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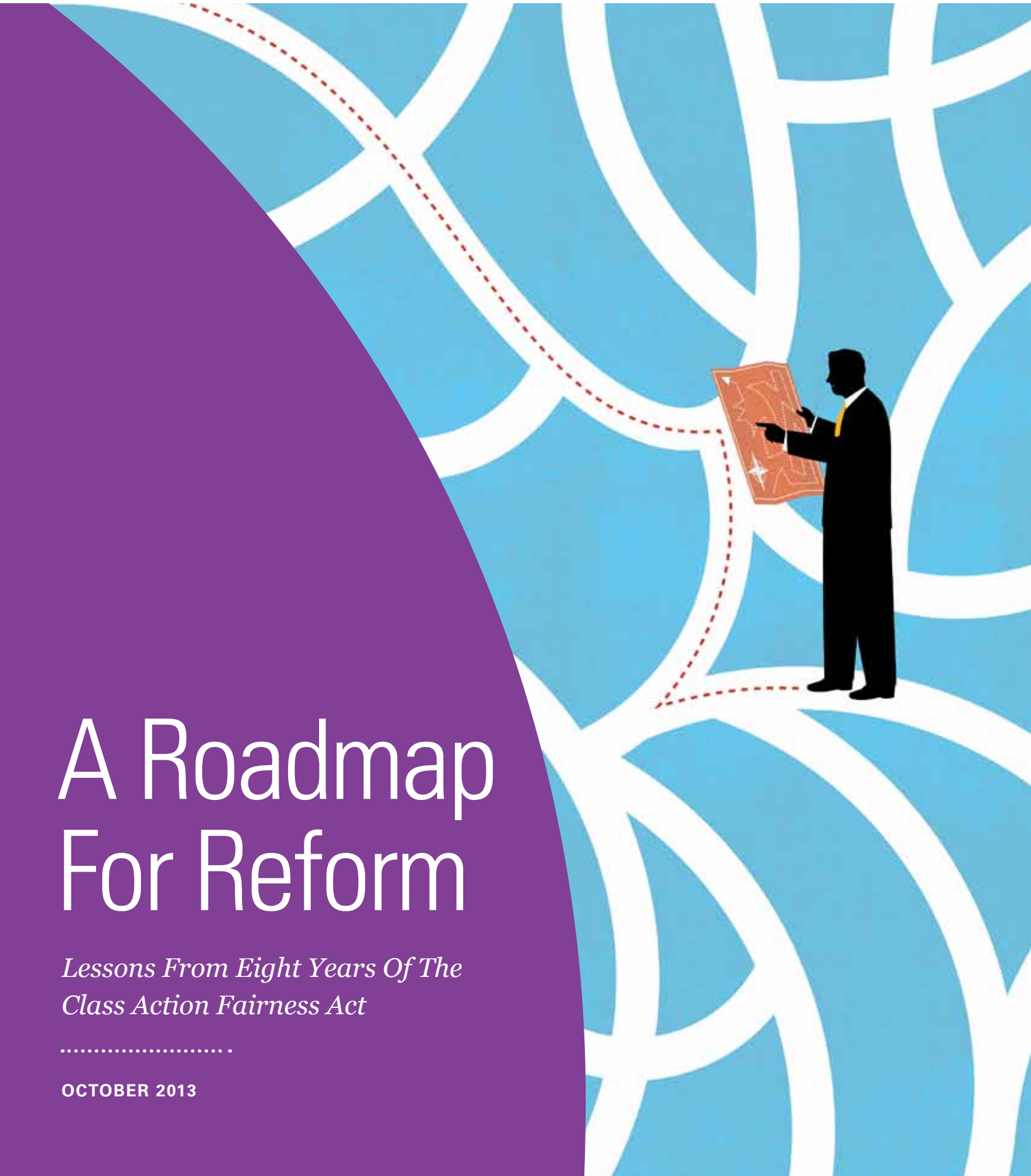

A Roadmap For Reform

Lessons From Eight Years Of The Class Action Fairness Act

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Executive Summary

Over the last several years, the U.S. has made significant progress in addressing class action abuse. The Class Action Fairness Act of 2005 (CAFA) was an important first step toward leveling the class action playing field for American businesses. Under that legislation, a defendant can "remove" a class action originally filed in state court to federal court as long as it satisfies certain criteria, including a $5 million amount-in-controversy threshold. This key provision in CAFA has helped move numerous interstate class actions from "magnet" state court jurisdictions that traditionally employed loose class certification standards to federal courts that must apply the stringent requirements of Rule 23 of the Federal Rules of Civil Procedure and the U.S. Supreme Court's decisions interpreting those prerequisites. As a result, more and more interstate class actions that were once trapped in state courts hostile to out-of-state defendants are now receiving the careful scrutiny they merit.

While this impressive result has decreased the level of class action abuse, additional reforms may be needed to address the legal abuses that still affect large-scale and aggregate litigation, even post-CAFA. This paper focuses on a targeted approach, combining concrete proposals to address the most widespread and disruptive abuses while also looking at other potential revisions to CAFA designed to address certain judicial misinterpretations of the statute as well as identifying several additional areas that warrant vigilance to ensure that they do not become festering problems in the future.

Extend the Reforms Adopted in CAFA to Address Management of Class Actions and Complex Litigation

First, we propose in this paper that Congress extend the reforms adopted in CAFA to address two widespread problems that undermine the management of class actions and complex litigation.

CONGRESS SHOULD EXTEND THE CAFA PROVISION TYING ATTORNEYS' FEES TO ACTUAL CLASS MEMBER RECOVERIES

Cy pres class action settlements, which award money to charities rather than class members, are on the rise. This practice is disturbing because plaintiffs' lawyers are garnering huge attorneys' fees without doing anything that benefits the class members. They simply strong arm a defendant into writing a check to a charity and then go home with a handsome check for themselves too. The *cy pres* problem could be fixed by applying CAFA's coupon settlement provision to *cy pres* settlements as well, basing attorneys' fees calculations on the value of the money actually *redeemed* by the injured class members and not on money that is simply distributed to an often-unrelated charity.

