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Foreword

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FOREWORD: COMPLEX LITIGATION IN CALIFORNIA AND BEYOND

*Georgene Vairo**

I. INTRODUCTION

As the author of a column on forum selection in the *National Law Journal*,¹ of four chapters on removal, venue, and multidistrict litigation in *Moore's Federal Practice*,² and of several monographs and law review articles,³ I have focused on various aspects of the competition between plaintiffs and defendants over whether they will do battle over the merits of a litigation in state or federal court. The focus of much of this writing has been on the often arcane rules of federal jurisdiction that both sides need to know in order to be successful in keeping the litigation in state court, as plaintiffs have usually desired, or federal court, where defendants have generally preferred to litigate.

What is forum shopping to some, is forum selection to others. And, the stakes of the forum selection battle became greater as mass litigation of various kinds, involving millions and even billions of dollars, became the popular paradigm of modern litigation.⁴ Sparks flew as plaintiffs filed massive nationwide class actions in state

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1. See, e.g., Georgene Vairo, *CAFA Mass Action Primer*, NAT'L L.J., Sept. 10, 2007, at 13.

2. See Georgene Vairo, *Removal*, in 16 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 107 (3d ed. 2007); Georgene Vairo, *Determination of Proper Venue*, in 17 MOORE ET AL. *supra* ¶ 110; Georgene Vairo, *Change of Venue*, in 17 MOORE ET AL., *supra*, ¶ 111; Georgene Vairo, *Multidistrict Litigation*, in 17 MOORE ET AL., *supra*, ¶ 112, [hereinafter *Multidistrict Litigation*].

3. See, e.g., GEORGENE VAIRO, *CLASS ACTION FAIRNESS ACT OF 2005: WITH COMMENTARY AND ANALYSIS* (LexisNexis 2005) [hereinafter *VAIRO, CAFA*]; Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559 (2000) [hereinafter *Federalism*]; Georgene Vairo, Georgine, *The Dalkon Shield Claimants Trust, and The Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79 (1997) [hereinafter *Rhetoric*].

4. VAIRO, *CAFA*, *supra* note 3, at 1–5.

courts that corporate defendants labeled “judicial hellholes.”⁵ Congress responded to such defendants’ pleas with the enactment of the Class Action Fairness Act of 2005 (“CAFA”).⁶ The purpose of CAFA was political: steer state court class actions to federal court, even if all claims asserted arise under state law.⁷

Why did defendants see federal courts as Nirvana? Beginning in the 1980s, there were a number of procedural developments in the federal courts that were seen, if not designed, as pro-defendant and anti-plaintiff. First, in 1983, Rule 11 of the Federal Rules of Civil Procedure was amended to hold lawyers to a higher standard of practice in order to deter the filing of frivolous lawsuits.⁸ At the same time, and continuing through the early 2000s, Rule 16 and the discovery rules were amended to enhance judicial control of litigation in order to reduce costs and delay.⁹ Then, in 1986, the Supreme Court decided its first trilogy of summary judgment cases, making Rule 56 a far more potent tool to shortcut cases that may have otherwise been on their way to a jury trial.¹⁰ Carrying this trend further, the Supreme Court in the 1990’s decided a second trilogy of cases, making the federal district court judge the gatekeeper of expert evidence to keep so-called “junk science” out of the system.¹¹ Done pre-trial, in connection with summary judgment motions, *Daubert* hearings were perceived to be helping to eliminate the “hired gun”

5. *Id.* at 5.

6. Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.) (2008).

7. *Id.* at 1–2.

8. GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* (3d ed. 2004).

9. *Id.* at 3–4.

10. See Georgene Vairo, *Through the Prism: Summary Judgment and the Trilogy*, in *CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS II-F-1* (5th ed. 1992) [hereinafter *Through the Prism*] (analyzing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 477 U.S. 574 (1986)).

11. In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the Supreme Court undertook the task of clarifying the standard for appellate review of summary judgments. The Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), assessed the role expert evidence should play in the context of summary judgment, holding that the district court is the gatekeeper who must assess the admissibility of the proposed expert evidence. And in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court ruled that the *Daubert* gatekeeper role applied to any proposed expert. See *Through the Prism*, *supra* note 10.

expert.¹² All of these developments applied to any case in federal court.

