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## **Should they Stay or Should they Go: Can State Attorneys General Avoid Removal of Parens Patriae Suits to Federal Court Under the Class Action Fairness Act?**

Michael Jaeger

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**SHOULD THEY STAY OR SHOULD THEY GO:  
CAN STATE ATTORNEYS GENERAL AVOID  
REMOVAL OF *PARENS PATRIAE* SUITS  
TO FEDERAL COURT UNDER THE  
CLASS ACTION FAIRNESS ACT?**

*Michael Jaeger\**

*The Class Action Fairness Act of 2005 (CAFA) allows a defendant to remove a class action filed in state court to federal court if certain requirements are met. There is currently a circuit split as to whether a parens patriae suit—a suit brought by a state attorney general on behalf of the citizens of the state—qualifies as a class action under CAFA. The issue raises serious concerns about federalism and has significant implications for civil procedure, and it could affect the ongoing suits by states against mortgage lenders in the wake of the financial crisis. This Note argues that the circuits that have declined to classify a traditional parens patriae suit as a class action are correct, because they are in line with both the intent of CAFA and longstanding jurisdictional and federalism principles underlying removal. The Note suggests that Congress craft a legislative solution to the split, using as a template an amendment contemplated during CAFA's passage but ultimately not included because it was believed—erroneously, it appears—not to be necessary.*

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\* J.D., December 2012, Loyola Law School Los Angeles; B.A., May 1993, Yale University. I owe a large debt of gratitude to Professor Georgene M. Vairo for her guidance, editorial assistance, and enthusiastic support, and would also like to thank Scott Westhoff and the rest of the 2011–2012 *Loyola of Los Angeles Law Review* Note and Comment Editors for their valuable advice. Thanks also to my parents and brother for their longstanding support over all of these years, and most of all to my wife Linnea Pyne and daughters Molly and Sarah, who have taught me and inspired me in ways I could never have imagined.

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## I. INTRODUCTION

It is a classic courtroom battle: the crusading state attorney general (AG) on one side, bringing suit to protect the citizens of her state,<sup>1</sup> and the multinational conglomerate on the other, defending its right to zealously pursue commercial success. The conflict raises a simple question: is the AG's suit a class action? The answer is far from simple, and the implications of that answer have serious consequences. If a court decides the suit is not a class action, the AG can stay in the friendly confines of state court. If the court finds otherwise, however, the Class Action Fairness Act (CAFA)<sup>2</sup> allows the company to remove the case to federal court, traditionally seen as a much more defendant-friendly forum.<sup>3</sup> This Note will examine the current state of the federal judiciary's interpretation of CAFA as it applies to attempted removal of *parens patriae* suits brought by state AGs.

The issue has wide-ranging implications for numerous aspects of jurisdictional analysis, including diversity, real parties in interest, plaintiff as master of the complaint, and piercing of pleadings, and touches broader legal concepts like standing and statutory interpretation. It also has serious consequences for federalism, specifically the states' ability to protect their citizens in the manner they see fit. This last point has recently become a nationally important issue, as states decide what actions they will and will not take against five of the country's largest banks in the wake of the home-mortgage crisis.<sup>4</sup> While the settlement involving forty-nine

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1. Such an action is called a "*parens patriae*" suit. The Latin phrase "*parens patriae*" literally means "parent of his or her country," and the current doctrine is derived from the English "royal prerogative," the right and duty of the sovereign to act as guardian for those who could not take care of themselves. See BLACK'S LAW DICTIONARY 1211 (9th ed. 2009); Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982); Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257 (1972).

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

3. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 617-18 (2006) (describing plaintiff and defense attorneys' preferences for state and federal court, respectively).

4. See, e.g., Consent Judgment at 5, United States v. Bank of Am., Corp., No. 12-cv-00361-RMC (D.D.C. Apr. 4, 2012), 2012 WL 1440437, at \*5.

state AGs and the banks barred some suits by states, it left open several alternate avenues of action.<sup>5</sup> An uncertain jurisdictional standard for the removal of state-brought *parens patriae* actions could have a serious impact on whether state AGs bring such suits at all, potentially delaying or preventing redress of wrongs done to millions of homeowners nationwide.<sup>6</sup>

Part II presents and analyzes the current state of the law, focusing on a circuit split: while the Fifth Circuit, the first to tackle the problem, came down on the side of removal under CAFA,<sup>7</sup> three subsequent circuits have distinguished the case or disapproved the Fifth Circuit's reasoning, granting remand based on a lack of CAFA jurisdiction.<sup>8</sup> Part III critiques the existing law, primarily by examining *West Virginia ex rel. McGraw v. Comcast*,<sup>9</sup> a district court opinion that followed the Fifth Circuit's approach. Finally, Part

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5. *State Attorneys General, Feds Reach \$25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs*, NAT'L ASS'N OF ATTORNEYS GEN., <http://naag.org/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php> (last visited Sep. 22, 2012) (stating that the settlement "does not include claims relating to securitizations of mortgage loans" and "release[s] the servicers only from servicing, foreclosure and origination liability claims").

6. The right of state attorneys general to bring and keep such suits—against out-of-state defendants based exclusively on state law—in-state court is a crucial weapon in their arsenal, both as an end in itself as well as a way to promote settlement. In addition to being a factor in the home-mortgage settlement, see, for example, Jenifer B. McKim, *State Sues Big US Lenders*, BOS. GLOBE, (Dec. 2, 2011), [http://articles.boston.com/2011-12-02/business/30468663\\_1\\_thousands-of-foreclosure-documents-foreclosure-crisis-foreclosure-proceedings\\_suits\\_by\\_state\\_attorneys\\_general\\_helped\\_lead\\_to\\_the\\_206\\_billion\\_Master\\_Settlement\\_Agreement\\_against\\_the\\_four\\_leading\\_tobacco\\_companies](http://articles.boston.com/2011-12-02/business/30468663_1_thousands-of-foreclosure-documents-foreclosure-crisis-foreclosure-proceedings_suits_by_state_attorneys_general_helped_lead_to_the_206_billion_Master_Settlement_Agreement_against_the_four_leading_tobacco_companies). See *Utah Sues Tobacco Companies*, WASH. POST, Oct. 1, 1996, at A9. It is important to note that those suits, and that settlement, occurred nearly ten years prior to the passage of CAFA.

7. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008); *Louisiana v. AAA Ins. (In re Katrina Canal Litig. Breaches)*, 524 F.3d 700 (5th Cir. 2008). Since this Note was submitted for publication, the Fifth Circuit addressed the issue again, in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796 (5th Cir. 2012). The court used a different provision of CAFA in its analysis than it did in *Caldwell* (a provision that is beyond the scope of this article), but it used the same "claim-by-claim" reasoning (see *infra* Part II.C.1.b.i) to arrive at the same ultimate conclusion that removal was proper. *Id.* at 803. The State of Mississippi has petitioned the Supreme Court for a writ of certiorari, invoking the circuit split. *Mississippi ex rel. Hood v. AU Optronics Corp.*, Case No. 12-1036 (Petition for Writ of Certiorari, filed Feb. 19, 2013).

8. *Washington v. Chimei Innolux Corp.*, 659 F.3d 842 (9th Cir. 2011); *LG Display Co. v. Madigan*, 665 F.3d 768 (7th Cir. 2011); *West Virginia ex rel. McGraw v. CVS Pharm., Inc.*, 646 F.3d 169 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 761 (2011). Since this Note was submitted for publication, the Second Circuit has concurred with these three circuits on the issue. See *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208 (2d Cir. 2013).

9. *West Virginia ex rel. McGraw v. Comcast*, 705 F. Supp. 2d 441 (E.D. Pa. 2010).

IV proposes that Congress craft a legislative solution to settle the issue, using as a template an amendment contemplated but ultimately voted down during the lead-up to CAFA's passage.

## II. STATEMENT AND ANALYSIS OF EXISTING LAW

### A. *The Class Action Fairness Act*

On February 18, 2005—not even a month after he had been sworn in at his second inaugural<sup>10</sup>—President George W. Bush signed into law the Class Action Fairness Act.<sup>11</sup> Its proponents had first introduced a similar bill in May of 1998 and had done so in every subsequent session of Congress.<sup>12</sup> Each time, the bill either did not make it out of committee, failed in a floor vote, or was filibustered.<sup>13</sup> However, after the reelection of President Bush and the strengthening of the Republican majorities in the House and Senate in the fall 2004 elections,<sup>14</sup> the stage was set for the Republicans to introduce and finally pass CAFA.<sup>15</sup>

Its sponsors moved quickly. CAFA was introduced in the Senate on January 25, 2005, passed the Senate on February 10, passed the House a week later, and was signed into law by the President the next day.<sup>16</sup> The broad intent of CAFA's proponents was "[t]o amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes."<sup>17</sup> They also sought to "restore the intent of the framers of the United States Constitution by providing for Federal

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10. Elisabeth Bumiller & Richard W. Stevenson, *Bush, at 2nd Inaugural, Says Spread of Liberty Is the 'Calling of Our Time,'* N.Y. TIMES, Jan. 21, 2005, at A1.