CONGRESS SHOULD EXPAND FEDERAL JURISDICTION TO STATE-COURT CASES THAT OVERLAP WITH FEDERAL MULTIDISTRICT LITIGATION (MDL) PROCEEDINGS

Plaintiffs frequently file cases in state courts with the goal of competing with federal MDL proceedings and undermining their efficiency. These cases typically name a distributor or some other peripheral defendant who is just there to keep the case in state court; inevitably, these defendants are dismissed before trial. Federal MDL proceedings are a critical tool for dealing with mass-tort and other large-scale litigation, but the work of MDL judges is undermined when they are stymied by competing state-court proceedings. Fixing this problem would ensure that MDLs achieve their goals and will benefit plaintiffs, defendants and the judicial system by promoting efficiency, consistency and fairness.

Clarify Judicial Misinterpretation of CAFA's Jurisdictional Provisions

Second, several judicial misinterpretations of CAFA's jurisdictional provisions may also warrant technical amendments by Congress to effectuate CAFA's intent. Such legislation would clarify that:

- Federal courts should consider evidence outside of the plaintiff's complaint when assessing whether a case falls under one of CAFA's jurisdictional exceptions;
- Plaintiffs cannot artificially slice and dice class actions and mass actions to avoid federal jurisdiction; and
- The test for determining the jurisdictional amount under CAFA is the "preponderance of the evidence" test, as opposed to the more difficult "legal certainty" standard.

Other Areas of Concern

Finally, several other issues of concern are percolating in certain federal courts and may be candidates for additional reforms in the future. A recent study found that federal appeals courts are increasingly reluctant to review class certification orders under Rule 23(f) of the Federal Rules of Civil Procedure, a development that threatens to encourage class action litigation. In addition, there has been increased activity in the area of issues classes, mostly in the Seventh Circuit, which has adopted a liberal construction of Rule 23's issues-class provision. And a few courts have recently embraced expansion of *American Pipe* tolling for statutes of limitations to cover "follow-on" class actions that are narrower than a rejected class.

Expanding CAFA To Stop Unfair *Cy Pres* Settlements And Promote The Efficiency Of MDL Proceedings

The twin goals of CAFA were to: (1) ensure that class actions are brought to benefit consumers rather than lawyers; and (2) enable federal courts to address class actions in a more efficient and consistent manner. Two additional logical reforms flow from these goals: reforming *cy pres* settlements and expanding federal jurisdiction over state-court cases that overlap with—and often undermine—MDL proceedings.

Cy Pres

First, congress should put an end to *cy pres* class action settlements that benefit plaintiffs' lawyers to the detriment of class members. *Cy pres* is the practice of distributing class funds to third-party charities instead of delivering the money to aggrieved class members. Plaintiffs' lawyers are attracted to *cy pres* settlements because they eliminate the need to identify claimants who were injured by the defendant and/or are sufficiently motivated to participate in a class settlement. In other words, *cy pres* is employed primarily to justify attorneys' fees by inflating the size of the "award," even though the award goes to charity, not the class members.[1] *Cy pres* awards thus undermine the fundamental goal of civil litigation: to provide compensation for allegedly aggrieved plaintiffs.

Some jurists, including Judge Edith Jones of the Fifth Circuit, have categorically rejected *cy pres* for these reasons, requiring that any unclaimed funds be returned to the defendant.[2] Judge Lee Rosenthal has similarly cautioned against the unfettered use of *cy pres*, given the potential of such awards to undermine the very purpose of the class device.[3] Legal scholars have criticized the practice too, lamenting that *cy pres* renders "[t]he real parties in interest in . . . class actions . . . the plaintiffs' lawyers, who are the ones primarily responsible for bringing th[e] proceeding."[4] And earlier this year, two courts of appeal rejected *cy pres* settlements on the ground that the attorneys' fees vastly outweighed any meaningful relief to the class members.[5]

A number of courts have nonetheless embraced *cy pres* as an efficient mechanism for distributing unclaimed class action recoveries, with little concern about these criticisms. In *Lane v. Facebook, Inc.*,[6] for example, the U.S. Court of Appeals for the Ninth Circuit approved a $9.5 million settlement of a privacy lawsuit, of which approximately $3 million was used to pay attorneys' fees, administrative costs, and incentive payments to the class representatives. The remaining $6.5 million was a *cy pres* award dedicated to establishing a new charity organization called the Digital Trust Foundation, to create educational programs about the protection of identity and personal information online. The Center for Class Action Fairness recently filed a petition for *certiorari* before the Supreme Court challenging the *Facebook* settlement and asking the High Court to clarify the law governing *cy pres*.[7] Thus, there is a possibility that the Supreme Court will weigh in on these issues at some point in the next year.

Absent Supreme Court review, there is a significant risk that *cy pres* settlements will become the norm in small-value class actions. Recently, Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit embraced the concept of *cy pres* in a ruling that is likely to be cited by *cy pres* proponents in future class actions.[8] In *Hughes v. Kore of Indiana Enterprises, Inc.*, Judge Posner reversed decertification of a class asserting claims under the Electronic Funds Transfer Act partly on the ground that *cy pres* would be an appropriate method to distribute class recovery. While recognizing that "the amount of damages that each class member can expect to recover is probably too small . . . to warrant the bother . . . of submitting a proof of claim in the class action proceeding," Judge Posner suggested that "the best

solution" may be the use of *cy pres* to distribute class action proceeds to charity.[9]

PROPOSED REFORM

Unless the Supreme Court grants *certiorari* and shuts down the *cy pres* practice in Facebook, a legislative solution is necessary. The most viable approach to the *cy pres* problem is a requirement that attorneys' fees in class actions be tied to the value of money and benefits actually redeemed by the injured class members—not the overall class fund or theoretical value of the *cy pres* remedy. Congress has already mandated in CAFA that the award of attorneys' fees in coupon class actions be tied to the value of the coupons actually claimed by individual class members.[10] While this provision has been effective at discouraging unfair coupon settlements, it should not be limited to the coupon context alone. After all, *cy pres* settlements typically offer consumers even less than coupon settlements. Congress should therefore extend the coupon-settlement provision to all class action settlements and require that attorneys' fees be based on the amount of money actually claimed by class members. While opponents of such a provision may argue that this will make it impossible for plaintiffs to bring some very small value class actions, the reality is that if class members are not sufficiently motivated to participate in a class action settlement, the suit should probably never have been brought in the first place. Thus, reforming the practice of *cy pres* will have the added benefit of discouraging plaintiffs' counsel from bringing class actions in which class members have no interest in recovery.