At the same time, there were other developments that led to the enactment of CAFA. Beginning in the 1980s, the federal courts began to use the multidistrict litigation statute¹³ as a pre-trial tool to consolidate complex lawsuits involving common questions of fact.¹⁴ Simultaneously, federal district courts began to certify class actions in more complex cases, such as mass tort cases.¹⁵ And, these class certifications were upheld at the appellate level.¹⁶

Then the other shoe dropped. In 1997, in *Amchem Products, Inc. v. Windsor*,¹⁷ the United States Supreme Court issued a restrictive class action opinion. The Court overturned a class action settlement that would have essentially ended the asbestos litigation that had been dragging on for decades.¹⁸ Because class certification in mass tort cases was thought to be unavailable in federal courts, plaintiffs began to file in state courts.¹⁹ State court judges, many of whom were relatively unfamiliar with complex litigation, issued so-called “drive-by” class certifications.²⁰ Some of these judges became known for approving class actions or class action settlements that would not be approved in federal court.²¹ Thus began the clamor for legislation at the federal level to help corporate defendants get out of

12. *Through the Prism*, *supra* note 10.

13. 28 U.S.C. § 1407 (2008).

14. *See Multidistrict Litigation*, *supra* note 2.

15. *See Rhetoric*, *supra* note 3, at 95–111.

16. *Id.*

17. 521 U.S. 591 (1997).

18. *Id.* at 597–612.

19. *See VAIRO, CAFA*, *supra* note 3, at 2–3.

20. The former Chief Justice of the Alabama Supreme Court has highlighted the so-called “drive-by” class action. *See Mitchell v. H & R Block, Inc.*, 783 So. 2d 812, 818 (Ala. 2000) (Hooper, C.J., dissenting) (arguing that Alabama appears “intent upon remaining the poster child for . . . abuse of the judicial system [through] the ‘drive-by’ class certification”); *see also* Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1715 (2000) (stating that the prevailing sense among some practitioners is that in Gulf states “judges are more than willing to certify almost anything that walks through the courtroom doors”).

21. For example, in the GM side-saddle fuel tank litigation, after the United States Court of Appeals struck down a class action settlement that had been approved by the district court, the plaintiffs and defendant settled on similar terms in a state court. For a discussion of this litigation, *see Federalism*, *supra* note 3, at 1602–03.

such courts and into the federal courts, which were perceived to be far more friendly to their interests.

President Bush signed CAFA into law on February 18, 2005, and the act became effective that day. Ironically, however, many of the states that had become known for harboring “judicial hellholes” already had enacted legislation²² or their state Supreme Courts²³ had issued rulings that limited the viability of the cases being brought in those jurisdictions. Additionally, there are important exceptions to CAFA jurisdiction. Thus, CAFA did not end the role of state courts in dealing with complex litigation.

CAFA allows for expanded federal diversity of class actions by allowing for minimal diversity where there is an amount in controversy in excess of \$5 million.²⁴ With minimal diversity, a California plaintiff, for example, could not prevent federal jurisdiction by naming an in-state defendant. But, CAFA is an interesting jurisdictional statute. Even though Congress has made it easy to acquire federal jurisdiction, the case may not remain in federal court because CAFA provides for exceptions to the exercise of jurisdiction.²⁵

Assume a class action is filed in California state court by a plaintiff who is a California citizen. The class is composed of California citizens as well as citizens of some other states. The complaint names California defendants and out of state defendants as well. Under CAFA, assuming the complaint alleges to a “legal certainty”²⁶ that the amount in controversy is in excess of \$5 million,²⁷ there is federal jurisdiction over the case, and any defendant may remove the case.²⁸ If, however, the plaintiff class

22. See, e.g., Lonny Hoffman, *The Trilogy of 2003: Venue, Forum Non Conveniens and Multidistrict Litigation*, 24 *ADVOC.* 76 (2003) (describing 2003 amendments to Texas’s procedural rules).

23. See, e.g., *Philip Morris USA, Inc. v. Byron*, 876 N.E.2d 645 (Ill. 2007) (overturning class action award of over \$10 billion in light cigarette consumer class action).

24. 28 U.S.C. § 1332(d)(2) (2008).

25. *Id.* § 1332(d)(3)–(5).

26. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288–89 (1938) (explaining that the amount in controversy is met unless there is no legal certainty that the plaintiff’s claims will meet the jurisdictional amount).

27. 28 U.S.C. § 1332(d)(2) (2008).