11. Scott L. Nelson, *The Class Action Fairness Act of 2005: An Analysis*, 2005 ABA ANNUAL MEETING, SECTION OF LITIGATION, THE CLASS ACTION FAIRNESS ACT: REFORM OR REVOLUTION? 1, (Aug. 4–7, 2005), [http://www.classactionlitigation.com/aba\\_cafa\\_analysis.pdf](http://www.classactionlitigation.com/aba_cafa_analysis.pdf).

12. S. 12, 108th Cong. (2004); H.R. 1115, 108th Cong. (2003); S. 274, 108th Cong. (2003); H.R. 2341, 107th Cong. (2002); S. 1712, 107th Cong. (2001); S. 353, 106th Cong. (2000); H.R. 1875, 106th Cong. (1999); H.R. 3789, 105th Cong. (1998).

13. Nelson, *supra* note 11; Anna Andreeva, Note, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. MIAMI L. REV. 385, 386–88 (2005).

14. Carl Hulse, *Republicans Add 4 Seats in Senate*, N.Y. TIMES, Nov. 4, 2004, at A1.

15. Nelson, *supra* note 11.

16. See S. REP. NO. 109-14, at 79 (2005), *reprinted in* 2005 U.S.C.A.N. 3, 73.

17. Class Action Fairness Act of 2005, PUB. L. NO. 109-2, Preamble, 119 Stat. 4.

court consideration of interstate cases of national importance under diversity jurisdiction . . . .”<sup>18</sup>

On its face, this goal, expressed by CAFA’s removal provisions, is laudable: to make sure class actions with implications beyond a single state are decided by a federal court. Some commentators, however, have stated that the stated goal concealed a secondary aim: to make it easier for corporate defendants to escape the purportedly more plaintiff-friendly confines of state court for the federal judiciary, which is believed to be more favorable to defendants.<sup>19</sup>

To expand federal jurisdiction, CAFA added an extensive subsection to 28 U.S.C. § 1332, the diversity statute, and a wholly new section, 28 U.S.C. § 1453, regarding removal of class actions.<sup>20</sup> Among many other changes, the most significant for AG-brought *parens patriae* cases were the elimination of the longstanding judicial requirement of complete diversity in favor of minimal diversity<sup>21</sup> and a provision granting class action defendants the right to remove suits brought in defendants’ states of citizenship (which is otherwise barred by 28 U.S.C. § 1441(b)<sup>22</sup>).<sup>23</sup> Given the overwhelming likelihood that one of the plaintiffs in a class action will be from a different state than one of the defendants, virtually any class action of any significance would meet CAFA’s relaxed diversity requirement.<sup>24</sup> Class action plaintiffs could also no longer

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18. *Id.* § 2(b)(2).

19. See, e.g., GEORGENE M. VAIRO, MOORE’S FEDERAL PRACTICE: THE COMPLETE CAFA: ANALYSIS AND DEVELOPMENTS UNDER THE CLASS ACTION FAIRNESS ACT OF 2005 5 (2011) (“Defendants had long complained about the economic pressure that class actions place on them . . . . One solution . . . was to give [them] a free pass out of the state courts, and CAFA was specifically designed to do just that.”); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1528–29 (2008).

20. 28 U.S.C. § 1332 (2006); 28 U.S.C. § 1453 (2006).

21. Complete diversity occurs when “all plaintiffs have different citizenship from all defendants.” BLACK’S LAW DICTIONARY 547 (9th ed. 2009). Minimal diversity simply requires one plaintiff and one defendant to be citizens of different states. See *id.*

22. 28 U.S.C. § 1441(b) (2006).

23. 28 U.S.C. § 1332(d). Other changes included the following: (i) the amount in controversy requirement for class actions was set at \$5,000,000 (§ 1453); (ii) a single defendant could file for removal (§ 1441(a) had traditionally been interpreted to require all defendants to join the filing); and (iii) the one-year statute of limitations on removal was eliminated (28 U.S.C. § 1446(b) (2006)).

24. See VAIRO, *supra* note 19, at 52 (“This ‘minimal diversity’ requirement of CAFA is generally not an issue because it is so easily satisfied.”).

avoid removal simply by bringing suit in one defendant's "home state."<sup>25</sup>

Finally, crucial to the analysis of CAFA's application in the state AG-suit context is CAFA's definition of a class action. Section 1332(d)(1)(B) states, "[T]he term 'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure ['Rule 23'] or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action."<sup>26</sup> CAFA's coverage is not limited to class actions per se, however; it also applies to "mass action[s]," described as "any civil action [that is not a class action] in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact . . . ."<sup>27</sup> The mass action provision also contains an exception for claims brought on behalf of the general public under a state statute specifically permitting such claims.<sup>28</sup> Such an action would not be subject to CAFA.

### B. *Parens Patriae Suits*

In the United States, *parens patriae* has developed into a doctrine of state standing, giving states the right to bring suit on behalf of their citizens when a "quasi-sovereign" interest is at stake.<sup>29</sup> While "quasi-sovereign" interest has never been specifically defined, courts have recognized at least two quasi-sovereign interests: the state's interest in the general economic and physical well-being of its citizens, and its interest in not being denied rights given to all states under the federal system.<sup>30</sup> The cases discussed in this Note fall under the first of these two.

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25. See S. REP. NO. 109-14, at 26 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 26 ("Under current law, however, plaintiffs' lawyers can easily manipulate their pleadings to ensure that their cases remain at the state level"); VAIRO, *supra* note 19, at 170.

26. § 1332(d)(1)(B); see FED. R. CIV. P. 23.

27. § 1332(d)(11)(B)(i). The action must also meet CAFA's amount in controversy requirement of \$5 million. See VAIRO, *supra* note 19, at 6.

28. § 1332(d)(11)(B)(ii)(III).

29. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600–01, 607 (1982).

30. See *id.* at 601–08. Courts have also often attempted to define "quasi-sovereign" by noting what it is *not*. It is not a sovereign interest, involving power over entities within the state's jurisdiction or a demand for recognition from other sovereigns in border disputes; it is not a



### C. The Circuit Split

In 2008, the Fifth Circuit heard the first two cases to reach the circuit level involving removal of suits brought by state AGs, deciding in favor of removal in both cases.<sup>31</sup> The Fourth, Seventh, and Ninth Circuits reached the opposite result in 2011.<sup>32</sup> At least one district court has followed the Fifth Circuit,<sup>33</sup> although most have agreed with the Fourth.<sup>34</sup>

#### 1. Did CAFA Fundamentally Change Removal? The Fifth Circuit Cases

##### a. Louisiana v. AAA Insurance (In re Canal Litigation Breaches)

In *Louisiana v. AAA Insurance*,<sup>35</sup> the state's AG filed suit against numerous insurance companies, alleging that they had breached insurance contracts by failing to pay certain claims in the aftermath of Hurricanes Katrina and Rita.<sup>36</sup> The state initially filed suit on its own behalf, because many of the affected homeowners had taken payment directly from the state in return for assigning their claims to the state.<sup>37</sup> The AG then amended the suit, adding a class action claim under a Louisiana state statute and naming as the class

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proprietary interest, such as ownership of land; and it is not a private individual or entity's interest being pursued only nominally by the state. See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 335–36 (2d Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 2527 (2011).

31. *Louisiana v. AAA Ins. (In re Katrina Canal Litig. Breaches)*, 524 F.3d 700 (5th Cir. 2008); *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008).

32. *West Virginia ex rel. McGraw v. CVS Pharm. Inc.*, 646 F.3d 169 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 761 (2011); *LG Display Co. v. Madigan*, 665 F.3d 768 (7th Cir. 2011); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842 (9th Cir. 2011).

33. *West Virginia ex rel. McGraw v. Comcast*, 705 F. Supp. 2d 441 (E.D. Pa. 2010).

34. See, e.g., *In re Vioxx Products Liab. Litig.*, 843 F. Supp. 2d 654, 664 (E.D. La. 2012) (distinguishing both *Caldwell* and *Comcast* and granting remand based on a "plain meaning" reading of the language of CAFA); *South Carolina v. LG Display Co.*, No. 3:11-cv-00729-JFA, 2011 WL 4344074 (D.S.C. Sep. 14, 2011); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C07-1827 SI, 2011 WL 560593 (N.D. Cal. Feb. 15, 2011) (making the same distinction as that found in *In re Vioxx*, 843 F. Supp. 2d at 664); *Missouri ex rel. Koster v. Portfolio Recovery Assocs., Inc.*, 686 F. Supp. 2d 942 (E.D. Mo. 2010) (distinguishing the *Caldwell* majority and following the dissent).

35. *AAA*, 524 F.3d at 700.

36. *Id.* at 702.