MDL Proceedings

Second, Congress should expand federal jurisdiction over cases that overlap with federal MDL proceedings. CAFA has demonstrated that limited, targeted expansion of federal jurisdiction can curb abuses and promote efficiency in the context of aggregate litigation without overburdening federal courts. Another type of large-scale, aggregate litigation that would benefit from similar reforms is multidistrict litigation.

Federal law provides that "[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred [by the Judicial Panel on Multidistrict Litigation (JPML)] to any district for coordinated or consolidated pretrial proceedings."[11] This mechanism has spurred more efficient resolution of aggregate litigation by avoiding the inconsistent pre-trial rulings and duplicative discovery that are inevitable when overlapping cases involving the same subject matter are left to advance in different courts. The one catch is that only federal cases may be consolidated into an MDL proceeding. As a result, some of the benefits of MDL proceedings have been undermined by the increasing number of parallel state cases that essentially "compete" with pending MDL proceedings.

Under current law, a plaintiffs' lawyer who wants to avoid a federal MDL proceeding can engage in simple jurisdictional tactics to keep a case in state court, even though virtually identical cases are being litigated in the federal MDL proceeding. These tactics typically take one of three forms: (1) plaintiffs sue in the defendant's home state, precluding removal under 28 U.S.C. § 1441(b), the forum-defendant rule; (2) plaintiffs add peripheral non-diverse defendants, such as sales representatives, to defeat diversity jurisdiction; or (3) plaintiffs combine large groups of claimants into a lawsuit and include one or a handful of plaintiffs who are not diverse from the main defendant. When plaintiffs' lawyers use these tactics to try to avoid removal of a case to federal court, their actions undermine the efficiency of MDL proceedings by limiting the MDL judge's control over related cases and forcing MDL judges to spend significant time and resources addressing jurisdictional issues rather than substantive matters.

PROPOSED REFORM

Congress should enact legislation to address the inefficiency concerns generated by parallel, competing federal and state court litigation. Such legislation should seek to accomplish what federal Judge Jack Weinstein first proposed in 2006: "expanding the Class Action Fairness Act from class actions to at least some national MDL, non-Rule 23, aggregate actions."[12] As Judge Weinstein, a seasoned jurist who presided over many MDL proceedings, explained:

> [T]here is a centrifugal force in [multidistrict litigation] driving some attorneys to bring new cases in many state courts and to remand federal cases in order to prevent effective national aggregation and consolidation. . . . It may be useful for Congress to consider expanding the Class Action Fairness Act from class actions to at least some national MDL, non-Rule 23, aggregate actions. As use of the class action device to aggregate claims has become more difficult, MDL consolidation has increased in importance as a means of achieving final, global resolution of mass national disputes. . . . Much the same concerns which animated CAFA's preference for a single, federal forum apply to national MDL aggregate actions.[13]

This approach would be consistent with CAFA because overlapping state court cases that compete with federal MDL proceedings present the same implications for the interstate judicial system as interstate class actions. Most notably, CAFA was designed to "create[] efficiencies in the judicial system by allowing overlapping and 'copycat' cases to be consolidated in a single federal court,"[14] a goal that would be best achieved by enhancing the ability of MDL courts to preside over related cases. As Congress explained in enacting CAFA, "expensive and predatory copy-cat cases force defendants to litigate the same case in multiple jurisdictions, driving up consumer costs."[15] This problem exists in spades in the MDL context, where defendants are forced to litigate similar cases in multiple

> *"Congress should ... require that attorneys' fees be based on the amount of money actually claimed by class members."*

state court jurisdictions if they are pled in a manner that avoids federal jurisdiction. Thus, expanding jurisdiction in the MDL context is critical to promote efficiency.

In addition, expanding the jurisdiction of federal MDL courts over parallel state court cases would also reduce the risks of inconsistent pre-trial rulings and duplicative discovery. Nobody is benefited when parties try to play state and federal courts off each other, and it makes far more sense for all concerned to coordinate discovery in large-scale litigation. Finally, this proposal would relieve the burdens of large-scale litigation on state courts that must serve many functions with limited budgets and typically are forced to duplicate the work of MDL judges who have greater resources and experience to bring to bear to complex interstate litigation.

The simplest way to achieve these goals is to enact legislation, similar to CAFA, allowing federal courts to hear any case related to the subject matter of an MDL proceeding as long as the $75,000 federal jurisdictional threshold is satisfied and minimal diversity of citizenship is present—*i.e.*, *any* plaintiff is a citizen of a different state from *any* defendant. If this were the rule, plaintiffs and defendants would no longer have to engage in protracted jurisdictional battles in the MDL context because only minimal diversity of citizenship would be required for removal of MDL-related cases. And like CAFA, this approach does not raise constitutional concerns because the Constitution does not mandate that *all* plaintiffs be diverse from *all* defendants to trigger federal jurisdiction.[16]

The legislation should also make clear that MDL-related cases can be removed even if they are filed *before* an MDL proceeding is created, given that some time will inevitably elapse between the filing of the initial complaints and the decision to transfer related cases for coordinated pre-trial proceedings.[17] To this end, the legislation should include a provision stating that a case would be removable to federal court if: (a) a related MDL proceeding is created within 180 days after the suit is filed; and (b) the defendant removes the case to federal court within 30 days after the MDL proceeding is established.

Other provisions we would propose for inclusion in MDL legislation are:

ELIMINATION OF THE "FORUM-DEFENDANT RULE" IN CASES RELATED TO MDL PROCEEDINGS

Under the forum-defendant rule, mentioned above, a case cannot be removed to federal court if any defendant is a resident of the state in which the case is filed.[18] The purpose of the rule is to provide a neutral forum for out-of-state plaintiffs. However, some plaintiffs have used this provision as an opportunity to avoid federal jurisdiction (and inclusion in an MDL proceeding), even where complete diversity requirements are met. Legislation could correct this problem by permitting removal without regard to whether a defendant is a citizen of the same state in which the action is brought, as was done in CAFA.