28. *Id.* § 1453 (providing special rules for removal of CAFA cases, including liberalizing the general removal rules that all defendants must agree to removal and that no defendant may be a citizen of the state in which the suit was brought). See *VAIRO, CAFA*, *supra* note 3, at 38–39.

contains more than two-thirds California citizens, and certain other requirements are met, the federal court is required to remand the class action.²⁹ And, if between one-third and two-thirds of the class are California citizens, the district court, after evaluating a number of statutory factors, may decline jurisdiction over the case.³⁰ Thus, CAFA does not federalize all class actions.

Additionally, of course, not all lawsuits are class actions. With the exception of “mass actions” of 100 or more plaintiffs that are treated as class actions under CAFA,³¹ all other state-claim-based litigation remains in state court, unless there is complete diversity and the amount in controversy exceeds \$75,000.³² Therefore, state courts will remain active in class action and complex litigation.

This Developments issue focuses mainly on how California courts deal with complex litigation. Additionally, it surveys how a number of other state courts deal with complex litigation. To bring alive the importance of what California and other state courts are doing, I will introduce the five student articles with hypotheticals to survey the problems this Developments issue will tackle.

II. CALIFORNIA CLASS ACTION LAW

As mentioned above, CAFA leaves room for state court class actions with classes composed primarily of in-state plaintiffs. It is important, then, to take a more careful look at how state court class action rules work in the context of a case that might otherwise be removed to or filed in federal court. What are the class action rules of the state? How are they interpreted? What other procedural provisions might apply in a state court class action?

California has a well developed and evolving body of statutes and case law that provide a good illustration of how states, in contrast to federal courts, handle class actions. To preview California law on class actions, consider a typical consumer class action litigation:

29. 28 U.S.C. § 1332(d)(4) (2008).

30. *Id.* § 1332(d)(3).

31. *Id.* § 1332(d)(11).

32. *Id.* § 1332(a); *see also* Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 558–59, 566–67 (2005) (holding that as long as one plaintiff meets the jurisdictional amount, supplemental jurisdiction under 28 U.S.C. § 1367 supports jurisdiction over the claims that do not meet the \$75,000 jurisdictional amount).

Suppose, for example, that Western Cooperative Bank (“Western”) conducted an advertising campaign in 1999 to highlight that its customers would not have to pay any ATM fees even if customers used the ATMs of rival banks. The program seemed to be successful in retaining customers who routinely complained about the lack of Western ATMs. In 2002, however, Western’s board members decided that the increased costs being passed on to them by rival banks made the continuation of the “no fee” program impossible. Therefore, Western began passing along part of the fees from rival banks to their customers.

Most customers did not notice the small charges that ranged from \$0.05 to \$1.35 per transaction. But one customer, Brad Johnson, was exceptionally frustrated by the charges and showed the charges to his attorney, Emily Solomon. Solomon was an experienced class action lawyer and saw an opportunity to remedy what she believed was a violation of state law. According to her estimates, the total amount charged to customers could reach into the millions of dollars, even though each customer’s personal recovery would not make individual adjudication viable.

Accordingly, Solomon filed a class action complaint against Western on behalf of Johnson. In drafting the complaint, she asserted claims pursuant to three different California class action devices: California Code of Civil Procedure (“CCP”) section 382 (the primary statute that authorizes class actions), the Consumer Legal Remedies Act (“CLRA”) (an alternative mechanism for class action claims involving unfair consumer transactions), and the Unfair Competition Law (“UCL”) (which, until 2004, provided for representative actions seeking equitable relief for illegal, fraudulent, or unfair business practices). In the complaint, Johnson sought compensatory damages, punitive damages, and injunctive relief for Western’s actions on behalf of himself and other similarly situated customers. The case, filed in the Superior Court of Los Angeles County, California, was assigned to a judge who is part of the state’s complex court system, which provides certain

judges additional training and resources to handle complex litigation.

Western believes that a notice it provided its customers immunizes it from any alleged wrongdoing. The bank believes that California courts can be very pro-plaintiff when it comes to high-profile class action cases and wants the case to be adjudicated in federal court. In order to do so, Western would have to remove the case, invoking federal jurisdiction pursuant to the Class Action Fairness Act. While Western's counsel is very familiar with the judge and believes the client would receive equitable treatment, she feels that federal courts are generally more "defendant friendly." Should Western's counsel remove to federal court under CAFA in order to take advantage of Federal Rule 23(f)? Is California class action procedure slanted in favor of plaintiffs when it comes to class adjudication?