37. *Id.* at 702, 703.

the same homeowners who had executed subrogation agreements.<sup>38</sup> The defendants removed the case to federal court under CAFA, and Louisiana requested remand, claiming that CAFA did not apply.<sup>39</sup> The district court denied Louisiana's motion.<sup>40</sup>

The Fifth Circuit affirmed, based on two rationales. First, the court determined that the case fell under CAFA's definition of a class action.<sup>41</sup> Louisiana attempted to argue that a state is not a person, which would exempt the suit from CAFA's language ("an action to be brought by 1 or more representative persons as a class action"). The court reasoned, however, that CAFA required only that the suit be brought under a statute *authorizing* class actions by a person, which this suit had been; it did not require that the suit actually be *brought* by a person.<sup>42</sup> Second, the court found that the group of plaintiffs met CAFA's requirement of minimal diversity.<sup>43</sup> Louisiana relied on the longstanding judicial rule that a state is not a citizen for diversity purposes,<sup>44</sup> arguing that there was no citizen plaintiff for a defendant to be diverse from.<sup>45</sup> The court agreed that a state is not a citizen under diversity statutes but concluded that the assignments of the insurance claims and the joinder of the citizens as class action plaintiffs made the citizens real parties in interest in addition to the state, thereby meeting the minimal diversity requirement.<sup>46</sup>

Louisiana also attempted to claim sovereign immunity from involuntary removal, as a state suing defendants that it was authorized to regulate in state court under state law.<sup>47</sup> The court discussed cases declining to grant states immunity in similar

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38. *Id.* at 703. The state statute was Louisiana Code of Civil Procedure Article 591(A), the state's class action statute, which essentially mirrors Federal Rule of Civil Procedure 23, the federal class action statute (which sets out the bedrock class action requirements of numerosity, commonality, typicality, and adequacy of representation). FED. R. CIV. P. 23. Louisiana's rule, however, adds that the class also must be able to be "defined objectively in terms of ascertainable criteria." LA. CODE CIV. PROC. ANN. art. 591 (1997).

39. AAA, 524 F.3d at 704.

40. *Id.*

41. *Id.* at 705.

42. *Id.*

43. *Id.* at 706.

44. *See, e.g., Moor v. Cnty. of Alameda*, 411 U.S. 693, 717 (1973).

45. AAA, 524 F.3d at 706.

46. *Id.*

47. *Id.*

situations, when the state was the plaintiff rather than a defendant, but ultimately made the decision on the narrow ground that even if the state was immune, its immunity did not extend to the individual citizens it had added to the suit.<sup>48</sup> The court noted that to extend a state's immunity to its citizens would be "in frustration of a congressional decision to give access to federal district courts to defendants exposed to these private claims . . . ."<sup>49</sup>

Thus the two crucial factors in AAA were that the AG had sued under the state's specific class action statute and that he had added specific citizens as plaintiffs.<sup>50</sup> Although the AG took a different approach in the second Fifth Circuit case, *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, decided only three months after AAA, the end result was the same.<sup>51</sup>

b. Louisiana ex rel.  
Caldwell v. Allstate Insurance Co.

Louisiana sued a number of insurance companies and the management consulting firm McKinsey & Company for "work[ing] together to form a 'combination' that illegally suppressed competition in the insurance and related industries."<sup>52</sup> Unlike in AAA, however, the AG brought the suit *parens patriae*, on behalf of the state's citizens, without joining any individual citizen plaintiffs.<sup>53</sup> He also filed suit under the Louisiana Monopolies Act, not Louisiana's version of Rule 23.<sup>54</sup>

The defendants removed, Louisiana filed for remand, and the district court judge denied the state's motion, piercing the pleadings to find that the state was only a nominal party and the citizen

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48. *Id.* at 707–11.

49. *Id.* at 711 & n.47 (quoting S. Rep. No. 109-14, at 43 (2005)) (stating that, as noted in the Senate Judiciary Committee's report, CAFA "is intended to expand substantially federal court jurisdiction over class actions," and "[i]ts provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant."). This rationale, and its source, will become a significant issue in subsequent cases.

50. *See id.* at 706–12.

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

52. *Id.* at 422.

53. *Id.* at 421–22.

54. *Id.* at 423.

policyholders were the real parties in interest, giving minimal diversity jurisdiction under CAFA.<sup>55</sup>

i. The majority's  
“claim-by-claim” approach

In a 2–1 decision, the majority affirmed the district court's decision and upheld the removal.<sup>56</sup> It used congressional intent, a real-party-in-interest analysis of the *parens patriae* suit, and the AAA analysis of the sovereign immunity issue to find that the case came within CAFA's jurisdiction.<sup>57</sup>

The majority first noted that the Senate Committee Report accompanying CAFA stated that “the definition of ‘class action’ is to be interpreted liberally. . . . [L]awsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions.”<sup>58</sup> The majority also observed that Congress considered but rejected an amendment that would have exempted class actions brought by states.<sup>59</sup>

The court then used this apparent intent behind CAFA's broad grant of jurisdiction, combined with three cases in which courts disapproved of plaintiffs' “fraud,” “ill-practice,” and “devices” used to “improperly creat[e] or destroy[] diversity jurisdiction,” to justify piercing the pleadings and looking beyond “the labels that the parties [may] attach.”<sup>60</sup> The majority carefully examined the state's *parens patriae* suit to determine whether the alleged quasi-sovereign interest

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55. *Id.* at 423. The circuit court's opinion does not discuss the district court judge's determination regarding how the suit met the CAFA definition of class action, *i.e.* pursuant to Rule 23 or the state equivalent.

56. *Id.* at 432. Judge Southwick filed a strong dissent, however, which will be discussed below. *See infra* Part II.C.1.b.ii.

57. *Caldwell*, 536 F.3d at 423–32.

58. *Id.* at 424 (quoting S. REP. NO. 109-14, at 35 (2005)). As will be discussed below, however, the Committee Report was not published until ten days after the passage of the bill, calling into question its value as a source of Congressional intent. S. REP. NO. 109-14, at 79 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 73.

59. *Id.* at 424 (quoting 151 CONG. REC. S1157, 1163–64 (daily ed. Feb. 9, 2005)). In a footnote, the court acknowledges that some Senators apparently rejected the amendment not because they opposed it, but because they saw it as unnecessary. The court does nothing further with this information. *Id.* at n.4.

60. *Id.* (quoting *Burchett v. Cargill, Inc.*, 48 F.3d 173, 175 (5th Cir. 1995); *Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 185 (5th Cir. 1990); *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 185–86 (1907)).

was sufficient to make Louisiana a real party in interest, as opposed to simply a nominal party bringing a private suit.<sup>61</sup>

Significantly, the court split up the claims, looking particularly at an antitrust claim for treble damages.<sup>62</sup> The court concluded that the policyholders, not the state, were the real parties in interest, for three reasons: (1) language in the state statute allowed *individuals* to recover treble damages; (2) repeated references in Louisiana's filings made it clear that it was asserting damages to individuals, not the state as a whole; and (3) the jurisprudence had established that "the purpose of antitrust treble damages provisions are [sic] to encourage private lawsuits by aggrieved individuals."<sup>63</sup> Having so determined, the court affirmed that CAFA properly applied: with the one-hundred-plus policyholders, not the state, as real parties in interest, the case now qualified under CAFA's definition as a "mass action."<sup>64</sup> By splitting the claims and focusing on an antitrust claim benefitting a few to the exclusion of a claim for injunctive relief benefitting many, the court was able to find grounds for removal under CAFA.<sup>65</sup>

ii. The dissent's  
"whole complaint" approach

Judge Southwick's dissent in *Caldwell* has been frequently cited by subsequent courts that reached the opposite result.<sup>66</sup>

As a threshold matter, he did not share the majority's belief that CAFA fundamentally changes the nature of removal analysis. He commenced with the concept that the plaintiff remains master of the complaint: any ambiguities or contested issues are still to be resolved against the party seeking removal.<sup>67</sup> He also pointed out that one of

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61. *Id.* at 428; *see also supra* note 30 (describing courts' efforts to define a quasi-sovereign interest).

62. *Caldwell*, 536 F.3d at 429.

63. *Id.* at 429–30 (citing *Hawaii v. Standard Oil*, 405 U.S. at 262 (1972)).

64. *Id.* at 430; *see also* 28 U.S.C. § 1332(d)(11)(B)(i) (2006) (describing CAFA's mass action provisions); *supra* text accompanying notes 26–28 (same).

65. *Caldwell*, 536 F.3d at 429–30.

66. *See, e.g., Missouri ex rel. Koster v. Portfolio Recovery Ass'n, Inc.*, 686 F. Supp. 2d 942, 945, 946 (E.D. Mo. 2010) ("This Court also does not find the legal analysis in the *Caldwell* majority opinion to be persuasive . . . . [T]he Court finds [the dissent] better reasoned and persuasive.").

67. *Caldwell*, 536 F.3d at 433 (Southwick, J., dissenting) (quoting *Rico v. Flores*, 481 F.3d 234, 238–39 (5th Cir. 2007); *see also* 5 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 23.63(2)(c) (3d ed. 2012) (stating same)).

the cases the majority had cited to justify piercing the pleadings, *Grassi v. Ciba-Geigy*, states that federal jurisdiction cannot be defeated by a “disguise.”<sup>68</sup> But because there was no indication that the AG had used “fraud” or “ill-practice” in bringing the suit, as was found in the cases the majority cited,<sup>69</sup> Judge Southwick found no “disguise” and saw no reason to justify reversing the longstanding presumption in favor of remand.<sup>70</sup>

He also differed from the majority on the proper method of analysis, maintaining that the court “should determine what the case is, not what it must be if all the relief requested is to be part of the litigation.”<sup>71</sup> Rather than focusing on one claim, for treble damages—which might not even end up being awarded—and finding it sufficient to remove the entire case, the court should assess the action as a whole as it stands at the moment of removal and determine whether it meets CAFA’s requirements.<sup>72</sup> This distinction between “whole complaint” and “claim-by-claim” analysis will govern the outcome in most cases of this kind.