CONSENT BY ALL DEFENDANTS NOT NECESSARY FOR REMOVAL

The legislation should also eliminate the requirement that all defendants must consent to removing a state case to federal court. Under current law, all defendants are generally required to consent to removal of a case.[19] However, there is some fear that plaintiffs could thwart removal by entering into side agreements with improperly joined defendants. The legislation could address this concern by allowing a defendant in any MDL-related action to remove the case to federal court without the consent of all defendants. Notably, CAFA similarly authorizes removal of certain class actions "by any defendant without the consent of all defendants."[20]

PROCEEDINGS STAYED PENDING JPML TRANSFER

Finally, the legislation should require a suspension of proceedings—known as a "stay"—pending a determination regarding transfer by the JPML. Federal courts are currently not required to stay proceedings pending the JPML's decision whether to transfer the case to an MDL court, although most courts do so.[21] Because the decision to stay is left to a court's discretion, a small minority of federal courts regularly return cases to state court before the JPML has decided whether to transfer the cases to an MDL.[22] This practice wastes judicial resources and undermines a core JPML function. It also leads to conflicting jurisdictional decisions where one federal court is inclined to remand to state court and the MDL court is not. Legislation could eliminate this problem by requiring the district court to which the action is removed to issue an automatic stay as soon as any party lists the case in a notice of related action filed with the JPML.

These provisions are fundamentally consistent with the overall intent behind CAFA and would help ensure that parallel state court actions do not undermine the effectiveness of MDL proceedings.

Restoring The Reach Of Federal Jurisdiction Under CAFA

> *"... some courts have adopted narrow interpretations of CAFA's expansive jurisdictional provisions even though the drafters of CAFA intended courts to apply a presumption in favor of jurisdiction."*

Although CAFA has succeeded in drawing most interstate class actions to federal court, not all federal courts have consistently embraced Congress's intent in expanding federal jurisdiction. Specifically, some courts have adopted narrow interpretations of CAFA's expansive jurisdictional provisions even though the drafters of CAFA intended courts to apply a presumption in favor of jurisdiction.[23]

For example, some courts have declined to consider evidence outside the plaintiff's complaint when assessing whether one of CAFA's exceptions to federal jurisdiction applies; other courts have allowed plaintiffs to artificially break up class actions and mass actions to avoid CAFA's jurisdictional thresholds; and still other federal courts have imposed a stringent "legal certainty" test with respect to CAFA's amount-in-controversy requirement. Now that Congress has had time to observe how CAFA is being interpreted by the judiciary, it may be time to clarify for the courts that these narrow readings of CAFA's jurisdictional provisions are contrary to the spirit and text of the law.

Some courts have misapplied CAFA by refusing to consider evidence outside of a plaintiff's complaint when assessing the applicability of CAFA's exceptions, including the local-controversy exception.[24]

For example, in *Coleman v. Estes Express Lines, Inc.*,[25] the Ninth Circuit rejected the defendants' argument that the court should have considered evidence outside of the plaintiff's complaint in assessing whether the requirements of the local-controversy exception had been satisfied. The court held that an inquiry regarding the local-controversy exception was limited strictly to the complaint, and it therefore declined to consider a sworn statement submitted by the defendants. The court did so even though the evidence indicated that the in-state defendant likely had insufficient funds to satisfy a judgment against it, calling into doubt the propriety of applying the local-controversy exception.[26]

PROPOSED REFORM

Congress might consider legislation clarifying for the courts that the use of evidence outside of the pleadings—including declarations, affidavits and other evidence—is appropriate when considering whether an exception to federal jurisdiction applies. Such legislation would be faithful to the legislative history accompanying CAFA. It would also provide guidance to the courts and preclude enterprising plaintiffs' attorneys from omitting relevant facts from class complaints in order to thwart the removal of interstate class actions to federal court.

Several courts have allowed plaintiffs' attorneys to undermine the intent of CAFA by artificially splitting up class actions or mass actions into smaller cases, each structured to recover less than $5 million or to include fewer than 100 plaintiffs.

For example, in *Marple v. T-Mobile Central LLC*,[27] two Missouri plaintiffs brought ten separate class actions against T-Mobile in Missouri state court, alleging that the company improperly passed on the contested taxes to Missouri consumers. T-Mobile sought to remove the Missouri plaintiffs' class actions to federal court under CAFA, claiming that the relief sought in the cases should be aggregated to satisfy the $5 million amount-in-controversy threshold. The district court refused to do so and remanded the cases to state court. The Eighth Circuit agreed with the lower court that defendants could not aggregate the amount of damages claimed in each suit to satisfy CAFA's $5 million jurisdictional threshold. The Court of Appeals reached this conclusion even though it recognized that the effect of multiple, separate lawsuits was to avoid CAFA removal.[28]

Plaintiffs' lawyers have also attempted to evade federal jurisdiction with respect to CAFA's mass action provision by artificially structuring overlapping cases that each involve fewer than 100 claimants, the number required for mass actions. A prime example of this tactic is *Tanoh v. Dow Chemical Co.*,[29] in which the Ninth Circuit allowed the claims of 664 named plaintiffs in *seven* separate lawsuits to proceed in

state court because the claims did not constitute a mass action. In its ruling, the Ninth Circuit held that the provision creating mass actions is a narrow one, and refused to consider the Senate Report that accompanied CAFA. Other courts, including the Seventh and Eleventh Circuits, have followed suit.[30]

Judicial rulings that allow plaintiffs to manipulate cases in order to avoid removal under CAFA undermine Congress's intent in enacting the statute—*i.e.*, to expand federal jurisdiction over aggregate proceedings. The Senate Report accompanying CAFA made clear that the law was designed in part to curb practices through which "[m]ultiple class action cases purporting to assert the same claims on behalf of the same people often proceed simultaneously in different state courts, causing judicial inefficiencies and promoting collusive activity."[31] And as the Supreme Court held in *Standard Fire Insurance Co. v. Knowles*, a named plaintiff may not circumvent CAFA by stipulating that the amount in controversy is less than $5 million.[32] According to the Court, to hold otherwise could allow "the subdivision of a $100 million action into 21 just-below-$5-million state-court actions simply by including nonbinding stipulations; such an outcome would squarely conflict with [CAFA's] objective."[33]