The first article in this Developments issue explores these questions.³³ Specifically, William R. Shafton's article surveys the evolution of the California class action devices and compares them to Rule 23. Consumer class actions are precisely the sort of class actions that prompted the enactment of CAFA. Small individual damages with huge aggregate exposure for defendants gave rise to the claims of legalized blackmail and "judicial hellholes."³⁴ Accordingly, understanding what differences there might be between California practice and federal practice is critical. If plaintiffs believe that it is more likely that a class will be certified under California's rules, they ought to consider proposing a class that consists mainly of California citizens. With such a proposed class, if Western removes the case under CAFA, it will be returned to

33. William R. Shafton, Developments, *California's Uncommon Common Law Class Action Litigation*, 41 LOY. L.A. L. REV. 783 (2008).

34. Class actions have provoked controversy in a multitude of contexts. Compare Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664 (1979) (defending Federal Rule of Civil Procedure 23 against those who would limit its scope and applicability and arguing that much of the hostility against this rule is based on misperceptions), with William Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 375 (1973) (finding that terms such as "legalized blackmail" have a legitimate basis in areas such as class action damage suits under Federal antitrust and securities law).

California state court under CAFA's mandatory remand provision, 28 U.S.C. § 1332(d)(4).³⁵

III. NON-CLASS COMPLEX LITIGATION IN CALIFORNIA

Given the jurisdictional reach of CAFA, there is no question that there will be many class actions filed in California that will remain in federal court.³⁶ More importantly, class actions are not the only game in town. The wrongful conduct by a defendant or a few defendants may cause grievous harm to one or a few individual or corporate plaintiffs. Additionally, even if a dispute appears to be a relatively simple two party litigation, it can become complex through the ability of defendants to assert claims against the plaintiff,³⁷ the ability to cross-claim against co-parties,³⁸ and the ability to add third parties pursuant to California's joinder rules³⁹—especially if the dispute involves a substantial sum. When the dollar amount sought is great, when discovery will be difficult, and/or when the legal issues and application of the law to the facts will be complicated, the case can be complex even when no class claims are alleged, all the parties are citizens of California, or there is not complete diversity. The next article, by Scott Paetty, focuses on this type of litigation and how California deals with it.⁴⁰

The following hypothetical provides a vehicle for looking at the various techniques California and its courts have developed to deal with a complex litigation:

After toiling in Hollywood for over a decade, Joe Writer finally sells his pirate movie-musical to a big studio. Joe wants to use some of the money to remodel his classic

35. 28 U.S.C. § 1332(d)(4).

36. See THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: THIRD INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 21 (2007), available at http://www.uscourts.gov/rules/CAFA_Third_Interim.pdf; THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., PROGRESS REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES ON THE IMPACT OF CAFA ON THE FEDERAL COURTS (2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/cafa1107.pdf/\\$file/cafa1107.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa1107.pdf/$file/cafa1107.pdf).

37. See CAL. CIV. PROC. §§ 426.30 to .60 (Deering 2008).

38. See *id.* §§ 428.10 to .70.

39. See *id.*

40. Scott Paetty, *Developments, Classless Not Clueless: A Comparison of Case Management Mechanisms for Non-Class-Based Complex Litigation in California and Federal Courts*, 41 LOY. L.A. L. REV. 845 (2008).

craftsman into the swanky pad he has always wanted by adding a second story, a pool, and a guesthouse, reconfiguring the backyard to resemble the tropical gardens that formed the scene of his franchise epic. Total cost of the remodel: almost two million dollars.

Joe engages Build Your Dreams Affiliates (“BYDA”) to plan and execute the project. BYDA spins the job to Build Your Dreams, Inc. (“BYD”), a general contractor sub-entity of BYDA that hires all of the architects and related subcontractors to draw up the plans and complete the work. After two years of delays, cost overruns, and faulty construction, Joe severs his relationship with BYDA. He then files suit for breach of contract, fraud, misrepresentation, negligence, and other claims centering on BYDA’s alleged bad faith. BYDA in turn files cross-claims against Joe Writer and all of the subcontractors (including the architects, door manufacturers, marble importers, air conditioning and electric companies, pool and plumbing companies, landscapers, roofers, tile installers, and the bank that Joe used to co-finance the venture).