To that end, Judge Southwick moved on to the language of CAFA. He stated that the case at hand simply did not fit into any of the statutory definitions of actions removable under CAFA and, further, that the majority had essentially found the AG’s pleading defective and cured it sua sponte in such a way as to make it fit under CAFA.<sup>73</sup>

This was not a class action for CAFA purposes, Judge Southwick reasoned, because it was not brought pursuant to Louisiana’s Rule 23 equivalent, as CAFA’s definition required, nor did the statute under which the AG actually brought suit, the Louisiana Monopolies Act, recognize the AG as a “Rule 23 class representative every time he seeks to enforce [it].”<sup>74</sup> Similarly, the suit could not be made into a CAFA mass action “simply because the removing party suggests that the best way to cure a defective

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68. *Caldwell*, 536 F.3d at 433 (Southwick, J., dissenting) (quoting *Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 185 (5th Cir. 1990)).

69. *See supra* text accompanying note 60.

70. *See Caldwell*, 536 F.3d at 433 (Southwick, J., dissenting).

71. *Id.*

72. *Id.* at 434–35.

73. *Id.* at 433–35.

74. *Id.* at 434–35 & n.1.

pleading is to join 100 additional parties.”<sup>75</sup> Instead, if the determination was that the AG could not bring the treble-damages claim *parens patriae*, then the pleading simply would be defective and the case should have been remanded for further “procedural work in state court.”<sup>76</sup>

Finally, Judge Southwick expressed some prudential concerns on the issue of federalism.<sup>77</sup> First, he stated that the majority put the cart before the horse when it found jurisdiction by effectively amending (or requiring amendment of) the pleadings, pointing out that “[t]his is the wrong court for forcing such discretionary choices because the only source of our jurisdiction is CAFA.”<sup>78</sup> In effect, Judge Southwick argued, the majority requested a change in the pleadings to give it jurisdiction at a moment in time when it did not yet have that jurisdiction to do so.

Second, he reasoned that the crucial issue—whether the case, or at least certain claims within it, must in fact be brought as class or mass actions—“is primarily a function of state law. The authoritative judicial interpreters of that issue are all in Louisiana state courts.”<sup>79</sup> Moreover, by abolishing the one-year statute of limitations on removal in class actions,<sup>80</sup> CAFA obviated the risk that the defendants’ removal would be time-barred; thus there was “no reason to rush questions of state law into the federal courts.”<sup>81</sup>

## 2. Removal’s Fundamentals Have Not Changed: The Fourth, Seventh, and Ninth Circuit Cases

The issue did not appear in the circuit courts again until 2011, when the Fourth, Seventh, and Ninth Circuits heard appeals of

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75. *Id.* at 435. See 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1785 (3d ed. 1998) (asserting that a court “should not force the parties to try an action as a class suit when they prefer to litigate in their individual capacities”).

76. *Caldwell*, 536 F.3d at 434–35 (Southwick, J., dissenting).

77. *Id.* at 435–36.

78. *Id.* at 435.

79. *Id.*

80. 28 U.S.C. §§ 1446(b), 1453(b) (2006).

81. *Caldwell*, 536 F.3d at 435–36 (Southwick, J., dissenting).

remand orders of attempted removal of state AG actions under CAFA.<sup>82</sup>

*a. Creation of the Split:*

West Virginia *ex rel.* McGraw v. CVS Pharmacy, Inc.

In *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*,<sup>83</sup> West Virginia's AG sued six pharmacies in state court, claiming that they had sold generic drugs to West Virginia citizens without passing along the cost savings associated with using generics instead of brand-name drugs.<sup>84</sup> The AG alleged this violated at least two state statutes, West Virginia Code § 30-5-12b(g), which regulates pharmacies, and § 46A-6-104, the West Virginia Consumer Credit Protection Act (WVCCPA).<sup>85</sup> West Virginia brought the suit *parens patriae* and sought injunctive relief as well as specific financial relief and restitution on behalf of the affected consumers.<sup>86</sup> The defendants removed the case under CAFA, but the district court remanded, finding that the case was indeed a *parens patriae* action as opposed to a class or mass action and thus was not removable under CAFA.<sup>87</sup>

The Fourth Circuit majority saw the case as “a straightforward statutory analysis of CAFA.”<sup>88</sup> The action was clearly not brought pursuant to either Rule 23 or West Virginia's equivalent class action statute, so the statute the AG was in fact suing under would have to have been sufficiently “similar” to Rule 23 to allow federal jurisdiction per CAFA's definition of a removable class action.<sup>89</sup> The way in which it must be similar is by “authorizing an action to be brought by 1 or more representative persons *as a class action*.”<sup>90</sup> The court thus concluded that while a similar statute need not be identical, it must require the essential characteristic elements of a

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82. See *supra* note 32. After this Note was submitted for publication, the Second Circuit also considered this issue and, like the Fourth, Seventh, and Ninth Circuits, granted remand for lack of CAFA jurisdiction. See *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208 (2d Cir. 2013).

83. *West Virginia ex rel. McGraw v. CVS Pharm., Inc.*, 646 F.3d 169 (4th Cir. 2011). Interestingly, as in *Caldwell*, the court was divided 2–1. *Id.* at 171.

84. *Id.* at 171–72.

85. *Id.* at 172.

86. *Id.*

87. *Id.*

88. *Id.* at 174.

89. *Id.*; see 28 U.S.C. § 1332(d) (2006) (setting out the federal jurisdictional requirements for a class action).

90. *CVS*, 646 F.3d at 174 (emphasis added) (quoting § 1332(d)(1)(B)).



class action: numerosity, commonality, typicality, and adequacy of representation.<sup>91</sup>

Applying that reasoning to the case at bar, the majority found that the two relevant West Virginia statutes had “virtually none” of the required class action elements.<sup>92</sup> Its reasoning is illustrated by its responses to two objections raised in the dissent, and those responses rebut the Fifth Circuit as well. To the claim that any action in which one individual purports to represent a larger group is similar enough to a class action,<sup>93</sup> the majority responded that “[a]ll class actions are representative in nature; but not all representative actions are necessarily class actions.”<sup>94</sup> What sets class actions apart from other representative actions, the court continued, is the requirement that the representative party have a claim that is typical of the rest of the class. Here, the AG’s interest was not the same as that of the affected citizens.<sup>95</sup>

The dissent, like the Fifth Circuit, also disputed the AG’s quasi-sovereign interest, saying that it was not a sufficient nonprivate interest because some of the disgorged profits would flow to individuals as opposed to either the state or *all* of its citizens.<sup>96</sup> The majority dismissed this concern, stating that even if it had not determined the case to be *parens patriae*, the central question was whether the action met the CAFA definition of a class action, *parens patriae* or not, and the court found that it had not.<sup>97</sup> Furthermore, the court cited multiple cases in which courts, including the Supreme Court, had found that even when a figure like an AG was asserting *some* claims on behalf of individuals, the action was not a class action.<sup>98</sup>

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91. *See id.* at 174–75.

92. *Id.* at 175–76.

93. *Id.* at 179 (Gilman, J., dissenting).

94. *Id.* at 175 n.1 (majority opinion).

95. *Id.* at 175 n.1, 176 (citing the Supreme Court’s statement that the representative party in a class action “must be part of the class and ‘possess the same interest and suffer the same injury’ as the class members” (citations omitted)).

96. *Id.* at 176 n.2.

97. *Id.*

98. *Id.* at 177; *see, e.g.*, *Gen. Tel. Co. of the Nw., Inc. v. Equal Emp’t. Opportunity Comm’n*, 446 U.S. 318, 334 & n.16 (1980); *In re Edmond*, 934 F.2d 1304, 1306, 1310–13 (4th Cir. 1991).

The majority also addressed the defendants' assertion, raised previously in *Caldwell*,<sup>99</sup> that their position was supported by CAFA's legislative history.<sup>100</sup> The court identified two critical problems with that argument. First, the Committee Report stating that CAFA's removal provisions should be construed broadly was issued ten days *after* CAFA became law.<sup>101</sup> It is thus a questionable expression of Congress's intent at best, according to simple logic as well as the Supreme Court: "[P]ost hoc statements of a congressional Committee are not entitled to much weight."<sup>102</sup> Second, the court cast doubt on the probative value of certain CAFA floor statements the defendants relied on, citing two contrary statements made by the same senator on the same page of the *Congressional Record*.<sup>103</sup>

Finally, just as Judge Southwick had done in his *Caldwell* dissent, the majority closed with its concerns about federalism.<sup>104</sup> Removal here, it wrote, would "risk trampling on the sovereign dignity of the State and inappropriately transforming what is essentially a West Virginia matter into a federal case."<sup>105</sup> The majority reinforced this assertion by comparing it to the relevant purpose stated in CAFA: this case was in no way "an 'interstate case of national importance,' the defining federal interest animating CAFA's removal provisions."<sup>106</sup> Instead of analyzing whether the state's sovereign immunity was transferable to citizens, as the Fifth Circuit did in both of its cases, the majority recognized the federalism risks inherent in removal and reminded federal courts that they should be "most reluctant to compel such removal, reserving [their] constitutional supremacy only for when removal serves an overriding federal interest."<sup>107</sup>

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99. See *supra* text accompanying note 58.