PROPOSED REFORM

Legislation authorizing aggregation of claims in overlapping class actions and mass actions would address this problem. Specifically, Congress might enact an amendment to CAFA stating that if multiple class actions are filed asserting similar allegations against the same defendant(s) on behalf of a group of people that has been artificially divided, the $5 million amount-in-controversy threshold would be calculated based on the aggregate value of all such cases. Such a requirement would be consistent with CAFA, which was designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction."[34] Similarly, in order to effectuate the Congressional intent behind CAFA's mass action provision, Congress might expressly provide that courts have the discretion to aggregate the number of claimants in overlapping cases when the court concludes that the claimants sought to evade that provision. In exercising this discretion, district courts could consider several factors, including: (1) the nature of the claims; (2) the number of claims in each case; (3) the location of the cases; and (4) the dates on which the various cases were filed. For instance, if the cases were filed in the same location and in close temporal proximity to each other, it would be appropriate to aggregate the claimants in the overlapping cases. Such legislation would provide courts with useful guidance to rein in plaintiffs' ability to "game" the system by structuring lawsuits to avoid CAFA jurisdiction.

The U.S. Court of Appeals for the Third Circuit has misperceived Congress's intent behind CAFA by requiring defendants to prove the amount in controversy in the case to a "legal certainty."[35]

The "legal certainty" standard is rooted in a 1938 case, *St. Paul Mercury Indemnity Co. v. Red Cab Co.*,[36] in which the Supreme Court held that when a complaint seeks damages in an amount *greater* than the jurisdictional amount required for the case to be in federal court, the amount pled in the complaint controls, unless there is a "legal certainty" that the claim is really for less than the jurisdictional threshold. That standard has now been expansively applied by the Third Circuit in the CAFA context such that the only way a defendant can successfully remove a class action to federal court is to prove with "legal certainty" that the plaintiffs cannot recover less than CAFA's $5 million jurisdictional amount. Under this test, "the defendant must produce enough evidence to allow a court 'to estimate with certainty the actual amount in controversy.'"[37] In contrast to the Third Circuit, all other circuits to have addressed the issue have adopted a more reasonable "preponderance of the evidence" test for establishing jurisdiction with respect to the amount in controversy under CAFA.[38] Under this standard, a defendant removing a class action from state court to federal court must show that the amount in controversy "'more likely than not' exceeds the jurisdictional threshold."[39]

The majority approach makes more sense because requiring a defendant to prove the amount in controversy to a "legal certainty" is contrary to Congressional intent. As made clear in the Senate Report, it is the plaintiff—not the defendant—who "should bear the burden of demonstrating that the removal was improvident (*i.e.*, that the applicable jurisdictional requirements are not satisfied)."[40]

The "legal certainty" requirement is also inconsistent with the Supreme Court's ruling in *Standard Fire*, as the Ninth Circuit recently recognized.[41] As previously discussed, in *Standard Fire*, the Court held that a named plaintiff could not evade federal jurisdiction under CAFA by waiving claims in excess of $5 million.[42] According to the Ninth Circuit, the rationale underpinning the "legal certainty" standard—*i.e.*, that a plaintiff is the master of his or her complaint—"is clearly irreconcilable with *Standard Fire*" because that ruling rejects strategic efforts to evade CAFA jurisdiction.[43]

PROPOSED REFORM

Congress could solve this problem through legislation clarifying that the "preponderance of the evidence" test (the majority approach) is the proper standard. That standard comports with the overarching intent behind CAFA. Codifying it into CAFA would likely eliminate the checkerboard of differing standards for assessing the amount-in-controversy question and ensure that true interstate class actions are removable to federal court.

> *"Specifically, Congress might enact an amendment to CAFA stating that if multiple class actions are filed asserting similar allegations against the same defendant(s) on behalf of a group of people that has been artificially divided, the $5 million amount-in-controversy threshold would be calculated based on the aggregate value of all such cases."*

Other Growing Areas Of Concern

Finally, several recent developments in federal class action practice raise concerns, including decreased appellate review of class certification rulings under Federal Rule of Civil Procedure 23(f); the embrace of "issues" class actions by a handful of federal courts, most notably, the Seventh Circuit; and the potential expansion of *American Pipe* tolling of statutes of limitations to sequential class actions. This paper does not propose immediate reforms in these areas. However, if these trends continue, they may be candidates for future reforms in the event that they grow and fester.

Appellate Court Reluctance To Review Class Certification Orders

Over the last several years, appellate courts have grown increasingly reluctant to review class certification orders under Rule 23(f). A recent study conducted by Skadden, Arps, Slate, Meagher & Flom LLP on behalf of the Institute for Legal Reform revealed that between September 30, 2006 and April 24, 2013, federal appellate courts granted fewer than *one fourth* of the petitions seeking interlocutory review of lower court class certification rulings.[44] This finding contrasts with an earlier report, sponsored by the federal judiciary, which found that federal appellate courts granted *36 percent* of Rule 23(f) petitions filed between 1998, when the rule was adopted, and 2006.[45] The study also revealed that the decline in 23(f) review has hurt class action defendants more than plaintiffs. While defendants' petitions were granted far less frequently than previously (24%, down from 45%), the grant rate for plaintiffs' petitions has dipped only slightly in recent years (to 20%, down from 22%).