The third-party defendant subcontractors in turn file counterclaims against BYDA asserting that BYD was inadequately capitalized and bonded for the work that it was supposed to do and that BYD was essentially a sham corporation designed to avoid liability.

Joe Writer files his suit against BYDA in California State court. California permits litigants to designate certain types of cases as complex⁴¹ by checking the complex case box on the civil cover sheet.⁴² Assuming Joe checks the complex box, will the presiding judge agree or initially

41. “A ‘complex case’ is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.” CAL. R. CT. 3.400(a). Except as provided in CAL. R. CT. 3.400(d), an action is provisionally a complex case if it involves one or more of the following types of claims: antitrust or trade regulation claims; construction defect claims involving many parties or structures; securities claims or investment losses involving many parties; environmental or toxic tort claims involving many parties; claims involving mass torts; claims involving class actions; or insurance coverage claims arising out of any of the claims listed above. CAL. R. CT. 3.400(c).

42. Cal. Jud. Council Form CM-010.

deny complex status?⁴³ As originally filed, this set of hypothetical facts would be atypical of cases deemed complex. Although it might appear to fit neatly into the construction defect provisional complex category, the initial claim is only between one plaintiff and one defendant. Once BYDA joins the subcontractors and the cross claims begin flying, however, the case is more likely to be designated complex and be subject to California's complex court system ("CCCS") procedures.

What other tools can the California courts use to efficiently resolve complex or multiparty litigation? Consolidation⁴⁴ and coordination⁴⁵ are two tools similar to those used by the federal courts.⁴⁶ For example, assuming that Joe Writer files his claims against BYDA in Los Angeles Superior Court and BYDA simultaneously files its claims against Writer in a separate suit there, these two cases will be ideal candidates for consolidation because this procedural device is appropriate when all related actions are filed in the same court. However, if the roofing company and the tile company were based in San Francisco and these companies chose to file their claims against BYDA and the other subcontractors in San Francisco Superior court, then the related cases may possibly be coordinated. Coordination is the appropriate tool to use when related actions are filed in different courts within California.

If Joe Writer's claims, the cross-claims, and the third party claims result in consolidation or coordination, one

43. In deciding whether an action is a complex case under CAL. R. CT. 3.400(a), the court must consider, among other things, whether the action is likely to involve: numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve; management of a large number of witnesses or a substantial amount of documentary evidence; management of a large number of separately represented parties; coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or substantial post-judgment judicial supervision. CAL. R. CT. 3.400(b).

44. See CAL. CIV. PROC. § 1048 (Deering 2008).

45. See *id.* § 404.

46. For example, the Federal Rules allow for consolidation of cases in one district if the cases involve common questions of law or fact, and 28 U.S.C. § 1407 allows for transfer of cases from any district court to one district court for coordinated pretrial proceedings. Additionally, when the statutory factors are met, 28 U.S.C. § 1404(a) can be used to transfer a case or cases from one district court to another, where they can then be consolidated under Rule 42.

judge will have an undeniably complex case, whether designated as such or not. Additionally, the hypothetical *Writer v. BYDA* case and claims will involve the need for expert evidence like much modern litigation, whether in state or federal court. For example, Joe Builder and BYDA will likely have expert witnesses set for depositions on each of the claims involved. Moreover, each of the subcontractors, the architects, and even the bank will certainly add their experts to the mix as well. Now add to this confusion the motions to compel and suppress that will inevitably be filed by attorneys for each of the parties, and it becomes readily apparent that judicial resources will be stretched to their limit. And this action is only focused on a single family residential improvement. Imagine if the construction defect claim involved a hundred unit condominium or a commercial development with even more parties involved. In federal courts, special masters are routinely used to help the court work with the parties and deal with discovery issues and experts. At what point, if ever, will the California courts employ special masters to help resolve the ever-increasing complex litigation?

As discovery proceeds in our hypothetical case, assume that it is revealed that BYDA, in its dealings with the subcontractors, implemented a series of change orders pertaining to the work on Joe Writer's house. For example, BYDA instructs the plumbing company to use PVC piping instead of copper to save costs and instructs the tile company to use slate instead of marble for the same reason. Now imagine that Joe Writer's fraud claim against BYDA is based on thirty of these change orders. Under the current summary judgment rule governing the CCCS, can the court streamline the proceedings by dispensing with any meritless assertions regarding the change orders? California does not allow summary adjudication of individual factual issues that dispose of only part of a cause of action. On the other hand, under the federal standard for partial summary judgment, the court could eliminate the baseless assertions regarding the change orders from Joe's fraud claim.