100. CVS, 646 F.3d at 177.

101. *Id.*; see S. REP. NO. 109-14 (2005).

102. CVS, 646 F.3d at 177 (quoting *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982)).

103. *Id.* ("Compare 151 CONG. REC. S1163 (daily ed. Feb. 9, 2005) (statement of Sen. Charles Grassley that a subsequently defeated amendment intended to exempt suits brought by state attorneys general would have 'create[d] a very serious loophole'), with *id.* (statement of Sen. Charles Grassley that 'the amendment [was] not necessary' because 'cases brought by State attorneys general will not be affected by this bill').").

104. *Id.* at 178.

105. *Id.*

106. *Id.* (quoting Class Action Fairness Act of 2005, PUB. L. NO. 109-2 § 2(b)(2), 119 Stat. 4, 5 (2005)).

107. *Id.* (citing *Tennessee v. Davis*, 100 U.S. 257, 266-67 (1880)).

*b. Following the Fourth:*  
Washington State and California  
ex rel. Harris v. Chimei Innolux Corp.

In a Ninth Circuit case, the AGs of Washington and California sued the manufacturers of certain types of LCD screens, alleging a price-fixing conspiracy.<sup>108</sup> Both states sued *parens patriae* in state court, seeking various types of relief, including an injunction, civil penalties, restitution, and treble damages for some claims.<sup>109</sup> As in the previous cases, the defendants removed under CAFA and the states opposed.<sup>110</sup> The district court, which heard the consolidated cases, granted remand, and the defendants appealed.<sup>111</sup>

The Ninth Circuit set the tone for its analysis by noting that “the general principles of removal jurisdiction apply in CAFA cases. The right of removal is statutory, and the requirements strictly construed. The burden of establishing removal jurisdiction, even in CAFA cases, lies with the defendant seeking removal.”<sup>112</sup> The Ninth Circuit thus agreed with the Fourth Circuit that CAFA did not change the presumptions underlying removal, contrary to the Fifth Circuit’s analysis.<sup>113</sup>

The court found that the actions were valid *parens patriae* suits, given that each state used a state statute that authorized it to bring suit on behalf of its citizens.<sup>114</sup> To assess whether such suits come under CAFA, the court employed statutory construction and came to a quick and simple conclusion: “There is no ambiguity in CAFA’s definition of class action.”<sup>115</sup> Such an action must be brought under a state statute or rule similar to Rule 23 that authorizes an action as a class action,<sup>116</sup> and none of the state laws the AGs used to bring their

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108. *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 846 (9th Cir. 2011).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 847 (citation omitted) (citing *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 685, 686 (9th Cir. 2006)).

113. *Cf. VAIRO*, *supra* note 19, at 88–89 (“After significant litigation on the burden of proving CAFA jurisdiction issue [sic], the courts have rejected the argument that Congress intended courts to shift the jurisdictional burden to the opponent of federal jurisdiction.”).

114. *Chimei*, 659 F.3d at 847 (citing WASH. REV. CODE § 19.86.080(1) (2007); CAL. BUS. & PROF. CODE § 16760(a)(1) (West 2002)).

115. *Id.* at 847–48.

116. *Id.* at 848.

suits were their states' Rule 23 analogs.<sup>117</sup> Furthermore, none required the fundamental class action elements the Fourth Circuit felt would have been necessary to transform a *parens patriae*-pleaded case into a class action.<sup>118</sup>

The defendants tried to broaden the statutory interpretation, emphasizing the word "similar" in the definition of a removable class action.<sup>119</sup> They, like the Fifth Circuit, cited the Senate Committee Report's instructions "to interpret the definition of class action 'liberally' under CAFA," because they wanted to minimize what is required in a state statute to show similarity to Rule 23.<sup>120</sup> The court's response was twofold: First, regardless of how flexibly one defines "similar," CAFA's definition states that the statute being sued under must also authorize the action to be brought *as a class action*.<sup>121</sup> A statute should be construed to give meaning to all words and phrases in the statute; had Congress not wanted to require that second element, it would not have added it.<sup>122</sup> None of the state statutes that Washington and California used to bring suit authorize AG suits *as class actions*; thus, the court concluded, regardless of similarity between a particular *parens patriae* action and a class action, without the required authorization in the state statute, the requisite CAFA "class action" definition could not be met.<sup>123</sup>

Secondly, just as the Fourth Circuit had done, the Ninth took issue with the probative value of legislative-history evidence on CAFA, undermining one of the Fifth Circuit's key reasons justifying *parens patriae* removal.<sup>124</sup> In a footnote, the court pointed out that the Senate Committee Report contains a quote that "contradicts the

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117. *Id.*

118. *Id.*; see *supra* note 91 and text accompanying.

119. *Chimei*, 659 F.3d at 849; see 28 U.S.C. § 1332(d)(1)(B) (2006).

120. *Chimei*, 659 F.3d at 849 (quoting S. REP. NO. 109-14, at 35 (2005) ("[CAFA's] application should not be confined solely to lawsuits that are labeled 'class actions' by the named plaintiff or the state rulemaking authority.")).

121. *Id.*

122. *Id.* at 849-50; see also *TRW v. Andrews*, 534 U.S. 19, 31 (2001) ("We are 'reluctant to treat statutory terms as surplusage in any setting' . . .").

123. *Chimei*, 659 F.3d at 849-50.

124. See *id.* at 850 & n.3.

Report's later statement that CAFA applies to all lawsuits that simply resemble class actions."<sup>125</sup>

Finally, the court acknowledged *AAA* and *Caldwell*, but distinguished rather than refuted them, explaining in a footnote that *AAA* involved an action filed under the state's Rule 23 equivalent and that *Caldwell* did not decide the issue.<sup>126</sup> It should be noted, however, that the court's brief mention of *Caldwell* could be termed somewhat formalistic, in that it claims that *Caldwell* did not decide whether a *parens patriae* action brought under state law was a class action under CAFA. The *Caldwell* majority found that particular *parens patriae* action to only be "styled" as such, disguising its true nature as a "mass action" qualifying for removal under CAFA.<sup>127</sup> Saying that the Fifth Circuit did not decide whether *parens patriae* actions were removable class actions under CAFA seems to be splitting hairs, since one could argue that the spirit of the Fifth Circuit's decision was that any *parens patriae* action was indeed vulnerable to CAFA removal, even if it was not brought pursuant to the state's class action statute.

*c. Reinforcing Claim-by-Claim:*

*LG Display Co., v. Madigan*

*LG Display Co. v. Madigan*, a Seventh Circuit case, is the most recent circuit court decision on the issue as of this writing. The case involved Illinois's allegations of price inflation on LCD products sold to the state, its agencies, and its residents.<sup>128</sup> The Illinois AG brought suit against multiple manufacturers under the Illinois Antitrust Act (IAA), the defendants removed under CAFA, and

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125. *Id.* at 850 n.3 (citing S. REP. NO. 109-14, at 29 (2005) "[CAFA] defines the term 'class action' to include representative actions filed in federal district court under Rule 23 of the Federal Rules of Civil Procedure, as well as actions *filed under similar rules* in state courts that have been removed to federal court."). The court interpreted this to tie the definition to the degree of similarity between the state statute being used to bring suit and Rule 23, as opposed to the definition proposed by the defendants, which attempted to broaden CAFA's application to cases beyond those labeled as class actions or brought specifically under Rule 23/state class action statutes. *Id.* at 850.

126. *Id.* at 849 n.2.

127. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 419, 430 (5th Cir. 2008).

128. *LG Display Co. v. Madigan*, 665 F.3d 768, 770 (7th Cir. 2011).

Illinois filed for remand, which the district court granted; the defendants then filed for leave to appeal.<sup>129</sup>

The defendants here had a slight advantage over the defendants in *CVS* and *Chimei*: the state statute the AG used, the IAA, says, “no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State’s Attorney General, who may maintain an action *parens patriae*.”<sup>130</sup> The court’s opinion notes that the defendants used this language to argue that the Illinois legislature saw a *parens patriae* suit under the IAA as a form of class action.<sup>131</sup> This would seem to satisfy the Ninth Circuit’s requirement, at least, that the state statute being used to bring suit authorized the suit to be brought as a class action.<sup>132</sup> While the defendants did make this argument,<sup>133</sup> they were unable to use the Ninth Circuit’s language in their favor, as that decision came down after they filed a leave to appeal.<sup>134</sup>

The court made fairly short work of the defendants’ arguments, based on the now-familiar criteria in the CAFA class action definition:<sup>135</sup> the plaintiff must use Rule 23 or a state equivalent, which was not done here; a “representative person” must bring the suit, but the AG is not a class representative; the suit must be brought *as a class action*, and this was a *parens patriae* suit; and if not a named class action, the suit must be sufficiently similar, and the IAA does not require a suit brought under its authority to have those characteristics deemed essential to a class action (adequacy, numerosity, commonality, and typicality).<sup>136</sup>

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129. *Id.* It should be noted that the Seventh Circuit, unlike the Fourth and Ninth, rendered its decision on the leave to appeal, not the appeal itself, stating that if the case was not in fact a class or mass action under CAFA, the court did not have subject matter jurisdiction to hear the full appeal. *Id.*

130. *Id.* at 771–72 (quoting 740 Ill. Comp. Stat. Ann. 10/7 (2010)).