> *"A recent study ... revealed that between September 30, 2006 and April 24, 2013, federal appellate courts granted fewer than one fourth of the petitions seeking interlocutory review of lower court class certification rulings."*

In addition, the study reveals stark differences among the federal circuits with respect to their approaches on 23(f) petitions:

- The Fifth Circuit allowed the highest percentage of interlocutory appellate reviews in recent years, granting 12 (48%) of the 25 petitions decided there (down from 54% between 1998 and 2006).
- The Third Circuit allowed the second-highest percentage of petitions, granting 20 (34.5%) of the 58 petitions decided there after 2006 (down from 86% previously).
- The Seventh Circuit was the most likely to grant petitions by defendants, agreeing to hear 22 (37%) of the 59 petitions filed there by defendants (down from 45%).
- On a percentage basis, the most welcoming jurisdiction for plaintiffs was the Sixth Circuit, which granted 5 (42%) of the 12 decided petitions filed there by plaintiffs (up from 25%).
- The First, Eighth, Ninth, Tenth, and D.C. Circuits were the least friendly to Rule 23(f) petitions, with grant rates ranging from 0% in the D.C. Circuit to 19% in the Ninth.

This trend has undermined the fairness of federal class action practice. Because of the potentially devastating effect of a classwide trial verdict, companies are often forced to settle after certification—even when the claims in substance appear to be meritless—if they cannot obtain appellate review of class certification. Routine denials of Rule 23(f) petitions thus encourage more class action filings and exacerbate the problem of "blackmail settlements" of class claims, hurting American businesses and consumers. If the trend continues, Congress or the federal judiciary may want to consider establishing standards for Rule 23(f) review or making such review mandatory.

Issues Classes

Another area that merits scrutiny is the so-called "issues class," in which one or more common issues are certified for class treatment, leaving other, non-certifiable issues to be decided later in individual trials. Many courts have traditionally held that such classes are inconsistent with Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members" and therefore are not permitted unless predominance is met with respect to the case as a whole.[46]

Recently, however, the Seventh Circuit has taken the opposite approach, finding that issues classes were proper in several cases, even though key elements of plaintiffs' claims could not be proven through classwide proof.[47] Issues classes like those approved by the Seventh Circuit are inappropriate for a number of reasons. First, they do not promote efficiency because they do not resolve any individual plaintiff's claims; after an issues trial is complete, each plaintiff would still have to prove injury, causation and damages in

separate trials.[48] Second, issues trials are inherently unfair to defendants because it is much easier for plaintiffs to secure a classwide verdict when the jury does not hear the actual facts of any individual plaintiff's claims.[49] And third, they pose constitutional problems because the Seventh Amendment bars a second jury from considering issues already decided by a prior jury in the same case. As one court explained, "the risk that a second jury would have to reconsider the liability issues decided by the first jury is too substantial to certify [an] issues class."[50]

If issues class actions gain momentum in other federal circuits, an amendment to Rule 23 or a statutory fix might be worth considering. Such an amendment would restore some of the fairness to class action practice by clarifying that Rule 23(c)(4) is a mere "housekeeping rule" to be applied, if at all, once predominance is satisfied as to the entire cause of action, as the Fifth Circuit has already recognized.[51]

Stacking Class Actions Under American Pipe

Several decades ago, in *American Pipe & Construction Co. v. Utah and Crown, Cork & Seal Co. v. Parker*, the Supreme Court held that the pendency of a class action tolls the statute of limitations for potential class members who may seek to bring their own lawsuits if class certification is denied.[52]

Because neither *American Pipe* nor *Crown, Cork & Seal* addressed whether this tolling applies to former members of a failed class action who file a follow-on *class action*—rather than an *individual* case—lower federal courts were left to grapple with this question. The Fifth Circuit was the first federal appeals court to rule that plaintiffs cannot "piggyback one class action onto another"; in other words, *American Pipe* tolling only applies if the class member later brings an individual action.[53] The Fifth Circuit's ruling has been widely followed; courts across the country have agreed that subsequent class actions cannot benefit from *American Pipe* tolling.[54]

Recently, however, a few courts have begun to question this well-established *American Pipe* principle. In *Ladik v. Wal-Mart Stores, Inc.*,[55] for example, several former members of the failed, nationwide *Wal-Mart Stores, Inc. v. Dukes* employment class brought a later class action against Wal-Mart on behalf of employees in "Region 14," which includes Wisconsin, Illinois, Indiana and Michigan. Wal-Mart moved to dismiss the lawsuit because it was time-barred. The district court rejected this argument, finding that *Dukes* tolled the limitations period for follow-on class actions. To the extent the *Ladik* court's approach gains greater currency among other lower courts, Congress might consider legislation prohibiting all class action "piggybacking" under *American Pipe*. Such legislation would close a significant avenue for unfair abuse of the *American Pipe* tolling doctrine by plaintiffs who seek to keep rejected class actions alive by filing them in another form.

Conclusion

Much progress has been made on the federal class action front, thanks in large part to CAFA, which has shifted countless interstate class actions from "magnet" state courts to federal courts that must abide by the more rigorous requirements of Rule 23. Despite this progress, some work remains to be done to further improve the federal class action environment.

First, CAFA should be expanded to address two distinct problems that continue to undermine the overarching goals of the statute: (1) the growth of cy pres settlements; and (2) the inefficiencies caused by state court cases that compete with federal MDL proceedings. While CAFA has helped make class actions fairer by requiring attorneys' fees to be tied to the value of coupons actually redeemed by class members, that rule should not be restricted to the coupon context. Expanding the rule to include cy pres settlements would help ensure that class action settlements provide more direct, meaningful benefits for class members. In addition, Congress should expand federal jurisdiction over cases that involve the same subject matter as a pending MDL proceeding to increase the efficiency of MDL proceedings and curtail jurisdictional manipulation by plaintiffs who seek to create competing proceedings that undermine the goals of the MDL statute.

Second, some courts have failed to effectuate Congress's intent behind CAFA by interpreting that statute far more narrowly than Congress had intended. In light of these judicial misinterpretations, Congress might consider amendments that reaffirm the strong presumption in favor of federal jurisdiction over interstate class actions.

Third and finally, several other class action developments—including the reluctance of federal appeals courts to grant 23(f) petitions, the Seventh Circuit's embrace of issues classes and potential erosion of American Pipe limitations—have the potential to make class actions less fair and therefore bear careful examination as well. If these trends continue, they might warrant Congressional action in the future.

