Side of the CAFA Effect: An Empirical Analysis of Class Action Activity in the Oklahoma State Courts*, 58 U. KAN. L. REV. 809 (2010) (reporting data on class action filings post-CAFA; suggesting multiple explanations for decline in both state and federal class actions filings after CAFA).

362. Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1942 (2006) ("[A]ny sentient reader of [CAFA]'s statement of findings and purposes [would recognize that t]hey are, at best, window dressing. Less charitably, they meet the philosopher Harry Frankfurt's definition of 'bullshit,' because they are made with apparent indifference to their truth content." (footnote omitted)); Burbank, *supra* note 165, at 1440-44.

363. Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1816 (2008) (describing the goal of many of CAFA's proponents to defeat class actions against them).

has issued decisions that have preserved the ability of state courts to determine class certification issues under state rules and that have preserved the ability of state attorneys general to pursue aggregate relief on behalf of state citizens in *parens patriae* litigation. In addition, the Court's decision in the *Home Depot* class counterclaim litigation reflects a jurisprudence favoring state court retention of class litigation, immunized from CAFA removal. Rather than favoring defendants, these decisions have been decidedly pro-plaintiff, especially for states, such as West Virginia, which embrace a liberal class action jurisprudence and Mississippi with an aggressively pro-plaintiff state AG.

The corporate-favoring CAFA narrative is predicated on the assumption that, with regard to class litigation, state courts generally are plaintiff-favoring while federal courts generally are defendant-favoring. Not only is this an over-simplification of judicial biases, but not every state-filed class litigation has been successfully removed to federal court to accomplish a defendant-favoring outcome. CAFA's home state and local controversy exceptions have carved out a domain for state retention of class litigation. As CAFA jurisprudence has developed, several federal courts (presumably defendant-favoring forums) have applied liberal constructions of CAFA's formal rules to enable states to maintain class litigation of local concern. This phenomenon complicates the portrait of CAFA as a legislatively pro-defendant scheme intended to federalize class action litigation.

It is also worth noting that in the Court's decisions touching on the allocation of complex litigation between federal and state courts, the Court has achieved a unanimity that seems to belie ideological orientations – and contrasts with the Court's otherwise ideologically fractured decisions in other types of appeals. How is one to explain this odd-bedfellows convergence of decision-making concerning the Court's cases that implicate dual system complex litigation? At least one possible explanation is that the Court's conservative wing recognizes the federalism values in preserving state court autonomy, while the Court's liberal wing pragmatically endorses results that best empower plaintiffs to vindicate their rights – that is, in state court forums.

The "federalization" narrative of class action litigation is further complicated by the shift, in the past decade, towards federal

multidistrict procedure means for resolving aggregate litigation.<sup>364</sup> This well-documented phenomenon adds another nuanced layer to an appreciation concerning how complex litigation currently is handled in a dual court system. Aggregate litigation that is transferred and consolidated under MDL auspices may or may not be resolved by class action settlements.<sup>365</sup> In addition, federal MDL procedure may incompletely capture all related litigation because state non-removable class litigation will remain outside the reach of federal global settlements.

Thus, not only do we live in a post-CAFA era, but we live in a post-class action era.<sup>366</sup> In recognition of this reality, one scholar has suggested that the existence of non-removable state class litigation “hold[s] promise, if properly harnessed, as [a] mechanism[] for achieving the goals of aggregate litigation and for meeting the challenges presented by the reality that mass litigation settlements occupy an important regulatory role in the American legal system.”<sup>367</sup> This scholar creatively has suggested that parallel non-removable state class litigation can help discipline federal mass litigation settlements in four keys ways:

one, by providing needed real-world data for use in any ultimate settlement grid; two, by ensuring greater legitimacy of those settlements as mechanisms of governance; three, by potentially making any ultimate settlements fairer to litigants; and four, by providing settlement finality through greater assurance that any resulting settlement terms will stick.<sup>368</sup>

In the post-CAFA enthusiasm inspired by the nationalization of class litigation, the federalism issues engendered by CAFA have gone largely unnoticed and unremarked. Professor Stephen Burbank, commenting on CAFA’s complicated jurisdictional

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364. See 28 U.S.C. § 1407 (2018) (multidistrict litigation statute). See generally Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1168–69 (2018) (reporting statistics of MDL proceedings in federal courts).

365. See Linda S. Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act*, 37 REV. LITIG. 129, 153–60 (2018) (discussing MDL non-class settlements); Amy L. Saack, *Global Settlements in Non-Class MDL Mass Torts*, 21 LEWIS & CLARK L. REV. 847 (2017) (same).

366. Glover, *supra* note 4.

367. *Id.* at 7.

368. *Id.*

scheme, has called CAFA “an affront to federalism.”<sup>369</sup> Without regard to whether the Court has endorsed an implicit federalism of class litigation, state courts nonetheless, under federalism principles, have retained the right to adjudicate aggregate litigation in their courts. This includes the authority to “define the features of aggregate litigation, and the procedural framework” for resolving it.<sup>370</sup> In this view, a nationalized, homogeneous class certification jurisprudence, based on federal courts’ narrowest interpretation of Rule 23, “is fundamentally at odds with the constitutional division of function[s]” between federal and state courts.<sup>371</sup>

In conclusion, the prevailing CAFA narrative concerning federalization of class action litigation needs to be tempered with an appreciation of the Court’s several decisions touching on the states’ authority to adjudicate complex litigation in their own courts. As discussed above, although the Court’s decisions rarely explicitly invoke federalism theories, several scholars have suggested that the Court instead has hazarded an “accidental federalism” that has constrained federal class litigation, based on

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369. Burbank, *supra* note 165, at 1446–47.

Ultimately, a combination of special interest overreaching, abetted by the fictions of corporate citizenship, and confusion about legislative aims, abetted by the institutional federal judiciary’s schizophrenia regarding overlapping class actions, led Congress to lose sight of its duty, when fashioning CAFA’s exceptions, to preserve the “happy relation of States to Nation.” As a result, CAFA represents an affront to federalism in two respects and a potential affront in a third.

First, CAFA deprives states of the ability to regulate matters of intense local interest by enlisting for that purpose the regulatory potential of the class action as the states conceive it, on the basis of a definition of national interest that rests on legal fictions and on a vision of aggregate litigation that ignores the costs of complexity. Second, and quite apart from the regulatory void that CAFA may entail, the means by which Congress reached that result are deplorable. Working with exceptions so complicated that even some academics have been unable to penetrate them—and in a fog of ambiguity and hypocrisy—Congress sacrificed transparency and accountability in the interests of preserving deniability. Third, by exalting the gathering powers of the federal courts, Congress has created incentives for litigants and courts to create ever bigger “litigations.” Whether in the form of multistate class actions or through nonclass aggregations, such litigation packages may replicate in federal court some of the supposed abuses in state court class actions to which CAFA supposedly responded, including the subordination of factual and legal differences of intense interest to individual states.

*Id.* (footnote omitted).

370. Margaret S. Thomas, *Constitutionalizing Class Certification*, 95 NEB. L. REV. 1024, 1069 (2017).

371. *Id.* at 1070.



rationales that are independent of federalism concerns.<sup>372</sup> In this view, “the Court’s class action cases might, in fact, reflect an un-theorized or intuitive sense that federalism principles shape federal courts’ use of the class action.”<sup>373</sup> Thus, it is worth noting that the Court, in recognizing the autonomy of state courts to resolve complex litigation, may implicitly have been countering the “affront to federalism” that is embodied in CAFA.

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372. Moller, *supra* note 121, at 862–63 (citing Glover’s “happenstantial” federalism).

373. *Id.*