131. *Id.* I would tend to agree. *See also* Notice of Removal at , *Illinois v. AU Optronics*, No. 10-cv-05720 (N.D. Ill. Sept. 9, 2010), 2010 WL 3624970 (asserting that “[t]he IAA itself makes clear that a *parens patriae* suit is a class action in all but name . . .”).

132. *See supra* text accompanying note 121.

133. *See* Notice of Removal, *supra* note 131 at 6–7.

134. The defendants in *LG Display*, 665 F.3d 768 (7th Cir. 2011), submitted their Petition for Leave to Appeal Remand on July 18, 2011; the opinion in *Chimei*, 659 F.3d 842, 843 (9th Cir. 2011), was issued on Oct. 3, 2011.

135. 28 U.S.C. § 1332(d)(1)(B) (2006).

136. *LG Display*, 665 F.3d at 772.

The court also summarily dismissed the defendants' alternative argument that the suit was a CAFA "mass action,"<sup>137</sup> which requires joinder of 100 or more persons' similar claims. The court's reasoning was simple: the AG was the only person making any claims, making the mass action provision inapplicable.<sup>138</sup> In addition, however, the Seventh Circuit was the first to point out a relevant mass action exception buried in CAFA at 28 U.S.C. § 1332(d)(11)(B)(ii)(III), which states that a suit is not a mass action if "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action."<sup>139</sup> If an AG sought to stop economic malfeasance in her state for the benefit of all consumers in that state via a *parens patriae* suit, that would clearly seem to fit within the exception.<sup>140</sup>

The Seventh Circuit was also the first circuit to adopt Judge Southwick's "whole complaint" analytical framework.<sup>141</sup> The defendants wanted the court to look behind the pleadings to "what's really going on,"<sup>142</sup> but they acknowledged that such an argument relied on separating the claims and only then determining the real parties in interest for each.<sup>143</sup> The defendants cited *Caldwell*, discussed above, and the district court decision *West Virginia ex rel. McGraw v. Comcast Corp.*,<sup>144</sup> which will be discussed below, as authority for the claim-by-claim analysis.

The court rejected the claim-by-claim approach for two primary reasons. First, three recent district court decisions on CAFA had specifically disapproved of the approach,<sup>145</sup> and an older Supreme

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137. *Id.*; see § 1332(d)(11)(B)(i) ("[M]onetary 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 . . .").

138. *LG Display*, 665 F.3d at 772.

139. *Id.*; see § 1332 (d)(11)(B)(ii)(III).

140. See *LG Display*, 665 F.3d at 772 ("By the plain language of that provision, too, this case is not a mass action.").

141. See *supra* text accompanying notes 71–72.

142. *LG Display*, 665 F.3d at 772.

143. *Id.* at 772–74.

144. 705 F. Supp. 2d 441 (E.D. Pa. 2010).

145. *LG Display*, 665 F.3d at 773 (citing *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 07-1827 2011, WL 560593, at \*3 (N.D. Cal. Feb. 15, 2011) (declining to take the claim-by-claim approach because (1) there is no language in CAFA to support such an analysis, and (2) there is no sign of congressional intent that CAFA should extend to *parens patriae* actions); *Missouri ex*

Court decision had set forth the proper real-party-in-interest analysis.<sup>146</sup> Second, because there is no basis for the claim-by-claim approach in the language of CAFA, the court disagreed with the Fifth Circuit's interpretation that the congressional intent to broaden federal jurisdiction over class actions allowed a divergence from the "traditional 'whole complaint' analysis."<sup>147</sup> It cited a district court opinion that could not have been more definitive: "Neither [*Comcast*] nor *Caldwell* cites any language in CAFA to support a claim-by-claim approach to evaluating the real party in the interest [sic] in a *parens patriae* case. There is no such language in CAFA . . . ."<sup>148</sup>

Finally, as both Judge Southwick and the Fourth Circuit had done, the Seventh Circuit expressed its concerns about the federalism conflicts raised by CAFA. It saw no reason to change the presumption against removal that exists due to "sovereignty concerns,"<sup>149</sup> as articulated by the Supreme Court: "considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it."<sup>150</sup>

### III. CRITIQUE OF EXISTING LAW

This Note has pointed out many of the problematic elements of the Fifth Circuit's reasoning throughout Section II. An analysis of the decision of the one court that has followed *Caldwell*—the Eastern

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*rel. Koster v. Portfolio Recovery Assocs., Inc.*, 686 F. Supp. 2d 942, 945–46 (E.D. Mo. 2010) (stating that piercing the pleadings to do a claim-by-claim analysis is appropriate only when fraudulent joinder has been alleged); *Illinois v. SDS W. Corp.*, 640 F. Supp. 2d 1047, 1050–53 (C.D. Ill. 2009) (holding that the state is a real party in interest in the action as a whole, regardless of potential individual citizen beneficiaries of certain claims, if it has "a substantial stake in the outcome of the case") (citations omitted)).

146. *Id.* (citing an earlier decision of its own, *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241 (7th Cir. 1981), which quotes *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459 (1945) (a state's status as the real party in interest "is a question to be determined from the 'essential nature and effect of the proceeding.'")).

147. *Id.* at 773–74 (quoting *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 07-1827, 2011 WL 560593, at \*3 (N.D. Cal. Feb. 15, 2011)).

148. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 07-1827 2011, WL 560593, at \*3 (N.D. Cal. Feb. 15, 2011).

149. *LG Display*, 665 F.3d at 774.

150. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 n.22 (1983); *see also LG Display*, 665 F.3d at 774 ("Restraint is particularly appropriate in light of the Supreme Court's directive that removal statutes should be 'strictly construed' . . . ." (quoting *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002))).



District of Pennsylvania, in *West Virginia ex rel. McGraw v. Comcast*<sup>151</sup>—is an excellent lens through which to examine the flaws and dangers in that reasoning, which could explain why other courts have been reluctant to follow in the Fifth Circuit’s footsteps.

In *Comcast*, West Virginia’s AG brought an antitrust and consumer protection suit under several state laws—none of which were the state’s equivalent of Rule 23—against Comcast for requiring certain customers to rent its proprietary cable box.<sup>152</sup> Comcast removed, and the state filed for remand.<sup>153</sup>

*A. The Approach:  
Whole Complaint vs. Claim-by-Claim*

To assess whether the complaint met CAFA’s requirement of minimal diversity, the judge used a real-party-in-interest analysis of the state’s *parens patriae* suit, just as the Fifth Circuit had done in *Caldwell*.<sup>154</sup> If the state was “only” trying to protect its citizens, the district court judge reasoned, it had asserted a proper quasi-sovereign interest in their economic and physical health and well-being, per *Snapp*,<sup>155</sup> and was therefore the real party in interest.<sup>156</sup> If, however, West Virginia was “also” bringing claims involving private individuals, those individuals were real parties in interest, thereby meeting CAFA’s minimal diversity requirement.<sup>157</sup>

Analyzing the claims in this way is a hallmark of the claim-by-claim analysis. The *Comcast* judge asserted that courts are split (in both pre-CAFA and non-CAFA cases) on the issue of whether a state can remain the sole real party in interest in a *parens patriae* suit when it is bringing treble- or compensatory-damages claims in addition to claims for injunctive relief.<sup>158</sup> Other courts, however,

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151. 705 F. Supp. 2d 441 (E.D. Pa. 2010).

152. *Id.* at 443–44.

153. *Id.* at 444.

154. It is well established that a state is not a citizen for purposes of diversity. *See Minnesota v. N. Sec. Co.*, 194 U.S. 48, 63 (1904).

155. *See supra* text accompanying note 30.

156. *Comcast*, 705 F. Supp. 2d at 446.

157. *Id.*

158. *Id.* at 447; *see Hood v. F. Hoffman-La Roche*, 639 F. Supp. 2d 25 (D.D.C. 2009) (using the claim-by-claim approach to find state has no quasi-sovereign interest with such a combination of claims). *Contra Illinois v. SDS W. Corp.*, 640 F. Supp. 2d 1047 (C.D. Ill. 2009) (using the whole-complaint approach to find the opposite with a similar combination of claims).

have said that rather than the equipoise that a “split” implies, most courts in fact fall on one side of the issue and only a few on the other.<sup>159</sup> Rather than assessing the claims individually, the large majority of courts examine the case as a whole by looking at all of the claims collectively, asking “not whether the state *alone* will benefit, but whether the state has ‘a substantial stake in the outcome of the case.’”<sup>160</sup> Similarly, many courts have held that adding individual damages claims to more broad-based state claims does not “automatically render[]” a state a nominal party.<sup>161</sup>

There are at least five reasons compelling the use of the “whole complaint” method of analysis. The first is simply the fundamental concept of what is judicially reviewable in federal courts according to the Constitution: “Cases” and “Controversies” are the words used in Article III, Section 2, not “claims.”<sup>162</sup> Thus in assessing whether federal jurisdiction exists, the Framers appear to have intended courts to examine the action as a whole (the *controversy*) rather than any one specific claim. Congress demonstrated its agreement with this concept in the codification of supplemental jurisdiction in 28 U.S.C. § 1367, which allows courts to exercise jurisdiction over additional claims when those claims “form part of the same case or controversy under Article III of the United States Constitution.”<sup>163</sup> In other words, claims are not to be treated independently; they are to be examined in the context of how they relate to the larger case or controversy at issue.