Endnotes

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

[2] *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 481-82 (5th Cir. 2011) (Jones, J., concurring) ("district courts should [steer clear of *cy pres* to] avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations").

[3] *Hoffer v. Landmark Chevrolet Ltd.*, 245 F.R.D. 588, 603 (S.D. Tex. 2007).

[4] Testimony of Martin H. Redish at 7, Hearing: *Class Actions Seven Years After the Class Action Fairness Act*, June 1, 2012, http://judiciary.house.gov/hearings/Hearings%202012/Redish%2006012012.pdf.

[5] *See In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) (striking a settlement that would have given $14 million to the lawyers, $3 million to class members, and $18.5 million to charities and remanding to the district court with suggestion that the parties should provide greater direct monetary compensation to the class); *In re Dry Max Pampers Litig.*, No. 11-4156, 2013 U.S. App. LEXIS 15930, at *4 (6th Cir. Aug. 2, 2013) (rejecting *cy pres* settlement providing that P&G would refund up to one box of Pampers per household, add information to its label and website and contribute $300,000 to a pediatric resident training program and $100,000 to the American Academy of Pediatrics to fund a program "in the area of skin health"—while plaintiffs' attorneys would receive fees of $2.73 million).

[6] *Lane v. Facebook, Inc.*, 696 F.3d 811, 817 (9th Cir. 2012).

[7] *See* Our first cert petition, challenging Facebook Beacon *cy pres* settlement, Center for Class Action Fairness, July 29, 2013, http://centerforclassactionfairness.blogspot.com/2013/07/our-first-cert-petition-challenging.html.

[8] *See Hughes v. Kore of Indiana Enterprises, Inc.*, No. 13-8018, 2013 U.S. App. LEXIS 18873 (7th Cir. Sept. 10, 2013).

[9] *Id.* at *6-7.

[10] 28 U.S.C. § 1712(a).

[11] 28 U.S.C. § 1407(a).

[12] *In re Zyprexa Prods. Liab. Litig.*, 238 F.R.D. 539, 541-42 (E.D.N.Y. 2006).

[13] *Id.*

[14] S. REP. NO. 109-14, at 5 (2005).

[15] *Id.* at 14.

[16] *See, e.g., Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005) ("complete diversity is not constitutionally required"); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492 n.18 (1983) ("Article III requires only 'minimal diversity'").

[17] As previously explained, the decision to create an MDL proceeding and to transfer related actions to the MDL proceeding is made by the JPML.

[18] 28 U.S.C. § 1441(b)(2).

[19] *See Pietrangelo v. Alvas Corp.*, 686 F.3d 62, 66 (2d Cir. 2012).

[20] 28 U.S.C. § 1453(b).

[21] *See Michael v. Warner-Lambert Co.*, No. 03cv1978 DMS(RBB), 2003 U.S. Dist. LEXIS 21525, at *3-4 (S.D. Cal. Nov. 20, 2003) ("[t]he general rule is for federal courts to defer ruling on pending motions . . . in MDL litigation until after the JPMDL . . . has transferred" the case to the MDL court) (internal quotation marks and citation omitted).

[22] *See, e.g., Marble v. Organon USA, Inc.*, No. C 12-02213 WHA, 2012 U.S. Dist. LEXIS 83520, at *19-20 (N.D. Cal. June 15, 2012) (denying motion to stay pending MDL transfer); *Guerrero v. Target Corp.*, No. 12-21115-CIV-COHN/SELTZER, 2012 U.S. Dist. LEXIS 81005, at *3 (S.D. Fla. June 7, 2012) ("[T]he Court finds that a stay of the proceedings is not warranted. Defendant has failed to demonstrate that it will endure hardship and inequity if this case is not stayed."); *Hagensicker v. Bos. Sci. Corp.*, No. 12-5018-CV-SW-RED, 2012 U.S. Dist. LEXIS 32715, at *15 (W.D. Mo. Mar. 12, 2012) (denying motion to stay pending MDL transfer); *Sullivan v. Cottrell, Inc.*, No. 11CV1076S, 2012 U.S. Dist. LEXIS 26434, at *16 (W.D.N.Y. Feb. 29, 2012) (refusing to stay case pending likely transfer to MDL proceeding); *Oberstar v. CBS Corp.*, No. 08-118 PA (JWJx), 2008 U.S. Dist. LEXIS 14023, at *16 (C.D. Cal. Feb. 11, 2008) ("the Court finds that GE has failed to establish the necessity for a stay" pending case's likely transfer to MDL proceeding); *Tortola Restaurants, L.P. v. Kimberly-Clark Corp.*, 987 F. Supp. 1186, 1188 (N.D. Cal. 1997) (denying motion for stay pending a determination of transfer by the MDL Panel and deciding threshold jurisdiction issue).

[23] As one of the bill's sponsors explained, if "a Federal court is uncertain . . . [that] court should err in favor of exercising jurisdiction over the case." 151 CONG. REC. H726 (statement of Rep. Jim Sensenbrenner); *see also* CAFA, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (2005) (stating that one purpose of CAFA is to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction"); H. Hunter Twiford, III et al., *CAFA's New 'Minimal Diversity' Standard for Interstate Class Actions Creates a Presumption That Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 Miss. C. L. Rev. 7, 53 (2005) (highlighting that "CAFA Section 2, 'Findings and Purposes,' . . . [reflects] the strong congressional policy seeking to limit class-action abuses in the state courts by allowing more interstate class actions to be maintained in the federal courts").

[24] *See, e.g., Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010, 1017 (9th Cir. 2011); *Smith v. Kawailoa Dev. LLP*, No. 11-00350 JM/BMK, 2011 U.S. Dist. LEXIS 147955, at *8 (D. Haw. Dec. 22, 2011). Under the local-controversy exception, a class action cannot be removed to federal court where more than two-thirds of the proposed class members are citizens of the state in which the lawsuit was filed; and either the defendant is from that state or (1) the plaintiffs have sued at least one in-state defendant whose conduct forms a significant basis for their claims; (2) the principal injuries occurred in the forum state; and (3) no class action has been filed alleging the same claims against any of the defendants in the preceding three years. 28 U.S.C. § 1332(d)(4)(A).

