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

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

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

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

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

[2] Pub. L. 109-2, § 2(b)(1)-(3).

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

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

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

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

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

[4] Pub. L. 109-2, § 2(b)(1)-(3).

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

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

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

B. CAFA Has Tightened The Requirements For Class Settlements.

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

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

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

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

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

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

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

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

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

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

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

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

10 *Id.* at 1321.

11 *Id.* at 1323.

12 *Id.* at 1327.

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

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

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

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

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

15 *Id.*

16 *Id.* at *7.

17 *Id.* at *10.

18 *Id.* at *11.

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

20 *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[27] DiFazio, *supra* at 149.

[28] 109 S. Rep. 14.

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

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

[31] DiFazio, *supra* at 147.

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

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

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

33 *Id.* at 1254.

34 *Id.* at 1255.

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

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

37 *Id.* at 1281-82.

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

39 *Id.*

40 *Id.*

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

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

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

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

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41 *Id.*

42 *Id.* at 1283.

43 28 U.S.C. § 1332(d)(4)(B).

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

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

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

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

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

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

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47 *Id.* at 452-53.

48 *Id.*

49 *Id.* at 458.

50 *Id.* at 460-61.

51 *Id.*

52 28 U.S.C. § 1332(d)(4)(A).

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

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

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

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

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

55 *Id.* at 1020.

56 *Id.*

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

58 *Id.*

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

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

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

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

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

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

61 109 S. Rep. 14.

62 28 U.S.C. § 1332(d)(11)(B)(i).

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

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

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

66 109 S. Rep. 14.

67 *Id.*

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

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

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

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68 561 F.3d 945.

69 *Id.* at 950-51.

70 *Id.*

71 *Id.* at 951.

72 *Id.* at 953-54.

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

74 *Id.*

75 *Id.* at 954 n.5.

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

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

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

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

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

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

79 *Id.*

80 *Id.*

81 *Id.*

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

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

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

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

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

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

83 *Id.*

84 *Id.*

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

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

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

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

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

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

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88 *Id.* at 520.

89 *Id.*

90 *Id.* at 521-22.

91 *Id.*

92 *Id.* at 522.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

101 *Id.* at *13.

102 *Id.* at *25.

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

104 *Id.* at *45.

105 *Id.* at *46.

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

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

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

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

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

107 *Id.* at 1036.

108 *Id.*

109 *Id.* at 1038.

110 *Id.* at 1040.

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

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

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

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

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

113 271 F.R.D. at 419.

114 *Id.* at 405-07.

115 *Id.* at 418.

116 *Id.* at 419.

117 *Id.*

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

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

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

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

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

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

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120 *Id.* at 324-26.

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

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

123 *Id.* at 1020.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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130 *Id.* at 1753.

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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