Second, to treat the claims individually destroys the plaintiff’s long-standing and oft-acknowledged right to be “master of the complaint” and choose the forum.<sup>164</sup> While CAFA’s Senate

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159. *See, e.g.,* Illinois v. AU Optronics Corp., 794 F. Supp. 2d 845, 852 (N.D. Ill. 2011) (collecting multiple authorities asserting that “most” courts have rejected the claim-by-claim approach and instead viewed the complaint as a whole); Ohio v. GMAC Mortg., LLC, 760 F. Supp. 2d 741, 745–46 (N.D. Oh. 2011).

160. *AU Optronics*, 794 F. Supp. 2d at 852 (quoting *SDS W. Corp.*, 640 F. Supp. 2d at 1052) (emphasis supplied).

161. *Id.* at 853.

162. U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .—to Controversies . . . between a State and Citizens of another State . . .”).

163. 28 U.S.C. § 1367(a) (2006).

164. *AU Optronics*, 794 F. Supp. 2d at 852.

Committee Report—the value of which, as has been discussed, is questionable<sup>165</sup>—has text which could be taken to suggest a more liberal approach to removal, there is certainly no text indicating a reversal of the power of forum selection. Indeed, the Seventh Circuit explicitly so stated: “a plaintiff, as master of the complaint, may include (or omit) claims or parties in order to determine the forum.”<sup>166</sup>

Third, the Fifth Circuit’s rationale appears to be a solution in search of a problem: it would be a rare case in which a state AG fraudulently manipulated the rules of pleading to disguise the nature of her suit, particularly when she was bringing the action under a state statute specifically authorizing the suit. In the context of class action removal under CAFA, in fact, no such case exists. One court disapproved of the Fifth Circuit’s approach for just this reason, saying that “the Fifth Circuit relied on cases involving fraudulent joinder or fraudulent pleading to justify ‘piercing’ the plaintiffs’ pleadings . . . despite the fact that it does not appear defendants had alleged that the plaintiffs used fraud to destroy federal jurisdiction . . . .”<sup>167</sup>

Fourth, even if one were to examine claims separately, there is ample precedent for finding that the “individualized” damages sought by the state that so troubled the *Caldwell* and *Comcast* courts—the treble and compensatory damages tied to particular individuals’ losses—would have a sufficient statewide deterrent effect on the defendants and other commercial actors in the state as to qualify as a quasi-sovereign interest.<sup>168</sup> The court in *Illinois v. SDS*

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165. See *supra* text accompanying note 102. The *Comcast* judge seemed to acknowledge this, saying in a footnote, “CAFA’s legislative history is extremely limited,” noting that there is no House or Conference report due to how quickly it went through Congress. *West Virginia ex rel. McGraw v. Comcast*, 705 F. Supp. 2d 441, 448 n.5 (E.D. Pa. Mar. 31, 2010). Given the paucity of the record and the speed of CAFA’s passage, a single Committee report may not be an accurate indicator of “Congress’s” intent.

166. *Anderson v. Bayer Corp.*, 610 F.3d 390, 393 (7th Cir. 2010).

167. *Missouri ex rel. Koster v. Portfolio Recovery Assocs. Inc.*, 686 F. Supp. 2d 942, 945–46 (E.D. Mo. 2010).

168. See *Illinois v. SDS W. Corp.*, 640 F. Supp. 2d 1047 (C.D. Ill. 2009); *Pennsylvania v. Mid-Atlantic Toyota Distribs., Inc.*, 704 F.2d 125, 132 (4th Cir. 1983) (“[A] state can have a legitimate public interest in ensuring the economic well-being of its citizens—and in indirectly promoting a smoothly functioning economy freed of antitrust violations—even though the most obvious beneficiaries may be individual consumers who ultimately recoup money damages.”).

*West*<sup>169</sup> put it simply: “[S]ecuring an honest marketplace is a quasi-sovereign interest.”<sup>170</sup>

Fifth, concerns about federalism are a final reason why the claim-by-claim approach in *parens patriae* CAFA removal situations is improper. The *Comcast* judge asserted that such an approach is “most consistent with Congress’s intent under CAFA to expand federal jurisdiction over class actions . . . with interstate ramifications.”<sup>171</sup> However, as many of the courts supporting remand have noted, these cases are brought in state court by state AGs under state laws designed to protect the citizens of that state; the inapplicability of the phrase “interstate ramifications” is clear.

This approach thus leaps from an undeniable congressional intent to expand federal jurisdiction—expressed in the law’s preamble as “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”<sup>172</sup>—to a disregard of three fundamental jurisdictional principles: the longstanding federalism-based presumption against removal, the Supreme Court’s command to construe all removal statutes strictly, and the respect always accorded the plaintiff as master of the complaint. The approach then appears to go even further, to an analytical piercing of the pleadings and a breaking up of the complaint in situations in which there was no indication that the parties were trying to disguise anything.

*B. The Substance:  
Statutory Interpretation  
and Congressional Intent*

In addition to these numerous flaws in the *method* of the *Caldwell/Comcast* analysis, the *substance* and rationales of the analysis are similarly troubling.

First, both courts strained the interpretation of a key word in CAFA’s definition of “class action.” The *Comcast* judge, following

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169. 640 F. Supp. 2d 1047 (C.D. Ill. 2009).

170. *Id.* at 1051.

171. *Comcast*, 705 F. Supp. 2d at 447–48 (citing S. REP. NO. 109–14, at 35 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 34).

172. Class Action Fairness Act of 2005, PUB. L. NO. 109-2, § 2(b)(2), 119 Stat. 4, 5 (emphasis added).

the lead of the defendants in *Chimei*,<sup>173</sup> attempted to broaden the definition of the word “similar” in the phrase “similar to Rule 23.”<sup>174</sup> The Fourth Circuit’s test for similarity in *CVS* is taken straight from the statute: a similar state statute would “authoriz[e] an action to be brought by 1 or more representative persons as a class action.”<sup>175</sup> Judge Brody, however, found that “[t]he primary objective of a class action suit . . . has always been to protect the interest of ‘absentees,’ i.e. unnamed class members.”<sup>176</sup> She then noted a few provisions in the WVAA having to do with notice, opt-out, and adequacy of representation, and found that those elements make the WVAA sufficiently similar to Rule 23.<sup>177</sup>

Not only is this at odds with the language of CAFA, but the underlying rationale is arguable: Is absentee-interest protection truly the “primary” objective of class actions? The Supreme Court case offered as support for that assertion does not in fact say so; instead, it simply cites protecting absentees’ interests as one of the “justifications that led to the development of the class action”<sup>178</sup>—not *the* justification, and not an *objective*; just one of *several* justifications. As noted earlier, a fairer statement of the federal class action prerequisites sets out four qualities: numerosity, commonality, typicality, and adequacy of representation.<sup>179</sup> These elements, as the *CVS* court said, are what a statute similar to Rule 23 must require (not least because they are codified in Rule 23).<sup>180</sup> Notice and opt-out provisions are clearly of secondary importance, and they do not define class actions per se, as the *Comcast* judge would have it.

Such an interpretation is also strained because it ignores the dictates of plain language in the analysis of the relevant state statute. CAFA’s provision is straightforward: a federal court has jurisdiction when the plaintiff has used Rule 23 or a “similar state statute or rule

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173. See generally *supra* text accompanying notes 115–117 for a discussion of the criteria used to determine whether a suit comes under CAFA.

174. *Comcast*, 705 F. Supp. 2d at 452–54.

175. *West Virginia ex rel. McGraw v. CVS*, 646 F.3d 169, 174 (4th Cir. 2011) (quoting 28 U.S.C. § 1332(d)(1)(B)); see generally *supra* text accompanying notes 90–91.

176. *Comcast*, 705 F. Supp. 2d at 452–53.

177. *Id.* at 452–54.

178. *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 402–03 (1980).

179. See *supra* notes 91, 136; see also BLACK’S LAW DICTIONARY 284 (9th ed. 2009) (detailing the four prerequisites of a class action).

180. See *supra* note 89 and accompanying text.

of judicial procedure . . . .”<sup>181</sup> The most logical interpretation of this language is that it applies to actions filed under state class action statutes (in other words, Rule 23 equivalents), not consumer-protection actions, which are separately authorized under any number of state laws. It stretches the boundaries of the word “similar” beyond any plain-language definition to say that, for instance, the South Carolina Antitrust Act,<sup>182</sup> or the Missouri Merchandising Practices Act,<sup>183</sup> or the West Virginia Pharmacy Act,<sup>184</sup> is as sufficiently similar to Rule 23 as are those states’ class-action statutes or rules.<sup>185</sup>

A second problematic substantive element is *Caldwell’s* and *Comcast’s* use of CAFA’s legislative history as a rationale for weakening the presumptions against removal and justifying piercing the pleadings. The rushed, scarce, and *post hoc* nature of CAFA’s legislative history has already been discussed several times above. The first federal court to tackle the CAFA *parens patriae* removal issue, the District of New Jersey in *Harvey v. Blockbuster, Inc.*, delved extensively into CAFA’s legislative history, finding persuasive such statements as “[AG suits] are not class actions; rather, they are very unique attorney general lawsuits authorized under State constitutions or under statutes. . . . [T]his amendment is not necessary . . . because our bill will not affect those lawsuits.”<sup>186</sup> It

181. 28 U.S.C. § 1332(d)(1)(B) (2006).