[25] *Coleman*, 631 F.3d at 1020.

[26] Under CAFA's "local controversy" exception, a district court cannot exercise jurisdiction where: (1) more than two-thirds of all proposed plaintiff classes are citizens of the State in which the action was originally filed; and (2) at least one defendant is a defendant: (a) "from whom significant relief is sought by members of the plaintiff class"; (b) "whose alleged conduct forms a *significant basis for the claims asserted by the proposed plaintiff class*"; and (c) "who is a citizen of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(A)(i)(II) (emphasis added). The evidence that the in-state defendant would not have been able to satisfy a class judgment undermined the supposedly local nature of the action and should have warranted a ruling by the court that "significant relief" had *not* been "sought" from that entity.

[27] *Marple v. T-Mobile Cent. LLC*, 639 F.3d 1109 (8th Cir. 2011).

[28] *Id.* at 1111; *see also Royalty Alliance, Inc. v. Tarsadia Hotel*, No. 10CV1231 DMS (CAB), 2010 U.S. Dist. LEXIS 87208, at *7-8 (S.D. Cal. Aug. 23, 2010) (refusing to aggregate monetary relief sought in overlapping class actions brought against the same defendant because "while similarities exist between the claims, there is a colorable basis for dividing up the lawsuits as [p]laintiffs have done").

[29] *Tanoh v. Dow Chem. Co.*, 561 F.3d 945 (9th Cir. 2009).

[30] *See also Anderson v. Bayer Corp.*, 610 F.3d 390, 392 (7th Cir. 2010); *Scimone v. Carnival Corp.*, No. 13-12291, 2013 U.S. App. LEXIS 13446 (11th Cir. July 1, 2013).

[31] S. REP. NO. 109-14, at 4 (2005).

[32] *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350-51 (2013).

[33] *Id.* at 1350.

[34] *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407-08 (6th Cir. 2008).

[35] *See Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006).

[36] 303 U.S. 283, 288-89 (1938).

[37] *Campbell v. Vitran Express, Inc.*, 471 F. App'x 646, 647 (9th Cir. 2012) (citation omitted).

[38] *See, e.g., Mann v. Unum Life Ins. Co. of Am.*, 505 F. App'x 854, 856 (11th Cir. 2013); *Hargis v. Access Capital Funding, LLC*, 674 F.3d 783, 789 (8th Cir. 2012); *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1246 (10th Cir. 2012); *Blomberg v. Serv. Corp. Int'l*, 639 F.3d 761, 763 (7th Cir. 2011); *Berniard v. Dow Chem. Co.*, 481 F. App'x 859, 862 (5th Cir. 2010); *Amoche v. Guar. Trust Life Ins. Co.*, 556 F.3d 41, 50 (1st Cir. 2009); *Bartnikowski v. NVR, Inc.*, 307 F. App'x 730, 734 & n.7 (4th Cir. 2009); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 404-05 (6th Cir. 2007); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 59 (2d Cir. 2006).

[39] Kalee DiFazio, *CAFA's Impact on Forum Shopping and the Manipulation of the Civil Justice System*, 17 Suffolk J. Trial & App. Advoc. 133, 147 (2012) (citation omitted).

[40] S. REP. NO. 109-14, at 42 (2005); *see also id.* ("[I]f a federal court is uncertain about whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value of $5,000,000,' the court should err in favor of exercising jurisdiction over the case.").

[41] *See Rodriguez v. AT&T Mobility Servs., LLC*, No. 13-56149, 2013 U.S. App. LEXIS 17851 (9th Cir. Aug. 27, 2013).

[42] *Standard Fire*, 133 S. Ct. at 1350-51

[43] *Rodriguez*, 2013 U.S. App. LEXIS 17851, at *18.

[44] The study was conducted by Skadden, Arps, Slate, Meagher & Flom on behalf of the U.S. Chamber Institute for Legal Reform. The data from the study are available upon request from the authors.

[45] *See Barry Sullivan and Amy Kobelski Trueblood, Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 284 (2008).

[46] *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("Reading Rule 23(c)(4) as allowing a court to sever issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case when there is a common issue, a result that could not have been intended.").

[47] *See, e.g., McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (approving an issues class for determining whether defendant's employment practices had a disparate impact on African-American financial advisers, even though individuals trials would be necessary to determine damages); *Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010) (upholding class certification with respect to one "common issue"—"whether the windows suffer from a single, inherent design defect leading to wood rot" —even though causation would require individualized inquiries).

[48] *In re Genetically Modified Rice Litig.*, 251 F.R.D. 392, 400 (E.D. Mo. 2008).

[49] *See, e.g., In re Paxil Litig.*, 212 F.R.D. 539, 547 (C.D. Cal. 2003) (refusing to certify class to resolve the purportedly "common" issue of general causation because such a trial would unfairly rob the defendant of the ability to present individualized "evidence rebutting the existence or cause of" the plaintiffs' alleged illnesses); *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (rejecting issues class that "would have allowed generic causation to be determined without regard to those characteristics and the individual's exposure" as unfair and inefficient).

[50] *In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 698-99 (N.D. Ga. 2008).

[51] *See Castano*, 84 F.3d at 745 n.21.

[52] *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983).

[53] *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985).

[54] *See, e.g., Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) ("the tolling rule established by *American Pipe* . . . was not intended to be applied to suspend the running of statutes of limitations for class action suits filed after a definitive determination of class certification; such an application of the rule would be inimical to the purposes behind statutes of limitations and the class action procedure."); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987) ("We agree . . . that to extend tolling to class actions 'tests the outer limits of the *American Pipe* doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options.'") (citation omitted); *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988) ("The courts of appeals that have dealt with the issue appear to be in *unanimous* agreement that the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class.") (emphasis added). *But see Yang v. Odom*, 392 F.3d 97, 108 (3d Cir. 2004) (holding that follow-on class claims were tolled under *American Pipe* where prior motion for class certification had been denied without prejudice based on the inadequacy of the class representative).

[55] Op. & Order at 1, *Ladik v. Wal-Mart Stores, Inc.*, No. 3:13-cv-00123-bbc (W.D. Wis. May 24, 2013).

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