Mr. Paetty concludes his article by comparing the California and federal complex litigation systems, arguing that although the CCCS system can be improved, it is innovative and has the potential for becoming a model for other states.

IV. COMPLEX LITIGATION APPROACHES OF OTHER STATES

The next article, by Adam Feit, explores developments in other states.⁴⁷ His focus is on “tort reform” and other state court developments designed to eliminate wasteful practices and improve the administration of justice in class actions and other types of complex and high stakes litigation. Thus far, this Developments issue has focused on California and comparisons of California procedures with federal procedures. But, as we all know, forum selection goes beyond the state-federal battle. Often, plaintiffs’ attorneys might prefer to litigate in a particular state because of favorable jury verdicts and/or substantive or procedural law. As discussed above, it is possible to keep a class action in state court under the mandatory exception from CAFA jurisdiction when a class is composed mainly of citizens of the forum state. But, many consumer cases involve citizens of all fifty states. Consider the following hypothetical:

Suppose a woman purchases a laptop computer from Great Goods, a major national electronic retailer headquartered in Illinois. The sales clerk recommends a “special” warranty that covers all costs of inspection, repair, or replacement should the laptop malfunction in any way. Erring on the side of caution, the woman agrees and buys the “special” warranty. In fact, almost all customers buy the “special” warranty for their laptops.

Within a year, the laptop begins to malfunction. The woman brings it to the service department at her local Great Goods. The service department accepts her laptop and charges her a \$5 inspection fee, which she doesn’t question. After a week, the woman inquires about the status of her laptop. She is told there is no record of the laptop in their

47. Adam Feit, *Developments, 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 (2008).

system. The laptop has disappeared. Now irate, the woman insists on a formal investigation and fair compensation for the replacement of her laptop. Great Goods responds by offering her a \$900 gift card, which she finds ridiculous. Not only are her lost files invaluable, but compensation in the form of a gift card would require her to buy another computer from Great Goods, something she refuses to do.

Thinking it would be too expensive to hire an attorney to sue Great Goods, the woman instead starts a blog to showcase her frustrating experiences. The blog unexpectedly becomes very popular. Hundreds of people visit the site and post their own horror stories from dealing with Great Goods' customer service. Eventually, a plaintiffs' attorney notices the blog and reads the stories. He notices a pattern of rude customer service, lost laptops, and the mysterious \$5 inspection fee, which contradicts Great Good's claim that the "special" warranty covers all costs incident to inspection and repair.

Suppose the plaintiffs' attorney decides to bring a consumer class action against Great Goods for fraudulently charging the \$5 inspection fee. She has read about the plaintiff-friendly "judicial hellholes" of Illinois, Florida, and Texas and envisions the large attorneys' fees that can be generated by representing a nationwide class in a state court. In which state should she file the action? How will the pleading requirements in different states affect her chances of class certification? Will she be able to add individual plaintiffs' claims for their lost laptops without destroying the prerequisites for certification? Will state courts still certify a nationwide class? Would it be advantageous to file single-state class actions, to lessen the chances of Great Goods removing the suits to federal courts?

On the other hand, suppose Great Goods has spent millions of dollars over the years defending and settling class actions in its home state of Illinois. If Great Goods decides to close all their Illinois factories and move their corporate headquarters to another state with a more hospitable legal climate, which state should they choose?

Maybe Great Goods routinely finds itself engaged in complex commercial disputes with its distributors and contractors, and often takes advantage of the benefits of a specialized “business court.” Can they find another state with either a “business court” or similarly effective approaches to complex litigation? Does the passage of recent tort reform legislation make Texas or Florida an attractive option? Can Great Goods move to a state that efficiently handles complex litigation and has heightened pleading requirements that could insulate Great Goods from tort and class action liability?

Mr. Feit’s article addresses all these questions and will provide plaintiffs’ attorneys and defense attorneys with food for thought about what questions to ask about these states as well as others, and how to approach the multifaceted forum selection problem in complex cases.