182. See *South Carolina v. LG Display Co.*, No. 3:11-cv-00729, 2011 WL 4344074, at \*1 (D.S.C. Sep. 14, 2011) (citing S.C. CODE ANN. § 39-3-180 (1976)).

183. See *Missouri ex rel. Koster v. Portfolio Recovery Assocs., Inc.*, 686 F. Supp. 2d 942, 943 (E.D. Mo. 2010) (citing MO. REV. STAT. § 407.010 (1986)).

184. See *West Virginia ex rel. McGraw v. CVS*, 646 F.3d 169, 172 (4th Cir. 2011) (citing W. VA. CODE § 30-5-12b (2007)).

185. See S. C. R. CIV. P. 23; MO. R. CIV. P. 52.08; W. VA. R. CIV. P. 23.

186. *Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749, 753 (D.N.J. 2005) (quoting 151 CONG. REC. S1157-02, at S1163 (statement of Sen. Grassley)). The court found another similarly definitive statement from a supporter of the bill:

[T]his amendment . . . is unnecessary . . . . [L]et me be perfectly clear that [attorney general *parens patriae* suits] are not class actions . . . . Section 1332(d) in no way affects these lawsuits . . . . [T]he bill applies only to class actions, and not *parens patriae* actions. Class actions being those lawsuits filed in Federal district court under rule 23 of the Federal rules of civil procedure or lawsuits brought in State court as a class action. Neither of these conditions are met when compared to the nature of a *parens patriae* action, and consequently, are excluded from the reach of this bill.

151 CONG. REC. 1811 (2005) (statement of Sen. Hatch); see also *Connecticut v. Moody’s Corp.*, 664 F. Supp. 2d 196, 202 (D. Conn. 2009) (citing *Harvey*, 384 F. Supp. 2d at 752–54) (stating that CAFA does not apply to state enforcement actions).

can be argued, of course, that floor statements are of dubious value; but given the extensive problems with the CAFA record already cited, any purported congressional intent is clearly ambiguous and certainly not sufficient to justify undermining jurisprudential doctrines of long standing.

The Ninth Circuit found an additional reason to discount the record. In *Abrego Abrego v. Dow Chemical*,<sup>187</sup> the court stated that in order to look to CAFA's legislative history to determine who bore the burden of proof on removal, an ambiguity in CAFA's statutory language was "at least a necessary condition."<sup>188</sup> Without any language at all in CAFA regarding the burden, the court relied on the bedrock presumption that "Congress is aware of the legal context in which it is legislating" and therefore found that Congress had no intention of effecting a major jurisprudential change such as shifting the burden on removal via silence.<sup>189</sup>

#### IV. PROPOSAL

For all of the reasons discussed above, it is clear that the appropriate choice for a jurist faced with a CAFA removal request in a *parens patriae* suit is to remand the action to state court. As stated in Part I, the recent mortgage crisis has brought state quasi-sovereign interests into current legal discussions, and it is likely such interests will continue to arise.<sup>190</sup> This fact necessitates a clear validation of the idea that state AG *parens patriae* suits are exempt from removal under CAFA.

The most definitive way to provide this validation would be for Congress to amend CAFA to specifically exempt *parens patriae* suits from removal under the statute. As discussed in Part II, this was attempted during the bill's passage but was unsuccessful, largely due to many senators believing that it was unnecessary.<sup>191</sup> There was also a procedural concern: the bill's proponents wanted to speed its passage by voting on identical bills, without amendments, in both

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187. *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006).

188. *Id.* at 683–84.

189. *Id.*

190. The effects of global warming provide another good example of a state quasi-sovereign interest likely to be litigated in the future. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497 (2007).

191. *See supra* note 59.

houses.<sup>192</sup> Finally, there was a belief that the amendment, which exempted “any civil action brought by, or on behalf of, any attorney general,”<sup>193</sup> would create a loophole for private lawyers to keep class actions in state court simply by adding the AG as a plaintiff.<sup>194</sup>

With a slight adjustment to the language, legislators could propose a very similar amendment today to prevent any future courts from misinterpreting the language and intent of CAFA as the *Caldwell* and *Comcast* courts did. As to the concerns expressed by the opponents in 2005, a new amendment would address each. First, given the actions of some courts, there can no longer be any serious doubt that the amendment is necessary. Second, as long as the amendment is passed by itself and not attached to a larger bill, the procedural concern would be moot. Finally, to address the alleged loophole, the amendment could exempt solely “*parens patriae* actions brought by any state attorney general.” This would give each side some, but not all, of what it wants. On the one hand, the amendment’s proponents would get an exemption, but not for *any* suit brought by *or on behalf of* an AG; if an AG wanted to be sure to avoid removal, she would have to bring the case herself rather than contract with outside counsel to do so.<sup>195</sup> On the other hand, would-be opponents of the amendment would compromise by voting for an amendment that had been limited to address some of their concerns.

There are additional jurisprudential reasons, beyond the narrow focus of AG *parens patriae* cases, why Congress should act. At the most basic level, there is nothing in the text or even legislative history of CAFA to indicate that it was intended to reverse the many longstanding jurisdictional principles at issue in these cases, as *Caldwell* and *Comcast* would have it: (1) the presumption against removal, with resolution of ambiguities in favor of remand; (2) the burden of justifying removal resting where it always has, on the defendant; (3) the determination of the real parties in interest based on the complaint as a whole, not by each individual claim; (4) the

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192. 151 CONG. REC. 1808 (2005) (statement of Sen. Carper).

193. 151 CONG. REC. 1804–05 (2005).

194. 151 CONG. REC. 1808 (2005) (statement of Sen. Cornyn).

195. An AG could still hire outside counsel to bring the suit; there would simply be a risk on removal of running into a judge who followed *Caldwell*. The AG would thus need to assess that risk against the importance of the case staying in state court and allocate her resources accordingly.



plaintiff as master of the complaint, in the absence of fraudulent pleading or joinder; and (5) the fundamental principles of federalism, which should allow state AGs to bring suit on behalf of their citizens as authorized by their state's laws and in the best manner they see fit, and which allow federal courts to yank these otherwise state-bound causes of action out of state court only on the rarest of occasions, when the justification for doing so is unquestionable and in line with CAFA's purpose ("interstate cases of national importance"<sup>196</sup>).

To allow the opposite to happen would do double damage: First, it would weaken core judicial principles, not just in CAFA removal cases, by rolling back concepts that have developed over years to protect smaller plaintiffs against larger defendants. Second, state parties involved in or contemplating such suits would think twice about taking the time and expense to bring an action if removal were to become so simple; this would seriously weaken the protection that AGs can offer their citizens via the valuable and unique remedy of *parens patriae* suits.

It is also important that Congress act sooner rather than later. While the trend is in the right direction, there are signs in a few of the cases cited that had one thing been different—say, that an AG was attempting to vindicate the rights of particular individuals as well as the citizenry as a whole, or was pursuing a remedy that individuals could also pursue themselves—the court's decision might have gone the other way.<sup>197</sup>

## V. CONCLUSION

Will the classic courtroom battle that commenced this Note have a happy ending for the state AG? She is a state employee bringing suit in state court under state law to protect the citizens of her state from alleged illegal actions in that state. Those facts alone present a compelling case for allowing her to remain right where she is. A United States statute would have to have quite an explicit grant of

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196. Class Action Fairness Act of 2005, PUB. L. NO. 109-2, § 2(b)(2), 119 Stat. 4, 5.

197. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 843 F. Supp. 2d 654, 667 (E.D. La. 2012) (distinguishing cases which found that the state was not a real party in interest by relying on the fact that the Attorney General was pursuing a cause of action that only he could enforce); *In re Oxycontin Antitrust Litig.*, 821 F. Supp. 2d 591, 602–03 (S.D.N.Y. 2011) (noting that the pro-remand outcome might have been different had the Attorney General been seeking anything other than injunctive relief and damages paid directly to the state).

jurisdiction in such circumstances to overcome federalism concerns; CAFA's language is not so express. CAFA's actual provisions—not its contradictory legislative history—would similarly need to clearly state Congress's intent to reverse the decades-old presumptions that removal ambiguities should be resolved in favor of remand and that the plaintiff is master of the complaint. Again, such definitiveness is lacking. Finally, no less a document than the Constitution states that federal jurisdiction is determined by cases or controversies, not claims.

Had lawmakers not been in such a rush in January and February of 2005, they might have seen the issue's importance and clarified CAFA's language, thereby avoiding the ensuing judicial confusion. The fix is simple, and even—a rare occurrence these days—arguably bipartisan. Indeed, forty-six state attorneys general from both major political parties supported the amendment then.<sup>198</sup> Even in our legislatively gridlocked times, perhaps it is not too much to hope for that such a small but vital measure as this could squeak through, benefitting attorneys general and, more importantly, their constituents in every state.

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198. 151 CONG. REC. 1805 (2005) (statement of Sen. Pryor).