V. CONSUMER CLASS AND MASS ACTIONS: THE ULTIMATE FORUM SELECTION BATTLE

Our next article, by Nicole Ochi, zeros in on consumer class actions and mass actions, the bane of corporate America’s existence, and whether recent federal legislation designed to steer all or most of such cases to federal court and out of state courts has affected the forum selection battle.⁴⁸ Her article deals with the questions raised by this hypothetical:

A catastrophic earthquake pummels Southern California in late July and kills hundreds of people. Many of the main water lines are rendered ineffective by the impact, and fires break out in the aftermath. At the USC County Hospital, hundreds of indigent patients are trapped by the fires without recourse: the internal sprinkler system is not functional, the exits are barred, and there is no evacuation plan. Despite rescue efforts, thirty-five patients remain trapped in the facility and pass away.

Subsequently, various patients and relatives of deceased and allegedly injured plaintiffs file a class action

48. Nicole Ochi, *Developments, Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA and MMTJA*, 41 *LOY. L.A. L. REV.* 965 (2008).

in Los Angeles County Superior Court against the hospital, alleging negligence for its failure to create and/or implement an evacuation plan and keep its emergency sprinkler system operable. The hospital removes the case to federal court under the federal Multiparty, Multiforum Trial Jurisdiction Act (MMTJA) and the Class Action Fairness Act (CAFA).

Defendant argues that federal court jurisdiction is proper under MMTJA because the earthquake is an “accident” and more than seventy-five deaths occurred in the metro Los Angeles area. What will the United States District Court for the Central District of California do if the plaintiffs seek a remand to California court? Will the district court reject jurisdiction under MMTJA because a natural disaster is not an accident under the statute? Even if each fire caused by the earthquake may be construed as an accident, will metro Los Angeles be deemed a discrete location? Although the hospital is a discrete location, the threshold number of deaths did not occur at the hospital (only thirty-five deaths in the hospital instead of the requisite seventy-five). Therefore, MMTJA may not confer federal jurisdiction over the action.

In the alternative, defendant argues that federal court jurisdiction is proper under CAFA because the defendant is a California citizen, at least one of the patients is a citizen of a state other than California, and the amount in controversy for thirty-five wrongful death suits and hundreds of personal injury cases substantially exceeds \$5 million.

Plaintiff moves to remand by arguing that one of the CAFA exceptions apply because at least two-thirds of the plaintiff class are citizens of California, the defendant is a citizen of California, and the injuries occurred in California. Plaintiff has the burden of proof, but the district court requires the defendant to provide the addresses and phone numbers of those patients who died at County during the relevant time period, as well as phone numbers of the patients’ emergency contacts listed on their medical forms. Of the thirty-five patients who died in the earthquake’s

aftermath, only two provided addresses outside the state of California. Additionally, an affidavit by County's medical records supervisor attests that less than 3 percent of the total patient population indicated that they were residents of other states.

The plaintiffs' attorney also hires a private investigator to trace the mailing addresses of 146 individuals that are potential class members. Due to the destruction across Southern California, one-third of those contacted currently reside outside of the state. However, eight plaintiffs living out of state submit affidavits suggesting that some displaced class members intend to return to Los Angeles in the near future when it is habitable.

What is the district court likely to rule? Will it find that the plaintiffs have met their burden of proof and that the local controversy and home state exceptions apply, thus requiring a remand? If not, will the court decline to exercise jurisdiction under the discretionary exception, which applies when one-third to two-thirds of the class are in-state citizens?

Specifically, the district court could find a distinct nexus between the forum of California, County Hospital, and the proposed class. All of the defendant's actions took place at County Hospital in Los Angeles, and most of the claims involve issues of negligence that will be governed by California law. The defendant is a California citizen, and over 97 percent of the patients registered at the hospital when the earthquake occurred provided information indicating California residence. Most of those displaced by the earthquake intend to return.

The answers to these technical, complex issues will drive forum selection, and Ms. Ochi's article provides the litigation strategies attorneys need to understand how to get complex cases into or out of federal court.

VI. CONSUMER CLASS ACTIONS: FILLING THE REGULATORY VOID

Having examined California complex litigation procedures, complex litigation procedures of several other states, as well as the

specifics of how recent federal legislation has affected the state-federal forum selection battle of complex cases, Alec Johnson takes us on a somewhat different tack: should consumer products be regulated by courts at all?⁴⁹ Or, should we limit courts' regulatory power over consumer product claims?

A typical products litigation scenario provides the backdrop to this discussion:

Fifteen years ago, Delfino Pharmaceuticals developed a new drug, Nifflin, that helped manage high blood pressure in middle-aged patients. Effective blood pressure medications had already been on the market for many years, including an older drug developed by Delfino, which had a patent set to expire in a couple of years. One side effect of these older medications, however, was a recurring dry cough that developed in 10 percent of patients, often resulting in these patients failing to take their medication on a regular basis and hindering the long-term reduction of their blood pressure. As these drugs were generally taken by patients prone to high blood pressure for many years, this seemingly small side effect had the potential to significantly undermine treatment.

Delfino hailed Nifflin as a major advancement because it reduced the rate of this side effect to less than 1 percent. After five years of clinical studies to establish the effectiveness of Nifflin and the associated rates of dry cough, the Food and Drug Administration ("FDA") approved the drug for widespread use with a prescription. Doctors quickly embraced the medication because it significantly reduced the amount of follow-up previously required to detect adverse reactions, as well as a potential barrier to their patients taking the medication regularly. After five years on the market, Nifflin became the most widely prescribed high blood pressure medication in the country and was regularly taken by over ten million patients.

49. Alec Johnson, *Developments, Vioxx and Consumer Product Pain Relief: The Policy Implications of Limiting Courts' Regulatory Influence over Mass Consumer Product Claims*, 41 *LOY. L.A. L. REV.* 1039 (2008).

Just after Nifflin had first been approved by the FDA, Delfino researchers noticed that several of the patients involved in the initial clinical tests had developed Alzheimer's disease. While the overall rate of Alzheimer's in the study group was only slightly above the national average at the time, some of the researchers voiced concerns over the data because Alzheimer's can often take many years to develop and detect. Despite these concerns, officials at Delfino did not think that the data warranted a sufficient issue to raise with the FDA, particularly since Nifflin was rapidly becoming the company's most profitable drug.

After ten years on the market, however, significant anecdotal evidence of increased rates of Alzheimer's began to emerge, and Delfino commissioned a study of a possible link between long-term use of Nifflin and Alzheimer's. After a two-year study, the results established that patients who regularly used Nifflin for more than a year were twice as likely to develop Alzheimer's, even if they had stopped taking the medication years prior to the onset of the disease. The researchers estimated that 20 percent of patients who had taken Nifflin, roughly two million people, would develop Alzheimer's as a result of the drug.

After Delfino quickly pulled Nifflin from the market following the study, the company faced a barrage of lawsuits including class actions in both state and federal courts. Despite the early warning signs of the drug's potential connection to Alzheimer's, the company was able to successfully defend itself against most of the individual suits by arguing to juries that Alzheimer's rates were advancing for many potential reasons and that identifying the actual cause of such a little understood disease was impossible. Further, courts were unwilling to grant class certification because variations in patient history made commonality impossible. Finally, Delfino also argued that FDA approval of the drug pre-empted tort claims involving the safety of the drug. The results have left two million potential plaintiffs suffering from Alzheimer's with little remedy.

Mr. Johnson's article traces the recent trends in complex litigation, such as the declining possibility of class certification in mass tort cases, which reduces plaintiffs' bargaining power. Nonetheless, even with the class action ax removed, corporate defendants worry about the slow bleed caused when hundreds or hundreds of thousands of individual cases remain unresolved on the merits. Pressure therefore remains on defendants to obtain global peace, or at least near global peace. And so, as seen recently in the Vioxx litigation, large settlements are still possible. The Vioxx settlement of over \$4 billion⁵⁰ seems large, but some have criticized the ethics of the settlement⁵¹ as well as the amount.⁵² Mr. Johnson analyzes the Vioxx litigation and argues that recent trends have limited the power of courts to provide adequate relief, proposing an expanded role of government involvement to ensure the safety of the citizenry.

VII. CONCLUSION

This Developments issue tackles the problems raised by complex litigation, particularly controversial forms of complex litigation such as consumer class actions and mass tort litigation, which have been driving the state-federal and state-state forum selection battle for the last decade or so. The five articles deftly handle the arcane, technical rules and statutes, the case law, and the regulatory implications of such litigation. Whether a litigation ends up in state or federal court, there is clearly a need for continued study of how best to handle cases such as those raised in our hypotheticals above and the articles to follow because how these cases are resolved will effect us all as consumers in this increasingly dangerous world.

50. *See id.* at 1086-88.

51. *Id.*

52. *Id.*

